

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION  
No. 2000-O-04**

DATE ISSUED: March 15, 2000

ISSUED TO: Central Cass Public School District Superintendent Larry Gegelman

**CITIZEN'S REQUEST FOR OPINION**

On February 4, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Carol Kratcha asking whether the Central Cass Public School District Board violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session which was not authorized by law and by failing to follow the statutory procedures for holding an executive session.

**FACTS PRESENTED**

The Central Cass Public School District Board (Board) held a regular meeting on January 10, 2000, during which two executive sessions were held. Both sessions were held to discuss the content of "education records" which are confidential under the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. The families of the two children whose records were discussed by the Board were given the opportunity to waive the right to have the discussion occur in a closed meeting, but both families indicated a preference for having the records discussed in a closed meeting.

A few days later, after the superintendent of the Central Cass Public School District (District) initially denied a request from one of the families for the recording of the executive session pertaining to their child, the superintendent realized that the discussion during that executive session did not concern the content of "education records" under FERPA and should not have been closed to the public. Accordingly, the superintendent provided a copy of the recording of the executive session to the parent who requested it. The Board also indicated at its next meeting that one of the executive sessions during the previous meeting was improperly closed and the recording would therefore be available to the public as an open record.<sup>1</sup>

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<sup>1</sup> We have not been asked to review the Board's decision that the first executive session was held in error and should have been open to the public. In an opinion issued under N.D.C.C. § 44-04-21.1 regarding an alleged violation of N.D.C.C. § 44-04-19, this office only reviews whether a person was denied access to a meeting which is required to be open to the public. Accordingly, this opinion does not address whether the Board's decision to make the recording of the first executive session open to the public complied with FERPA. Concerns over FERPA compliance should be directed to the Family Compliance Office of the United States Department of Education.

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The request for this opinion pertains to the second executive session held by the Board on January 10. The requester alleges that both executive sessions should have been open to the public. The Board disagrees, arguing that, unlike the first executive session, the second executive session did involve a discussion of the content of a confidential "education record" under FERPA and was properly closed to the public.

The executive session lasted 16 minutes. At the end of the executive session, the Board voted to uphold the administrative decision to discipline the student. The results of the vote were announced when the Board reconvened in open session. The tape recording has been received and reviewed by this office.

## ISSUES

1. Whether the Board violated N.D.C.C. § 44-04-19.2 by failing to announce the topics to be discussed during the executive session.
2. Whether the executive session of the Board was authorized by law and limited to topics for which an executive session may be held.
3. Whether the Board violated N.D.C.C. § 44-04-19.2 by taking final action during the executive session rather than during the open meeting.

## ANALYSES

### Issue One:

Before invoking the authority to hold an executive session, a governing body must announce "the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics." N.D.C.C. § 44-04-19.2(2)(b). In satisfying this requirement, a governing body is not required to reveal closed or confidential information. N.D.A.G. 99-O-04.

In response to this office's inquiry, the superintendent described the information provided by the Board before holding the executive session:

At the open meeting each family was asked individually, and they both agreed, that they would prefer to meet in executive session. Executive session was then explained to the others present as a means for confidential information about juveniles to be discussed in private. This type of information is not to be released to the public or to be shared with the rest of the community, as the media is usually present at all our board

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meetings. It was then explained that the executive session was closed to everyone other than the parties involved and all else were asked to leave and were not called back until both executive sessions were completed. Each family request was handled through a separate executive session.

The requester alleges that this announcement was not made by the Board. Under N.D.C.C. § 44-04-21.1, we will not resolve this factual dispute and will assume for purposes of this opinion that the announcement was provided as described by the superintendent.

The announcement could have been clearer on the legal authority for the executive session (i.e. discussion of records which are confidential under FERPA). Nevertheless, it is my opinion that the announcement reasonably explained the authority and reason for the executive session and was sufficient to comply with N.D.C.C. § 44-04-19.2.

### Issue Two:

A discussion of the content of "education records" which are confidential under FERPA must be held in an executive session rather than in an open meeting. N.D.C.C. § 44-04-19.2(1); N.D.A.G. 98-O-06; N.D.A.G. 94-F-28. It is important to note that this exception applies only to the discussion of records, and not to all discussion regarding students. N.D.A.G. 98-O-06.

The Board's executive session on January 10 concerned a letter from the District to a student informing him of the discipline imposed by the District, the reason for the District's decision, and the right to be heard by the Board regarding the decision. Although the discipline imposed by the District was not academic in nature, a copy of the letter was added to the student's permanent school record. The discussion at the executive session consisted of the student responding to the letter and the Board asking questions and making comments regarding both the letter and the student's response. Holding this discussion in an open meeting would have revealed the content of the letter. Thus, the only question remaining is whether the letter qualified as an "education record" under FERPA.

The broad definition of "education record" in FERPA, read literally, applies to all records of a student maintained by an educational facility, which would include the letter imposing discipline on the student. However, several courts have examined the underlying purpose of FERPA and concluded that records which are nonacademic in nature and do not relate to student academic performance, financial aid, or scholastic probation are not confidential under FERPA. Kirwan v. The Diamondback, 721 A.2d 196 (Md. 1998); State ex rel. The Miami Student v. Miami University, 680 N.E.2d 956

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(Ohio 1997), cert. denied, 522 U.S. 1022 (1997); Red and Black Publishing v. Board of Regents, 427 S.E.2d 257 (Ga. 1993); Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991). But see Belanger v. Nashua, New Hampshire, School Dist., 856 F. Supp. 40 (D.N.H. 1994). With the exception of the Belanger decision, the cases cited above involve records of student discipline for, or other records relating to, alleged criminal activity on college campuses.<sup>2</sup>

In interpreting the meaning of "education record," it is helpful to note that the "education records" which are confidential under subsection (b) of FERPA are the same records to which subsection (a) of FERPA gives parents a right of access. A conclusion that FERPA does not apply to the letter imposing nonacademic discipline on the student in this case would also mean that the parents of that student do not have the right under FERPA to have access to the letter or to comment on the content of the letter, despite the fact the letter would be placed in the student's permanent file. Although the North Dakota open records law may give the parent and other members of the public a right to the record, the conclusion that FERPA does not apply to the letter is clearly not what Congress intended when it amended FERPA in 1974 to specifically define "education records." Rather, as the federal district court observed in Belanger, the purpose of the definition of "education record" was that "parents and students should have access to everything in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student." 856 F. Supp. at 49 (quotation omitted).

Normally, the location of a record is not relevant to whether it is open to the public. However, in the cases cited above which held that certain records were not "education records," the courts specifically observed that the records were stored in a different location than the student's academic records. In this situation, including the letter in the student's permanent file means that the record and its contents will follow the student from one school to the next. In effect, by choosing to include the letter in the student's permanent file, the District was making the letter an "education record" under FERPA.

As a record in the student's permanent file maintained by the District, FERPA gives the student's parents a right to have access to the letter sent by the District to the student. For the same reason, it is my opinion that the letter is an "education record" which is confidential under both the plain meaning of FERPA as well as the court cases applying that law. Since the discussion during the executive session involved the content of that letter, and holding a discussion in the open would have revealed the content of the

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<sup>2</sup> Recent amendments to FERPA in 1998 now address the issue of access to student discipline records at postsecondary institutions for crimes of violence and nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6)(B) and (C).

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letter, it is my opinion that the executive session was authorized under N.D.C.C. § 44-04-19.2(1).

### Issue Three:

The Board admits that it took final action during the executive session to affirm the administrative decision to discipline the student. The vote was later repeated during the open meeting. Final action on a topic discussed during an executive session must occur during the open portion of the meeting, unless final action is otherwise required by law to be taken during the executive session. N.D.C.C. § 44-04-19.2(2)(e). In this situation, the question is whether the Board could have voted during an open meeting on whether to affirm the administrative decision to discipline the student without divulging the contents of an "education record" under FERPA.

FERPA prohibits the release of "personally identifiable information contained" in an "education record." 20 U.S.C. § 1232g(b). As discussed in Issue Two of this opinion, the education record discussed by the Board was a letter which 1) identified a student, 2) indicated that the student was being disciplined by the District, 3) indicated the reason for the discipline, and 4) informed the student of the type or form of discipline imposed by the District administration.

The announcement and minutes of an executive session do not have to reveal closed or confidential information. N.D.C.C. § 44-04-19.2(4) (minutes); N.D.A.G. 99-O-04 (announcement). Similarly, the Board could have made a motion during the executive session to approve the administrative decision on discipline of the named student. After reconvening in an open meeting, the presiding officer could have summarized the motion, and the roll call vote could have been taken, without identifying either the student or the fact that the vote pertained to student discipline.<sup>3</sup> For example, the motion could have been summarized simply as whether to approve the decision of the school administration. Although allowing the student's parents to attend the executive session might provide some indication of the student's identity, voting in this fashion would not disclose the four items of information which are included in the "education record" discussed by the Board.

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<sup>3</sup> Since the Board announced that the executive session was being held to discuss the records of a named student, the identity of the student on which the vote was held had already been disclosed. A better practice would be to refrain from listing the student's name on the notice and agenda of the meeting and to refrain from announcing the student's name prior to convening in an executive session.

Because voting on the Board's final decision was not required to occur during the executive session, it is my opinion the Board violated N.D.C.C. § 44-04-19.2 by taking a final vote during the executive session.

#### CONCLUSIONS

1. The Board's announcement of the authority and topics to be discussed during the executive session was sufficient under N.D.C.C. § 44-04-19.2.
2. The executive session was authorized by law and limited to topics for which an executive session may be held.
3. The Board violated N.D.C.C. § 44-04-19.2 by taking final action during the executive session.

#### STEPS NEEDED TO REMEDY VIOLATION

The Board cured its violation of N.D.C.C. § 44-04-19.2 by voting again, during an open meeting, to affirm the administrative decision to discipline the student. No further remedial action is required.

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Assisted by: James C. Fleming  
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