

Official Opinion No. 81-18, Parental Access to Student Records

May 7, 1981

Dr. Robert A. Fallon  
Superintendent  
Rapid City School District  
809 South Street  
Rapid City, South Dakota 57701

Official Opinion No. 81-18

### **Parental Access to Student Records**

Dear Superintendent Fallon:

You have requested an official opinion from this office in regard to the following facts:

#### **FACTS:**

You indicate an intention to adopt the following policy in your district regarding parental access to student records:

(a) Parents or Guardians. If the request [for access to student records] is made by the parent not having legal custody, information shall be released unless a copy of a court order granting legal custody to only one parent or other guardian has been filed with the district.

Based upon the proposed policy you have asked the following questions:

#### **QUESTIONS:**

1. If the court order clearly awards custody to one individual, is a district to treat the students involved as only having one parent, that is, all rights normally granted to parents in terms of school records and access to students are granted only to the parent having custody and absolutely no parental rights granted to the parent who is without custody?
2. If the court order clearly assigns custody to one parent and in addition speaks to parental rights of the non-custody parent, such as the right to visit the children on certain occasions or to telephone them, but \_the parental rights granted to the non-custody parent

do not speak specifically to access to students when they are on school premises or to student record information, or the wording of the court order in these respects is unclear to the particular school employee involved, is the district to assume that no access to the students or student records is to be granted by the district?

3. Assuming that the district is provided with a copy of a court order granting custody to one individual and that the district has made a determination that one parent has no right of access to the student, while he or she is on the school premises, or to the student's records, and that the non-custodial parent requests to speak to the student or to receive the student record information, is it legally correct and permissible for a district employee to respond, either verbally or in writing, with the following: 'Filed within our district is a court order which prohibits us from releasing information concerning this student or access to the student while on school premises, to anyone other than the individual having legal custody'?

SDCL 1-27-1 provides:

In every case where the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, such record, document, or other instrument shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept.

SDCL 1-27-3 provides:

Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept.

Regarding the school records there is a confidentiality exception applicable to this matter through the provisions of SDCL 1-27-3 set out above. The Family Education Rights and Privacy Act, 20 U.S.C. § 1230 through § 1232(g) (FERPA) requires that school records not be released to persons other than school personnel, state and federal education personnel, without parental consent except in the case of eighteen-year-old students who may exercise the parental rights. FERPA defines parent as follows:

'Parent' includes a parent, a guardian, or an individual acting as a parent of a student, in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or

institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary. 45 C.F.R. § 99.3.

Based upon the foregoing it is my opinion that a school may not deny access to school records unless it has received a copy of a court order or other legally binding instrument providing to the contrary. In dealing with custody decrees issued in a divorce action it is to be understood that a custody decree as such does not terminate the ordinary parental rights of the non-custodial parent except as specifically set out in the decree. SDCL 25-4-45 provides:

In an action for divorce the court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

Clearly, this statute allows a court in a divorce decree to enter specific restrictions on 'custody, care, and education of the children.' As a general proposition, unless the divorce decree specifically restricts access of the non-custodial parent to the child's school records the parent retains this right as a residual parental right.

IN RE QUESTION NO. 1:

The mere awarding of custody to one parent does not terminate the parental rights of the non-custodial parent except as modified in the divorce decree.

A distinction should be drawn between access to student records and access to students. By that I mean the general run of divorce decrees sets out with some specificity the visitation rights of the non-custodial parent. These 'visitation rights' can be seen as a legitimate modification of the non-custodial parent's access to the person of the child. If you have been given a copy of a divorce decree which identifies restrictions on visitation rights which are inconsistent with the non-custodial parent's request to have access to the child, you may legitimately deny such access. Without such a legal document in your possession you may treat all parental requests for access to the student in a similar fashion regardless of custody.

IN RE QUESTION NO. 2:

The presumption is that parental rights have not been terminated and without clear evidence to the contrary, i.e., a divorce decree or other legally binding instrument, you should allow access to the student or the student's records on an equal basis to all parents regardless of custody arrangements. SDCL 25-5-17 provides:

The authority of a parent ceases:

- (1) Upon the appointment by a court of a guardian of the person of the child;
- (2) Upon the marriage of the child;
- (3) Upon its attaining majority;
- (4) Upon the emancipation of a child.

SDCL 25-5-8 provides:

The husband and father, as such, has no rights superior to those of the wife and mother in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other.

The conclusion to be drawn from the above is that there are specific methods for termination and modification of parental rights including divorce decrees-- SDCL 25-4-45 et seq.; voluntary termination of parental rights--SDCL ch. 25- 5A; involuntary termination of parental rights--SDCL ch. 26-8. Clearly, the termination of parental rights is viewed as a serious matter and is not to be lightly inferred, and the South Dakota Supreme Court has construed SDCL 25-5-8 above as creating equal rights in both parents although separated. Cody v. Baughmon, 50 S.D. 372, 210 N.W. 348, 48 A.L.R. 1205 (1926).

IN RE QUESTION NO. 3:

If your district has been provided with a copy of a court order or other legally binding instrument, either terminating the parental rights of one parent or restricting the exercise of those rights in such a manner that access to the student or the student's records would be inconsistent with the \_document, the language you suggest would be entirely appropriate.

Finally, I am enclosing a position paper from the FERPA Office, Department of Education, 4512 Switzer Building, Washington, D.C. 20202, entitled 'Custody and Parent Rights Under the FERPA' that may be useful to you.

Respectfully submitted,

Mark V. Meierhenry  
Attorney General

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ATTACHMENT

#### CUSTODY AND PARENT RIGHTS UNDER THE FERPA

Section 438 of the General Education Provisions Act as amended [The Family Educational Rights and Privacy Act of 1974 (FERPA)], sets out requirements designed to protect the privacy of parents and students. Specifically, the statute governs (1) access to records that educational agencies and institutions maintain, and (2) the release of such records. In brief, the statute provides: that school districts must provide parents of students and postsecondary schools must provide students access to records that educational agencies and institutions maintain that are directly related to the students. They must provide the parents of the student and postsecondary students an opportunity to seek to amend education records they believe are inaccurate, misleading, or in violation of the student's rights. School districts must obtain the written permission of the student's parents and postsecondary institutions must obtain the written permission of the student before they can disclose information (with some exceptions) contained in the student's education record.

Since the FERPA rights to parents relative to their minor children's education records, school districts must make certain that they properly identify parents.

Black's Law Dictionary 4th ed., 1968 defines 'parent' as; 'The lawful father or mother of a person. One who procreates, begets, or brings forth offspring.'--'The term literally can apply only to a father or mother related by blood, including the parent of an illegitimate child: Commonwealth v. Wibner, 73 Pa. Super. Ct. 349,351;' (emphasis added).

Though the FERPA itself does not include a definition of the term, the implementing regulations define 'parent' within the scope of the definition found in Black's Words and Phrases, permanent edition Vol. 31, 1957, which states in part, 'The term 'parent' primarily means one who begets a child, and usually denotes consanguinity rather than affinity, but in a broad sense, and \_under certain circumstances, it may include any one standing in a position equivalent to that of a parent. Muller v. United States, C.C.A. Ark., 123 F2d 715, 717.

The FERPA regulations state at section 99.3, Definitions. As used in this part:

'Parent' includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary. (Emphasis added)

One can best understand the FERPA position on parent rights if he separates the concept of custody from the rights that the FERPA accords parents. Custody or other residential arrangements for a child do not, in themselves, affect the rights of the child's parents under the FERPA. The FERPA deals with a parent's rights of access to and control over a child's education record.

For the purposes of the FERPA, a school district must accord a natural parent the rights the Act accords him or her unless the courts or a responsible party has provided it a legally binding document that specifically removes that parent's right to have knowledge about and participate in his or her child's \_educational process.