UNITED STATES DEPARTMENT OF EDUCATION

STUDENT PRIVACY POLICY OFFICE

April 15, 2025

Dr. Dana Monogue
Superintendent
Middleton Cross Plains Area School District
7106 South Avenue
Middleton, Wisconsin 53562

Complaint No. [redacted]
Family Educational Rights
and Privacy Act

Dear Dr. Monogue:

This is to inform you of the finding in the complaint filed against Middleton Cross Plains Area School District (District) by [redacted] (Parent) under the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99. The Student Privacy Policy Office (Office or SPPO), formerly the Family Policy Compliance Office (FPCO), received the Parent's complaint, dated May 4, 2013, alleging that the District violated her rights under § 99.10 of the FERPA regulations when it denied her access to certain education records of her child, [redacted] (Student). By letter dated October 30, 2015, this Office informed the former superintendent of the District, Dr. Don Johnson, of the Parent's allegations and requested a written response. This Office apologizes for the extended delay in which we informed the District of the allegation and for the delay in issuing this letter of finding. Due to the complex factual and legal issues involved in this complaint, the volume of correspondence received by this Office, and our limited resources, we are currently not able to respond to all complaints in as timely a manner as we would like. We regret any inconvenience this prolonged delay in completing this investigation may have caused you.

Statement of Facts

- May 4, 2013: The Parent alleged that the District denied her April 12, 2013, request to view the Student's education records by requiring her to pay $425 for copies of the 2,800 records maintained by the District and that the District denied her access to certain memorandums citing that such records were sole possession "notes" as defined under FERPA. We note that the allegation specific to the District imposing a $425 fee was not included in our investigation as explained in our letter to the Parent dated October 30, 2015, and therefore not further addressed in this letter of finding.

- October 12, 2014: The Parent alleged that the District denied her April 4, 2014, follow-up request for access to the Student's education records.

- August 31, 2015: Former Education Secretary Arne Duncan received a letter from the Parent regarding her complaint.

- October 30, 2015: This Office opened an investigation and notified the District setting forth the Parent's allegation.

- December 2, 2015: [redacted], attorney, submitted a letter of response on behalf of the District, explaining that it provided the Parent access in response to a request she made under Wisconsin Public Records Law §§ 19.31 - 19.39.

- February 13, 2017: This Office wrote a second letter to the District to request information about its records retention and maintenance policies.

- March 13, 2017: The District provided this Office with information about its records retention and maintenance policies.

By letter dated December 2, 2015, the District responded and requested that the investigation be closed and that the complaint be dismissed for the reasons detailed below.

Allegation One

The Parent alleged that the District denied her April 12, 2013, April 14, 2014, and August 31, 2015, requests for access to email communications, including telephone and meeting notes and electronic paper records related to the Student.

District Response

In its December 2, 2015, response, the District explained that it denied the Parent's FERPA access requests based on the following: 1) the District's position that the email communications that the Parent sought are not education records under FERPA; 2) the fact that, pursuant to the Wisconsin Public Records Law, the Parent already obtained the email communications that she is seeking; and 3) the fact that the Wisconsin Department of Public Instruction upheld the District's denial of the Parent's FERPA requests.

In its March 13, 2017, response to this Office's requests for the District's records policies, the District reiterated the following:

> The District has responded appropriately to [the Parent's] multiple requests under FERPA. Though the District did deny [the Parent's] request for electronic mail that was not included in the student's pupil file, that denial is consistent with application law for the reasons outlined in our December 2, 2015 correspondence. Finally, [the Parent] has

> already accessed the electronic mail she seeks through FERPA. She sought, paid for and was provided with the electronic mail through the Wisconsin Public Records Law.

Regarding the District's records maintenance and retention policies, the District explained that, prior to 2012, the District maintained records, including emails, on a dedicated server. Subsequently, the District contracted with a third-party cloud-based electronic information system, Infinite Campus, to house email communications and records. The oldest emails related to the Parent's child are dated September 9, 2011. The District also explained that there are no separate, dedicated servers for special education records and provided the name of the network person who handles all searches on the District's server once the records request is approved by the District superintendent.

Additionally, the District explained that it follows the Wisconsin Records Retention Schedule (WRRS) for school districts, provided by the Wisconsin Department of Public Instruction. The record retention schedule in the WRRS covers both hard copies and electronic copies, and specifically requires that emails be maintained for seven years. The District states that it recognizes its obligation to refrain from destroying education records under FERPA when a parent has an outstanding request to inspect and review those records. After the seven-year time period, the emails are deleted and are not backed up, unless "good cause" exists to maintain them longer than seven years.

Furthermore, the District stated:

> [The Parent's] first request under FERPA was by e-mail dated April 12, 2013. In that request, [the Parent] stated: We agree to limit the scope of this request to records dated on or after July 1, 2011. Because records are retained for seven (7) years, the records that directly relate to [Student] from July 1, 2011 to the date of this correspondence are maintained by the District.

The District's December 2, 2015, response sets forth its position that it operates with the understanding that if an email contains personally identifiable information about a student and "is maintained" by the District, in either hard copy or electronic format, it will qualify as an "education record." The District continued:

> However, if an email is simply still on a server and not filed in a way that associates it with a student, it is not an education record. This is based on the distinction that the Supreme Court drew in [*Owasso Indep. Sch. Dist. v. Falvo,* 534 U.S. 426 (2002)]. The Supreme Court in *Falvo* clearly held that not all documents related to a child, even if in the possession of [an] individual in a school district, come within the definition of an "education record" under FERPA. Therefore, unless emails are removed and actually placed in the institutional record kept by a single central custodian, then they are not education records and the parent does not have a right to review and inspect them.

The District's response further sets forth its position that the court in *S.A. v. Tulare Cty. Office of Educ.,* 53 IDELR 143 (E.D. Cal. 2009) also applied the Supreme Court decision in *Owasso* in holding that only emails that are printed and placed in a student's pupil file are "education records" under FERPA. The District cites to the following passage in *Tulare*:

> Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student's assertion – that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained "in the same way the registrar maintains a student's folder in a permanent file" – is "fanciful." *Owasso*, 534 U.S. at 433. Like individual assignments that are handled by many student graders, emails may appear in the inboxes of many individuals at the educational institution. FERPA does not contemplate that education records are maintained in numerous places. As the Court set forth above, "Congress contemplated that education records would be kept *in one place with a single record of access*." Id. at 434 (emphasis added). Thus, California DOE's position that emails that are printed and placed in Student's file are "maintained" is accordant with the case law interpreting the meaning of FERPA and the IDEA.

Lastly, the District contends that Congress and the Department acquiesced in the *Tulare* decision through inaction. In the discussion below, this Office addresses the District's response.

Relevant Law

FERPA is a federal law that protects the privacy of students' education records. The term "education records" means, with certain exceptions, those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A)*;* 34 CFR § 99.3 "Education records." FERPA affords parents and eligible students the right to have access to their children's or their education records, the right to seek to have the records amended, and the right to have some control over the disclosure of personally identifiable information from the records. (An "eligible student" is a student who has turned 18 or is attending college at any age.)

Under FERPA, an educational agency or institution must generally provide a parent with an opportunity to inspect and review his or her child's education records within a reasonable period of time, but not more than 45 days it has received the request. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10(b). While required to provide a parent with access to their child's education records, an educational agency or institution is not generally required by FERPA to provide copies of education records. However, if circumstances effectively prevent a parent from exercising his or her right to inspect and review education records, the educational agency or institution would be required to either make other arrangements that would allow for the parent to inspect and view the requested records or provide the parent with a copy of the records requested. 34 CFR § 99.10(d). For example, a school could be

required to make other arrangements for inspection and review or provide copies, if the parent did not live within commuting distance of the school.

Allegation One Analysis and Finding

In making a determination as to whether a violation of FERPA occurred, this Office considers all documentation acquired through the investigatory process, in conjunction with the relevant statutory and regulatory requirements and the Department's interpretation of those requirements. Based on our review of the information provided by the Parent and the District, we do not have sufficient evidence to make a determination that the District violated § 99.10 of the FERPA regulations as alleged when it denied the Parent access to certain records of the Student, specifically email communications. The Department previously opined in our Letter to Husk, dated December 29, 2006, in which we conveyed the finding that "all handwritten, typed or computer generated notes, including email messages, written by school district personnel that identify the Parent or Student and are maintained by the District (or service providers acting for the District) constitute the Student's 'education records' under FERPA." (See https://studentprivacy.ed.gov/resources/letter-husk.)

However, as the District asserts, since the issuance of that letter, there have been relevant federal district court decisions, such as the aforementioned *Tulare* decision, that may not be fully consistent with the position conveyed in our 2006 letter. Although these court decisions may have limited jurisdictional application, the Department is aware that some educational agencies and institutions across the country have adopted the *Tulare* holding and consider only those emails that are printed and placed in a student's pupil file as "education records" under FERPA. To date, the Department has not adopted the holding in *Tulare* or similar cases, or issued any subsequent formal guidance or regulations that specifically addresses the applicability of FERPA to emails. Accordingly, the Department does not have a regulatory basis to support a conclusion that a FERPA violation occurred in this case. Further, we note that when an educational agency or institution, including school officials, sends emails containing personally identifiable information from a student's education records to other parties, even if such emails are not maintained by a central custodian, such emails may only be disclosed in compliance with FERPA.

Based on our analysis as referenced above, we find that, with respect to this allegation, we cannot find that the District violated FERPA as alleged. Please note that in reaching this conclusion, the Department is not itself adopting the analysis of the *Tulare* case, but only finding that the District did not violate FERPA in doing so. Finally, and as we previously noted, we realize that this issue is of importance to parents, students, and school officials, and we hope to issue guidance or regulations in the foreseeable future that will address this matter. Moreover, we note that the Parent did ultimately receive the emails in question through the State's open records law.

Allegation Two

As noted above, the Parent alleged that the District denied her access to personal notes from telephone calls and personal notes from meeting records to which she requested access.

District Response

In its December 2, 2015, letter the District responded as follows:

> In each of her requests for educational records under FERPA, [the Parent] sought "notes of telephone calls or meetings." Consistent with FERPA statutory and regulatory language, as well as case law, the District denied the request to the extent it sought personal notes kept in the sole possession of the maker of the record. Personal notes or records that are kept in the sole possession of the maker, are used only as a personal memory aide, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record are not records considered to be part of a student's educational or pupil record. 20 U.S.C. 1232g(a)(4)(B)(i). The District properly concluded that the personal notes of telephone calls or meetings that [the Parent] requested fall within the federal exemptions as being a personal memory aid. Consequently, such documents, if they exist, were not produced under FERPA.

The District acknowledged that it did not comply with the Parent's request for any records that it deemed to fall outside of the definition of education records because they were the sole possession records of the author of such records and notes.

Relevant Law

As noted, exempted from the definition of education records are those records which are kept in the sole possession of the maker of the records, are used only as a memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the records. 34 CFR § 99.3 "Education records" (b)(1); *see also* 20 U.S.C. § 1232g(a)(4)(B)(i) exempting "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." Once the contents or information recorded in sole possession records is disclosed to any party other than a temporary substitute for the maker of the records, those records become education records subject to FERPA. Generally sole possession records are of the nature to serve as a "memory jogger" for the creator of the record.

Allegation Two Analysis and Finding

Our review of the documentation acquired regarding the second allegation indicates that the District investigated the allegation and found that the personal notes from telephone calls and personal notes from meeting records to which the Parent requested access were sole possession records. Therefore, the District asserts that, with respect to the Parent's second

allegation, it did not provide the records she requested because the records were not education records subject to FERPA. The District asserts that the records were kept in the sole possession of the maker of the records, were used only as a memory aid, and were not accessible or revealed to any other person except a temporary substitute for the maker of the records. No factual evidence was presented in this case that would give this Office reasonable cause to believe that the records identified by the District as sole possession records were disclosed by the maker of the records to other school officials or used in a manner that would cause the records to lose their status as sole possession records. Accordingly, since schools are not required to provide parents access to records that fall under the sole possession exception to the definition of "education records" under FERPA, we do not find sufficient evidence that the District violated FERPA with respect to this allegation.

In the absence of a finding of noncompliance in regard to either allegation, this Office is closing this complaint and will so notify the Parent by copy of this letter. This letter constitutes notice of a final agency action regarding this matter.

Thank you for your cooperation with this investigation.

Sincerely,

/s/

Frank E. Miller Jr.
Acting Director
Student Privacy Policy Office

cc: Parent

Attorney for District