

Confidentiality for Students with Disabilities: Liability Cases*

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Abstract

After an introductory legal framework based on the Family Educational Rights and Privacy Act, this article canvasses the court decisions concerning liability for disclosures of confidential information about students with disabilities. The relatively few court decisions illustrate the wide variety of disclosures, including to the media, other students, and private providers; the range of federal and state bases, such as Section 1983 civil rights claims based on the constitutional right to privacy; and the judicial outcomes of these claims, which have been strongly skewed in favor of the school side, especially the institutional rather than individual defendants. Yet, other compelling interests, including the need for educational environment that values human dignity and psychological safety.

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An issue that arises on occasion incidental to the Individuals with Disabilities Education Act (IDEA, 2013) is liability for violating the confidentiality of information specific to the student. “Liability” in this context refers to its narrow meaning of the judicial remedy of money damages. In turn, “confidentiality” herein is used interchangeably with privacy without any nuanced differentiation.

Background Frame of Reference

The federal Family Educational Rights and Privacy Act (FERPA, 2013) is a useful starting point, or backdrop, for examining liability issues specific to the privacy rights of students with disabilities. Representing a legislative balancing of competing interests, FERPA provides (a) protection of the student’s “education records” that is keyed to personally identifiable information that is not merely for directory purposes; (b) the parent as proxy for the student under age 18; and (c) limited exceptions, such as access for school employees with legitimate educational interests. Moreover, for students with disabilities, FERPA is incorporated in the IDEA legislation (§ 1417[c]) and customized in its regulations (§§ 300.610–300.627). This customization includes additional requirements beyond those of FERPA (e.g., Letter to Weatherly, 2015).

However, FERPA in combination with the IDEA does not represent the contours of liability for two major reasons. First, in some cases, the privacy interests of students with disabilities extend beyond the specific contours for “education records.” Second, the remedy of money damages, which is the specific meaning of liability, is not available under either FERPA (e.g., *Gonzaga University v. Doe*, 2002) or the IDEA (e.g., *C.O. v Portland Public Schools*, 2012).

The Specifically Pertinent Case Law

In light of the limited coverage in the professional literature both in terms of scope and currency (e.g., Zirkel, 1997), the purpose of this article is to canvass the case law to date that identifies and applies the sources of liability specific to the privacy rights of students with disabilities. These cases examine the liability for the school district and, to the extent applicable, individual district employees. The organization of this synthesis is in terms of practitioners of education, rather than law. Thus, the subheadings are in terms of the nature of the alleged breach, such as disclosure to the media, with the summary of each case identifying the various legal bases for the liability claims, such as privacy under the federal Constitution or negligence under state common law.

Disclosure to the Media

Releasing personally identifiable information about a student with a disability to the media pits the competing interests of the individual's right to privacy and, via the media, the public's right to know. The individual interest is sensitively strong because the student is not only a minor but also with disabilities. Yet, the public interest is also obvious in light of the governmental context of the school system, as state "sunshine," or freedom of information, laws illustrate.

Although illustrative in their factual content, these cases are limited in terms of their legal contours and currency. More specifically, the only two pertinent court decisions were at the lowest level of the federal judiciary in the mid-1990s. Thus, these decisions were before the Supreme Court decided that FERPA may not serve as the basis for money damages; it is not enforceable via Section 1983, the generic federal civil rights act that provides for liability for violations of the U.S. Constitution or other federal laws.

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First, in *Maynard v. Greater Hoyt School District No. 61-4* (1995), the parents of a child with autism resided in a rural area in the Midwest. The district agreed, via the IDEA's IEP process to place the student in a residential program in Connecticut, with the costs including not only tuition room and board but also periodic parental visits. As required by state law, the school board reported the cost in public meeting notices in the local newspaper. Upon the significant increase in property taxes to cover this cost, public pressure resulted in news coverage that identified the student by name and photograph as the source of the tax increase. Faced with harassing phone calls and various other forms of local hostility, the parents filed suit in federal court against both the district and the individual school board members. For their federal claims, they relied on Section 1983 tied separately to two federal statutes—FERPA and the federal law prohibiting discriminatory conspiracies interfering with protected rights.

In response to the Section 1983-FERPA claim, the *Maynard* court summarily ruled in favor of the school district based on the lack of a prerequisite for municipal liability—a policy or custom. Observing that the board's only action was publication of its minutes per state law, the court concluded: "The school board was not implementing its own policy or custom, but was enforcing the state's policy of informing constituents of expenditures" (p. 1108). For the corresponding FERPA-based claim against the individual board members, the court also rendered summary judgment, that is, without a trial, in their favor based on the qualified immunity that applies to school officials, including but not limited to employees, in their personal capacities. This defense applies unless the federal rights are clearly established. To the contrary, in the circumstances of this case, which included not only the school board members' limited disclosure in accordance with state law but also the father's disclosure in an open letter to the public during a school board election, of his child's autism, the court concluded: "An

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objective reasonable school board member would not know that the release of information regarding the cause of the increase in property taxes was a violation of the plaintiffs' clearly established right to confidentiality" (p. 1108).

The *Maynard* court even more easily disposed of the Section 1983 conspiracy discrimination claim based on the absence of two essential elements for such claims: protected status and discriminatory intent. Finally, per the usual exercise of judicial discretion in cases where the federal claims fail at the pretrial stage, the court declined to exercise jurisdiction for the parents' ancillary state claims.

Second, in *Doe v. Knox County School District* (1996), the student was a twelve-year-old with the special education classification of emotional disturbance (ED). Dissatisfied with her IEP, the parents filed for a due process hearing. At their request, the hearing officer issued a protective order prohibiting the disclosure of her confidential records, which included the fact that she was a hermaphrodite, that is, having both male and female reproductive organs. Based on state law, the school board discussed with a reporter the reasons for emergency purchases made on her behalf. Soon thereafter, an article appeared in the local newspaper reporting that the district had established an ED unit, as an alternative to residential placement, for "a female within severe emotional and behavioral problems resulting primarily from a medical condition, hermaphroditism." The parents filed suit in federal court in Kentucky against not only the district but also the superintendent and the board members in their individual capacities. Their federal claim was Section 1983 tied to FERPA. Their ancillary state claims were based on the Kentucky's state law that similarly protected student records as well as various common law torts, such as invasion of privacy.

For the Section 1983-FERPA claim, the *Knox* court acknowledged the then split in

judicial authority but sided with the now-preempted *Maynard* view that recognized the viability of such claims. However, different from the outcome in *Maynard*, this court denied the district's motion for dismissal, reasoning that the crux of the claim is whether the disclosed information was personally identifiable to this student. The district defendants argued that the answer to this question was clearly "no," but the court found sufficient lack of clarity to preserve the issue for further proceedings, concluding that "[t]he defendants may be correct but that is an issue of fact that the jury must decide at trial" (p. 184). While denying to dismiss the corresponding claim against the superintendent and board members in their individual capacities, the court raised the possibility of revisiting their asserted defense of qualified immunity at the next pretrial stage, which is summary judgment. In other words, after further factual development as a result of depositions and other such pretrial "discovery," ruling before trial whether, as an objective matter, their disclosure clearly violated FERPA.

In light of these rulings on the federal claim, the court addressed the parents' state claims. The court granted their dismissal of their state law liability claims against the district and its identified individuals in light of the broad scope of governmental immunity in Kentucky. In partial contrast, court denied dismissal of their claim under the Kentucky student records act but only as to the remaining, nonmonetary remedies of declaratory and injunctive relief.

Disclosure to Students

Release of personally identifiable private information about a student with disabilities to other students, although usually unintentional, has been the subject of more recent case law. Moreover, because these cases do not rely on FERPA, they illustrate more robust alternative legal bases for liability.

In *M.P. v. Independent School District No. 721* (2003/2006), the Eighth Circuit addressed

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an employee's disclosure of a sixteen-year-old student diagnosis of schizophrenia to other students, which resulted in their persistent verbal and physical peer harassment of him. Upon the parents' confidential disclosure of the diagnosis to school officials a year earlier, the district determined that, based on the student's medication, he did not need special education but was entitled to a 504 plan. The 504 plan, with subsequent revisions, appeared to suffice until the school's health paraprofessional, who knew about the student's condition based on her medication responsibilities, disclosed this information to other students. After several months in which the school administration allegedly failed to respond to the reported disclosure and harassment, the family enrolled the student in a neighboring district. The parents filed suit under the IDEA for compensatory education and Section 504 for money damages. In its 2003 decision, the Eighth Circuit disposed of the IDEA issue but remanded the Section 504 issue back to the lower court for more factual development as to whether the district's acts or omissions amounted to bad faith or gross misjudgment, which is the Section 504 standard for liability. However, the lower court granted the district's motion to dismiss the case because the parents' had not exhausted their administrative remedies, which was to have the matter addressed first at a due process hearing. Upon the parents' appeal, the Eighth Circuit's 2006 decision was that the IDEA's exhaustion requirement did not apply because the parents' claim was "wholly unrelated to the IEP process" (p. 868). The published record of the case ended at that point, with an order remanding it back to the lower court again for further factual development, although the likely result was a settlement. The exhaustion ruling still represents current law, because (a) this student did not have an IEP and neither party claimed that he should have had one, and, in any event, (b) the Supreme Court recently ruled that exhaustion does not apply where the crux of the claim is not denial of FAPE under the IDEA (*Fry v. Napoleon Community Schools*, 2017).

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The more recent decision in *L.S. v. Mount Olive Board of Education* (2011) illustrates another factual variation of disclosure to students and alternative legal bases for liability claims. In this case, student X was a ninth grader with a 504 plan based on diabetes, depression, and school phobia. One of the eleventh-grade teachers at the school, who did not know X, asked the school social worker to share with him a sample psychological or psychiatric evaluation for use as a template for his class's assignment to develop such an evaluation of the primary character in the novel *The Catcher in the Rye*. The social worker gave the teacher a copy of X's psychiatric evaluation, instructing him to delete any personally identifiable information. The teacher distributed a redacted copy to his class, one of the students, who was a friend of X, recognized that the evaluation was X's. Directly after class, he encountered X's parents, who were at school for a 504 meeting, and gave them a copy of the evaluation. They immediately contacted the administration, who promptly collected and destroyed the distributed copies.

Obviously upset, the parents first filed a complaint with the state education department that resulted in a finding that the district had breached the confidentiality of X's records and that "district personnel are uninformed of the importance of maintaining the privacy of potentially disabled students" (p. 653). Subsequently, the parents filed suit in federal court against the school district and various individuals, including the teacher and the social worker who participated in the disclosure of the document, alleging that this ill-conceived disclosure had significantly exacerbated their son's social anxieties and school phobia. Their multiple claims included various federal and state legal bases.

For the Section 1983 liability claims, the *L.S.* court dismissed those based on (a) First Amendment expression and Fourth Amendment search or seizure as inapplicable; (b) S.S.'s constitutional rights to privacy against individual school administrators due to their "lack of any

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personal direction, actual knowledge, or acquiescence in the disclosure of S.S.'s evaluation" (p. 658); and (c) based on SS's constitution right to privacy against the district due to the lack of the requisite deliberation indifference via policy, custom, or training). However, the court ruled that the teacher and social worker were liable for their "wholly intentional" disclosure, with "feeble" redaction, to the other seventeen students in the class. Moreover, the court dismissed the claims under the IDEA and FERPA for their failure to provide the right to sue for money damages.

Proceeding to address the state claims, the *L.S.* court issued matching rulings for the parallel provisions under the state constitution and state statutes. Their remaining state claim, which was for negligence, succeeded only against the teacher and the social worker, with governmental immunity contributing to the negligence ruling in favor of the school district.

The most recent case in this category, *Ex parte Trimble* (2016), similarly started with action between two school employees that resulted in disclosure of confidential information about Crystal, a twelfth grader with a 504 plan, but the claims were limited to state law. More specifically, per the high school principal's authorization, the teacher who served as secretary of the Section 504 committee disseminated Section 504 reports to implementing teachers via a student aide. She placed the reports in sealed envelopes and instructed the student not to open them or deliver the envelopes to any individual except the specified teachers. The assigned student opened one of the sealed envelopes, thus finding out about the Crystal's medical condition. He then circulated this confidential information to other students. As a result, Crystal was subject to harassment and bullying. The parents filed suit in state court against the district and various individuals on various state law bases, including negligence and common law invasion of privacy.

The trial court denied the defendants' motion for summary judgement, thus reserving the

matter for further proceedings, but the principal and the 504 teacher appealed this ruling to the state's highest court. The Alabama Supreme Court held that the state's governmental immunity covered their actions, because there was no showing of willfulness or bad faith.

Disclosure to District Personnel

The case law to date concerning release to other district employees is much more limited. In the only pertinent decision, *G.R. v. Dallas School District No. 2* (2010/2011), a high school student with an IEP was convicted of sexually assaulting another student. The parents alleged that the special education director and the high school's two assistant principals contacted the probation officer of the county's juvenile department, obtained from him confidential information about the student in violation of state law concerning youthful offenders, and disclosed this information as part of the district's case in a due process hearing for the student. The parents filed suit in federal court on various legal bases.

In its first of two decisions, the *G.R.* court dismissed their claims under Section 504 and the Americans with Disabilities Act because these civil rights statutes apply to the district, not its employees. The court also dismissed the parents Section 1983 claim based on constitutional parent-child privacy and liberty rights, concluding that the alleged violation of the state law protecting the confidentiality of youthful offenders did not violate these constitutional rights. The court also dismissed the various state claims, including negligence and intentional infliction of emotional distress against the individuals, substituting instead the district subject to further proceedings.

In its second decision, which was the following year, the court dismissed the state liability claims, concluding that the district did not violate the confidentiality statute. In the same decision, the court rejected the parents' IDEA claims for tuition reimbursement or compensatory

education.

Disclosure to Private Providers

In some cases, the release of personally identifiable information is to a district-related private evaluator or school that arguably has a legitimate educational interest but for which the IDEA appears to require parental consent. In *W.A. v. Hendrick Hudson Central School District* (2016), the privacy issue between the parents of a seventeen-year-old with an IEP and the district started, as a background matter, two years before the culminating incident. At that earlier point, the school board minutes, which appeared on the district website, contained personally identifiable information about the student. Although the school board, when the parents expressed their concern, corrected the matter, the parents filed a complaint with the state education department. After an investigation, the agency found a violation of the IDEA's FERPA provisions and ordered the corrective action of training. Then, two years later, the IEP team met for an annual review and determined that the student needed a private placement. The district's administrative representative identified five possible private special education schools, which were not well known to the parents or other IEP team members, and requested that the parents sign the consent form to share the student's record with these schools. The parents requested time to consider the request and, a week later, when the administrator again asked them for their authorization, they declined pending more information about these schools and the district's rationale for these particular choices. Two weeks later, after another such back-and-forth in which the parents expressly refused consent, the district forwarded the student's referral packets, including the student's neuropsychological evaluation and psychiatric update with selected redaction and with notice to the parents, to the five schools. The parents filed a liability suit against the district and its applicable administrator on various federal and state grounds.

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In response to the Section 1983 claims based on the U.S. Constitution, the federal district court in *W.A.* granted the dismissal of the Fourteenth Amendment equal protection claim due to the lack of the requisite comparator evidence but proceeded to apply the constitution right of privacy claim because its protection extends to personal health information, particularly but not exclusively psychiatric records. For the individual defendant, the court rejected the defense of qualified immunity, although observing that at the next stage of the pretrial proceedings further factual development may lead to the opposite conclusion, which would be that it was objectively reasonable for her to conclude that her action was not a clear constitutional violation. As for the defendant district, the court ruled that the parents failed to show the requisite policy or custom based on either failure to train (due to the limited scope of the prior incident) or the administrator's status (due to lack of final decision-making authority for student records).

Based on the survival of the constitutional claim against the individual defendant, the *W.A.* court exercised its discretion to address the ancillary, state law claims. However, the plaintiff parents failed on both of their state law claims. First, the court rejected their negligence claim because the pled breach of duty against them, whereas the duty of confidentiality was applicable to their son. Second, the court ruled that New York courts have failed to recognize a common law right of privacy. Providing due deference to state courts regarding state common law, its concluding comment was that “given the well-established precedent directly on point, this Court sees no reason to put its oar in the water and make a splash with respect to state privacy law” (p. *12).

In another recent case, *Luo v. Owen J. Roberts School District* (2016), the parents of a child with a disability filed various claims against the district and various individuals that led to a whole series of court decisions, with the focus here limited to the liability claims against the

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district, its special education director, and a private psychologist. In a due process hearing concerning the appropriate placement of the student, the hearing officer ordered an independent educational evaluation (IEE). As a result, the district's special education director contracted with a licensed private psychologist and released the student's records to her without the consent of the parents, who did not acquiesce to the hearing officer's decision. Based on these records, private psychologist prepared the IEE report. The parents, who litigated the matter pro se, that is, without an attorney, claimed that the release and use of the student's records without their consent violated the Declaration of Independence. In light of the parents' pro se status, the court declined to dismiss their claim, interpreting it as viable under Section 1983 based on the constitutional rights of parental liberty and privacy. However, their claim only survived against the private psychologist and special education director, because the parents' vague assertions of policy or custom were insufficient to establish possible district liability.

Discussion

Table 1 provides a summarizing overview of the applicable case law to date. The ruling column, headed with the abbreviation "Rul.," provides the judicial outcome for each major claim according to the following categorical outcomes scale: D=conclusively in favor of the defendant(s); (D)=inconclusively in favor of the defendant(s) subject to further proceedings; (P)=inconclusively in favor of the plaintiff(s) subject to further proceedings; and P=conclusively in favor of the plaintiff(s).

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Table 1

Overview of Case Law Specific to Liability Claims for Breach of Confidentiality for Students with Disabilities

Case Name	Ct./Yr.	Disclosure	Claim Basis	Defendant(s)	Rul.	Reason for Ruling
Maynard v. Greater Hoyt Sch. Dist. No. 61-4	D.S.D. 1995	to media re costly placement per state law	§ 1983-FERPA	district individuals	D D	lack of policy or custom qualified immunity
			§ 1983-conspiracy	both	D	lack of both protected interest and discriminatory intent
			state claims	both	(D)	declined jurisdiction
Doe v. Knox Cty. Sch. Dist.	E.D. Ky. 1996	to media re costly placement	§ 1983-FERPA	district individuals	(P) (P)	personally identifiable? qualified immunity?
			state claims	both	D	governmental immunity
M.P. v. Indep. Sch. Dist. No. 721	8th Cir. 2003/2006	to other students via school health employee	IDEA	district	D	moot due to change in residence
			§ 504	district	(P)	IDEA exhaustion provision does not apply
G.R. v. Dallas Sch. Dist. No. 2	D. Or. 2010/2011	to co-employees for due process hearing contrary to state juvenile justice statute	§ 504/ADA	district individuals	- D	not part of this court's decision inapplicable to employees
			§ 1983-const. rt. to privacy	both	D	applicable to the student, not the parents
			negligence +	individuals district	D D	district instead under state law no violation of said state statute
L.S. v. Mount Olive Bd. of Educ.	D.N.J. 2011	to other students via high school class exercise via teacher (T) and social worker (SW)	§ 1983-const. rt. of privacy (& state const.)	district ind. admrs. ind. T & SW	D D P	lack of policy or custom lack of knowledge or direction wholly intentional
			negligence	district ind. T & SW	D P	governmental immunity no immunity
Ex parte Trimble	Ala. 2016	to other students via student office aide (from § 504 committee member)	negligence & inv. of privacy	both	D	governmental immunity
W.A. v. Hendrick Hudson Cent. Sch. Dist.	S.D.N.Y. 2016	to potential private placements	§ 1983-const. rt. to privacy	district ind. admr.	D (P)	lack of policy or custom qualified immunity?
			negligence inv. of privacy	both both	D D	duty to student, not parent not recognized in NY
Luo v. Owen J. Roberts Sch. Dist.	E.D. Pa. 2016	to private psychologist for hearing officer-ordered IEE	§ 1983-const. rt. to privacy	district individuals	D (P)	lack of policy or custom lack of consent

Note: §=Section; T=teacher; SW=social worker

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A review of Table 1, with particular attention to the ruling column and in light of current judicial law more generally, reveals that the various liability claims against the district have been almost entirely unsuccessful. At the federal level, the reasons are that (a) the *Gonzaga University v. Doe* (2002) decision has closed the door on claims based on FERPA, thus nullifying any future effect of the limited, inconclusive ruling in *Doe v. Knox County School District* (1996); (b) even though the exhaustion doctrine may well not apply to Section 504 or ADA claims, the resulting direct court action faces the steep uphill slope of proving bad faith, gross misjudgment, or deliberate indifference, which are all variations of a high liability standard; and (c) the difficulty of establishing the requisite policy or custom is a formidable barrier for the remaining viable alternative of the constitutional right of privacy. For state claims, governmental immunity. For state claims, governmental immunity, which varies from state-to-state but is generally “not only alive but robust” (e.g., Maher, Price, & Zirkel, 2010, p. 246), poses a major obstacle in many states. Moreover, the common law right of privacy, as the ruling in *W.A. v. Hendrik Hudson Central School District* (2016) illustrates, has not gained recognition in some states.

The ruling column suggests that the outcomes odds are better in relation to individual defendants. For federal claims, although statutory alternatives such as FERPA and Section 504 are unavailing, the constitutional right of privacy, particularly for the student rather than the parents, appears to be an increasingly viable basis for individual liability via Section 1983. More specifically, the expanding judicial recognition of the applicability of the constitutional right to privacy strengthens the prospect of defeating their defense of qualified immunity, because a reasonable public school representative has reason to know of the applicability of this constitutional right as it becomes more clearly settled. For state claims, governmental immunity,

which more specifically is “official immunity” for the individual defendants, may not, depending on the state, be as protective (Maher, Price, & Zirkel, 2010), especially to the extent that the claim is based on the individual’s direct and intentional action or omission. Yet, although posing the possibility of a victory in moral principle, claims against school-related individuals often do not mean a victory in monetary principal; in most cases such individuals do not have the “deep pockets” of school district budgets, and professional liability insurance, if they have it, may have exceptions and/or limits for civil rights violations.

Other aspects of Table 1 also merit attention. First, on an overall basis, the number of cases has been less than ten, which quite low compared to the rising total of more than 2,000 special education court decisions overall (e.g., Zirkel & Johnson, 2011). Yet, more than a third of the cases have been during the most recent year, and, as Table 1’s disclosure column reminds us, the factual circumstances vary widely, with some of the disclosures representing legitimate competing interests rather than clear malfeasance. Finally, as the court column reveals, the jurisdictions vary across the country, and most of the claims have been in federal court. Stuart (2005) proposed that state courts may be a stronger venue for student confidentiality cases based on state constitutions and state privacy laws, but the aforementioned liability barriers would appear to apply as well for this avenue.

Nevertheless, two important considerations weigh in favor of more concern in terms of prudent policies, regular training, and system-wide accountability for protecting the confidentiality of students generally and students with disabilities specifically. First, for students with disabilities, the available remedies of tuition reimbursement and compensatory education, and the added costly consideration of attorneys’ fees for prevailing parents, under the IDEA do not pose the same formidably district-favorable odds. Obtaining corrective action via the

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alternative IDEA avenue of the state's complaint procedures process similarly is more favorable to parents, as the *L.S.* and *W.A.* illustrate and as a more broad-based empirical analysis has corroborated (Zirkel, in press).

Second and ultimately more importantly, as a matter of the overall mission of public schools, assuring the safety and dignity of students, all the more strongly for those with disabilities, is the key to not only professional ethics but also educational effectiveness. The courts, in light of our litigious culture, are not only congested but, due to cases in both the civil and criminal dockets that are far more horrific and shocking breaches of student confidentiality, are rather callous and gross mechanisms than the professional and community lenses that should ultimately be controlling in public school policies and practices.

Thus, protecting the confidentiality of personally identifiable information of students with disabilities is a rather compelling priority as a matter of best practice and local accountability even if not in terms of the narrow sense of judicial liability. Whether the information is maintained as formal student record or not, the key consideration is whether a reasonable person, representing a student with a disability, would have an expectation of privacy in this information. If so, obtaining informed consent from the parents or via the impartial hearing process is one alternative, but the parents or the hearing officer may deny the requested authorization. Another alternative may be redaction, but this process is labor-intensive (e.g., Letter to Anderson, 2006), and in some cases, such as arranging for an outside placement, may not leave sufficient information for the intended purpose. Beyond informed consent and effective redaction, "erring" on the side of privacy would appear to be the best policy.

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