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**Statement of Sonja Trainor, Managing Director, Legal Advocacy**

**National School Boards Association**

**Before the Federal Commission on School Safety**

**U.S. Department of Health and Human Services**

**200 Independence Avenue, S.W.**

**Washington, D.C. 20201**

**July 11, 2018**

Good morning, Secretaries DeVos, Azar, and Nielson, and Attorney General Sessions. Thank you for inviting the National School Boards Association to offer comments on public schools' interaction with the Family Educational Rights and Privacy Act<sup>1</sup> in the important context of school safety. NSBA, through its member state school boards associations, represents the nation's 95,000 board members who, in turn, govern approximately 15,000 local districts serving more than 50 million public school students. In addition, NSBA is fortunate to count among its programs the NSBA Council of School Attorneys. As the professional network of 3000 plus attorneys who represent public school boards, the Council of School Attorneys informs the work of local school board attorneys as they come together with their school boards and district staff to support efforts to maintain safe and supportive environments where students can learn and thrive.

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<sup>1</sup> 20 U.S.C. § 1232g (2018); 34 C.F.R. Part 99 (2018).

In pursuing this goal, schools must navigate the sea of federal and state legal regulations, always mindful of potential risk. They call on their school attorneys to help them comply with legal requirements on nearly every aspect of their mission – bidding, building codes, employment and labor concerns, due process rights of students and staff, special education, equity, equal access, open meetings and records requirements – the list goes on. But perhaps more than any other federal law, the Family Educational Rights and Privacy Act (“FERPA”) pervades nearly every step school staff take in their daily interactions with students, families and the community. NSBA is pleased to appear before you today to share its insight on how this law can inform matters of school safety as school boards works toward preventing tragic acts of mass violence at school such as school shootings.

For over forty years, FERPA has provided a federal framework for schools to safeguard student education records and personally identifiable information (“PII”) contained in such records. The law requires schools to give parents and students access to their education records and prohibits the release of records without parental consent, with various enumerated exceptions. Since FERPA’s passage in 1974, the statute and its implementing regulations have changed to address the concerns of the times. In 2008, for instance, amendments allowed contractors access to records when they are acting as “school officials.”<sup>2</sup> After the devastating Virginia Tech shooting, schools were given clear deference under a “rational basis” standard when applying the “health and safety” exception allowing release without consent.<sup>3</sup> The Department of Education, through its Family Policy Compliance Office and Privacy Technical Assistance Center, has provided timely and helpful guidance for schools as technology and safety needs have evolved. The amendments and resulting guidance aim to allow

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<sup>2</sup> 34 C.F.R. § 99.31(a)(1)(i)(B) (2018); 73 Fed. Reg. 74806-01.

<sup>3</sup> 34 C.F.R. § 99.36 (2018); 73 Fed. Reg. 74806-01.

schools to fulfill their mission to keep students and staff safe, and to facilitate learning, while still safeguarding student privacy.

As schools address increasingly heightened awareness of risks and threats to school safety, however, there have been situations that show the limitations of the current FERPA framework. One category is what has been termed a “brewing” incident – a situation in which school officials would like to act to address safety concerns before they escalate. Although school officials can share information they know personally, outside of education records, with others including law enforcement, there are instances where information contained in education records would be helpful to assess a situation and to ensure a child receives appropriate services, to protect the safety of the school and larger community. If parental consent is not easily obtainable, FERPA can be a barrier. Another category is what may be deemed an “exculpatory” information incident. Here, a student known to the school is reported as making a threat, but FERPA does not permit the school to share with concerned authorities information in education records that would show the child to be unlikely to commit, or incapable of committing, violence against the school community.

Currently, schools work with local and state law enforcement, as well as mental health and social services organizations to the extent permitted by law, guided by the FERPA framework and webs of state law and regulation. Schools often enter Memoranda of Understanding with other local entities to spell out clear guidelines for sharing information about students who cross over agencies. The breadth of these agreements depends on the needs and perceived risk each entity has, given the constraints of the law. In Orange County, California, for example, there is an ongoing Miscellaneous Order issued by the juvenile court allowing school districts, social services, probation, and mental health to share information about students who may have committed criminal offenses. This order arguably authorizes release of information beyond what the letter of FERPA allows, but participating

entities recognize the shared larger goal to provide appropriate services to students in the juvenile system, and to prevent future mass violence in schools and elsewhere.

This Commission should examine the possibility of a limited amendment to FERPA and its regulations allowing school officials discretion to share certain information when reasonable and appropriate, under circumstances where there is concern that a student is a danger to himself or others, or there is a concern that the student may be considered a threat absent knowledge of his background that would indicate otherwise. This change would help get students needed services and help school maintain safe environments.

Any change to FERPA and its regulations allowing additional discretion to school officials should come with clear safeguards for family and student privacy, and clear limits on school authority. The goal behind any change would be to remove a barrier to collaboration between schools and community services, including law enforcement, that would prevent a particular act of mass violence such as a shooting at school, or similar future acts. Parental participation in this process, and consent for disclosure of education records, should remain the first and preferred approach when a student is perceived to present a threat.

### **The “brewing” incident scenario**

Let us consider the limitations of current law and regulations with the two scenarios alluded to earlier -- first, the “brewing” incident scenario. School staff are alerted to activity on social media about two students taunting each other over the course of the school year. No time, place, or manner of violence is specifically threatened, and there is no threat of imminent physical harm yet, but the banter is escalating to the point where school staff believe the students are a post or two away from things boiling over into violence at school. School personnel have information in some education records – for example, an on-campus fight that occurred recently between the two students that resulted in

discipline, or an exchange of words in the hallway that was noted as an infraction of the conduct code -- that might help local law enforcement intercede and head off violence at school.

Under FERPA, school personnel would need parent or student consent (if the student is 18) to release education records or personally identifiable information contained in them, or the situation would have to fall under an exception. Although many schools will, and should, seek parent involvement and consent in this scenario, that participation is not always forthcoming or possible, especially if time is of the essence. Each FERPA exception that might apply has a limitation:

1. The health and safety exception requires an “articulable and significant threat to the health or safety of a student or other individuals”<sup>4</sup> before the school may disclose PII from an education record. In this scenario, the threat is not yet articulable or significant, as there has been no specific time, place, or manner expressed in the posts. Although the regulation grants substantial deference to educational institutions with a “rational basis” for release in this situation, many cautious school leaders are understandably reluctant to share information under this exception.
2. The subpoena or court order exception would be applied to release education records to law enforcement,<sup>5</sup> but that exception requires notice to the parent or student and sufficient time for that person to seek protective action. This takes time, and often prevents immediate sharing of education records with law enforcement absent an imminent emergency.

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<sup>4</sup> 34 C.F.R. §§ 99.31(a)(10), 99.36(c) (2018).

<sup>5</sup> 34 C.F.R. § 99.31(a)(9)(i) (2018).

3. The juvenile justice exception<sup>6</sup> would permit sharing of education records, under certain state statutes, in certain circumstances, but only if the student is already part of the juvenile justice system.

School personnel who find themselves in this position – in possession of information that might help law enforcement identify and head off a potentially tragic incident of school violence – often consult with their school attorney. When the fear of violence is real and arguably imminent, many attorneys will advise their school clients that the risk of a FERPA violation is low, and recommend that they report information necessary to keep the school community safe. But, a rational, understandable, and cautious approach would be not to report any information in education records so as not to violate FERPA.

#### **The “exculpatory information” scenario**

A second real-world example, shows a FERPA barrier in reverse. A high school student with significant special needs and school-based services makes the statement, “it would be easy to bring a gun to this school.” He makes this statement shortly after the devastating and highly publicized school shooting at Marjorie Stoneman Douglas High School. This student is well-known by the administration, staff, and students as a person who presents no danger whatsoever, even considering the statement. The administration does not, therefore, report the statement to law enforcement. A fellow student goes home and tells his parent what the student said. Social media explodes and law enforcement shows up at school the next day with no subpoena or other documents for an arrest, but seeking information from, and access to, the school. In this scenario, school personnel are unsure what information they may share with the police officer, as they do not believe there is any danger. The health and safety emergency exception, by its own terms, simply does not apply here.

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<sup>6</sup> 20 U.S.C. § 1232g (b)(1)(E); 34 C.F.R. §§ 99.31(a)(5)(i), 99.38.

Should school staff have discretion to disclose this clarifying information to law enforcement in this case? The staff has detailed information in the student’s education record about his needs and typical behaviors, including a well-documented and data-based assessment indicating a propensity for inappropriate outbursts but no propensity for violence. A cautious school attorney will advise against disclosure in this example without parental consent, to avoid a FERPA violation. But if parental consent is not obtainable, a narrow exception allowing school officials to share information necessary for local officials to assess a threat accurately, could diffuse unnecessary panic in a very limited set of situations and prevent needless law enforcement action against a student.

**Suggested Limited Changes to the FERPA Framework**

School staff members know and care about their students. Their overarching goal every day in school buildings throughout the country is to provide a safe and supportive environment where students can learn and thrive. School officials should be granted limited and narrow discretion to share information contained in education records when they have a good faith belief that such sharing is appropriate to protect the student and the school community. Such a change should not allow unlimited access to private student and family information, nor should it create a wide exception by which the public has access to education records. This change could mean a clarification of FERPA’s health and safety exception to allow schools to share information when deemed necessary and appropriate earlier than the current point of an “articulable and significant threat.” Language that authorizes school personnel to disclose information contained in a student’s education record to local law enforcement or other appropriate government agencies when, in the exercise of their professional discretion, the school personnel find disclosure is necessary to protect students or school staff from the risk of physical harm such as a mass shooting, would allow collaboration in situations where the harm is not yet “articulable” but, is reasonably foreseeable. Similarly, a FERPA amendment could expressly allow states, local

governments, and community service agencies to enter Memoranda of Understanding permitting certain narrowly-defined standards for sharing of information without violating FERPA.

Such changes to FERPA would require policy-makers to consider longstanding jurisprudence establishing limits on restrictions of First Amendment rights. The well-established standard set out by the Supreme Court in *Tinker v. Des Moines Independent Community School District*,<sup>7</sup> for example, requires schools to have a reasonable forecast of substantial disruption or interference with the rights of others before student speech may be regulated.

Similarly, sharing personal information regarding a student's mental or emotional health raises serious concerns about the student's privacy rights. Because confidentiality is a cornerstone of mental health treatment in this country, care should be taken avoid broad new rules that discourage access to treatment for mental, behavioral or emotional issues. Rather, the goal should be to craft narrowly defined exceptions that permit referral to mental health services, and to law enforcement when physical harm or violence such as a school shooting is reasonably foreseeable.

## **Conclusion**

School personnel know and care about their students and their school communities. They know the school climate, community concerns, the history of student interactions, and their needs. They are in a unique position to share information about a student contained in an education record that could be necessary to maintain a safe school environment. NSBA asks the Commission to consider narrow and carefully-crafted amendments to the FERPA statute and regulations that give school officials the discretion, not the command, to share relevant information when needed to keep schools safe, as we have outlined today. Such discretion could lead to greater coordination of services for students before a tragedy occurs. Many of these services already exist; what is needed is a federal system that supports

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<sup>7</sup> 393 U.S. 503 (1969).

limited information sharing without unfunded mandates and provides much-needed funding and technical assistance to encourage coordination of services.

NSBA also urges federal policy makers to confer with school boards as the local policy makers to ensure the final guidance, rule or statute can be implemented and is supported by federal funding. We are eager to be part of the process of a broader modernizing of the 40-year old FERPA, to reflect 21<sup>st</sup>-century tools for student achievement and family privacy concerns. Included as an appendix to these remarks are Resolutions of the NSBA Delegate Assembly with specific recommendations for changes to the FERPA framework that will allow schools to keep student data safe and maintain its privacy, while using it to support student achievement. We urge the Commission and the Department of Education to consult meaningfully with school boards and their representatives, including state school boards associations, to address implementation specifics, effects on existing contracts and agreements with service providers, and related requirements, to avoid undue disruption and administrative burden.

We appreciate the Commission's attention to this integral component of the school safety effort – the FERPA framework – and for seeking input from the National School Boards Association and its members in this crucial conversation. We look forward to assisting the Commission in its future work.

## Appendix

### **Resolutions of the National School Boards Association<sup>8</sup>**

**Adopted April 6, 2018 by the NSBA Delegate Assembly**

#### **Resolution 20. Student Data Privacy**

NSBA urges Congress and the Administration to modernize the more than forty-year-old Family Educational Rights and Privacy Act (FERPA) to address the 21st Century needs of students, school districts, parents, state education agencies, and federal education policies without compromising the protection of stakeholders. Specifically, NSBA urges Congress and the Administration to do the following in future law and guidance addressing data privacy and security:

- (a) Reconcile and update definitions of “education records,” “directory information” and “personally identifiable information”;
- (b) Refrain from adopting a broad definition of the term “education records” to incorporate, for example, “metadata” and “de-identified” data;
- (c) Consult meaningfully with school boards, administrators and school attorneys to address implementation specifics, effects on existing contracts and agreements with service providers, and related requirements, to avoid undue disruption and administrative burden;
- (d) Make any update to FERPA or other laws and regulations affecting school district management of student data consistent with those affecting online educational service providers;

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<sup>8</sup> Resolutions of the National School Boards Association, available at <https://www.nsba.org/about-us/resolutions-beliefs-policies>.

- (e) Limit the role of the U.S. Department of Education with respect to student data privacy to that of technical support and training, not enforcement;
- (f) Incorporate balanced provisions for parental consent that do not compromise student achievement and do not impose significant (and/or disproportionate) administrative burdens on school districts; and,
- (g) Support school district and state policies as well as effective training regarding data usage, privacy, and security protections for administrators, teachers and related personnel/stakeholders.

**Resolution 21. Changes to the Family Educational Rights and Privacy Act**

NSBA urges Congress to change the Family Educational Rights and Privacy Act (FERPA) to explicitly include student data maintained in electronic media, and exclude address, telephone listing, and date and place of birth from the definition of directory information.