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Education CLIENT ADVISORY ALERT

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Revised College Common Application Requests Student Disciplinary Records

This fall, the question of disciplinary history was added to the college common application. Recognizing that such requests may infringe on student privacy rights, this advisory will serve as a reference on how schools may reconcile the privacy rights of its students with the requests of colleges and universities. Schools should not respond to these requests unless they have received from a student or parent "specific, informed consent."

College applicants are often told that constructing the perfect application will serve as the gateway to future success and happiness; thus, concerns about grades, extra-curricular activities and teacher recommendations can take a toll on an adolescent. In addition to these factors, college applicants are now being asked to disclose their disciplinary history. The 2006-2007 academic year marks the first year that colleges and universities are requesting high schools, both public and private, as part of the college "common application" process, to disclose student disciplinary records. The 2006-2007 College Common Application asks both students and guidance counselors to respond to the following:

1. Has this student ever been found responsible for a disciplinary violation at any secondary school attended, whether related to academic misconduct or behavioral misconduct that resulted in probation, suspension, removal, dismissal or expulsion from the institution?

2. Has the student ever been convicted of a misdemeanor, felony, or other crime?

In addition to the Common Application's disciplinary history request, some colleges and universities have adopted even more elaborate questions in seeking access to student records by requiring students to fill out supplemental forms as well. Some of these forms may ask for disclosure of full records of expulsions, long term suspensions, criminal background information and a list of all the schools the applicant has attended. Recognizing the impact of such requests, this advisory reflects our best judgment on how schools can avoid violating students' privacy rights while still cooperating with the requests of colleges.

School districts must consider both federal and state law when confronted with such an issue. Presently, there is no instructive case law which discusses whether the release of student disciplinary records to colleges is a violation of the Massachusetts regulatory language or is a violation of the Federal Family Educational Rights Privacy Act ("FERPA"). Based upon the statutory language, however, it appears that the Massachusetts regulations are more stringent than is FERPA. Under FERPA, student disciplinary records can be released as part of a student's educational file to third parties if the eligible student or parent first consents to the disclosure. (20 U.S.C.A. § 1232g(h)(1)). More distinctly, under Massachusetts regulations, student disciplinary records may not be released, unless the student or parent gives the school "specific, informed consent." (603 CMR § 23.07).

It is arguable that the slightly different language in the Massachusetts regulations affords greater privacy rights than the rights granted under FERPA. Thus, school personnel should adhere to the requirements of the Massachusetts regulations and obtain "specific, informed consent" from a student before releasing any of the student's disciplinary history. The Common Application contains the following "release" language: "I authorize all secondary schools I've attended to release all requested records and to authorize review of my application for the admission process indicated on this form." It appears likely that this release would satisfy both the federal and the Massachusetts requirements. However, because the Massachusetts "specific, informed consent" requirement is arguably more stringent, a conservative approach might be to employ an additional school form stating the following: **"I hereby authorize the release of all requested student records. I understand my student records will also contain any disciplinary records."** In addition, it may be in a school district's best interest to keep this form for its own records. Having obtained such a consent, school officials can communicate freely with colleges and universities without worrying about privacy and liability issues.

It is important to note that students are still free to not disclose any disciplinary history, yet they may choose to do so at a profound cost. The Common Application contains a Privacy Policy which informs students that they are free not to provide any personal information requested on the Common Application, but that they do so at the risk of the member colleges not accepting their applications, or perhaps drawing an adverse conclusion about the applicant. Schools should make a concerted effort to make applicants aware of such consequences. Further, schools should no longer as common practice leave all disciplinary questions unanswered. Rather, each student should have the chance to decide whether he or she will release his or her disciplinary record. The harsh reality is that a college may infer that a blank response is the equivalent of a negative disciplinary history.

Whether or not to disclose a student's disciplinary history remains ultimately up to the student. However, schools may rest assured that if they have obtained the required "specific informed consent" of its students, they are protecting students' privacy interests while still cooperating with the requests of colleges.

If you have any questions regarding this client advisory, please contact Jessica Ritter Esq., or the attorney assigned to your account.

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