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## **All E-mails May Not Be Student Records**

Recently, the Wisconsin Department of Public Instruction issued an IDEA Complaint Decision (Decision 15-029, 2015) 115 LRP 31928, in which it determined that a parental request for all of their child's education records under the Family Educational Rights and Privacy Act (FERPA) does not include any e-mails not within the student's actual file. The DPI relied upon a federal district court decision in California, [S.A. v. Tulare County Office of Education](#), 53 IDELR 143 (E.D. Cal. 2009), in which the court decided that e-mails which are not in the student's file are not education records because they are not "maintained" as contemplated by Congress. This is true, the court said, even though the e-mails may appear in multiple in-boxes of many school and school district officials. In essence, the court and the DPI concluded that the location and the content determined whether the record must be disclosed. Thus, given that the parent only requested the student's education records, the district was not required to disclose records not within the student's file.

School officials should be cautious to not interpret the DPI's decision too broadly. First of all, the parent's request specifically asked for the student's "education" records. Had the parent included a public records request under Section 19.21 of the Wisconsin Statutes, the district would likely have been required to provide responsive e-mails regardless of location.

Second of all, the DPI relies on a federal court in California which lacks controlling jurisdiction in Wisconsin. A Wisconsin court could issue a contrary decision in the future. The legal status of electronic media is a fast developing area of the law and this 2009 California Decision may not be followed by other courts. Additionally, the Family Policy and Compliance Office of the U.S. Department of Education explains in its guidance that student records may be recorded in any way, including computer media and e-mail.

In any event, this IDEA Complaint Decision provides helpful meaning to the definition of "student records" in FERPA and Section 118.125, Wis. Stats. School officials are advised to:

- Develop consistent policies and practices as to the location of documents that contain personally identifiable information relating to students;
- Recognize that, at least for now, the location of the document will likely be relevant as to whether or not it is an education record;
- Carefully review any student records request to determine whether or not it is also a request under Wisconsin's Public Records Law and, therefore, may require disclosure of documents outside of the student's education file; and
- When drafting emails regarding specific students, be mindful that it may be read by the family.

For more information or assistance on this topic, please contact your Buelow Vetter attorney, or Gary M. Ruesch at (262) 364-0263 or [gruesch@buelowvetter.com](mailto:gruesch@buelowvetter.com).