STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-28

Date issued: September 2, 1994

Requested by: Bill Oban, House of Representatives

- QUESTION PRESENTED -

Whether a hearing held by a public school board on the suspension or expulsion of a student can be closed to the public if requested by the student's parent or guardian.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that if a hearing held by a public school board will create or discuss records that are confidential under 20 U.S.C.A. ? 1232g, the hearing must be closed to the public unless the student's parent or guardian consents in writing to the hearing being open.

- ANALYSIS -

Meetings of public or governmental bodies must be open to the public "[e]xcept as otherwise specifically provided by law." N.D.C.C. ? 44-04-19; N.D. Const. art. XI, ? 5. Although not defined by statute, the term "meetings" has been interpreted by this office to include all gatherings of members of a public body where matters concerning its responsibilities and duties to the public are discussed. Your Guide to North Dakota's Open Meetings, Open Records Laws, Revised November, 1989; GUIDELINES FOR NOTICES OF PUBLIC MEETINGS AS REQUIRED BY SECTION 44-04-20 NDCC, Issued July 1, 1979; Letter from Attorney General Allen Olson to Myron Atkinson (March 5, 1976).

A public school district board is responsible for disciplining students in the district, N.D.C.C. ? 15-29-08(13), and the board is a public body under the open meetings and open records laws. See Hovet v. Hebron Public School Dist., 419 N.W.2d 189 (N.D. 1988); Danroth v. Mandaree Public School Dist., 320 N.W.2d 780 (N.D. 1982); Peters v. Bowman Public School Dist., 231 N.W.2d 817 (N.D. 1975). Therefore, disciplinary hearings held by the board must be open to the public unless a closed session is specifically provided for by law.

A school district's records also must be open to the public "[e]xcept as

otherwise specifically provided by law." N.D.C.C. ?? 44-04-18, 15-29-10; N.D. Const. art. XI, ? 6. The "except as otherwise specifically provided by law" exception includes both state laws and federal laws. 1981 N.D. Op. Att'y Gen. 395. There is no state law specifying that records of students in elementary and secondary schools are private records. Compare N.D.C.C. ? 15-10-17(2) (regarding records of students at higher education institutions). However, educational institutions receiving federal funds must keep education records confidential or lose their entitlement to federal funds. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. ? 1232g.

Under FERPA, directory information is the only education record that can be released to the general public without prior written consent. 20 U.S.C. ? 1232g(b). "Directory information" means "information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. ? 99.3 (1993). Because information contained in a student's disciplinary records would generally be considered harmful or an invasion of privacy if disclosed, it is not directory information and the release of such information to the general public without prior written consent is prohibited by FERPA. See Letter from Attorney General Nicholas Spaeth to Douglas Manbeck (March 13, 1990). Thus, "as federal law provides for the confidentiality of [education records], that confidentiality is carried forward and incorporated under North Dakota's Open Records Law." 1981 N.D. Op. Att'y Gen. 395, 396.

Some courts have reached a different result, concluding that FERPA simply withholds federal funds and does not prohibit school districts from releasing records to the public. Bauer v. Kincaid, 759 F.Supp. 575, 587 (W.D.Mo. 1991); Red & Black Publishing Company, Inc. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993); Student Bar Ass'n Bd. of Governors v. Byrd, 239 S.E.2d 415, 419 (N.C. 1977). However, another court has said that FERPA imposes such a severe penalty for releasing education records that as a practical matter, the Department of Education always obtains "voluntary" compliance. Student Press Law Center v. Alexander, 778 F.Supp. 1227, 1232 (D.D.C. 1991).

FERPA clearly "provides" that these records be closed to the public. Even if a law must "prohibit" the release of education records to be an exception to the open records law, to view the penalty for FERPA violations as anything but a prohibition would place school boards in the difficult position of having to choose between losing federal funds and violating state law. Therefore, it is my opinion that FERPA is a specific exception to the open records law.

While FERPA provides for an exception to the open records statute, the

question remains whether it becomes an exception to the open meetings provisions of N.D.C.C. ? 44-04-19.

In a letter to then Labor Commissioner Orville Hagen, this office, in 1985, repeated its long-standing belief that the Legislature did not intend that a student's confidential records "could be made public indirectly through the open meeting statute but not directly by virtue of the open records statute." Letter from Attorney General Nicholas Spaeth to Orville Hagen (May 17, 1985) (citation omitted); see also Letter from Attorney General Nicholas Spaeth to Alan Person (January 21, 1988). This position of the Attorney General was based on the analysis in Marston v. Gainesville Sun Publishing Co., 341 So.2d 783 (Fla. Dist. Ct. App. 1976), discussing statutes similar to North Dakota's open records and open meetings laws. After holding that student records were exempt from the Florida open records law, the court, in Marston, held:

> The question is therefore whether the Honor Court, without the consent of the affected student, must open to press and general public scrutiny Honor Court "meetings", the written record and result of which are shielded from public eyes. To ask the question, we think, is to answer it. As in the case of proceedings for adoption, the beneficial policy promoted by the legislature in . . . [the Florida law allowing limited access to student records] would be entirely subverted if the curious public, denied access to the record of the Honor Court's consideration and recommended disposition of a disciplinary matter, should nevertheless have entry as of right to the meeting whose only purpose is formulation of that record. To put it another way, there is no benefit to the student of confidentiality in the documentary evidence and report of his infraction if the public may demand admittance to the meeting where that evidence is exhibited and the substance of that report discussed; and there is little purpose in preserving from public view a memorandum or transcript of a witness' testimony before the Honor Court if the public is there to hear the spoken word.

Marston, 341 So.2d at 785.

In summary, there is a specific exception to the open meetings law where a public school board is considering suspension or expulsion of a student and thereby discussing or creating records which are required to be confidential. This exception is limited to discussion or creation of records that are confidential. Thus, only so much of the meeting as is related to confidential records can be closed, and the hearing must be open

to the public if the confidentiality of the records is waived by the student's parent or guardian.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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