

PROTOCOL FOR RESPONDING TO SUBPOENAS FOR STUDENT RECORDS AND/OR STAFF TESTIMONY

Notice and Preliminary Review

1. If a teacher or other staff member receives a subpoena to produce student records and/or provide testimony he or she should notify the building administrator immediately. Staff should not directly respond to the subpoena or contact the subpoenaing attorney.
2. The building administrator should obtain a copy of the subpoena, notify the Superintendent, and provide a copy to him or her.
3. The Superintendent will contact District counsel to receive legal assistance in providing a response.
4. District counsel will review the subpoena for the following:
 - a. To verify that the subpoena has been submitted pursuant to a pending case. The Judge does not need to sign the subpoena for it to be valid. An attorney, as an officer of the court, may sign the subpoena.
 - b. whether the subpoena seeks student records and/or staff member testimony;
 - c. whether the subpoenaed staff member was provided sufficient notice to comply with the subpoena. Michigan Court Rules require a subpoena be served **“sufficiently in advance of the trial or hearing to give the witness reasonable notice** of the date and time the witness is to appear. Unless the court orders otherwise, **the subpoena must be served at least 2 days before the witness is to appear.”** MCR 2.506(C)(1);
 - d. the type of legal proceeding the subpoena is related to such as divorce and custody disputes, civil suits, criminal proceedings, or third-party information requests.

Written Consent

5. Before student records are disclosed or a staff member testifies, it may be necessary to obtain written parental consent to the disclosure.

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**COLLINS & BLAHA, P.C.
31440 Northwestern Highway, Suite 170
Farmington Hills, Michigan 48334
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- a. Custodial and non-custodial **parents** have equal rights to their student's **records** unless a court order specifies otherwise. The Attorney General has stated that a board of education may not refuse to disclose school records of a child to the child's divorced parent on the ground he or she does not have custody of the child. AG Opinion No. 5027 (1976).
- b. The Family Educational Rights and Privacy Act ("FERPA") prohibits the release of education records to a third party without the consent of the parent, guardian or eligible student. An exception under FERPA exists when a District is served with a lawful subpoena, but the District must provide notice to the parents and students prior to disclosure. 20 USC 1232g(b)(2)(B).
- c. However, Michigan's Revised Judicature Act ("RJA") precludes the District staff from providing testimony regarding **student records** or **confidential communications** without the permission of the parent, guardian, or eligible student.

No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains **records** of students' behavior or who has **records in his custody**, or who **receives in confidence communications from students or other juveniles**, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him **from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian.** [MCL 600.2165]

- d. Sometimes, one parent will not consent to the release of records or staff member testimony. This usually occurs during divorce proceedings or custody disputes. If parental consent is not obtained, then the matter may have to be determined by a court of law in order to protect the District from potential liability.
- e. Testimony regarding observations not obtained from confidential communications or from student records would be permissible as not subject to the RJA's restrictions (unless there are other grounds to exclude the testimony of observations).

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6. District counsel will contact the **subpoenaing attorney** and explain the need for parental consent prior to disclosure of a student's records or staff member testimony. District counsel will provide an Authorization and Waiver and request that his or her client sign the Authorization. District counsel attempts to obtain this authorization to avoid the necessity of seeking a judge's determination as to whether disclosure is permissible pursuant to FERPA and the RJA.
7. District counsel will also contact the **opposing counsel** to provide notice that the subpoena was received, to obtain his or her client's consent to release records via the Authorization and Waiver, or permit opposing counsel to assert grounds before the court to quash the subpoena. District counsel will explain what documents are to be released and ask whether opposing counsel wishes to receive copies of any documents produced. Again, District counsel attempts to obtain this authorization to avoid the necessity of seeking a judge's determination as to whether disclosure is permissible pursuant to FERPA and the RJA. Doing so also provides transparency to avoid causing disputes between the subpoenaing attorney and opposing counsel or placing the District in the middle of legal disputes.

Disclosure of Records and/or Testimony Provided

8. If the subpoena is for student records, District counsel will review the records and provide the records to the subpoenaing attorney and to opposing counsel. It should be noted that disclosure of records pursuant to a lawful subpoena is different than disclosure under the Freedom of Information Act, MCL 15.231 et. seq. (the "FOIA"), which permits certain records or portions of records to be exempted from disclosure, if authorized under the FOIA list of items exempted from disclosure. See MCL 15.243.
9. If the subpoena is for testimony District counsel will meet with the staff member or speak with him or her by telephone to prepare the individual to testify, explain courtroom procedures, and answer questions he or she may have. If it is impossible for the staff member to appear on the hearing date (for example if the staff member is out of the country or in the hospital), District counsel will notify the Court, subpoenaing attorney, and opposing counsel. MCR 2.506(C)(3) provides as follows:

If the served witness notifies the party that it is *impossible* for the witness to be present in court as directed, the party must either excuse the witness from attendance at that time or notify the witness that a special hearing may be held to adjudicate the issue.

District counsel will ask the subpoenaing attorney to excuse the witness. Note that "impossible" is a difficult standard to meet to avoid a subpoena; this standard will not be met if attendance at the hearing is a mere inconvenience.

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10. District counsel will maintain contact with the attorneys involved in the case and the staff member prior to the hearing date regarding any adjournments or cancellations of the hearing. On the date of the hearing, District counsel may need to attend the hearing with the staff member to offer assistance and address any legal issues that may arise.
11. If parental consent is not obtained, District counsel will provide the presiding judge a memorandum of law explaining the limitations placed on a staff member's ability to testify by the Revised Judicature Act and FERPA. District counsel will request that the judge make a determination as to whether disclosure should take place or testimony be given. This will allow the District to remain neutral and protect the District from potential liability resulting from disclosure.

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