

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-43-07

(UNFAIR LABOR PRACTICE)

EAST COUNTY BARGAINING	)	
COUNCIL,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
DAVID DOUGLAS SCHOOL	)	AND ORDER
DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

On November 25, 2008, this Board heard oral argument on both parties' objections to a Recommended Order issued on October 8, 2008, by Administrative Law Judge (ALJ) Wendy L. Greenwald after a hearing held on April 8, 2008, in Salem, Oregon. The record closed on May 27, 2008, following receipt of the parties' post-hearing briefs.

Ralph E. Wisner, Attorney at Law, represented Complainant.

Michelle E. Barton, Attorney at Law, represented Respondent.

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On October 15, 2007, the East County Bargaining Council (Council) filed an unfair labor practice complaint against the David Douglas School District (District), alleging that the District violated ORS 243.672(1)(e) and (g) by refusing to provide the names, addresses, and telephone numbers of students who were interviewed prior to the District's decision to reprimand an employee. The District filed a timely answer.

The issue is:

Did the District refuse to provide the Association with the names, addresses, and telephone numbers of students interviewed during the investigation which led to Carlos Monteblanco's reprimand on December 11, 2006, in violation of ORS 243.672(1)(e) or (g)?

### RULINGS

1. During the hearing, the ALJ correctly allowed the Council to amend paragraph 7 of its complaint to conform to the evidence by substituting the language from Article 9, Section C, the article referred to in the complaint, in place of the language from Article 10, to which the complaint incorrectly referred.

2. The Council filed a 57-page post-hearing brief without seeking prior approval from this Board or ALJ in violation of OAR 115-010-0077(3) (briefs cannot exceed 30 pages unless authorized by an ALJ or this Board). After the ALJ reminded the parties of the rule, the Council requested approval to file its 57-page brief or to revise its brief to comply with the 30-page limit. The District objected to the request. The ALJ correctly ruled that the Council had not shown significant or complex issues of fact or law that merited a brief almost double the normal limit. Since Board rules provide for simultaneous submission of briefs, the ALJ also correctly denied the Council's request to revise its brief. The Council was allowed to select 30 pages from the 57-page brief for the ALJ's consideration. It did so.

3. The remaining rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. The Council is the exclusive representative of a bargaining unit of licensed teachers employed by the District, a public employer. The David Douglas Education Association (DDEA) is the Council's local chapter in the District.

#### Collective Bargaining Agreement Language

2. The Council and the District are parties to a collective bargaining agreement effective July 1, 2005 to June 30, 2008. The agreement includes the following provisions:

Article 6, "Council/Local Chapter Rights," Section E, "Public Information," provides:

"Upon request, the District agrees to furnish the Council with all public information required by Public Records Law and the Public Employee Collective Bargaining Act (PECBA) which is necessary to carry out its responsibilities as the exclusive bargaining representative."

The references to the Public Records Law and PECBA were added as a result of a Council proposal made during negotiations for the 2005-2008 collective bargaining agreement. The Council also proposed to delete the phrase "public information." The District did not agree.

Article 9, "Rights of Professional Teachers," Section C, "Just Cause," provides:

"No member of the bargaining unit shall be disciplined, reprimanded or reduced in basic salary without just cause. All information forming the basis for disciplinary action will be made available to the professional teacher and the Council at the teacher's request. Any violation of this provision may be used as a basis for a grievance."

Article 10, "Certificated Grievance Procedure," provides a multi-step grievance process as follows:

Level 1: informal discussion with the immediate supervisor;

Level 2: formal grievance filed with immediate supervisor;

Level 3: appeal to Superintendent;

Level 4A: arbitration for grievances alleging collective bargaining agreement violations; and

Level 4B: school board appeal for grievances other than collective bargaining agreement violations.

3. During negotiations for the 2005-2008 collective bargaining agreement and prior agreements, the District consistently expressed its position that it would not agree to any language that would require it to violate a law.

## District Policies and Guidelines

4. District Policy 5700, "Student Records," provides:

"Student education records report evidence of instruction, career development, guidance, and educational progress. This policy is in keeping with state and federal guidelines on student education records. The objectives of this policy are: to protect the privacy of both students and parents; to ensure that a process exists for challenging incorrect, inappropriate or misleading materials in the records; to enforce an orderly process in the transfer of records; to guarantee that only authorized persons and agencies have access to records; and that parents and eligible students can review the records. The administration is directed to maintain David Douglas Guidelines for Student Education Records as provided by Oregon Revised Statutes, Oregon Administrative Rules, and David Douglas School Board Policy. A copy of these guidelines will be available free of charge in each school building." (Emphasis in original.)

The District's Floyd Light Middle School student handbook provides the following guidelines concerning student records:

"Parents and eligible students have the right to:

- "• Inspect and review the student's education records
- "• Request the amendment of the student's education records if it is believed they are inaccurate, misleading, or otherwise in violation of the student's privacy or other rights
- "• Consent to disclosures of personally identifiable information contained in the student's education record, unless disclosure can be authorized without parent consent, e.g., to law enforcement agencies, child protective services, or health care professionals, if the disclosure would protect the health and safety of the student or other individuals.
- "• File a complaint with the United States Department of Education concerning alleged failures by the district to comply with the requirements of the Family Educational Rights and Privacy Act (OAR 581-21-410, 34 CFR 99.64).
- "• Obtain a copy of District Policy regarding student records.

"Copies of District Student Records Policy are located in all schools. Please contact the school secretary or principal."

5. District's Floyd Light Middle School student handbook also contains the following provisions regarding disclosure of student directory information:

"Information about students cannot be released unless schools have parent's consent. However, information defined as directory information may be given to a newspaper reporter covering a school event, the Booster Club or some other agency if the school principal is sure release of such information is in the best interest of students and if the parent has no objection. Parents or eligible students can refuse to let any of this information be designated as directory information.

"Directory information includes:

- "• The student's name, date and place of birth
- "• Participation in officially recognized activities and sports
- "• Weights and heights of members of athletic teams
- "• Dates of school attendance
- "• Awards received
- "• The most recent previous educational agency or institution the student has attended
- "• If you object to the release of any or all of the items listed under directory information, please notify the principal in writing. Your letter will be attached to your student's records and will prevent any release of information about your child. This must be done within one week following enrollment of the student and annually thereafter.

"NOTE: District policy prohibits schools from releasing the names of students to any individual, business or agency for solicitation purposes. District policy also prohibits school or district endorsement of products or services. Anyone who has questions about the student record policy, call the school principal, or the district office, 252-2900."

6. Under its policies, the District has published or allowed publication of student names in school yearbooks, brochures regarding concerts at which students played, and school newspaper articles. Students' names are also posted on lockers in the middle school.

7. The District's Human Resources Director, Susan Summers, is not aware of any case in which the District has failed to comply with its student records policy.

## Monteblanco Discipline

8. Carlos Monteblanco is a teacher at the District's Floyd Light Middle School and a Council bargaining unit member. On November 29, 2006, Monteblanco was involved in a classroom incident with a student. During the investigation of the incident, Vice Principal Rolando Florez interviewed the student involved in the incident, five other students who were present in the classroom, staff, and Monteblanco. Principal Mark Gaulke interviewed five additional students who were present in the classroom at the time of the incident.

9. On December 11, 2006, Principal Gaulke issued a written reprimand to Monteblanco regarding the November 29 incident. Gaulke stated that he decided to reprimand Monteblanco "[a]fter investigating the incident and interviewing students, staff, and you \* \* \*." Gaulke also placed Monteblanco on a plan of assistance, which was later withdrawn during the grievance process.

10. On January 4, 2007, DDEA President Bob Gray and Principal Gaulke held a Level 1 informal grievance meeting to discuss Monteblanco's reprimand.<sup>1</sup> Gray and Gaulke were unable to resolve the matter. On January 11, Gray filed a formal grievance over Monteblanco's written reprimand.

11. On January 19, Monteblanco and Gray met with Principal Gaulke and Human Resources Director Summers for the Level 2 formal grievance meeting. On January 23, Gaulke notified Gray in writing that the District would not withdraw the written reprimand issued to Monteblanco.

12. By letter dated January 31, Gray requested that Gaulke provide him copies of "any and all information that you used to come to your decision in reprimanding Carlos Monteblanco" in accordance with Article 6, Section E, of the parties' agreement.

13. By letter dated February 1, Gray notified District Superintendent Barbara Rommel that DDEA and the Council were appealing Monteblanco's reprimand grievance to Level 3.

14. On February 7, Principal Gaulke provided DDEA President Gray with the following information he used in his decision to reprimand Monteblanco: (a) a November 29, 2006, memorandum from Vice Principal Florez to Summers that summarized the information Florez obtained from interviews with the attendance

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<sup>1</sup>Subsequent events occurred in 2007, unless otherwise indicated.

secretary, the student involved in the incident, and five other students; (b) Principal Gaulke's November 30, 2006, letter to Monteblanco scheduling a meeting to discuss the classroom incident; (c) a one-page document entitled "Notes from student interviews 12/1/06" by an unnamed author, which includes an account of an interview with "student A" and indicates that five other students provided almost identical accounts; and (d) the attendance secretary's written statement about the altercation between Monteblanco and the student. Gaulke also provided Gray with information from a prior parent complaint involving Monteblanco, including the parent's letter dated December 27, 2005, and a February 1, 2005, letter to Monteblanco notifying him of the complaint

Based on the information Gray received, he believed that District administrators had interviewed only five student witnesses about the November 29 incident.

15. On February 15, Gray, Monteblanco, and Oregon Education Association UniServ Consultant Debbie Hagan met with Gaulke, Summers, and Superintendent Rommel for the Level 3 grievance meeting. By letter dated February 26, Superintendent Rommel notified Gray that she was denying Monteblanco's grievance at Level 3

16. In a letter to Gaulke dated March 20, Gray summarized the information that he had received and stated:

"It is my understanding that these documents constitute the totality of the information on which you based your decision to discipline Mr. Monteblanco. If my understanding is incorrect, please notify me immediately via email. If this is the case, I would also request that you provide me with copies of any additional information on which you relied."

17. The Council appealed the Monteblanco grievance to the District school board. On April 5, when Gray and Hagan presented Monteblanco's grievance at the school board meeting, they learned that District administrators had interviewed a total of ten student witnesses to the incident. After the presentations, the board voted to deny the grievance. By letter dated April 10, Board Chair Donn Gardner provided Gray and Monteblanco written confirmation that the board had denied Monteblanco's grievance.

18. On April 18, the Council notified the District that it was appealing the Monteblanco grievance to arbitration. By letter dated April 19, Gray notified Superintendent Rommel that UniServ Consultant Hagan would be representing Monteblanco in the arbitration.

19. Hagan decided that she needed to interview the student witnesses to enable her to evaluate the substance of the reprimand and determine whether the District conducted a fair investigation of the incident. By letter dated May 2, Hagan requested that Gaulke provide her the following information by May 16:

- "1. A copy of Mr. Monteblanco's personnel file
- "2. A copy of any and all supervisory files that pertain to Mr. Monteblanco
- "3. A copy of any and all notes from the meeting between Vice Principle R. Florez and [student involved in incident]<sup>2</sup>
- "4. The date on which Mr. Florez met with [student involved in incident] and who was present if this is not indicated on the notes
- "5. The names, addresses and phone numbers of any and all students that you, Mr. Florez or any other District representative interviewed during your investigation of the incident that led to the December 11, 2006 reprimand
- "6. A copy of any and all notes from the meetings listed in #5 above
- "7. The dates that these meetings took place and who was present if this is not indicated on the notes
- "8. Please identify who student A refers to on the document entitled 'Notes from student interviews 12/1/06.'"

20. On May 16, 2007, J. Michael Porter, an attorney representing the District, notified Hagan that the District would provide the information requested in items 1, 2, 3, 4 and 7 of Hagan's May 2 letter. Regarding the other items, Porter stated:

"5. The information requested in request number 5 is confidential and protected from disclosure under the Family Education Rights and Privacy Act ('FERPA'), 20 USC Section 1232g (see also 34 CFR Part 99) and state administrative rules concerning education records. These laws prohibit the District from disclosing to a third party personally identifiable information directly related to a student without the parent's consent. Disclosure of the information requested would fall within the prohibition

"6. The District will provide the information requested in request 6 (without personally identifiable information about students).

"\* \* \*

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<sup>2</sup>Hagan used the name of this student in her request. We have omitted it.

“8. The information requested in request number 8 is confidential because of the education records laws described in response number 5.

“On a final note, if there are education records that fall within the information being provided, student names will be redacted because of education records laws.”

21. By letter dated May 30, Hagan responded to Porter as follows:

“It is my understanding that the District has provided us only a portion of the information that we requested. The District is asserting that it is prohibited from responding to certain requests because of the Family Education Rights and Privacy Act (FERPA). Specifically, the District is alleging that it is prohibited from providing us with the following:

- “1. The names, addresses and phone numbers of any and all students that Mr. Gaulke, Mr. Florez or any other District representative interviewed during your investigation of the incident that led to the December 11, 2006 reprimand.
- “2. All personally identifiable information about students in notes taken during student interviews
- “3. The identity of student A referenced in the document entitled ‘Notes from student interviews 12/1/06.’

“It is my understanding that the Family Education Rights and Privacy Act requires that families be given only notice prior to the disclosure of information. Accordingly, the Council is requesting that you provide such notice to the appropriate individuals and then transmit the requested information to the Council. Should the District choose not to supply this information, the Council is prepared to take the appropriate legal action.”

5. By letter dated June 4, Porter responded to Hagan that:

“Your letter states that you understand that FERPA only requires the District to provide notice to families before disclosure of education record information. It appears your understanding stems from the provisions of FERPA and state law that permit an educational institution to provide education record information in response to a lawfully issued subpoena or judicial order after providing notice to a parent or eligible student of the

institution's intent to comply. 34 CFR § 99.31(a)(9); OAR 581-021-0340(8). These notice provisions do not apply here because there has been no subpoena or judicial order requiring the District to disclose information from education records.

“As a result, the general prohibition on disclosing education record information applies and the District is not permitted to disclose the information to the Council.”

23. By letter dated June 8, Hagan responded to Porter as follows:

“The Council continues to believe that we are entitled to this information. We would ask that you review *Graduate Teaching Fellows v. Oregon University System* 19PECBR496 (2001) [*GTFE*]. If, after reviewing this case, you still believe that the Council is not entitled to the information we have requested please let me know within five business days and the Council will move forward with the appropriate legal action.”

24. On June 14, Porter and Hagan spoke by telephone. Porter summarized their conversation in a letter, which stated, in relevant part:

“I am familiar with GTFE and do not believe it stands for the proposition that the Council is entitled to education record information in this case. In GTFE, the union sought information specifically identified in a collective bargaining agreement, which the employer had historically provided for more than 20 years. The union brought an unfair labor practice charge based on a breach of the collective bargaining agreement and an unfair labor practice charge for a unilateral change to a mandatory subject of bargaining.

“The collective bargaining agreement between the District and the Council does not require the District to provide information the Council seeks, but instead requires the District to furnish the Council ‘with all information required by Public Records Law and the Public Employee Collective Bargaining Act (PECBA).’ Article 6 E. Under PECBA, the duty to provide information does not include an obligation to produce confidential information when legitimate confidentiality issues exist. OSEA Chapter 68 v. Colton School Dist. 53, 6 PECBR 5027, 5032 (1982). The District’s obligation to comply with the Family Educational Rights and Privacy Act and state education records laws is a legitimate and important confidentiality issue. Similarly, Oregon Public Records Law exempts

information protected by federal or state law, which is the type of information sought here. ORS 192.502(8); 192.502(9).

“We have two alternative proposals that might resolve the dispute concerning education records. First, the District is willing to ask the parents of the students whose records have been requested whether they will consent in writing to allow the District to provide the records to the council. In making a request, the District will need to inform the parent or parents that the Council has requested the records as part of the grievance asserted by Mr. Monteblanco over an incident that occurred in class and it will need to honestly answer any questions the parents might have.

“Alternatively, the parties could select an arbitrator, the Council could request the arbitrator authorize subpoenas for the records, and the District would have an opportunity to object to the subpoenas. If the arbitrator authorizes the subpoenas, then the District would comply with education records requirements concerning subpoenas, which require the District notify the parents of the subpoenas and its intent to comply with them. Education records laws then allow a parent the opportunity to raise any concerns about release of the records with the arbitrator

“Please let me know if the Council is willing to resolve the dispute concerning the records under one of the two alternatives outlined above ”

25. Hagan was willing to allow the District to attempt to obtain the parents' consent, but was unwilling to select an arbitrator and attempt to secure a subpoena. Hagan believed that the language in Article 9, Section C, as well as this Board's *GTF* decision, clearly and unambiguously required the District to provide the information she had requested. She wanted the information in order to evaluate the merits of the grievance [Finding of Fact 19] and evaluate a possible settlement of the grievance before arbitration. By letter dated June 21, Hagan restated the Council's position that the parties' agreement and the PECBA required the District to produce the requested information. She agreed to give the District time to obtain parents' consent to release the requested information, but stated that the Council was “not agreeing to waive our right to take appropriate action should the District not be able to obtain such consent.”

Hagan confirmed her agreement with the District that it would tell her by August 15 if parents consented to releasing the information sought by the Council, and that the Council and District would choose an arbitrator after August 15

26. Principal Gaulke asked the parents of the student witnesses if they would allow the District to release information about their children to the Council. Three parents consented. By letter dated August 15, Porter provided Hagan with the names, addresses, and telephone numbers of the three students whose parents consented to release of information about them. Gaulke also stated:

“The District is able to provide this information only on the condition that the Council not disclose the information to any other party without prior consent of the parent. 34 CFR § 99.33; OAR 581-021-0350. Also, I believe it is appropriate to mention that any sort of retaliatory conduct toward any of these students or their families would be highly inappropriate.”

27. After receiving Porter’s letter, Hagan became concerned that the conditions Porter imposed in his letter would limit her ability to use the students’ names when she interviewed students and other staff as part of her investigation of the incident.

28. By letter dated September 13, 2007, Council attorney Ralph Wiser notified Porter that the Council had authorized him to make a final request for information about the students interviewed as part of the investigation that resulted in Monteblanco’s reprimand. Wiser stated that if the District did not provide the requested information, the Council would file an unfair labor practice complaint. Wiser cited ORS 243.672(1)(a), (1)(b), and (1)(e), and the parties’ collective bargaining agreement in support of the Council’s right to the information.

29. After receiving Wiser’s September 13 letter, Porter contacted Wiser by telephone and told him that in order to resolve the records request issue, the District would be willing to select an arbitrator for Monteblanco’s grievance. If the Council then requested a subpoena for the records from the arbitrator, the District would not object to the subpoena request.<sup>3</sup>

30. On October 15, 2007, the Council filed the complaint in this matter.

31. In an unrelated incident sometime in October 2007, a high school teacher contacted DDEA President Gray and asked for assistance with a problem involving a student threat. Gray asked Vice Principle Elise Guest for information about the threat.

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<sup>3</sup>Porter testified that he had previously made this same suggestion to Hagan. Hagan testified that she did not recall Porter making such a suggestion and that she typically would have asked that such an offer be placed in writing. There is no evidence in the record that Porter sent this suggestion to Hagan in writing.

Guest told Gray that she was not sure she could give him the information, so Gray requested the information from Human Resources Director Summers. Summers was aware that Gray was assisting the teacher who had been threatened. She decided that because Gray was also a high school teacher, involved with the same students, and assisting the teacher, the information could be disclosed under the FERPA provision that allows information to be provided for an educational purpose. Summers gave a mental health counselor's report and an incident report regarding the student who made the threat. Gray also attended a risk assessment meeting regarding the student with the teacher who was threatened and received a copy of the risk assessment report.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District violated ORS 243.672(1)(e) and (g) when it refused to provide the Council with the names, addresses, and telephone numbers of students it interviewed about the Monteblanco incident.

### DISCUSSION

After a District administrator reprimanded Council bargaining unit member Monteblanco for an altercation involving a student, Monteblanco sought the Council's help. The Council grieved Monteblanco's reprimand, and as part of its investigation into the grievance, asked the District for all the information upon which the District based the reprimand. Although the District gave the Council most of what it requested, it refused to provide the Council with the names, addresses and phone numbers of student witnesses whom District administrators interviewed. It also refused to identify a student referred to in a document as "Student A." The Council alleges that the District's refusal to disclose this information violates the duty to bargain in good faith imposed by ORS 243.672(1)(e). Under subsection (1)(e), an employer's duty to bargain in good faith with a labor organization includes the obligation to provide the union with information that is probably or potentially relevant to a grievance. *Lebanon Education Association v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 367 (2008).

We begin our analysis by considering the District's obligation under the Public Employee Collective Bargaining Act (PECBA) to provide the information requested by the Council.

### Duty to Provide Information Under ORS 243.672(1)(e)

When determining whether a public employer has a PECBA duty to provide information to a union that requests it, we start with “the premise of full disclosure.” *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999). If the employer objects to providing the information, the threshold question is whether the requested information has “some probable or potential relevance to a grievance or other contractual matter.” *Id.* If we find that the information is relevant, we then consider the following four factors to decide if the employer must disclose the information: (1) the reason given for the request; (2) the ease or difficulty with which the data can be produced; (3) the kind of information requested; and (4) the history of the parties’ labor management relations. *Oregon School Employees Association, Chapter 68 v Colton School District 53*, Case No. C-124-81, 6 PECBR 5027 (1982).

We readily conclude (and the District does not dispute) that the information requested by the Council is relevant to Monteblanco’s grievance. The reprimand itself refers to the interviews with the students as a basis for the decision to discipline Monteblanco.

In regard to the four factors we apply to analyze an information request, the District agrees that the reason for the request is valid and that the information can be easily produced. Although the Council presented evidence regarding past problems with the parties’ labor-management relations, there was no evidence of any difficulties involving prior information requests. Normally, we consider the parties’ history of labor-management relations only in regard to past information requests and their disposition.

The District asserts two reasons why it need not disclose the requested information. First, the District contends that it is legally prohibited from providing the requested information by the Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, and Oregon Department of Education (Oregon DOE) administrative rules, OAR 581-021-0220 through 581-021-0430.<sup>4</sup> Second, the District contends that it has a legitimate need to protect confidential student data. We begin our analysis by considering applicable federal and state law.

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<sup>4</sup>The Council asserts that the District should be precluded from raising its objections based on FERPA and Oregon law because it did not raise this issue as an affirmative defense. We find that the District’s reference in its answer to “confidentiality laws protecting information in student education records” is sufficient to raise the issue of whether the District is prohibited from providing the information by FERPA and Oregon laws.

## FERPA and Oregon Administrative Rules

FERPA has two purposes. It both protects students and their parents against unauthorized disclosure of certain education records, and guarantees parents and students access to these records. In regard to disclosure of student records, FERPA provides:

“(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following – [The statute then lists a number of exceptions which are not applicable here.] \* \* \*” 20 USC § 1232g(b)(1)

State law parallels FERPA.<sup>5</sup> ORS 326.565 requires the Oregon DOE “to adopt by rule standards for the creation, use, custody and disclosure, including access, of student education records that are consistent with the requirements of applicable state and federal law.” Under Oregon DOE regulations, no education records or personally identifiable information from a student’s education records may be released without written consent of a parent or student over the age of 18. OAR 581-021-0220(7) and (9); OAR 581-021-0330. As with FERPA, however, Oregon law provides that a school may designate directory information that can be disclosed under certain conditions.<sup>6</sup> OAR 581-021-0340(11).

The U.S. Supreme Court explained FERPA’s limit on the disclosure of student education records in *Owasso Independent School District No. I-011 v. Falvo*, 534 US 426, 428-429, 122 S Ct 934, 51 L Ed 2d 896 (2002).

“Under FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. [20 USC] §1232g(a)(3).

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<sup>5</sup>Relevant Oregon law, OAR 581-021-0220 through 581-021-0430, is virtually identical to FERPA and the United States Department of Education regulations, 34 CFR, Part 99. Accordingly, we will mainly focus our analysis on whether the District would be penalized under FERPA for disclosing the information requested by the Association. Because state law is similar to FERPA, the results will be the same as under federal law.

<sup>6</sup>Both Oregon law and FERPA require that a school district give parents notice of the information it has designated as directory information, and provide parents an opportunity to object to the release of any or all of this information. OAR 581-021-0390(1); 20 USC §1232g(a)(5)(B).

One condition specified in the Act is that sensitive information about students may not be released without parental consent. The Act states that federal funds are to be withheld from school districts that have ‘a policy or practice of permitting the release of *education records (or personally identifiable information contained therein . . .)* of students without the written consent of their parents.’ §1232g(b)(1) ” (Emphasis added.)

In determining whether the District is prohibited under FERPA or Oregon law from providing the names, addresses, and telephone numbers of the students interviewed about the Monteblanco incident, we first consider whether the information requested is an education record. “Education records” are defined under FERPA as “records, files, documents, and other materials which:

- “(i) contain information directly related to a student; and
- “(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 USC § 1232g(a)(4)(A).<sup>7</sup>

Both FERPA and Oregon law specifically exclude from the definition of education records any records that relate to an individual employed by an educational institution (who is not a student) that are made and kept in the normal course of business, that relate only to the individual in the individual’s capacity as an employee, and that are not available for any other use. 20 USC § 1232g(a)(4)(B); OAR 581-021-0220(6)(b)(C).

We conclude that the information obtained from the student interviews is not an education record under FERPA or Oregon law. The information gained through these interviews is not “directly related to a student.” The interviews concern Monteblanco’s behavior on the job, a matter related to his continued employment with the District. The District never asserted, and the record is devoid of any evidence, that matters discussed in the interviews related to *students’* behavior, academic progress, or any other aspect of their education.<sup>8</sup>

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<sup>7</sup>Oregon law defines “education records” as “those records that are directly related to a student and maintained by an educational agency or by a party acting for the agency or institution” OAR 581-021-0220(6). Federal DOE regulations similarly define “education records” as “records that are (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.” 34 CFR §99.3.

<sup>8</sup>If there were evidence that any of the requested records concerned a student disciplinary matter, our decision might be different. See *United States v Miami University*, 294 F3d 797 (6th Cir 2002) (student disciplinary records are “education records” under FERPA)

Our conclusion – that the type of information collected in the student interviews about the Monteblanco incident is not an “education record” – is consistent with the purpose of FERPA. FERPA was designed to protect records concerning a student’s educational progress and process. The information collected by the District in the interviews has nothing to do with the students’ education progress or process. As the court explained in *Bauer v. Kincaid*, 759 F Supp 575, 592 (WD Mo 1991), “[t]he function of the statute [FERPA] is to protect educationally related information.” The court in *Bauer* went on to identify the type of records FERPA was intended to protect as those “records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files.” *Id.* at 591. District policy similarly recognizes that FERPA’s intent is to protect educationally related information. Its policy defines student education records as those that “report evidence of instruction, career development, guidance, and educational progress.” (Emphasis added.) The information sought by the Council does not fall within any of these categories.

Our conclusion that the information obtained during the student interviews is not an “education record” is consistent with other provisions of FERPA. Under the access portion of FERPA, the District must allow parents and students to inspect and review the students’ education records; to challenge the content of those records based on inaccurate, misleading, or inappropriate information; and to provide parents with an opportunity for the correction or deletion of such inaccurate, misleading, or inappropriate information. 20 USC § 1232g(a)(1)(A) and (2). We find no evidence in the record to indicate that the District has maintained the records related to the Monteblanco investigation and discipline as part of these students’ education records, or that the District intends to allow parents to review, challenge, or correct these records as provided under FERPA.

Several federal court decisions have held that records of student interviews that were made in the course of investigating employee conduct are not “education records” within the meaning of FERPA. *See, e.g., Ellis v. Cleveland Municipal School District*, 309 F Supp 2d 1019, 1022 (ND Ohio 2004) (incident reports and student witness statements related to altercations between students and substitute teachers were not “education records” because FERPA “applies to the disclosure of student records, not teacher records”);<sup>9</sup> *Klein Independent Sch. Dist. v. Mattox*, 830 F2d 576, 579 (5th Cir. 1987) (a teacher’s college transcript is not an “education record” since FERPA protects students, not employees, of a school district); and *Wallace v. Cranbrook Educational Community*, 2006 US Dist LEXIS 71251 at 12 (ED Mich 2006) (investigatory notes and student statements related to an employee’s alleged inappropriate behavior “do not directly relate to the students and are not education records” under FERPA).

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<sup>9</sup>The Court of Appeals did not address the discovery order in its review of the District Court decision. *Ellis v. Cleveland Municipal School District*, 455 F 3d 690 (6th Cir 2006).

A number of state court decisions are also consistent with our conclusion. In *City of Boston School Committee, et al. v. Boston Teachers Union, Local 66, AFT, MFT, AFL-CIO*, 22 Mass L Rep 15 (Mass Super Ct 2006), the court refused to vacate an arbitration award which required the employer to provide the union with unredacted student witness statements regarding alleged teacher misconduct. The court held that disclosure of the student witness statements did not violate FERPA because the statements are not “education records.” In *Baker v. Mitchell-Waters*, 160 Ohio App 3d 250, 826 NE 2d 894 (2005), one child’s parents sought records of allegations of abuse and neglect made by other parents and children. Citing *Ellis v. Cleveland Municipal School District*, the court found that the documents sought were not “education records” under FERPA because they did not contain information directly related to students. Finally, *Colonial School District v. Colonial Education Association*, 1996 Del Ch LEXIS 27, 152 LRRM 2369 (Del Ch 1996), concerned the appeal of a decision by the Delaware Public Employment Relations Board that the school district committed an unfair labor practice under Delaware law when it refused to disclose to a union the names of witnesses and victims in an alleged sexual harassment incident. Citing *Bauer v. Kincaid*, the Court of Chancery found that the records were not educationally-related information protected by FERPA.<sup>10</sup>

The Indiana Court of Appeals reached a different conclusion in *An Unincorporated Operating Division of Indiana Newspapers, Inc., Indiana Corporation d/b/a The Indianapolis Star v. The Trustees of Indiana University*, 787 NE 2d 893 (Ind Ct App 2003). It held that information collected during an investigation into allegations concerning a coach’s inappropriate conduct were “education records” under FERPA because the materials contained “information directly relating to students.” This case is readily distinguishable from others discussed above, however. The Indiana court’s conclusions were based entirely on cases which hold that *student* disciplinary records are “education records” under FERPA. The court offered no analysis or explanation as to why *employee* disciplinary records are protected under FERPA.

We find the overwhelming majority of these state and federal court decisions to be persuasive and conclude that the information obtained during the student interviews about the Monteblanco incident is not an “education record” protected from disclosure under FERPA or Oregon law. Because this interview information is not an “education record,” the names, telephone numbers and addresses of the student witnesses are not protected under state or federal law. FERPA penalizes educational institutions only for disclosing any “personally identifiable” information contained *in* education records. 20 USC §1232g(b)(1); *Wallace v. Cranbrook Education Community*, 2006 US Dist LEXIS

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<sup>10</sup>The Chancellor’s decision was subsequently affirmed by the Delaware Supreme Court although the court did not specifically address the FERPA issue in its decision. *Colonial Education Association v. Board of Education of Colonial School District*, 1996 DE LEXIS 445, 685 A2d 361 (1996).

71251 at 12 (because student statements made during an investigation of alleged employee misconduct are not “education records” under FERPA, student names are not protected and need not be redacted when the statements are given to a union). OAR 581-021-0330(1) is similar to the federal law; it requires parental consent (for a student under 18) to disclose “personally identifiable information from the student’s education records.”

We addressed a possible conflict between FERPA and a union’s PECBA right to information in *Graduate Teaching Fellows Federation, Local 3544, AFT, AFL-CIO v. Oregon University System (University of Oregon) [GTFF]*, Case No. UP-18-00, 19 PECBR 496 (2001). Under the terms of the parties’ collective bargaining agreement, the employer in *GTFF* – the University of Oregon – was required to provide a union with the names, social security numbers, department affiliations, and terms of appointment for the graduate teaching assistants whom the union represented. The university stopped giving the union this data because it feared it might be penalized under FERPA if it continued to do so. The University’s concern about possible FERPA penalties was based on an advisory letter the federal Department of Education sent to a California university. We noted that the University in *GTFF* had little, if any, valid reason to believe that there was a conflict between the terms of the collective bargaining agreement and FERPA:

“there is not even a final order or decree that causes a collision between the University’s PECBA and FERPA obligations. That is, there is no binding order or decree that the University can point to that indicates a direct and irreconcilable legal conflict. Rather, the University violated its existing contractual obligations here because of an opinion letter issued to parties in another state under different circumstances. Indeed, the University stopped providing student names to *GTFF* despite FERPA’s express language that allows disclosure of student names without consent. *See* 20 USC, Section 1232g(5)(a).” 19 PECBR at 508.

In *GTFF*, we described the procedures an educational institution must use if faced with possibly conflicting obligations under FERPA and state or local law,<sup>11</sup> and noted that the University had not utilized these procedures. We held that the “potentially conflicting obligations” did not excuse the employer from complying with the PECBA,

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<sup>11</sup>If an educational institution believes it cannot comply with FERPA because of state or local laws, the institution must notify the federal DOE. 34 CFR § 99.61. The federal DOE then investigates the matter. If the DOE finds that the educational institution failed to comply with FERPA, the DOE notifies the parties, explains what steps must be taken to comply with FERPA, and gives the educational institution a “reasonable period of time” to voluntarily comply with the DOE’s order. 34 CFR § 99.67. Only after this process is completed may the DOE take action to compel compliance. 34 CFR § 99.67.

and concluded that the University's refusal to give the union the information it sought violated ORS 243.672(1)(e) and (g).<sup>12</sup> *Id.*

Here, as in *GTFF*, the District refused to provide information sought by the Council because the District believes it would violate FERPA to do so. The District has not utilized the FERPA procedures for reconciling conflicts between federal and state law, and can point to no decision or order that identifies such a conflict. We conclude, as we did in *GTFF*, that the District is not excused from complying with the PECBA on the grounds of a perceived conflict with federal law.

We next consider the District's contention that it refused to disclose the information sought by the Association because of a legitimate concern—the need to protect confidential student information.

In *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, we explained how we analyze an employer's obligation to provide confidential material in response to a union's information request under the PECBA. We stated:

“In dealing with union requests for relevant, but assertedly confidential information, this Board is required to balance a union's need for information against any legitimate and substantial confidentiality interests established by the employer. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims may be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation.” 18 PECBR at 71.

On the one hand, a student's right to privacy regarding sensitive information has been recognized in both federal and state legislation and administrative rules. As discussed above, both FERPA and the Oregon DOE rules, adopted pursuant to ORS 326.565, place a high value on a student's privacy. The District carries a special responsibility in regard to middle school students. It must both educate these students and protect them while they are under District supervision. In carrying out this responsibility, pursuant to FERPA and OAR 581-021-0250, the District has adopted a policy “to protect the privacy of both students and parents.”

On the other hand, a union's obligation to represent employees who have been disciplined also carries a significant weight under the PECBA. As we stated in *Multnomah*

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<sup>12</sup>ORS 243.672(1)(g) makes it an unfair labor practice for an employer to “[v]iolate the provisions of any written contract with respect to employment relations \* \* \*.”

*County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County*, Case No. UP-21-86, 9 PECBR 9529, 9556, *amended*, 10 PECBR 105 (1987):

“The defense of employees who face disciplinary action is at the heart of a union’s function as collective bargaining representative and disclosure of information necessary to that function is a primary element of the duty to bargain under the PECBA.”

The union needs information necessary to fully and fairly represent employees; to protect employees’ interests; and to investigate, evaluate, and make an informed decision whether to arbitrate an employee’s grievance. *Oregon State Police Officers’ Association v. State of Oregon*, Case No. UP-24-88, 11 PECBR 718, 724-28 (1989).

Identification of and access to the witnesses relied on by an employer in issuing discipline is a critical part of a union’s investigation into, and evaluation and preparation of, an employee disciplinary grievance. For both the union and the employee, the stakes are high in such a process. The union is legally obligated to fairly represent all members of a bargaining unit, and discipline can detrimentally affect on an employee’s career. We have previously acknowledged these important considerations and rejected employers’ confidentiality objections to disclosing the identity of complainants or witnesses in investigation and disciplinary processes. In *Multnomah County Corrections Officers Association*, we required the employer to provide police internal affairs investigation reports to a union in spite of an employer policy that limited such disclosure. In both *Morrow County Education Association v. Morrow County School District*, Case Nos. UP-68/69-89, 11 PECBR 695, 714 (1989) and *Benton County Deputy Sheriff’s Association v. Benton County*, Case No. UP-24-06, 22 PECBR 46 (2007), we upheld a union’s right to obtain confidential information, even though the information was exempt from disclosure under the Oregon Public Records Law, ORS Chapter 192. In *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924 (2005) we rejected an employer’s claim that Equal Employment Opportunity Commission guidelines prevented it from disclosing to a union reports about investigations of a complaint of discrimination.

Here, the only reason the District gave for keeping students’ names, addresses, and telephone numbers confidential was the need to comply with federal and state law and District policy. As discussed above, disclosure of this information violates neither FERPA nor Oregon law. The PECBA takes precedence over any conflicting District policies. *City of Roseburg v. Roseburg City Firefighters, Local No. 1489*, 292 OR 266, 288, 639 P2d 90 (1981) and *Portland Fire Fighters’ Association, Local 43, IAFF v. City of Portland*, Case No. UP-14-07, 23 PECBR 43, 75 (2009) *appeal pending*. The District

presented no evidence or argument that students or their families will be harmed by disclosure of the names, addresses, and telephone numbers sought by the Council. Accordingly, there is no evidence of legitimate confidentiality concerns that outweigh the Council's obligation to represent its bargaining unit members under the PECBA. In addition, the two accommodations proposed by the District – that the District would attempt to get parental consent for the Council to interview students or that the parties would proceed to arbitration and ask the arbitrator to subpoena the information sought by the Council – are inadequate to satisfy the Council's PECBA right to information. The Council's right to interview students is not subject to parents' or an arbitrator's discretion. The Council is also entitled to have access to the students prior to arbitration so that it can use the information obtained from the student witnesses to decide if it should arbitrate Monteblanco's grievance.

In sum, we hold that the PECBA requires the District to give the Council the names, addresses, and telephone numbers of the students interviewed regarding Monteblanco's reprimand. Accordingly, the District violated ORS 243.672(1)(e) when it refused to do so.

#### Duty to Provide Information Under ORS 243.672(1)(g)

The Council also asserts that the District's failure to provide the student witnesses' names, addresses, and telephone numbers violates the parties' collective bargaining agreement and consequently ORS 243.672(1)(g). ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations \* \* \*." Ordinarily, we require a complainant to exhaust any applicable grievance procedure before we consider a claim under subsection (1)(g) that an employer violated the provisions of a written contract. However, failure to exhaust a contract grievance procedure is an affirmative defense which is waived if never raised or pled by the respondent. *GTFE*, 19 PECBR at 504 n 6. Since the District never raised failure to exhaust as an affirmative defense, we assume that the parties have waived their contract remedies. We will address the merits of the alleged violation of subsection (1)(g). *Id.*; *OSPOA v. State of Oregon*, 11 PECBR at 729.<sup>13</sup>

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<sup>13</sup>We also stated in *OSPOA v. State of Oregon* that it is likely we would not defer cases, such as the matter before us, which primarily involve

“questions of statutory rights and duties which exist apart from any contract discovery rights and duties. \* \* \* Not only would that compound existing delay and defeat the purposes of such arbitration, it would also permit an arbitrator to determine statutory rights and obligations that are the sole responsibility of this Board.”

The collective bargaining agreement refers to information disclosures required by the PECBA. This Board is better suited to address this issue.

Under Article 6, Section E of the parties' collective bargaining agreement, the District is required to give the Council all information required by the PECBA. We have concluded that under the PECBA, the District is obligated to give the Council the names, addresses, and phone numbers of student witnesses to the Monteblanco incident. Accordingly, the District violated this contract provision and subsection (1)(g) when it refused to provide the Council with this data.

### Remedy

We will order the District to cease and desist from refusing to provide the Council with the names, addresses, and telephone numbers of the students the District interviewed regarding the Monteblanco incident. ORS 243.676(2)(b). We recognize that there may be some valid reasons why the parties wish to protect the privacy rights of these middle school students in conjunction with the release of this information. Accordingly, we will give either party an opportunity to request discussions about the conditions under which the information sought by the Council will be disclosed. At the request of either party, release of the requested information will be postponed while the parties discuss a protective order to limit access to the names, addresses, and telephone numbers of the student witnesses, and to limit disclosure of information obtained through Council interviews of these students. If the parties are unable to reach agreement, each party will, within 35 days of the date of this Order, submit its last proposal for a protective order to us. Each party may include with its proposal a memorandum explaining the rationale for its proposal and its reasons for rejecting the other party's proposal. Within 28 days of receipt of these proposals, we will issue a Supplemental Order in which we will adopt and order performance of one of the party's proposals.

We will not order the District to post a notice of its wrongdoing. We generally require an employer to post such a notice when an employer's violation of the law was: (1) calculated or flagrant; (2) part of a continuing course of unlawful conduct; (3) perpetrated by a significant number of the employer's personnel; (4) affected a significant number of bargaining unit employees; (5) had a significant impact or potential impact on the functioning of the exclusive bargaining representative; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, AWOP, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984). Not all of these criteria need be met for us to order posting of a notice. *Blue Mountain Faculty Association/Oregon Education Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 781-782 (2007). Here, an insufficient number of these criteria were met and we will not order the District to post a notice.

ORDER

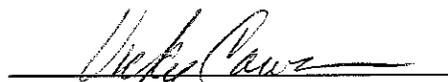
1. The District shall cease and desist from violating ORS 243.672(1)(e) and (1)(g).

2. Within seven days of this Board's final order, the District shall provide the Council with the names, addresses, and telephone numbers of the students interviewed prior to Monteblanco's discipline.

3. At the request of either party, disclosure of this information may be postponed for up to 63 days from the date of this Order. During this period, the parties may discuss a protective order to limit access to the names, addresses, and telephone numbers of the student witnesses to the Monteblanco incident and to limit disclosure of information the Council obtains from the students. If the parties are unable to reach agreement, each party will submit to us, within 35 days of the date of this Order, its last proposal for a protective order. Each party may include with its submission a memorandum explaining the rationale for its proposal and its reasons for rejecting the other party's proposal. Within 28 days of receipt of these proposals, we will issue a Supplemental Order which adopts and orders performance of one of the proposed protective orders.

DATED this 15<sup>th</sup> day of September 2009.

  
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Paul B. Gamson, Chair

  
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Vickie Cowan, Board Member

  
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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.