



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

TAMMY FERRY, )  
 )  
 Respondent, )  
 )  
 v. ) WD83649  
 )  
 THE BOARD OF EDUCATION ) Opinion filed: December 15, 2020  
 OF THE JEFFERSON CITY PUBLIC )  
 SCHOOL DISTRICT, )  
 )  
 Appellant. )

**APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI  
THE HONORABLE JON E. BEETEM, JUDGE**

Division One: Thomas N. Chapman, Presiding Judge,  
Mark D. Pfeiffer, Judge and W. Douglas Thomson, Judge

The Board of Education of the Jefferson City Public School District ("Board") appeals from the circuit court's judgment reversing the decision of the Board terminating Tammy Ferry ("Ferry"). On appeal, in which we review the decision of the Board, Ferry contends that the Board erred in: (1) terminating Ferry for violating the Family Educational Rights and Privacy Act ("FERPA") and Board policy by making an unlawful disclosure because it is undisputed that she did not disclose any confidential student information to a third party; (2) terminating Ferry for willfully violating Board policies by transferring confidential student information to her

personal Google account because it is undisputed that Board policy does not address such transfers; and (3) concluding that Ferry, based on her training, willfully or persistently violated Board policies by transferring her work files containing confidential student information to her personal Google account because there was no competent and substantial evidence demonstrating the training received informed her that such transfers were prohibited and that evidence adduced demonstrated that such transfers were allowed. We affirm the circuit court's judgment reversing the Board's decision.

### **Factual and Procedural History**

The material facts are not in dispute. Ferry was a tenured teacher with the Jefferson City School District ("District"), employed as an instructional technology coordinator. On or about January 28, 2019, Ferry transferred thousands of District files to her personal Google account. Over one thousand of the files transferred contained confidential student information. The District placed Ferry on paid administrative leave pending further investigation, during which the District required her to return certain electronic devices to the District, and forbid her from communicating with other District employees and entering upon District property. The Board issued a Statement of Charges seeking to terminate Ferry's employment. Ferry was charged with willful or persistent violation of the published regulations of the Board by (1) transferring files which contained confidential student information to her personal Google account; (2) failing to return District property; (3) talking to District employees while the investigation was ongoing; and (4) returning to District premises. After a hearing, the Board issued its findings of facts and conclusions of

law, and decision ("Decision"). The Board terminated Ferry's employment on the ground that she willfully and persistently violated FERPA and Board policy by disclosing confidential student information to herself when she transferred District files to her personal Google account. The Board declined to address the three remaining violations in the Statement of Charges. Ferry requested judicial review. The circuit court reversed the Board's decision finding that there was no disclosure, as the term is defined by FERPA and Board policy, when Ferry transferred the data to her own Google account. The circuit court further found, "The Board impermissibly expands the definition of "disclosure" beyond the bounds of the agency definition, and beyond reason. . . . The real issue under the law is not where the information is stored by an authorized user of confidential student data. The issue is disclosure to unauthorized third parties." Ferry was ordered reinstated. The Board appeals.

### **Standard of Review**

"In an appeal following judicial review of an administrative agency's decision, the Court of Appeals reviews the agency's decision, not the circuit court's judgment." *Reuter v. Hickman*, 563 S.W.3d 816, 819 (Mo. App. W.D. 2018). On appeal, we presume the agency's decision was correct, and the burden to show otherwise is on the challenging party. *Id.* "Pursuant to section 536.140.2, appellate review of an agency decision is to determine whether the decision:

- (1) Is in violation of constitutional provisions;
- (2) Is in excess of the statutory authority or jurisdiction of the agency;

- (3) Is unsupported by competent and substantial evidence upon the whole record;
- (4) Is, for any other reason, unauthorized by law;
- (5) Is made upon unlawful procedure or without a fair trial;
- (6) Is arbitrary, capricious or unreasonable;
- (7) Involves an abuse of discretion."<sup>1</sup>

*Id.* "When the agency's decision involves a question of law, the court reviews the question *de novo*." *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 428 (Mo. banc 2009). Review of the interpretation of an administrative rule or regulation, like review of statutory interpretation, is *de novo*. *State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 35 (Mo. banc 2008).

## **Analysis**

### ***Point I***

In Point I, Ferry argues the Board erred in terminating her for violating FERPA and Board policy by making an unlawful disclosure to herself because under section 536.140.2(4), the Board's decision is not authorized by law in that there is no dispute that Ferry did not disclose any confidential student information to any third party, and her conduct of transferring confidential student information to herself was not a "disclosure" as that term is defined under FERPA or Board policy. We agree.

Section 168.114.1(4) of the Teacher Tenure Act provides that the Board may terminate an indefinite contract with a permanent teacher for "[w]illful or persistent

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<sup>1</sup>All statutory references are to RSMo 2016, unless otherwise indicated.

violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him." Here, although the Statement of Charges alleged four violations, the Board found that Ferry violated only one, declining to consider the remaining violations. The Board found that Ferry willfully violated Board policies and FERPA by disclosing confidential student information when she transferred files to her personal Google account. The sole issue is whether Ferry's transfer of files to her personal Google account constitutes a disclosure under FERPA and Board policy.

"Administrative rules and regulations are interpreted under the same principles of construction as statutes." *In re Trenton Farms RE, LLC v. Mo. Dep't of Nat. Res.*, 504 S.W.3d 157, 164 (Mo. App. W.D. 2016) (citation omitted). "When interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute." *Stiers v. Dir. of Revenue*, 477 S.W.3d 611, 615 (Mo. banc 2016) (citation omitted). "In interpreting regulations, the words must be 'given their plain and ordinary meaning.'" *Dep't of Soc. Servs., Div. of Med. Servs. v. Senior Citizens Nursing Home Dist. of Ray Cty.*, 224 S.W.3d 1, 9 (Mo. App. W.D. 2007) (citation omitted). "Context determines meaning." *Id.* "Regulations should be interpreted reasonably, and absurd interpretations should not be adopted." *Id.*

We do not look beyond the plain and ordinary meaning of the words used by the governing body unless their meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislation. If the agency's rule is unambiguous on its face, no interpretation is necessary and the court must give effect to the agency's intention as clearly expressed, and even a long standing interpretation should be

disregarded when such interpretation conflicts with the clear language of the rules.

*Id.* at 16 (internal quotation marks and citation omitted).

Preliminarily, although the Board found that Ferry's actions violated FERPA and Board policy, *both rely on the FERPA definition of "disclosure."*<sup>2</sup> At all times herein, the Board has maintained Board policies are aligned with FERPA, and the Decision reflects the same. Moreover, the Board *policies* do not define "disclosure." Instead, the District utilizes the FERPA definition of disclosure from time to time in its policies and manuals. For instance, the District's training materials that reference a definition of disclosure are training on FERPA. Thus, our analysis of the FERPA definition of disclosure is dispositive of whether a violation of FERPA, *or Board policies*, occurred. If there is no disclosure of confidential information under FERPA, there is likewise no disclosure of confidential information under the Board's present policies.

The language of FERPA is not ambiguous. FERPA defines "disclosure" as:

[T]o permit access to the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party, ***except the party identified as the party that provided or created the record.***

34 C.F.R. § 99.3 (emphasis added). FERPA clearly and unambiguously defines disclosure as a communication to a party other than the providing/creating party. Thus, the definition requires two parties—a providing/creating party and a receiving

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<sup>2</sup>The Board found Ferry violated policies GBCB, EHB, and EHBC in failing to keep student records confidential in violation of Board policy JO and Administrative Procedure JO-AP(1).

party. The providing/creating party is expressly excluded from simultaneously qualifying as a receiving party by FERPA's definition. Likewise, the District's own training materials on FERPA provide that FERPA is a law that protects the confidentiality of student records from "*third parties*."

Here, it is undisputed that Ferry did not transfer files to a third party that would constitute a FERPA disclosure. Based on the plain language of FERPA's definition of disclosure, Ferry's transfer of files to herself via her personal Google account does not constitute a disclosure. This plain language application is entirely consistent with the express purpose of FERPA as set out in the FERPA training materials provided by the District which state, "[FERPA is] a law that ensures parental access to the 'education records' of their children while protecting the confidentiality of those records from *third parties*[" (emphasis added).

Moreover, disclosure to a "third party" is referenced again in District training materials in its discussion of unintended disclosures of confidential student information during research. There, the training materials state, "Research data for a *third party* that is easily traceable to a particular student can violate FERPA law." (Emphasis added). It is also consistent with the plain and ordinary meaning of disclosure as defined by Black's Law Dictionary as "[t]he act or process of making known something that was previously unknown; a revelation of facts[.]" BLACK'S LAW DICTIONARY (11<sup>th</sup> ed. 2019). Ferry's files were not previously unknown to her prior to the transfer to her Google account; there was no revelation.

The Board argues *de novo* review of this point is the incorrect standard of review. The Board cites the standard of review for administrative proceedings and claims that it applies to review of the entire Decision even if questions of law were raised in administrative proceedings. The Board's argument is without merit. As reflected by our analysis, Point I involves a question of law, which we review *de novo*. See *Dinkins v. S. Iron R-1 Sch. Dist.*, 445 S.W.3d 600, 605 (Mo. App. S.D. 2014) (Where the action involves only the application by the Board of the law to the facts, our review is *de novo*; we view the question of whether the Board complied with the procedural and substantive provisions of the Teacher Tenure Act in the termination proceeding as a question of law); *Burgess v. Ferguson Reorganized School Dist.*, 820 S.W.2d 651, 654 (Mo. App. E.D. 1991) (Issue of whether a policy that proscribes conduct constituting grounds for termination is fatally vague or indefinite is a question of law reviewed independently in a termination of tenured teacher case).

The Board argues for the first time on appeal that the District defined disclosure in its training materials more stringently than the FERPA definition. This argument was not raised before the Board and, as such, not addressed by the Board in its Decision. "We will not consider arguments not raised below and made for the first time on appeal." *Osage Mobile Home Park, LLC v. Jones*, 571 S.W.3d 623, 624 (Mo. App. W.D. 2019) (citation omitted); see also *Hammond v. Municipal Correction Institute*, 117 S.W.3d 130, 136 (Mo. App. W.D. 2003) ("An issue raised for the first time on appeal is not preserved for appellate review"). Notably, the Board makes this argument without *any* citations to the record or legal authority. This is insufficient



and in violation of Rule 84.04(e) which requires that "[a]ll factual assertions in the argument shall have specific page references to the relevant portion of the record on appeal." Moreover, the Board must cite appropriate and available precedent if it expects to prevail. *Rademan v. Al Scheppers Motor Co.*, 423 S.W.3d 834, 837 (Mo. App. W.D. 2014).

In any event, this argument is without merit. The Board policies do not provide a different definition of disclosure than FERPA. We can only presume (due to the lack of citation to the record) that the Board is referring to the training materials titled, "FERPA: Confidentiality of Records," wherein FERPA's definition of disclosure is paraphrased, notably *omitting* "except the party identified as the party that provided or created the record." Regardless, the materials are clearly referencing FERPA's definition of disclosure. The goal of these training materials is stated, "to teach school staff members about FERPA[.]" And, a previous page of the same training material specifically states that FERPA protects confidentiality of records *from third parties*. Nothing in these training materials indicate that this is the District creating its own definition of disclosure different from the FERPA definition. Moreover, this argument is inconsistent with the Board's position that Board policies are aligned with FERPA.

The Board argues that Ferry did not have lawful access to the files in the first place. Again, the Board fails to offer any citations to the record in violation of Rule 84.04(e). Nonetheless, whether or not Ferry had lawful access to the files she transferred to her personal Google account is irrelevant to the determination of

whether the transfer constituted an unlawful disclosure of confidential student information under FERPA. *The Board did not find that Ferry did not have lawful access to the files.* The only findings the Board made pertaining to access were in the context of whether Ferry's disclosure met an exception rendering the disclosure lawful. Because we find there was no disclosure, we need not determine whether an exception was met.

Lastly, the Board argues, for the first time, that even if the transfer of files was not a disclosure under FERPA, Ferry attempted or intended to disclose confidential student records. This argument is not preserved for our review. *Osage Mobile Home Park, LLC*, 571 S.W.3d at 624. Additionally, the Board again fails to include any citations to the record or legal authority in violation of Rule 84.04(e). However, this argument fails in that, as a matter of law, FERPA's definition of disclosure does not include an attempted or intended disclosure. Neither does the Board's Decision address this as an alternative rationale for Ferry's termination.

As a matter of law, the Board erred in finding that Ferry disclosed confidential student information when she transferred files to her personal Google account under FERPA and in terminating her employment on that basis. Thus, the Board's Decision was unauthorized by law. Point I is granted.

### ***Points II and III***

In Points II and III, Ferry alleges additional claims that the Board erred in finding that she violated Board policies by transferring confidential student information to her personal account. In light of our determination in Point I finding

that the Board erred in finding Ferry violated FERPA and Board policies because the transfer of files to her personal account was not a disclosure, we need not address these additional arguments.

### **Conclusion**

We affirm the circuit court's judgment reversing the Board's decision.

  
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W. DOUGLAS THOMSON, JUDGE

All concur.