



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

FEB 26 1999

Dear

This is in response to your October 14, 1998, e-mail, and your follow-up letter of January 11, 1999, and fax of January 19, 1999, regarding the Family Educational Rights and Privacy Act (FERPA) and Part B of the Individuals with Disabilities Education Act (Part B). This letter is also in follow-up to your recent telephone conversations with Ellen Campbell of my staff. Specifically, you state that you requested that _____ (District) provide you with access to all special education records, including "all hearing documents and transcripts concerning [your] _____" and that the District "was unable to provide the confidential hearing records and other documents." You also state the following:

Special Education Rules and Regulations require the public agency to establish a procedure for destruction of date, inform parent(s) that personally identifiable information collected, maintain[ed] or used in provision of a FAPE is no longer needed to provide educational services to the student. According to the regulations these procedures **are to be in accordance with FERPA** and Georgia Records Act.

(Emphasis added.) In your letter to this Office, you do not identify the specific regulations to which you refer; however, in your January 16, 1999, e-mail to Dr. Thomas Hehir, Director, Office of Special Education Programs (OSEP), a copy of which you provided this Office, you cite "the Georgia Special Education Rule 160-4-7.06.6(g)." You quote the State rule as stating: "These procedures shall be in accordance with [FERPA] and Georgia Records Act." In your letter to Dr. Hehir, you also note the following:

According to [34 CFR] Sec. 300.561 the SEA shall give notice that is adequate to fully inform parents about the requirements of Sec. 300.128, including (3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, RETENTION and DESTRUCTION of personally identifiable information. [Emphasis provided.]

Additionally, you state that the District "has a history of not keeping records confidential" and you ask that we investigate to determine if the District is in violation of FERPA. This Office administers FERPA (20 U.S.C. § 1232g; 34 CFR Part 99) and, as such, we will address the applicability of FERPA to the issues you have raised.

FERPA is a Federal law which affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. The term "education records" is defined as those records that are directly related to a student and maintained by an educational agency or institution or a party acting for the agency or institution.

FERPA applies to educational agencies or institutions to which funds have been made available under any program administered by the Secretary of Education. Additionally, Part B applies to all public agencies that have direct or delegated authority to provide special education and related services under Part B. Part B incorporates some of the provisions of FERPA by reference. Although it is a Federal law, Part B is administered by the States.

From the information that you have provided, it appears that you believe that there are provisions in FERPA which govern the retention and destruction of education records. Specifically, with regard to the Georgia Special Education Rule that you cite, as well as your reference to §§ 300.561 and 300.128 of the Part B regulations, FERPA does not require the State to establish a procedure for the destruction of records, nor does it require that the State inform parents of their intention to destroy such records when no longer needed. Under FERPA, a educational agency or institution may destroy education records unless there is an outstanding request to inspect and review. Otherwise, FERPA does not specifically address the issue of destruction of education records. The reference to FERPA in § 300.561 merely provides that a State educational agency (SEA) shall include in its notice to parents information about their general rights under FERPA. FERPA, on the other hand, does **not** require that an SEA provide notice to parents but that each local educational agency advise parents of their rights under FERPA. (See § 99.7.) Because there may be provisions under Part B which might specifically address the issue of notification to parents of an SEA or LEA's intention to destroy education records, I suggest that you contact your State special education director for any Part B requirements in this regard. The name and address of the Georgia special education director is:

Ms. P. Paulette Bragg
Director
Division for Exceptional Students.
Georgia Department of Education
1952 Twin Towers East - 205 Butler St.
Atlanta, Georgia 39334-5040

With regard to your request to the District to inspect and review all special education records, including hearing documents and transcripts, concerning _____ FERPA does not require a school to provide records that do not exist or to create records that are not maintained. Should you have evidence that the District does maintain education records to which you are being denied access, you may contact this Office again and provide such evidence. At that time, please complete the enclosed complaint form. We will review the information that you provide and inform you of any appropriate action we might take.

Finally, with regard to your allegation that the District "has a history of not keeping records confidential" and your request that this Office investigate to determine if the District is in violation of FERPA, please note this Office investigates those timely complaints which contain **specific allegations of fact** giving reasonable cause to believe that a violation of FERPA has occurred. A complaint is considered timely if it is submitted to this Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

As we have previously explained to you, FERPA vests the rights it affords with the parent or eligible student; therefore, the statute does not provide for these rights to be vested in a third party that has not suffered an alleged violation. See 20 U.S.C. §1232g(b)(1) and (d). Thus, an individual must have "standing," i.e., have suffered an alleged violation, in order to file a complaint under FERPA. It is not clear whether you have standing with regard to any potential alleged violation in this matter. That is, you have not provided specific allegations of fact indicating that the District has specifically violated your rights under FERPA. Accordingly, there is no basis on which to initiate an investigation into your allegation.

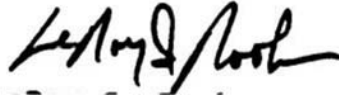
Further, under FERPA, when a student turns 18 years of age or attends an institution of postsecondary education, the student becomes an "eligible student" and all FERPA rights transfer from the parent to the student. Under Part B, consistent with FERPA, the 1997 Amendments to the Individuals with Disabilities Education Act provide that States can choose, after a child with a disability reaches the age of majority under State law, to transfer the rights accorded to parents under Part B to the child. It is not clear from the information you have provided to this Office, whether _____ are "eligible students." If _____ are eligible students under FERPA, then any complaints involving alleged violations of FERPA must be filed with this Office by them.

I trust that this adequately explains the scope and limitations of FERPA as it pertains to your concerns. If, after a review of this letter and the enclosed information, you believe that the District has violated your rights under FERPA, that your complaint is timely, and that you have standing to file a complaint, you may contact this Office again. Please note, however, that any additional information you provide must be to the address on the enclosed complaint form and

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should be noted on the form. Because records maintained by this Office are subject to the Federal Privacy Act and due to the fact that there is no expectation of privacy over the Internet, we conduct correspondence regarding FERPA complaints via the U.S. Mail, not the Internet.

Sincerely,

A handwritten signature in black ink, appearing to read "LeRoy S. Rooker". The signature is written in a cursive style with a horizontal line underneath it.

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Dr. Thomas Hehir

Enclosure