



UNITED STATES DEPARTMENT OF EDUCATION

Dated March 7, 2008

David Anderson, Esq.
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

Dear Mr. Anderson:

This responds in part to your January 24, 2007, letter regarding the authority of the Texas Education Agency (TEA) to enforce certain requirements in Part B of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and 34 CFR Part 300. You stated that the TEA has received a special education complaint from a parent who alleges that the school district violated IDEA and the Family Educational Rights and Privacy Act (FERPA) by publicly disclosing personally identifiable information from his son's education records without consent. The school district asserts that the TEA does not have jurisdiction to investigate this complaint because the Family Policy Compliance Office (FPCO) has exclusive jurisdiction to investigate alleged violations of FERPA and any IDEA regulations that merely restate FERPA requirements. According to the school district, 34 CFR §§ 300.151-300.153 of the Part B IDEA regulations (the State complaint procedures) authorize the TEA to investigate only allegations related to "additional protections" afforded to students in the Part B Confidentiality of Information regulations and not those that restate FERPA requirements. You indicated that the TEA has previously investigated special education complaints that allege violations of the overlapping provisions of FERPA and Part B of the IDEA but that you share the district's concern that the TEA and FPCO could investigate the same complaint and reach different conclusions. You asked for our guidance on the issue of jurisdiction and coordination between the TEA and FPCO on complaints filed with both agencies.

In summary, a State educational agency (SEA) is required under Part B of the IDEA to enforce all Part B requirements, including those Part B Confidentiality of Information regulations that restate or paraphrase FERPA requirements. The Part B Confidentiality of Information regulations do not simply incorporate or restate FERPA; they contain several provisions that are tailored specifically to the special education environment. We note also that public agencies and participating agencies (as defined in Part B of the IDEA) are subject to the Part B Confidentiality of Information regulations even if they are not also an educational agency or institution under FERPA. In developing special confidentiality requirements for Part B of IDEA rather than simply applying FERPA to all Part B agencies, the Department recognizes that SEAs have unique expertise for addressing confidentiality issues in the special education context. FPCO

works with the Office of Special Education Programs (OSEP), which oversees and monitors SEA compliance with Part B of the IDEA, to ensure that SEAs enforce the Part B Confidentiality of Information requirements in a manner consistent with the more general requirements contained in FERPA.

FERPA protects the privacy interests of parents and eligible students in the student's education records. 20 U.S.C. § 1232g and 34 CFR Part 99. Under FERPA, parents and eligible students have certain rights with respect to education records maintained by an educational agency or institution, including a right to inspect and review the student's education records, to seek to have them amended in certain circumstances, and to consent to the disclosure of personally identifiable information from the student's education records, except as provided in 34 CFR § 99.31.

FERPA applies to any "educational agency or institution" that receives funds under a program administered by the Department, as described in 34 CFR § 99.1(a). (In 34 CFR § 99.31(a), an "educational institution" provides educational services or instruction, or both, to students; an "educational agency" is authorized to direct and control public elementary, secondary, or postsecondary educational institutions.) This generally includes local educational agencies (LEAs) that provide special education and related services to students under Part B of the IDEA. Except with respect to the right to inspect and review education records under 34 CFR § 99.10, however, SEAs generally do not meet the requirements in 34 CFR § 99.1(a) to be considered an educational agency or institution and, therefore, are not subject directly to other FERPA requirements. (We note that FERPA does apply to education records, or personally identifiable information from education records that an SEA has received from an LEA or other educational agency or institution subject to FERPA.)

The Part B, IDEA regulations apply to each State that receives payments under Part B, including the SEA, LEAs, and all other public agencies in the State involved in the education of children with disabilities regardless of whether that agency receives funds under Part B. See 34 CFR §§ 300.2; 300.33. By statute, the Secretary is directed to "take appropriate action, in accordance with [FERPA], to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by SEAs and LEAs pursuant to Part B of IDEA...." 20 U.S.C. § 1417(c); 34 CFR § 300.610. The Secretary has done so by promulgating the Part B Confidentiality of Information regulations, 34 CFR §§ 300.610-300.627, which contain inspection and review, amendment, and consent requirements for education records and personally identifiable information collected, maintained, or used by "participating agencies" under Part B of the IDEA. ("Participating agency" is defined in 34 CFR § 300.611(c) as any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA.) The Part B Confidentiality of Information regulations contain many of the same privacy protections that exist in FERPA and, as pointed out in your letter, some that do not exist in FERPA or that go beyond FERPA requirements.

For example, FERPA applies to "education records," defined as records that are "directly related to a student [and] maintained by an educational agency or institution, or by a party acting for the agency or institution." 34 CFR § 99.3. In 34 CFR § 300.611(b), the term "education records"

has the same meaning in the Part B IDEA regulations as it does in FERPA. Parents have a right to access those records under both Part B of the IDEA (from a “participating agency”) and under FERPA (from an “educational agency or institution” and an SEA). However, according to 34 CFR § 300.613, each Part B participating agency must permit parents to inspect and review their children’s education records “without unnecessary delay and before any meeting regarding an individualized education program (IEP)” and certain other hearings, and in no case more than 45 days after the request has been made. In contrast, under FERPA there is no requirement that an educational agency or institution must comply with a parent’s request for access to education records before an IEP meeting. Rather, the educational agency or institution must comply “within a reasonable period of time, but not more than 45 days after it has received the request.” 34 CFR § 99.10(b). The following are among those provisions in the Part B of the IDEA Confidentiality of Information regulations that have no counterpart in FERPA or that provide protections beyond those provided by FERPA:

- 34 CFR § 300.611(a), definition of “destruction”
- 34 CFR § 300.612 (a)(1)-(3); (b), notice to parents
- 34 CFR § 300.613(b)(3), access rights
- 34 CFR § 300.614, record of access
- 34 CFR § 300.616, list of types and locations of information
- 34 CFR § 300.622, consent
- 34 CFR § 300.623, safeguards
- 34 CFR § 300.624, destruction of information
- 34 CFR § 300.625, children’s rights
- 34 CFR § 300.626, SEA enforcement
- 34 CFR § 300.627, Department use of personally identifiable information

Under 34 CFR § 99.30, written parental consent is required before an educational agency or institution may disclose personally identifiable information from education records, unless the disclosure is authorized without consent under one of the exceptions in 34 CFR § 99.31(a). The IDEA regulations, at 34 CFR § 300.622, contain additional protections related to parental consent that apply to all participating agencies, whether or not they are “educational agencies or institutions” subject to FERPA. For participating agencies that are not covered by FERPA, the consent provisions at 34 CFR § 300.622 would still apply. In addition, under the Part B State complaint procedure, a complaint must be filed within one year of an alleged violation. See 34 CFR § 300.153(c). In contrast, a complaint under FERPA must be filed within 180 days of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation. See 34 CFR § 99.64(c). In short, the Part B IDEA regulations do not simply incorporate or restate FERPA requirements and apply them to Part B agencies; they address specific issues and concerns that arise in the special education context and that are not addressed adequately under the more general FERPA requirements.

The Secretary of Education has delegated to FPCO the authority to investigate, process, and review complaints and violations and to provide technical assistance to ensure that educational agencies and institutions comply with FERPA. See 34 CFR § 99.60(b). FPCO has not been delegated authority to enforce Part B confidentiality requirements and has no institutional

authority or expertise with respect to special education issues. Implementation of Part B of the IDEA is monitored and enforced at the State level, with oversight by OSEP. See 34 CFR § 300.600(a). The State's enforcement responsibilities include a requirement that each SEA adopt State complaint procedures for resolving any complaint that a public agency has violated a Part B requirement, including a requirement under the Confidentiality of Information regulations. See 34 CFR §§ 300.151-300.153. The State's overall responsibilities for implementation and enforcement of Part B provide it with a level of expertise on special education issues that the SEA uses in resolving complaints under the Confidentiality of Information regulations, including a complaint that a public agency or a participating agency violated those confidentiality requirements that restate or paraphrase FERPA.

To the extent appropriate, the Department encourages parents of special education children to resolve their confidentiality complaints under the State complaint procedures to take advantage of the SEA's expertise on special education matters and knowledge of local issues and conditions. Parents of special education children may file a FERPA complaint with FPCO instead of or in addition to an IDEA Part B complaint with their SEA. When parents of special education children elect to file both a FERPA complaint with FPCO and an IDEA Part B complaint with the SEA, FPCO's policy is to hold the FERPA complaint in abeyance pending a decision by the SEA. In these circumstances, for purposes of timeliness under 34 CFR § 99.64(c), FPCO will treat the parent's FERPA complaint as having been submitted the date that the parents initially filed a complaint with FPCO.

We are conducting additional research into your question whether a parent's request for an open school board meeting constitutes written consent to disclose personally identifiable information under FERPA (and Part B) and will respond in a separate communication as soon as possible.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

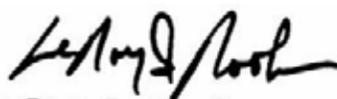
I trust that the above information is helpful in explaining the scope and limitations of FERPA and Part B of IDEA as they relate to your concerns.

Sincerely,



William W. Knudsen
Acting Director
Office of Special Education Programs

Sincerely,



LeRoy S. Rooker
Director
Family Policy Compliance Office