



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 7, 2007

Honorable Bill Shuster
U.S. Representative
Ninth District of Pennsylvania
647 Philadelphia Street, Suite 304
Indiana, PA 15701

Dear Congressman Shuster:

Thank you for your letter of June 9, 2007 to Dr. Alexa Posny, then Director of the Office of Special Education Programs with the U.S. Department of Education, on behalf of your constituent XXXXXXXXXXXXXXXXXXXXXXXX. In the letter to Dr. Posny, you indicated that your office received a June 4, 2007 letter from XXXX. in which he expressed dissatisfaction with the issues and records being released for his son in accordance with the Educational Rights and Privacy Act (FERPA). You used your letter as an opportunity to follow up with Dr. Posny about the status of this case, and requested information be offered in a letter that would be helpful to you in responding to your constituent.

As stated in an April 12, 2007 letter to you from Dr. Posny, in an effort to resolve this matter, Hugh Reid, then the Office Of Special Education Programs (OSEP) contact to Pennsylvania, contacted XXXX on April 10, 2007 seeking, and receiving, permission to speak with the Pennsylvania Department Education (PDE), Bureau of Special Education (BSE). Mr. Reid contacted BSE and spoke with Mr. Thomas Reich, Acting Chief, Division of Compliance, Monitoring and Planning for Western Pennsylvania. Mr. Reich indicated that he would contact X directly, specifically to: (1) assist XXXX with the resolution of his issues with PDE; (2) if necessary, assist XXX with filing a complaint under the Individuals with Disabilities Education Act (IDEA), as specified in 34 CFR §§300.151 through 300.153; and (3) provide oversight of the process on behalf of Mr. John Tommasini, Director of Special Education, PDE.

Since X continues to express dissatisfaction with PDE and the U.S. Department of Education's efforts to resolve his concerns, it might be helpful in this correspondence to explain how the IDEA regulations define "education records" and access to those records. 34 CFR §300.611(b) defines education records the type of records covered by FERPA as implemented by regulations in 34 CFR part 99. Under §99.3 (of the FERPA regulations), the term "education records" is broadly defined to mean those records that directly relate to a student that are maintained by an educational agency or institution or by a party acting for the agency or institution. (FERPA applies to all educational agencies and institutions to which funds have been made available under any program administered by the Secretary of Education. 34 CFR §99.1.

Parents of children with disabilities have access rights to education records under 34 CFR §300.613. This provision requires that, "Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part." The provision does not necessarily require the public agency to provide copies of the records unless the "failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records." 34 CFR §300.613(b)(2).

Since X's request for his son's education records includes a request for test protocols, we are providing to you our long-standing policy regarding test protocols as education records and our policy regarding providing copies of copyrighted materials (such as test protocols) to parents. This policy is contained in the *Analysis of Comments and Changes* section of the 1999 IDEA regulations. Our policy remains the same. The discussion from the 1999 regulations regarding these issues states:

Records that are not directly related to a student and maintained by an agency or institution are not "education records" under FERPA and parents do not have a right to inspect and review such records. For example, a test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be part of his or her "education records." However, Part B and FERPA provide that an educational agency or institution shall respond to reasonable requests for explanations and interpretations of education records. (34 CFR §300.562(b)(1); 34 CFR §99.10(c)). Accordingly, if a school were to maintain a copy of a student's test answer sheet (an "education record"), the parent would have a right under Part B and FERPA to request an explanation and interpretation of the record. The explanation and interpretation by the school could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the responses in some other adequate manner that would inform the parent.

With respect to the issue of liability for disclosing information to parents when other laws or contractual obligations would prohibit it, public agencies are required to comply with the provisions of IDEA and FERPA and must ensure that State law and other contractual obligations do not interfere with compliance with IDEA and FERPA. Federal copyright law protects against the distribution of copies of a copyrighted document, such as a test protocol. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations.

There is nothing in the legislative history of section 615(b)(1) of the Act to suggest that it expanded the scope of information available to parent examination beyond those records that they would have access to under FERPA.
644 Fed. Reg. 12605, 12641 (March 12, 1999)

If, after reviewing this information, X continues to believe that PDE has denied his right to access his son's education records, he may file a State complaint under 34 CFR §300.153.

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.

If you have further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Patricia J. Guard". The signature is written in a cursive, flowing style.

Patricia J. Guard
Acting Director
Office of Special Education
Programs