



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

**JUL 22 1997**

Dr. John T. Benson  
Superintendent of Public Instruction  
Wisconsin Department of Public Instruction  
P.O. Box 7841  
Madison, Wisconsin 53707

Dear Dr. Benson:

This is in response to your recent telephone conversations with Ellen Campbell of my staff concerning a request by the Wisconsin Department of Public Instruction (WDPI) for technical assistance. Specifically, the WDPI has asked whether parental written consent is required under the Family Educational Rights and Privacy Act (FERPA) before school districts disclose information from student education records in order to determine which students with disabilities are Medicaid eligible and to seek reimbursement from the State's Medicaid agency for services provided to those students. This letter also responds to letters dated March 20, April 18, May 9, and June 25, 1997, from Dr. Juanita S. Pawlisch, Assistant Superintendent, Division for Learning Support: Equity and Advocacy, and to information provided this office by Ms. Phyllis D. Thompson of Covington & Burling and from Mr. Frederick D. Cheney of Kinney & Associates, Inc. This Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions on the law. 20 U.S.C. §1232g; 34 CFR Part 99.

In Dr. Pawlisch's March 20 letter, she states the following:

We have received multiple requests for clarification regarding parent consent requirements when a school district wants to (as certified care providers) access medical assistance funds for reimbursement for school-based services. These requests have been from local school districts, parents, billing agencies, and other interested parties. In Wisconsin, the state medical assistance plan allows use of medical assistance [(MA)] funds for MA eligible students who receive MA services at school pursuant to an individualized educational program (IEP).

After considerable analysis by program staff and legal counsel from both our agency and our state MA agency, Department of Health and Family Services (DHFS), we have



advised school districts that FERPA and [the Individuals with Disabilities Education Act (IDEA)] require them to obtain informed written parental consent prior to releasing to the state MA agency records which 1) identify students as disabled to determine MA eligibility and 2) identify the nature and extent of services provided to individual disabled pupils . . . . Are we correct in our understanding that FERPA and IDEA require written parental consent to release this information for these purposes?

In her letter, Dr. Pawlisch also refers to a July 6, 1993, letter of advice from this Office to Mr. Gary M. Sherman, Director of Special Education, Nebraska Department of Education, in which we advise Mr. Sherman on a similar issue, as follows:

The consent for release of information included on the [Nebraska] Application for Assistance form includes the information required by the FERPA regulations and can therefore be considered to be sufficient consent for schools to submit claims containing information from education records to [the Department of Social Services (DSS), Nebraska's Medicaid agency]. However, before making any disclosures pursuant to a consent provided to a party other than the educational agency or institution itself, in this case to the DSS, the educational agency or institution should assure itself that the consent has been signed and dated in accordance with the above discussed requirements.

In this regard, Dr. Pawlisch asks the following questions:

Assuming that Wisconsin's MA application does meet the requirements of informed consent under FERPA and IDEA, or if it were modified to do so, must the [local educational agency (LEA)] have a copy of this signed form in its possession prior to releasing information? Are there other acceptable ways in which a school may confirm that informed consent has been given via an MA application? May a school or its billing agent send a list identifying all disabled students to the MA agency and request a determination of which students are MA eligible?

Both Ms. Thompson and Mr. Cheney have provided us analyses concluding that FERPA would not preclude school districts from disclosing information from student education records to the DHFS in order to be reimbursed under Medicaid. Notwithstanding their analyses, we concur with the WDPI in its conclusion that, under FERPA and IDEA, school districts are prohibited from disclosing information from student education records to the State Medicaid agency (DHFS), absent prior written parental consent.



FERPA applies to educational agencies or institutions that receive federal funds under any program administered by the Secretary of Education. As you are aware, FERPA is a Federal law that protects a parent's privacy interest in his or her child's "education records." In particular, FERPA affords parents the right to inspect and review 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 broadly defined as:

[T]hose 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 U.S.C. §1232g(a)(4). See also 34 CFR §99.3 "Education records." FERPA provides that education records, or personally identifiable information from such records, may be disclosed by educational agencies and institutions only after obtaining prior written consent of the parent, except in several statutorily specified circumstances. 20 U.S.C. §1232g(b)(1) and (d). See also 34 CFR 5 99.30.

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FERPA generally prohibits the nonconsensual disclosure of information derived from education records, except in certain circumstances. 20 U.S.C. §1232g(b); 34 CFR §99.31. Accordingly, if one or more of the exceptions are met, an educational agency or institution can disclose education records, or personally identifiable information from education records, without prior written consent. However, from the information your office has provided, as well as the information provided by Ms. Thompson and Mr. Cheney, it does not appear that any of FERPA's exceptions to the prior written consent provisions would permit the nonconsensual disclosure by school districts of personally identifiable information from education records to the State Medicaid agency.

Specifically, Ms. Thompson and Mr. Cheney provided this office their opinions that FERPA would not preclude school districts from disclosing information from student education records to the DHFS in order to be reimbursed under Medicaid. A discussion of some of the issues raised by them, as well as other issues that relate to your inquiry, follows:



### Directory Information

In a draft document entitled "Parental Consent Issues," prepared by Kinney & Associates and faxed to this Office on July 8 by Mr. Cheney, it was concluded that under Wisconsin law (Chapter 118 of General School Operations), schools may disclose "directory data" without parental consent. The document states: "Once the directory information has been utilized to determine Medicaid eligibility it falls upon the Wisconsin Application for Assistance to provide the school with the necessary consent."

Under FERPA, schools may disclose "directory information" under 34 CFR §99.31 (a)(11), in accordance with the requirements of 34 CFR §99.37. Section 99.37 requires the educational agency or institution to notify parents of the agency's or institution's intent to disclose specific information as directory information without consent unless otherwise notified by the parent. The name and address of the student are generally considered directory information which can be disclosed without prior written consent as long as the conditions in §99.37 have been met and the parent has not refused disclosure of directory information.

However, this office has consistently advised that directory information cannot be disclosed linked to other, non-directory information about a student, such as special education status. Thus, a list of the names of students who are disabled and/or who are receiving services under Part B cannot be considered "directory information" under FERPA and disclosed to an unauthorized third party, such as the DHFS for the purposes of ascertaining MA eligibility.

### Health Records

In this same document provided by Mr. Cheney, it was suggested that medical records maintained by schools were not "education records" subject to FERPA or, in some circumstances, could be considered excluded from the FERPA definition of "education records." The document states:

The school based services currently being provided are a development of the [Early and Periodic Screening, Diagnosis, and Treatment (EPSDT)] program which was intended to provide *medically necessary services* to needy children in any setting appropriate. In many cases the only setting which children could reasonably be expected to receive services on a regular basis was in the school setting. Based on this fact it is not unreasonable to conclude that schools would have, and maintain, *health care records* for those students in receipt of services. By implementing the EPSDT



requirements the school becomes a *health care provider*, the student then may be looked upon as a *patient*, and therefore the records pertaining 'to that student's services become *patient health care records*. The very fact that in order to file claims for Medicaid a school must register as a Medicaid *provider* with the state Medicaid agency lends credibility to this reasoning . . . . Under this section the records may be released without informed consent "[t]o the extent that the records are needed for billing, collection or payment of claims" or, if "[a]ccess to the patient health care records is necessary to comply with a requirement in federal or state law." In light of the mandate present in EPSDT. and the IDEA amendment[s] of 1997 the use of Medicaid funding in exceptional education programs is very much a requirement of federal law. [Emphasis provided.]

Consistent with the general purpose of FERPA to protect parents' privacy rights in their children's education records, Congress provided a broad definition of "education records" that includes any type of material directly related to a student in whatever physical form the institution decides to maintain it. The use of the terms "records, files, documents, and other materials" indicates the broad scope and general nature, of items that are subject to the statute. Neither the legislative history nor the statute supports this argument that because certain education records are used for a particular purpose, i.e., to provide "medically necessary services," they lose their definition as "education records" under FERPA. Therefore, any records relating to a minor student's health, such as medical or psychological records, which are maintained by an educational agency or institution or a party acting for the agency or institution are "education records" under FERPA. As such, parents have the right under FERPA to consent to the disclosure of those records.<sup>1</sup>

#### Financial Aid

in a letter dated April 7, 1997, Ms. Thompson states:

The [Family Policy Compliance Office] reportedly has expressed the view that none of the exceptions [under FERPA] would permit schools to release special education students'

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<sup>1</sup>Please note that records of a student which pertain to services provided to that student under Part B are "education records" under FERPA and are subject to the confidentiality provisions under IDEA (see 34 CFR § 300.560-300.576) and to all of the provisions of FERPA.



health services records to a State Medicaid agency without parental consent. [Footnote refers to a February 17, 1989, letter from this Office.] By their literal terms, however, section 1232g(b)(1)(D) and 34 C.F.R. §99.31(a)(4)(i) create an exception that arguably is applicable. Section 99.31(a)(4)(i) provides that parental consent for disclosure is not required if the disclosure is "in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to (A) [d]etermine eligibility for the aid." Id.; see also 20 U.S.C. §1232g(b)(1)(D). Further, section 99.31(a)(4)(ii) defines "financial aid" to denote a "payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution." Medicaid reimbursement of school-based services can fairly be described as financial assistance that is conditioned on a child's school attendance. Therefore, we believe that the exception described in section 99.31(a)(4) could reasonably be applied to permit a school to release records to a Medicaid agency without parental consent, to enable the Medicaid agency to determine whether the services provided are eligible for Medicaid reimbursement. We are not aware of any inquiry requesting a formal opinion from DOE as to the applicability of this specific exception in the context of Medicaid reimbursement claims.

FERPA permits the nonconsensual disclosure of education records when the disclosure is "in connection with a student's application for, or receipt of, financial aid." 20 U.S.C. § 1232g(b)(1)(D). The regulations provide that consent is not required when:

[t]he disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to --

- (A) Determine eligibility for the aid;
- (B) Determine the amount of the aid;
- (C) Determine the conditions for the aid; or
- (D) Enforce the terms and conditions of the aid.

34 CFR §99.31(a)(4). The Department has always interpreted this provision to apply to financial aid such as student loans and scholarships. Further, as Ms. Thompson noted, the FERPA regulations define "financial aid" to mean "a payment of funds provided to an individual . . . that is conditioned on the individual's attendance at an educational agency or institution." (Emphasis added.) Because the State Medicaid agency provides



funds (in the form of reimbursement) to the school district and not to the student, the financial aid exception in FERPA does not apply. Moreover, we do not believe that financial assistance to school districts, in the form of MA reimbursement, is conditioned on school attendance by those children who are Medicaid eligible.

#### Consent Form

Schools districts should ensure that parents provide written consent prior to any disclosures of personally identifiable information from education records to the State Medicaid agency. Section 99.30(b) of the FERPA regulations requires that the written consent permitting disclosure of education records must be: (1) signed and dated; (2) specify the records that may be disclosed; (3) state the purpose of the disclosures and (4) identify the party or class of parties to whom the disclosure may be made. Consent could be provided to either party, in this case the school or the Medicaid agency, so long as it meets the requirements of 34 CFR §99.30.

The consent form in the "Application and Review Form for Financial Assistance, Medical Assistance and Food Stamps" generally includes the information required by the FERPA regulations and can, therefore, be considered to be technically sufficient under FERPA. Specifically, the form: (1) requires the applicant to provide their signature and the date of signature; (2) specifies what information may be disclosed and (3) the purpose of the disclosure: "any information that is appropriate and necessary for the proper administration of assistance programs authorized under Wisconsin law (. . . Medical Assistance of "Medicaid" . . . )"; and, (4) specifies that the party or class of parties to whom the disclosure may be made as the State Department of Health and Social Services<sup>2</sup>. However, nothing in FERPA would allow school districts, absent such a signed consent, to disclose to the State Medicaid agency a list of students with disabilities, or a list of students who are receiving services under Part B, so that the Medicaid agency can ascertain which of these students are MA eligible.

In her letter, Dr. Pawlisch asked about the advice we provided to the Nebraska Department of Education. In our July 6, 1993, letter, we advised Nebraska that before disclosures are made pursuant to a consent provided to a third party, such as to a State Medicaid agency, the educational agency or institution

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<sup>2</sup>It is assumed that the State's Department of Health and Social Services is now referred to the Department of Health and Family Services (DHFS) and is, indeed, the state's Medicaid agency.



should assure itself "that the consent has been signed and dated in accordance with the above discussed requirements." In that regard, Dr. Pawlisch asked whether school districts "must have a copy of the signed form in its possession prior to releasing information" or whether there are other acceptable ways in which a school "may confirm that informed consent has been given via an MA application."

In January 1993, §99.30(a) of the FERPA regulations were amended to read:

The parent . . . shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in §99.31.

(Emphasis added.) Thus, FERPA now permits a school to disclose information from student education records to a third party who has been provided consent by the parent. The regulations do not require that the school obtain a copy of the consent from the third-party. However, schools should be reasonably assured that such a consent exists and meets the requirements of §99.30, especially when the school is not aware of the consent process used by a third party. With regard to the consent form in the Wisconsin "Application and Review Form for Financial Assistance, Medical Assistance and Food Stamps," this Office has determined that it meets the requirements of §99.30. As such, school districts do not have to seek any other assurances regarding the consent.

In her April 18 letter to this Office, Dr. Pawlisch enclosed a copy of an April 3 letter from two members of Wisconsin's Joint Legislative Council's Special Committee on Programs for Developmentally Disabled Persons. In the April 3 letter, the legislators expressed their concern that parents be provided with more information regarding the disclosure of education records under the school-based services (SBS) benefit under the MA program. Enclosed with their letter was a sample consent form, found in the Wisconsin Medicaid Provider Handbook, utilized by school districts "to verify MA eligibility and bill the MA program for services." In a July 16 telephone conversation, Dr. Pawlisch and Mrs. Nancy Holloway, Director, Student Services/Prevention and Wellness, informed Ellen Campbell of my staff that this consent form is presently used by some schools in Wisconsin. Dr. Pawlisch and Mrs. Holloway explained that, should it be necessary to obtain parental consent prior to disclosing information from student education records to the State Medicaid agency, this consent form could be used to obtain parental consent from parents in all schools in Wisconsin.



In their letter, addressed to Secretary Joseph LEEAN, Department of Health and Family Services, Senator Kimberly Plache and Representative Bonnie Ladwig state the following:

Currently, schools must obtain the informed, written consent of a parent or guardian of a pupil before disclosing personally identifiable information and student records to either (1) obtain MA eligibility information; or (2) bill the MA program for these services. The Bureau of Health Care Financing, Department of Health and Family Services (DHFS), provided the Special Committee with the portion of the Wisconsin Medicaid Provider Handbook explaining the [school-based services] benefit, as well as the sample consent form used by school districts to verify MA eligibility and bill the MA program for services . . . .

In reviewing the sample consent form and hearing concerns of parents of children with disabilities in the school system, we request that the DHFS and the Department of Public Instruction modify this consent form as follows to provide more clarity to parents . . . .

Senator Plache and Representative Ladwig provide some suggestions regarding modifying the consent form in order to ensure that parents are more fully informed of the program. One of their recommendations pertinent to this discussion is the following:

In the section of the letter where the actual consent is given by parents, the parent should be required to specifically authorize the school district not only to release information to the MA program, but to file claims with the MA program for reimbursement of services. Although this is explained in the top half of the sample consent form, the consent form is misleading in that it does not include this information in the actual consent language.

If an educational agency or institution wishes to continue to receive Federal funds, it must comply with FERPA's provisions on the disclosure of education records. Compliance with portions of a State law that conflict with FERPA may jeopardize continued eligibility to receive Federal education funds. However, nothing in FERPA would prevent a school district or State from establishing additional privacy rights for parents. Although, as discussed above, we believe that the consent signed by parents whose children are Medicaid eligible is technically sufficient to meet the requirements of FERPA, it would not be contrary to FERPA for the State to require that school districts take additional steps in order to more fully inform parents of what information is being disclosed from their children's records and the purposes of those disclosures.



A review of the consent form found in the Wisconsin Medicaid Provider Handbook indicates that the consent does generally meet the requirements of §99.30. Therefore, school districts may wish to use this form to obtain consent from parents of children receiving special education and related services, who have not already provided consent through the State Medicaid agency consent procedures, so that the school may disclose education records where necessary to seek reimbursement from the State Medicaid agency. However, we agree with Senator Plache and Representative Ladwig's suggestion that the consent form itself indicate the purposes of the disclosure. We would also suggest that, instead of stating that the disclosure is made to "Medicaid," the appropriate State agency be noted.

#### Billing Agents for Schools

One of the questions that has been raised with regard to the Medicaid reimbursement issue is whether FERPA prohibits school districts from contracting with private companies for the purposes of confirming a student's Medicaid eligibility and preparing Medicaid claims for the reimbursements process. As explained more fully below, FERPA does not restrict schools in this manner.

As noted in the definition of "education records," FERPA's privacy protections are extended explicitly to records and materials maintained by persons "acting for" an educational agency or institution. In so doing, FERPA recognizes that educational agencies or institutions do not necessarily perform all operations and services on an inhouse basis and, in fact, frequently obtain professional, insurance, and other business services in consultation with individuals and organizations outside the institution, such as attorneys, accountants, and collection agents. In short, it is our opinion that FERPA's prior written consent requirement was not intended to and does not prevent institutions from disclosing education records, or personally identifiable information from education records, to outside persons performing professional, business, and related services as part of the operation of the institution. Accordingly, a school district may disclose education records, or personally identifiable information from such records, to a consulting agency without prior written consent if that agency is performing a service for the school district that it would otherwise have to perform for itself.

FERPA establishes certain recordkeeping requirements regarding requests for access to and disclosures of education records. In this regard, FERPA states:

Each educational agency or institution shall maintain a record, kept with the education records of each student,



which will indicate all individuals [except as provided below], agencies, or organizations which have requested or obtained access to a student's education records maintained . by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information . . . .

20 U.S.C. §1232g(b)(4)(A). See 34 CFR §99.32. FERPA also provides that an educational agency or institution does not have to keep a record if the request was from or the disclosure was to: 1) the parent or eligible student; 2) a school official within the educational agency or institution who is determined to have a legitimate educational interest; 3) a party with written consent; 4) a party seeking directory information; or 5) a party requesting or receiving the records as directed by a Federal grand jury or other law enforcement subpoena when the issuing court or agency has ordered that disclose the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed. 34 CFR §99.32(d).

Therefore, under this provision, a school district must record any disclosures made to a billing agent. However, if the consent form used by the school district indicates that information, in addition to being disclosed to the State Medicaid agency, is also disclosed to the specific billing agent for processing purposes, and the school district secures a parent's consent, then no recordation has to be made:

Under §99.31, neither a school district nor a party acting for the school district, such as a billing agent, could disclose education records to the State Medicaid agency to confirm a student's Medicaid eligibility without prior written parental consent. FERPA would not prohibit a consulting agency performing services for a school district from obtaining a list of Medicaid eligible students from the State Medicaid agency and comparing that list with a list of students to whom the school has provided medical services because no improper disclosure of education records would have occurred. However, a school district or a party acting for the school district, such as a consulting agency, could not disclose information from a student's education records to an. outside party in connection with preparing Medicaid claims unless the prior written consent of the parent is obtained. Of course, nothing in FERPA would prevent a school district from obtaining a list of Medicaid eligible students from the State Medicaid agency directly, rather than working through a consulting agency.



Electronic Data Matching

In a June 2, 1997, letter to the WDPI Office of Legal Affairs, Mr. Joseph Kinney states the following:

. . . Kinney & Associates, Inc., is under contract with [Milwaukee Public School System (MPS)] to perform Medicaid billing for school based services. Our responsibilities include determining which students are Medicaid eligible. This eligibility identification activity is carried out through a contractual relationship we have with the EDS, a private company who has a copy of the State's Medicaid eligibility file. For a fee based on time utilizing their inquiry system EDS allows us to search the electronic file of Medicaid eligibles and extract information from records we select. **EDS does not keep any record of the inquiries we make.** The only record they keep is that of the amount of time we are signed on to their system . . . . The use of this blind inquiry process can solve a major problem for the Wisconsin schools. This method allows the schools to concentrate their Medicaid claiming efforts to only the Medicaid eligible portion of their school population and to do so without violating the FERPA confidentiality requirements. [Emphasis provided.]

As explained above, nothing in FERPA would prevent a school district from contracting with a billing agent ("party acting for") for the purposes of confirming a student's Medicaid eligibility and for preparing Medicaid claims for reimbursement. Because, in the scenario presented above, information from student education records is disclosed, without consent, only to the billing agent under contract to the school district and not to the Medicaid agency, FERPA would not prohibit a 'school, or a party acting for the school, from accessing such a data base for the purposes of extracting and matching Medicaid eligibility information with information from student education records.

IDEA Amend to of 1997

Finally, in Dr. Pawlisch' letter of June 25, she notes:

The reauthorization of IDEA has raised additional questions relative to Medicaid billing. Wisconsin law currently permits school districts to bill Medicaid for certain services provided at school to a disabled child pursuant to a child's individualized education program . . . Questions have arisen whether changes in IDEA would now require school districts to bill Medicaid for such services . . . . However, the issue of parent consent remains even if the IDEA mandates school districts to bill Medicaid.



We have consulted with OSEP, and they have advised us of the following. The 1997 Amendments to IDEA require the State educational agency (SEA), through the Chief Executive Officer or the designee of that officer, to ensure that an interagency agreement or other mechanism for interagency coordination is in effect between the SEA and each public agency that is obligated under Federal or State law, or assigned responsibility under State policy, to provide or pay for any services that are also considered special education or related services. See §612(a)(12)(A) and (B). If a public agency other than an educational agency, such as the State Medicaid agency, is obligated under Federal or State law, or assigned responsibility under State policy, to provide or pay for any services that are also considered special education or related services that are necessary for ensuring a free appropriate public education to children with disabilities within the State, that public agency must fulfill that obligation or responsibility, either directly or through contract or other arrangement. See §612(a)(12)(B)(i).

The interagency agreement or mechanism between the SEA and any public agency responsible to provide or pay for special education or related services must include a method for defining the financial responsibility of each agency for providing or paying for special education and related services to ensure a free appropriate public education to children with disabilities. The financial responsibility of the public agencies other than educational agencies, such as the State Medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the LEA. It must also include conditions, terms, and procedures under which a LEA will be reimbursed by other agencies and procedures for resolving interagency disputes. §612(a)(12)(A)(i)(ii) and (iii). If the public agency other than the educational agency fails to provide or pay for the special education and related services, the LEA shall provide or pay for such services to the child so that the child is ensured a free appropriate public education, then obtain reimbursement for the services from the other public agency. §612(a)(12)(B)(ii).

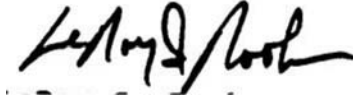
The Department is currently reviewing the above provisions, along with other provisions of the IDEA Amendments of 1997, to determine the extent that guidance in the form of proposed regulations or other types of non-regulatory guidance will be needed. However, the Amendments regarding the obligations of the SEA, LEAs, and other public agencies to provide and pay for services for children with disabilities do not alter the protections afforded under FERPA that prohibit unauthorized disclosure of personally identifiable information contained in education records without parental consent.



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I trust that the above information is helpful to you. Should you have further questions regarding this issue, please do not hesitate to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "LeRoy S. Rooker". The signature is fluid and cursive, with the first name "LeRoy" being more prominent.

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

cc: Dr. Juanita S. Pawlisch  
Assistant Superintendent.

Ms. Phyllis D. Thompson  
Covington & Burling

Mr. Frederick D. Cheney  
Kinney & Associates, Inc.,

Thomas Hehir  
Director  
Office of Special Education Programs