



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR 29 1998

Ms. Linda Garvin
Advocate/FEAT
San Diego North County
213 Sailfish Lane
Oceanside, CA 92054

Dear Ms. Garvin:

This is in response to your letter of November 7, 1997, written to the U.S. Department (Department) of Education's Office of Special Education Programs (OSEP). In that letter, you request clarification under Part B of the Individuals with Disabilities Education Act (IDEA) regarding the presence of non-attorney advocates at an individualized education program (IEP) meeting before the filing of a due process hearing request and regarding the advocates' access to confidential records.

Your questions and OSEP's responses follow.

1. Do School Districts have the right to invite Individuals to IEP [meetings] who are under contract to provide Advocacy and Legal Representation to the School District (District) prior to the filing of a [request for a] Due Process Hearing?

Each child's IEP must be developed at a meeting initiated and conducted by the public agency, which must include parents and school officials. The current regulation governing IEP meeting participants sets forth those individuals who must attend IEP meetings, and provides that the parent(s) and public agency may invite other individuals at their discretion. 34 CFR §300.344(a)(5). The Department has interpreted this provision to mean that "attendance at IEP meetings should be limited to those who have an intense interest in the child." Appendix C to 34 CFR Part 300, (question 20), citing 121 Cong. Rec. S10974 (June 18, 1975) (remarks of Sen. Randolph).

While nothing in the current regulations prohibits legal advocates who meet this criteria from participating in IEP meetings prior to a request for a due process hearing, OSEP

believes that such a practice potentially creates an adversarial atmosphere which can interfere with the development of the child's IEP and the consideration of the child's needs.

I also want to make you aware of a new provision in the statute that will have an impact on your inquiry when it takes effect. The IDEA Amendments of 1997, Pub. L. 105-17 (IDEA '97) contain provisions that revise the composition of the IEP team. §614(d)(1)(B). One such provision limits the individuals invited to IEP meetings at the parent's or agency's discretion to "other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate." §614(d)(1)(B)(vi). Please note that the provisions of prior law governing individualized education programs "shall remain in effect until July 1, 1998," and that the majority of the provisions of IDEA '97 governing IEPs will not take effect until that time. See §201(a) (2) (A) & (C).

Your letter also asks:

2. Do Individuals from outside Agencies have full access to Student Records without parental consent prior to the filing of a [request for a] Due Process Hearing?

Your question requires an interpretation of the confidentiality requirements of the Part B regulations at 34 CFR §§300.560-300.576 and the Family Educational Rights and Privacy Act (FERPA). Part B incorporates and cross-references FERPA at 34 CFR §300.571(b). This question is also similar to one that this office has previously responded to. I am enclosing a copy of my January 17, 1995 letter to Ms. Nancy Diehl regarding how these confidentiality requirements apply to an attorney representing a school system.

In responding to your inquiry, this office has consulted with officials of the Department's Family Policy Compliance Office (FPCO), the office that administers and interprets FERPA and its implementing regulations, 34 CFR Part 99.

FERPA prohibits the improper disclosure of information from education records and generally protects parents' and students' privacy interests in "education records." Records regarding an individual student's disability maintained by an educational agency or institution or by a party acting for the agency or institution, are education records under FERPA. 20 U.S.C. §1232(g). Under FERPA and Part B, the prior written consent of the student's parent or of the eligible student must be obtained

for disclosure of personally identifiable information in education records unless one of the authorized exceptions to the prior written consent requirement is applicable. 34 CFR §§99.30 and 300.571(a)(2) and (b). One such exception is when the disclosure of information from education records is to school officials with legitimate educational interests. 34 CFR §99.31(a)(1).

Each educational agency and institution must provide annual notification regarding how it meets the requirements of FERPA, including a statement indicating that the parent or eligible student has a right to consent to disclosure of personally identifiable information and describing the exception permitting nonconsensual disclosures to school officials with legitimate educational interests, including a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. 34 CFR §99.7(a)(3). Accordingly, an educational agency or institution may disclose information from education records to teachers and other school officials and employees who meet the criteria set forth in the agency's or institution's notice and must restrict access by other school employees who do not fall within an exception unless consent to the disclosures is obtained. Also enclosed for your information is a copy of a Model Notification of Rights under FERPA for Elementary and Secondary Education Institutions.

Generally, if a school official is performing an official task for the agency or institution which requires access to information in student education records, FPCO has interpreted FERPA to mean that such an official is said to have a legitimate educational interest. Additionally, FERPA's privacy protections are extended explicitly to records and materials maintained by persons "acting for" an educational agency or institution, such as a party contracting with an educational agency or institution. FERPA's prior written consent requirement was not intended to and does not prevent agencies and institutions from disclosing education records to outside persons performing professional, business, and similar services related to the agency or institution's mission that it otherwise would provide for itself. Therefore, FERPA would permit the disclosure of information from education records to an outside physician, for example, who is under contract with the District to provide certain services. However, that physician would be under the same duty not to disclose personally identifiable information without prior consent.

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For further information regarding the requirements of FERPA, you may wish to contact FPCO at the following address and telephone number:

Mr. Leroy Rooker, Director
Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605

Telephone: (202) 260-3887

We hope that you find this explanation helpful. If you would like further assistance, please contact Ms. Ellen Safranek, the California State contact in the Monitoring and State Improvement Planning Division, at (202) 205-9131.

Sincerely,



Thomas Hehir
Director
Office of Special Education
Programs

Enclosure

cc: Alice Parker, Ed.D.
California State Department
of Education