

NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to FERPA@ed.gov.

October 18, 1999

[Letter to Parent]

Dear [Parent]:

This is in response to your May 25 complaint form, May 27 letter, and July 28, 1999, facsimile to the Family Policy Compliance Office. You have alleged that the Applewild School (Applewild) violated your rights under the Family Educational Rights and Privacy Act (FERPA) when it failed to provide you access to some of your son's education records in response to your requests. You also allege that Applewild destroyed some of your son's education records while your request for access to the records was pending. This letter also responds to your September 9, 1999, letters to General Counsel Judith Winston and Mr. Richard Mellman of the Office of General Counsel.

This Office administers FERPA. FERPA is a Federal law that gives 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 contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. § 1232g; 34 CFR § 99.3. Under FERPA, an educational agency must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days of the receipt of a request. Also, while an educational agency is not required by FERPA to maintain particular records, it may not destroy education records when there is an outstanding request by a parent to inspect and review such records. 34 CFR § 99.10(e).

Based on the information you have provided us, it appears that Fitchburg Public Schools (District) is making non-monetary services and benefits available to teachers and students at Applewild under Title II and Title VI of the Elementary and Secondary Education Act (ESEA). Specifically, attachment 7a of your FERPA complaint includes a copy of a September 16, 1998, letter from the District to Applewild. This letter announced the availability of funds under Title-II (Eisenhower Professional Development) and Title VI (Innovative Education Program Strategies) of the ESEA. However, the letter also clarifies that the District was not proposing to provide these funds to Applewild. Rather, the District informed Applewild of the amount of funds that it had set aside for materials that, upon Applewild's application, would be made available to the school's teachers and students.

This distinction is important. Sections 14503(a) and (b) of the ESEA require all public school districts, after timely meaningful consultation with officials of private schools located in areas

the school districts serve, to provide private school teachers and students equitable services under Title II and VI. 20 U.S.C. §§ 8993(a) and (b). We read Attachment 7a as evidence that the Fitchburg Public Schools had met this responsibility.

Beyond this, section 14503(d) of the ESEA requires that the school district must retain control of the funds used to provide these services (as well as title to materials and equipment, and property purchased with these ESEA program funds). We are unable to read the September 18, 1998, letter from the District to Applewild as evidence that Applewild ever received any federal program funds. (This conclusion is consistent with my understanding of a phone call you had with Mr. Mellman. During the call, you told him that you had revised your claim to be based on Applewild's receipt of services, not the funds themselves.)

Nevertheless, it is understandable that the wording of the District's September 16, 1998, letter suggested to you that Applewild be subject to FERPA. Moreover, I understand that providing-Title II and Title VI funded services for Applewild's teachers and students certainly appears to be the equivalent of providing direct funding to the school. However, the ESEA and FERPA clearly distinguish between a school district's provision of equitable services to private school teachers and students, and its making program funds directly available to the private school.

As you noted in your September 5, 1999, letter to Senator Kerry, FERPA applies to educational agencies and institutions **to which funds have been made available** under any program administered by the U.S. Department of Education (Department). In addition, FERPA applies only to institutions that "provide educational services or instruction, or both, to students" and to agencies that "provide administrative control of or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions." 34 CFR § 99.1(a). As noted above, the Department considers funds to be made available to an educational agency or institution only if there is a payment of federal money to a particular institution. In sum, because the District is setting aside funds for services to private school teachers and students, rather than providing funds to Applewild, it is not subject to FERPA.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to your concerns.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Senator John Kerry