

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.

November 4, 2002

Mr. George P. Dowaliby, Chief
Bureau of Special Education and Pupil Services
Connecticut State Department of Education
25 Industrial Park Road
Middletown, Connecticut 06457

Dear Mr. Dowaliby:

This is in follow-up to your recent discussions with JoLeta Reynolds, Office of Special Education Programs (OSEP), and Ellen Campbell of my staff, regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) to certain disclosures of personally identifiable information on students in response to a settlement agreement in a class action lawsuit. On May 22, 2002, the United States District Court for the District of Connecticut entered an order approving all the terms of the settlement agreement in P.J. et al. v. State of Connecticut Board of Education, et al., Docket No. 2:91CV00180(RNC). 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. We have coordinated with OSEP in providing this response to you. As explained more fully below, we believe that the Connecticut State Department of Education (CSDE) may comply with the requirements of the settlement agreement, without violating FERPA, if certain conditions are met.

You have explained that, as part of the court ordered and approved settlement, the CSDE is required to disclose certain information about members of the class with the classmembers' attorneys. Additionally, a prior protective order was entered by the Court in the case (dated December 11, 1992) which prohibits the classmembers' counsel from further disclosing personally identifiable information regarding classmembers to other parties. You state that the information that will be shared may include the student's name, address, date of birth, grade, school, data collected by the CSDE on the time the student spends with nondisabled peers, and information about the student's educational program and activities.

From the information you provided this Office, it also appears that, under the February 28, 2002, settlement agreement, the CSDE agreed to prepare and distribute to the parties and the court, and update regularly, a list of public school students in the State who on or after December 1, 1999, carry the label of "mental retardation" or "intellectual disability" and who are eligible for special education. The agreement also allows plaintiffs to challenge the accuracy of the list and to collect data regarding these students. CSDE has agreed to cooperate with the plaintiffs to gain

access to data and files relating to class members, “to the extent allowed by state and federal statute,” for all purposes related to the enforcement and implementation of the agreement. Plaintiffs’ rights to the data end when the court terminates its jurisdiction over the matter, which may continue for up to eight years after establishment of an expert advisory panel (EAP).

The Individuals with Disability Education Act (IDEA) assigns responsibility to State educational agencies (SEAs) for ensuring that the requirements of IDEA are met and that all educational programs for children with disabilities, including all such programs administered by any other State or local agency, are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities and that these programs meet the educational standards of the SEA. State support and involvement at the local level are critical to the successful implementation of IDEA. In fact, the IDEA statute, in relevant part, states the following:

- (a) IN GENERAL- A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

* * * * *

(11) STATE EDUCATIONAL AGENCY RESPONSIBLE FOR GENERAL SUPERVISION-

(A) IN GENERAL- The State educational agency is responsible for ensuring that-

(i) **the requirements of this subchapter are met**; and

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency-

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency.

(B) LIMITATION- Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) EXCEPTION- Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

20 U.S.C. § 1412(a)(11). (Emphasis added.)

FERPA is a Federal law that protects a parent’s privacy interest in his or her child’s “education records.” In particular, FERPA provides that an educational agency or institution may not have a policy or practice of denying parents the right to: inspect and review their children’s education records; seek to amend education records; or consent to the disclosure of information from education records, except as provided by law. The term “education records” is 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.” Moreover, the records of a student which pertain to services provided to that student under IDEA 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.

As a practical matter, FERPA generally would not apply to the records of an SEA. This is because FERPA defines “education records” as information directly related to a “student,” which itself is defined as excluding a person who has not been in attendance at the educational agency or institution. 20 U.S.C. § 1232g(a)(4) and (a)(6). Since students generally are not in attendance at an SEA, it follows that FERPA does not generally apply to the SEA’s records. However, FERPA does provide parents with the right to inspect and review education records maintained by the SEA within 45 days of receipt of a request. 20 U.S.C. § 1232g(a)(1)(B).

FERPA permits educational agencies and institutions, such as LEAs and their constituent schools, to disclose education records to SEAs and other State educational authorities without a parent’s prior written consent under certain conditions. The most common exception that relates to disclosures to a State educational authority is found in 34 CFR § 99.31(a)(3) and § 99.35. Under this exception to the prior written consent provision, an educational agency or institution may disclose education records, or personally identifiable information from such records, without prior written consent, when the disclosure is, subject to the requirements of § 99.35, to authorized representatives of State and local educational authorities. 20 U.S.C. § 1232g(b)(3) and (5); 34 CFR § 99.31(a)(3). FERPA provides that disclosures under this exception be made only when authorized representatives of the State or local educational authority are conducting an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs. Disclosures by LEAs to SEAs with regard to students receiving services under IDEA fit the condition concerning the enforcement of or compliance with Federal legal requirements which relate to a Federal education program.

Although FERPA provides that a third party receiving personally identifiable information from education records may redisclose the information on behalf of the agency or institution under certain conditions, without prior written consent, this provision does not generally apply to SEAs. That is because FERPA provides that information from education records which is disclosed to authorized representatives of State educational authorities must be protected in a manner that does not permit personal identification of individual students by anyone except the officials identified in 34 CFR § 99.31(a)(3) and must be destroyed when no longer needed for the purposes for which it was collected. 20 U.S.C. § 1232g(b)(3); 34 CFR § 99.35.

Another exception that applies to educational agencies and institutions, such as LEAs, permits the nonconsensual disclosure of education records when the disclosure is made in compliance with a lawfully issued subpoena or court order if the educational agency or institution makes a reasonable attempt to notify the parent or eligible student of the order or subpoena in advance of

compliance. 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9). Section 99.32 of the FERPA regulations generally requires that an educational agency or institution maintain a record of all requests for access to and disclosures from education records. However, such recordation would not be required when the disclosure was made in compliance with a judicial order or subpoena, so long as the school was successful in its attempt to notify the parent or eligible student of the order or subpoena in advance of compliance.

The regulations also provide that the general limitations on redisclosure under 34 CFR § 99.33 do not apply to records that have been disclosed pursuant to a court order or lawfully issued subpoena. Once an institution determines that the subpoena or judicial order is valid and makes a reasonable attempt to provide advance notice in sufficient time to allow the parent or eligible student to take appropriate action, the institution is not responsible for taking any further action to protect the records against redisclosure. In your situation, however, a prior protective order was entered by the court in the case, prohibiting further disclosure of personally identifiable information regarding classmates to other parties without prior written authorization from CSDE or the court.

CSDE and certain local school districts were named as defendants in the litigation and are represented as parties to the settlement agreement. We view CSDE as acting as agent for all school districts that are required to report information about special education students under the specific terms of the settlement agreement inasmuch as only school districts maintain the necessary information. FERPA would allow school districts to use CSDE as their agent for purposes of disclosing personally identifiable information from education records, without consent, in accordance with the terms of the settlement agreement under § 99.31(a)(9) of the regulations. CSDE or the school districts must comply with the notice requirements in § 99.31(a)(9) in advance of disclosing any information. The notice should allow sufficient time to permit the parent or eligible student to take appropriate action. If they are not successful in their attempts to notify parents as required, then the school district must record the disclosure as required under § 99.32 of the regulations.

I trust this is responsive to your inquiry and adequately explains the scope and limitations of FERPA, as it applies to your situation.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: JoLeta Reynolds
OSEP

