



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INNOVATION AND IMPROVEMENT

February 2, 2006

Ms. Karen S. Feuchtenberger  
Assistant Counsel  
Commonwealth of Pennsylvania  
Department of Education  
333 Market Street  
Harrisburg, Pennsylvania 17126-0333

Dear Ms. Feuchtenberger:

This responds to your letters dated November 22, 2004, and June 6, 2005, in which you asked for guidance about the disclosure of records of special education students under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. This Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations, which are codified at 34 CFR Part 99.

Your November 22, 2004, letter explains that under the Pennsylvania Charter School Law (CSL), a student's school district of residence is obligated to pay a charter school a proportional share of State public education subsidy payments if the student attends at a charter school instead of a district public school. The CSL provides a formula used to calculate State funding for charter schools. Under that formula, the subsidy rate for special education students substantially exceeds the regular education rate.

According to your letter, charter schools send school districts an invoice for each attending student who is a resident of that district. The invoice states whether the charter school should be reimbursed at the regular or special education rate. If the charter school seeks payment at the special education rate, it provides the district of residence with a copy of the cover sheet of the student's individualized education program (IEP), a one-page form that contains identifying information including the student's name and address, information about the student's parents or guardians, the student's date of birth and school, and the names of the student's IEP team members but excludes information about "the student's diagnosis, clinical condition, and medication history." You stated that "[r]eceipt of the IEP cover sheet triggers the district's obligation to pay at the special education rate for the identified student," citing 22 Pa. Code §711.9(a)(2), which provides:

The child's school district of residence shall provide the special education payment required by section 1725-A(a)(3) of the act (24 P.S. § 17-1725-A(a)(3)) to the charter school either when:

- (1) A child with an IBP from a school entity in this Commonwealth begins attending the charter school.
- (2) The charter school has identified an enrolled child as a child with a disability under the IDEA [Individuals with Disabilities Education Improvement Act], has developed an IEP for the child, and *notifies the district of residence of the identification.*

(Emphasis added.) You added that some school districts are reluctant to pay at the higher, special education rate based only on receipt of the IEP cover sheet, particularly when the student was previously enrolled in the school district and was not identified as a student with a disability prior to enrollment in the charter school. You indicated that some school districts insist that they be permitted to review the student's complete special education records in order to determine whether the student is, in fact, disabled.

You explained that the Pennsylvania Department of Education (PDOE) has taken the position that school districts are not entitled to view the special education records of a student enrolled at a charter school because the charter school, and not the school district, is the local educational agency (LEA) responsible for providing a free appropriate public education (FAPE). According to your letter, under the CSL (quoted above) "the only responsibility of the school district is to pay the charter school at the special education rate if the charter school has identified the student as a student with a disability who needs special services." You confirmed in subsequent telephone conversations with my staff that PDOE has determined that local school districts have no authority under State law to validate or question a charter school's identification of an enrolled child as a child with a disability under IDEA. However, school districts nevertheless assert that they have a right to condition payment at the higher, special education rate on the production of the child's entire special education records. You asked whether, in the absence of parental consent, a school district may view special education records maintained by a charter school when, in the school district's judgment, the records are essential to validate the charter school's entitlement to payment of the State subsidy at the higher rate for students receiving special education services.

FERPA applies to an educational agency or institution that receives funds under any program administered by the Secretary of Education. 34 CFR § 99.1(a). We assume for purposes of this discussion that both the charter schools and the local school districts in Pennsylvania are "educational agencies or institutions" subject to FERPA because they provide educational services to students and receive Department funds (including funds under the IDEA), and, therefore, meet the descriptions in § 99.1(a). Parents have a right under FERPA to inspect and review their children's education records and to seek to have them amended in certain circumstances. See 34 CFR Part 99, Subparts B and C. A parent must also provide a signed and dated written consent before an educational agency or institution discloses education records, or

personally identifiable information from education records, except as authorized by law. 34 CFR § 99.30. Exceptions to this requirement are set forth in § 99.31 of the regulations. Under FERPA, an educational agency or institution may disclose education records, without consent, to authorized representatives of "State and local educational authorities" if the disclosure is in connection with the audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs. 20 U.S.C. §§ 1232g(b)(1)(C)(i)(III), (b)(3), and (b)(5); 34 CFR §§ 99.31(a)(3)(iv) and 99.35. In order to meet this requirement, Federal, State, or local law (including valid administrative regulations) must authorize the relevant "State or local educational authority" to conduct the audit, evaluation, or compliance or enforcement activity in question. Further, any personally identifiable information collected by the relevant "State or local educational authority" under this exception must be "protected in a manner that will not permit the personal identification of students and their parents" by other than enumerated officials and must be destroyed when no longer needed for the purposes of the audit or evaluation. 20 U.S.C. §§ 1232g(b)(3) and (b)(5); 34 CFR §§ 99.31(a)(3)(iv) and 99.35.

We will defer to your State Attorney General's determination whether State law authorizes a school district of residence to "audit or evaluate" a charter school LEA's request for payment of State funds at the special education rate and, if so, whether personally identifiable information from students' education records is needed in connection with this audit or evaluation. In this regard, it is not clear to us whether the "notification" provision in 22 Pa. Code § 711.9(a)(2) requires a charter school LEA to identify each individual student for whom it seeks payment at the special education rate or merely to provide the school district of residence with the gross number of students in that category. However, we would defer to a determination by your State Attorney General that 22 Pa. Code § 711.9(a)(2) authorizes a school district of residence to "audit" a charter school's submission for payment of State funds at the higher rate by examining the information contained in a student's IBP cover sheet, as described above, to ensure that the student has been identified as a child with a disability and that the charter school has developed an IEP for the student. This interpretation of State law would permit a charter school LEA to disclose a student's IEP cover sheet, without prior written consent, to the student's school district of residence under §§ 99.31(a)(3)(iv) and 99.35 of the FERPA regulations.

In regard to a charter school LEA's disclosure of a student's entire IEP to the school district of residence, while we will defer to your State Attorney General's interpretation of State law on the matter, it is our understanding that under the CSL the State alone is responsible for supervising charter school LEAs' compliance with IDEA and for the general supervision of special education programs provided by charter school LEAs under the IDEA. 22 Pa. Code §§ 711.2 - 711.4 (2005). This kind of general supervisory authority could permit a charter school LEA to disclose a student's full IEP to the responsible supervising entity (in this case, the State) to permit the supervising entity to review the LEA's determination that a child was in need of special education services, and in that case disclosure would be permissible, without parental consent, under §§ 99.31(a)(3) and 99.35 of the FERPA regulations. However, we are not aware of any State law that authorizes a school district of residence to undertake the type of "audit or evaluation" of a charter school LEA that would necessitate the disclosure of a student's entire IEP.

Under 34 CFR §300.600 of current IDEA regulations, the State educational agency must exercise general supervision over all education programs for children with disabilities administered within the State and must ensure that those programs meet State standards and the requirements of Part B of IDEA. Consistent with this general supervisory responsibility, the SEA designates the public agency or school district in the State that is responsible for ensuring the provision of FAPE to disabled students, and the SEA generally assigns this responsibility to only one agency. It is our understanding that in Pennsylvania, the charter school, not the district of residence, is the public agency responsible for ensuring the provision of FAPE to disabled students attending the charter school. As such, there is no authority under IDEA to allow a school district in the State that is not responsible for ensuring the provision of FAPE to the students in question to review or otherwise challenge the disability determination made by the responsible school district. We are not aware of any other basis on which the school district of residence may conduct an "audit or evaluation" under IDEA, or seek compliance with, or enforcement of, Federal legal requirements in IDEA, that would justify a charter school LEA's disclosure of a student's entire IEP to the school district of residence without parental consent.

In summary, we are unaware of any authority in State or Federal law that would permit a charter school LEA to disclose to the school district of residence the student's entire IEP. Therefore, we conclude that the charter school may disclose only the personally identifiable information contained in a student's IEP cover sheet to the school district of residence under the exception to consent contained at §§ 99.31(a)(3)(iv) and 99.35 of the FERPA regulations (assuming your State Attorney General interprets State law as described above).

We would also like to clarify that the disclosure of a student's IEP cover sheet cannot be characterized as a "directory information" disclosure under FERPA, as suggested in footnote 1 of your letter. This Office has consistently advised that a student's receipt of special education services is the type of information that generally would be considered "harmful or an invasion of privacy if disclosed" and, therefore, may not be designated and disclosed as "directory information" under FERPA. 20 U.S.C. § 1232g(a)(5)(A); 34 CFR § 99.3 ("Directory information.")

Finally, Federal officials responsible for the administration of IDEA have advised that a student with a disability attending a charter school must receive the special education and related services and supports identified in the student's IEP. As provided in 34 CFR § 300.301(c), the State must ensure that there is no delay in implementing a student's IEP, including any case in which the payment source for providing or paying for special education and related services to the student is being determined. See also 34 CFR Part 76, Subpart H (allocation of federal formula funds to charter schools).

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

Sincerely,

/s/

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

cc: Troy Justesen, Director  
Office of Special Education Programs  
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Dean Kern, Director  
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