

December 23, 2004

Jerome D. Schad, Esq.  
Hudson Russ LLP, Attorneys  
One M&T Plaza, Suite 2000  
Buffalo, NY 14203-2391

Dear Mr. Schad:

This responds to your letter of May 21, 2004, in which you raised questions on behalf of public school districts you represent regarding compliance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. The Family Policy Compliance Office (Office) administers FERPA and provides technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations codified at 34 CFR Part 99.

As stated in your letter, parents of children with disabilities who initiate a due process hearing under Part B of the Individuals with Disabilities Education Act (Part B), 20 U.S.C. § 1415(f)(1), have a right to open the hearing to the public pursuant to 34 CFR § 300.509(c)(1), as well as a parallel New York State provision at 8 N.Y.C.R.R. § 200.5(i)(3)(viii). Your letter indicates that under the common law of New York (and most states), the right to maintain a closed proceeding, once waived, is waived forever, and thereafter all testimonial and documentary information disclosed in the proceeding becomes “public records” subject to New York’s Freedom of Information (FOI) law, which is contained in the Public Officers Law, Article 6, §§84-96, 46 McKinney’s (2001). You noted further that under both State and federal law, once a party waives a privilege protecting documents from disclosure, the privilege is lost forever and cannot be reasserted. In light of the preceding, you asked what a public school district must do regarding further disclosure of the testimony and evidence from a due process hearing in the following circumstances:

An individual from a news media organization requests, under state law, the right to inspect and copy the **transcript of the testimony of witnesses** from the due process proceeding, regarding which the parent has exercised their right, pursuant to 34 C.F.R. § 300.509(c)(1)(ii), to “[o]pen the hearing to the public.”

An individual from a news media organization requests, under state law, the right to inspect and copy **each exhibit marked [which include educational records] in evidence** in the due process proceeding, regarding which the parent has exercised their right, pursuant to 34 C.F.R. § 300.509(c)(1)(ii), to “[o]pen the hearing to the public.”

Once educational records become “exhibits admitted into evidence” in a due process hearing open to the public and testimony is taken in the open hearing, is the school district’s disclosure of the exhibits in evidence and the hearing transcript a violation of FERPA?

FERPA applies to an educational agency or institution that receives funds under any program administered by the Secretary of Education, which includes virtually all public school districts in the United States. 34 CFR § 99.1. It provides that parents and eligible students (i.e., those that are 18 years of age or attending a postsecondary institution) have a right to inspect and review the student's education records and to seek to have them amended in certain circumstances. FERPA also provides that an educational agency or institution may not have a policy or practice of disclosing personally identifiable information from education records without the prior written consent of a parent or eligible student except as specified by law. "Education records" are defined as records that contain information that is directly related to a student and are maintained by an educational agency or institution subject to FERPA, or by a party acting for such an educational agency or institution. 34 CFR § 99.3.

An agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B is a "participating agency" subject to the Part B Confidentiality of Information requirements codified at 34 CFR §§ 300.560 – 300.577. See 34 CFR § 300.560(c). These requirements contain many of the same provisions that exist in FERPA and apply, along with FERPA, to any public school district that provides Part B services to students.

Under Part B regulations, a parent or a public agency may initiate a "due process" hearing relating to the identification, evaluation or educational placement of a child with a disability, or the provision of free appropriate public education (FAPE) to the child. 34 CFR § 300.507(a). We assume that for purposes of your inquiry the public agency directly responsible for the education of the child, i.e., a public school district, has conducted the Part B hearing as provided under 34 CFR § 300.507(b) and maintains transcripts of witnesses' testimony and exhibits from those proceedings. Transcripts and exhibits from a Part B due process hearing that are maintained by a public school district subject to FERPA qualify as "education records" if they contain information that is directly related to a student.

Under FERPA, a parent (or eligible student) must provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from a student's education records. Assuming that the transcripts and exhibits from the Part B due process hearing are "education records" (because they contain information directly related to a student), a public school district that maintains these records may not disclose them in response to a State FOI request without the parent's prior written consent even if they were created or submitted into evidence in a hearing that was open to the public at the parent's request.

The common law standards that you identified regarding the waiver of privileges to maintain a closed proceeding and to keep certain information confidential are derived from and apply to public courts and judicial proceedings. Like rules of evidence and other court rules, however, these standards do not apply to non-judicial authorities, such as a public school district, unless they have been specifically adopted or imposed by an appropriate governing authority. We are aware of no legal requirement, and certainly none in FERPA or the Part B Confidentiality of Information provisions, that would permit a public school district to disclose education records

without prior written consent on the grounds that the records were derived from or admitted into evidence in an open due process proceeding. News media organizations may indeed have grounds to obtain records maintained by a *court* that conducted a hearing in which a party waived privileges to keep the information confidential. However, there is no basis in FERPA or Part B for concluding that education records maintained by a school district may be disclosed without prior written consent because a parent previously permitted them to be submitted into evidence at an open public hearing, or that transcripts of the district's open hearing that contain information directly related to a student are not entitled to protection as education records under FERPA.

I trust that this adequately explains the scope and limitation of FERPA as it relates to your concerns.

Sincerely,

/s/

LeRoy S. Rooker

Director

Family Policy Compliance Office

cc: Edward Anthony, Office of Special Education and Rehabilitation Services