

Colorado Department of Education
Decision of the Federal Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA)

Federal Complaint 2005:503

El Paso County SD No. 11

Decision

I. INTRODUCTION

This Complaint was dated and received, by hand delivery, March 4, 2005. On March 21, 2005, the complainants' submitted an additional document as a part of their Complaint – a copy of a one page article dated October 26, 2004 obtained from the online archives of *The Gazette*, a Colorado Springs newspaper. The document indicated that the article had been written by a member of the El Paso County SD No. 11's school board. The complainants indicated that a copy of this document had been provided to the school district's Executive Director of Special Education, and the Federal Complaints Officer confirmed by telephone call of March 22, 2005, to the school district's legal counsel, that the school district had a copy of this document.

The school district's response to the Complaint was dated April 14, 2005, and received by the Federal Complaints Officer by fax on April 14, 2005, and by Federal Express mail delivery on April 15, 2005. The complainants' response to the school district's response to their Complaint was dated May 2, 2005, and was received by fax on the same date, and by regular mail on May 3, 2005. The Federal Complaints Officer then closed the record. Subsequently, on May 9, 2005, the Federal Complaints Officer had a telephone conversation with the school district's legal counsel. However, as is indicated by the Federal Complaints Officer's findings in this Decision, the Federal Complaints Officer determined that this conversation did not require further submissions, oral or written, from either the school district or legal counsel for the complainants.

The school district's legal counsel requested an extension of time for filing the school district's response to this Complaint due to an upcoming spring break within the school district; and to afford legal counsel time to meet with the school board to determine appropriate legal representation for the board; and to afford legal counsel time to clarify the response status to the Complaint of the school district and individual school board members. The complainants, who are the parents of the student who is the subject of this complaint, agreed to the extension. The mother of this student, who is one of the complainants, is a member of the El Paso County SD No. 11 school board. The Federal Complaints Officer granted the school district an extension of time until April 15, 2005 within which to submit its response to the Complaint. Because of this extension, and because of the complexities of this Complaint, the Federal Complaints Officer finds exceptional circumstances for extending the time period for deciding this Complaint.

II. COMPLAINANTS' ALLEGATIONS

The complainants allege that the school district, by actions of two of its school board members, and by an alleged inappropriate release to one of these board members of an alleged *education record*, and by an alleged release, by email, by authority of the superintendent, of the information in this alleged *education record* to other school board members, violated their daughter's right, and their right, to privacy under relevant law. The complainants' daughter is a student within El Paso County SD No. 11 who is covered by the requirements of the Individuals with Disabilities Education Act (IDEA). The law that the complainants allege that the school district has violated, as clarified by the Federal Complaints Officer in his letter to the Executive Director of Special Education in El Paso County SD No. 11, dated March 10, 2005, which included a copy of the Complaint, are confidentiality provisions in the Family Educational Rights and Privacy Act of 1974 (FERPA) and its implementing regulations, and in the IDEA statute and its implementing regulations. FERPA is incorporated by reference in the IDEA. Rule 6.01 of the Colorado Rules for implementing Colorado's Exceptional Children's Educational Act (ECEA) recites similar provisions; as does Colo. Rev. Stat. 22-1-123.

U.S.C. 20 §1412(a)(8) and §1417(c), cited by the complainants, are sections of the IDEA statute which impose a duty on appropriate educational entities to maintain the confidentiality of *personally identifiable information* contained in *education records* of the student under the authority of those entities. U.S.C. 20 §1417(c) incorporates by reference the provisions of FERPA, found at U.S.C. 20 §1232g. The IDEA regulations, implementing the IDEA statute, state, at 34 C.F.R. § 300.571, entitled **Consent**, that:

- (a) Except as to disclosures addressed in section 300.529(b) for which parental consent is not required by Part 99, parental consent must be obtained before *personally identifiable information* is –
 - (1) Disclosed to anyone other than officials of participating agencies collecting or using information under this part, subject to paragraph (b) of this section; or
 - (2) Used for any purpose other than meeting a requirement of this part.
- (b) An educational agency or institution subject to 34 CFR part 99 may not release information from *education records* to participating agencies without parental consent unless authorized to do so under part 99.
- (c) The SEA shall provide policies and procedures that are used in the event a parent refuses to provide consent under this section. Italics added by the Federal Complaints Officer.

Part 99 refers to the FERPA regulations. SEA means state educational agency. The Federal Complaints Officer interprets these IDEA regulatory consent provisions to be consistent with the language of the IDEA statute at U.S.C. 20 §1439(a) (2). The Federal Complaints Officer also interprets these IDEA regulatory consent provisions to be consistent with the consent requirements of the FERPA statute at 20 U.S.C. §1232g (b) (1). The Federal Complaints Officer further interprets these IDEA regulatory consent provisions to be consistent with the FERPA regulations at 34 C.F.R. § 99.30(a) which state that “[t]he parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses *personally identifiable information* from the student's records...” Italics added by the Federal

Complaints Officer. It is undisputed in this Complaint that the parents of the student who is the subject of this Complaint provided no written consent for release of *personally identifiable information* contained in *education records*.

The definition of *education records* in the FERPA regulations, while not verbatim with the FERPA statutory definition, is consistent with that definition. The FERPA statute does not provide a definition of *personally identifiable information*. The FERPA regulations do provide such a definition. The FERPA regulations define *education records* as those records “[d]irectly related to a student; and ... [m]aintained by an educational agency or institution.” C.F.R. 34 § 99.3(a). And, also at 34 C.F.R. § 99 of the FERPA regulations: “Record means any information recorded in any way, including but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”

The FERPA regulations, at 34 C.F.R. § 99.3 state that *personally identifiable information* includes, but is not limited to:

- (a) The student’s name;
- (b) The name of the student’s parent or other family member;
- (c) The address of the student or student’s family;
- (d) A personal identifier, such as the student’s social security number, or student number;
- (e) A list of personal characteristics that would make the student’s identity easily traceable; or
- (f) Other information that would make the student’s identity easily traceable.

The IDEA statute contains no definition of *education records* or *personally identifiable information*. The IDEA regulations, at 34 C.F.R. § 300.560(b), incorporates by reference the FERPA regulatory definition of *education records*. The IDEA regulations at 34 C.F.R. § 300.500(b) (3) defines *personally identifiable information* as:

- (i) The name of the child, the child’s parent, or other family member;
- (ii) The address of the child;
- (iii) A personal identifier, such as the child’s social security number or student number; or
- (iv) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

The complainants allege that the school district released *education records*, containing *personally identifiable information*, regarding their daughter, in the custody of the school district, without their written consent, to a school board member, and, by later email, the information contained in these records to all school board members, in violation of FERPA and the IDEA. The complainants also allege that the school board member who obtained the *education records*, and another school board member, further released the *personally identifiable information* in the *education records* to the public. The complainants base these allegations on factual allegations that:

- one school board member obtained a copy of a personnel contract [purchase order] that the school district had with an employee that provided tutoring services to their daughter;
- two school board members made statements at public school board meetings during the time period September 22, 2004 through February, 2005 that violated IDEA and FERPA with regard to the complainants and their daughter;
- one school board member had an editorial, dated October 26, 2004, published in *The Gazette*, a Colorado Springs newspaper, that contained information that violated IDEA and FERPA with regard to the complainants and their daughter;
- one school board member participated in a radio call in show on October 15, 2004, in which he made statements that violated IDEA and FERPA with regard to the complainants and their daughter;
- all school board members, in response to an open records request from one of these two school board members, received an email from the school district's superintendent, dated December 1, 2004, that violated IDEA and FERPA with regard to the complainants and their daughter;
- one school board member publicly released an email dated January 5, 2005 that violated IDEA and FERPA with regard to the complainants and their daughter;
- editorials by *The Gazette* published between January 20, 2005 and January 23, 2005, including a cartoon published on January 22, 2005 contained information received by the newspaper, from two school board members, that violated IDEA and FERPA with regard to the complainants and their daughter;
- these editorials resulted in information being received by students and parents that violated IDEA and FERPA with regard to the complainants and their daughter;
- two school board members made inappropriate requests of the school district for information that violated IDEA and FERPA with regard to the complainants and their daughter.

III. SCHOOL DISTRICT'S RESPONSE

The school district denies any violation of law. The school district argues:

- (i) the District was permitted, if not required, to disclose the purchase order and the information in [the superintendent's] email to individual members of its Board, including [one of the two board members alleged to have acted in violation of IDEA and FERPA] ;
- (ii) neither the purchase order nor [the superintendent's] e-mail was an *education record* and neither contained *personally identifiable information* about [the student]; and
- (iii) at no time did the District disclose the purchase order or [the superintendent's] e-mail to any individuals outside of the District. School District's Response at page 4. Italics added by the Federal Complaints Officer.

The school district states:

After learning from Director [the complainant, a school board member, and the student's mother] that the District was paying for [the student's] private tutoring,

the parents with whom Director [the complainant, a school board member, and the student's mother] had met in the spring of 2004 contacted District Board member, [proper name], to complain that their children should also receive district-paid private tutoring, just like Director [the complainant, a school board member, and the student's mother] child. ... In or around October 24, [one of the two school board members alleged to have acted in violation of IDEA and FERPA] requested from the District a copy of "P.O. #SD11-C2005-0018 with [the name of the person with whom the school district contracted]". In response to the request, the District's Procurement Department provided [the school board member] with a copy of a purchase order, indicating that [the name of the person with whom the school district contracted] would provide support for a "special needs student" from July 1, 2004 until December 2004 and would be paid a total of \$4950.00. Neither [the student's] name, address, her parents' names nor any other personally identifiable information appears on the purchase order. When asked by parties outside of the District, including the media, to identify the student subject to the purchase order, the District declined to do so. School District's Response at pages 2 and 3.

The school district further states:

With the exception of the purchase order, all information distributed by [the two board members alleged to have violated IDEA and FERPA on behalf of the school district] came from sources outside of the District, including the parents of dyslexic children referenced above and individuals calling in to the radio talk show on which [name of board member] appeared as a guest.

The school district also argues that Colo. Rev. Stat. Section 22-32-103, which states at subsection (2) that "[e]ach school director shall have access to all school records at all times" is authority for the school district's disclosure of the purchase order to the school board member. In addition, the school district cites the FERPA statute at 20 U.S.C. § 1232g (b) (1) (A), as authority that, even if the purchase order could be construed as an *education record*, the school district was entitled to disclose it to the school board member to whom it was disclosed since he was a school official with "legitimate educational interests", as allowed by 20 U.S.C. § 1232g (b) (1) (A) of FERPA. As for *personally identifiable information* that might have been disclosed independent of these sources, the school district argues:

FERPA's prohibition against disclosure of *personally identifiable information* from *education records* does not extend to information derived from a source independent of such records, even if it is the very same information contained therein. In Frasca v. Andrews, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979), the court stated "Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records." Similarly, in Daniel S. v. Bd. of Educ. of York Cmty. High Sch., 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001), the court, citing Frasca stated that "FERPA does not protect information which might appear in school records but would also be [']known by members of the school community through

conversation and personal contact[?]. School District's Response at page 6. Italics added by the Federal Complaints Officer.

And, even if the two school board members did act inappropriately they did so, argues the school district, without the authority of the school district. "Unlike employees, the District has no authority to control the actions of individual Board members, and should not be held responsible for their unauthorized actions." School District's Response at page 8.

IV. FINDINGS AND DISCUSSION

IDEA, FERPA, and controlling court case law in Colorado, do not make clear whether the disclosure by school districts of *personally identifiable information*, whether or not contained in *education records*, obtained from a source independent of *education records*, requires appropriate parental or student consent, in order to avoid being a disclosure precluded by IDEA and FERPA. The Federal Complaints Officer finds that a finding cannot be made that disclosure of information not contained in *education records* is precluded by IDEA and FERPA, consistent with the statutory and regulatory schemes of IDEA and FERPA. IDEA and FERPA contemplate a nexus between *personally identifiable information* and *education records*. The preclusion contemplated by IDEA and FERPA is one in which *education records* of a student, containing *personally identifiable information* about that student, are precluded from being released, without appropriate parental or student consent. If it is to be determined that the release, without appropriate parental or student consent, of *personally identifiable information*, not contained in *education records*, is to be precluded by IDEA and FERPA, then appropriate legal authority will have to determine whether, and if so, with what, such *personally identifiable information* will have to be associated in order to be precluded. However, this does not mean that a school district, or its representatives, can avoid the non-disclosure requirements of IDEA and FERPA by claiming that *personally identifiable information* that would have otherwise been precluded from disclosure in *education records*, is not precluded from disclosure simply because it exists in a source separate from the student's *education records*, where the school district or its representatives knows, or should know, that such *education records* information exists.

While there is no controlling court case law in Colorado available to the Federal Complaints Officer as precedent for deciding this Complaint, the Federal Complaints Officer has determined that there is authority that he is bound to follow. That authority is the Family Policy Compliance Office (FPCO). The FPCO is the federal regulatory office for enforcing FERPA, provided for beginning at 34 C.F.R. § 99.60, under the authority directed by Congress at 20 U.S.C. §1232g (g). 20 U.S.C. §1417(c) of the IDEA requires, as interpreted by the Federal Complaints Officer, that the confidentiality provisions of the IDEA be enforced in accord with FERPA. The Federal Complaints Officer interprets this to mean that while the IDEA may grant confidentiality rights in excess of those granted by FERPA, it cannot restrict those rights as granted by FERPA.

In *Greater Hoyt (SD) School Board*, 20 IDELR 105 (FPCO 1993) (hereinafter cited as *Hoyt*), the FPCO found that a local school board could be found to have violated FERPA, notwithstanding a potential conflict with state law.

The FPCO stated:

FERPA establishes requirements with which a recipient must comply if it desires to continue receiving certain Federal education funds; it does not act to preempt conflicting state laws. Thus, FERPA does not prohibit application of SDCL 13-8-35 [a South Dakota law cited by the school board in support of their argument that they were required to make public certain portions of a student's *education records*]. However, if the Board discloses *personally identifiable information* from *education records* without prior written consent, the Board will violate FERPA and jeopardize its continued receipt of Federal education funds. *Hoyt* at p. 106, parenthetical information, and italics, added by the Federal Complaints Officer.

The FPCO's decision in *Hoyt* was primarily directed at the actions of an entire school board, and not individual members. However, one of the allegations made by the parents, that was found by the FPCO to be a FERPA violation, was directed at disclosures made by the school board president and another individual school board member. This allegation was that the school board president and another board member had disclosed financial information, and other details, about the student's educational placement to reporters. The placement was out of state and was costing the school district about \$100,000.00 a year. This information, disclosed to the press by these school board members, subsequently appeared in the January 18, 1992 edition of the *Sioux City Journal*. While the FPCO in *Hoyt* does not make clear whether the actions by these individual board members were consistent with the implied or express authority of the entire school board, the Federal Complaints Officer interprets the FPCO's decision in *Hoyt* to be that these actions violated FERPA, whether or not they were taken with the authority of the entire board.

Thus, while the Federal Complaints Officer does not have authority to address the actions of individual school board members as individuals, he does have authority to address their actions, under the IDEA, and FERPA as incorporated in the IDEA, when they act in their capacity as school board and school district representatives, whether or not these actions are taken with the authority of other school board members or the school district. Moreover, the Federal Complaints Officer finds that he has the authority to determine whether the school board as a whole, and the school district, had the obligation, and, if so, met their obligation, to restrain the actions of individual school board members.

Hoyt finds FERPA violations based upon the release of a variety of *personally identifiable information* from the *education records* of the student including "information that would make the student's identity easily traceable". 34 C.F.R. § 99.3(f). The *education records* from which this *personally identifiable information* was released were primarily the student's Individualized Education Program (IEP), and an addendum to the student's IEP. However, other public releases of *personally identifiable information* were cited by the FPCO as being from *education records* that were maintained independent of the information contained either in the student's IEP or its addendum.

As stated by the FPCO:

Other information released to the newspaper regarding financial reimbursements to [an] out of state program for [the student's] special education appears to have been derived from records, such as receipts or vouchers, that are maintained by the Board. That information is directly related to [the student] and is also a part of his *education record*. *Hoyt* at p. 106. Italics added by the Federal Complaints Officer.

The FPCO in *Hoyt* does not expressly state whether these records bore any information beyond the name of the payee, the purpose of the payments, or the amounts. However, the FPCO quoted the school board, as a part of the school board's argument to the FPCO as to why it should not be found to have violated FERPA, as stating:

The published minutes [referring to published minutes of the school board] simply state the name of the payee, the purpose and the amount. The information does not reference any individual student nor in any manner reflect or infer that the payment is for special education purposes or refer to any information about a student's [IEP]. *Hoyt* at p. 106.

The FPCO in *Hoyt* did not challenge the accuracy of this statement by the school board, and the Federal Complaints Officer accepts it as accurate for the purpose of deciding this Complaint. The purchase order in contention in this Complaint, in the custody of the school district, that was released to a school board member, and the information in it to other school board members by the school district, and subsequently in its entirety by email attachment by the school board member to whom the document was released, and subsequently made public by that school board member, contains the name of the payee, the purpose of the payments, the amounts of the payments, and, in addition to this similar information disclosed by the school board in *Hoyt*, identifies the student as a special needs student.

The Federal Complaints Officer finds that the purchase order in contention in this Complaint is an *education record* containing *personally identifiable information*. He also finds that it was disclosed to an individual school board member, and subsequently to all school board members, in violation of the IDEA and FERPA. He also finds that at least one of the district's school board members further disclosed this information to the public without parental consent in violation of the IDEA and FERPA. These unauthorized disclosures occurred through statements made by a school board member in a call in talk radio show on Colorado Springs KVOR on October 15, 2004; in an editorial to *The Gazette* dated October 26, 2004; in emails forwarded, by one school board member's admission, to the press dated January 5, 2005; and by statements of at least one school board member during the public school board meeting of September 22, 2004. Whether or not there were other violations, the Federal Complaints Officer has determined that these are the violations of FERPA and the IDEA that can be determined based upon the record before him.

The complainants' counsel argues in his response that the school district also violated its own policies since the custodian of records did not inform the superintendent and all board members

of the request for a copy of the purchase order for staff services, and did not release the purchase order for staff services to the superintendent, but instead released it to the individual board member who initiated the request. The school district's counsel stated to the Federal Complaints Officer in a telephone conversation of May 9, 2005 that this process was not in place at the time this purchase order was released to one of the school board members. The Federal Complaints Officer makes no finding on complainants' counsel's allegation because, in any case, he has found that the school district violated the IDEA and FERPA, whether or not the purchase order was appropriately released according to school district policies. Moreover, nothing in the Federal Complaints Officer's findings should be construed as determining that school board members do not have the right to have information disclosed to them that would aid them in determining whether there was wrongdoing within a school district.

The Federal Complaints Officer agrees with the school district's counsel that such a disclosure to school board members is within the "legitimate educational interests" exception of FERPA. However, the exercise of these "legitimate educational interests" by school board members must be done in appropriate compliance with the IDEA and FERPA. The public releases of *personally identifiable information* contained in *education records* by at least one school board member violated the IDEA and FERPA. Thus, what would have otherwise been an allowable disclosure under the IDEA and FERPA, not requiring parental consent, became otherwise when at least one school board member, acting in his capacity as a school board member, and hence a representative of the school district, released this information to the public. The "legitimate educational interests" exception in FERPA does not contemplate the use of information that would otherwise require parental consent, for release as political ammunition by one school board member in a public political duel with another school board member. At a minimum, the school district, and the school board, has a responsibility to not release information under the "legitimate educational interests" exception of FERPA when they know, or should know, that the person to whom they release it is likely to violate the provisions of the IDEA and FERPA. And, at a minimum, if such violation occurs, the school district, and the school board, has a responsibility to take sufficient appropriate action to limit its reoccurrence. It is the finding of the Federal Complaints Officer that this did not happen in this Complaint.

V. REMEDY

Within thirty (30) days of the date of the school district's certified receipt of this Decision, the Director of Special Education for the school district, the Superintendent for the school district, and the School Board for the school district, shall submit to the Federal Complaints Officer a statement of assurance that the school district accepts the findings and Decision of the Federal Complaints Officer. That statement of assurance shall also include an assurance that the school district has policies and procedures in place to avoid future violations of FERPA and the IDEA, and shall include, as necessary, copies of those policies and procedures. The Federal Complaints Officer will determine whether this statement of assurance is timely, and sufficient. The school district's legal counsel is directed to contact the Federal Complaints Officer with any questions the school district has about complying with this Remedy. Should compliance not be obtained, the Federal Complaints Officer reserves the right to recommend the ordering of further Remedy.

VI. CONCLUSION

In his response to the school district's response to this Complaint, counsel for the complainants' states:

Tragically, [the student's proper name], a [student's grade level] student struggling with a learning disability, has become the focus of the wrath of the reckless political ambitions of two board members from the Colorado Springs School District 11 ("School District"). In their zeal to advance their "school voucher" agenda, board members [proper names of board members] have targeted [student's first name], a student with dyslexia, because she received *as part of her IEP*, direct services from a private reading specialist to assist in remediating her learning disability. Not understanding IDEA's mandate to provide every eligible student a free appropriate public education, [proper names of school board members] misconstrued the special education services provided to [the student] as some form of "voucher". Because Directors [proper names] are fervent "voucher" proponents, and [the student's] mother has voiced her opposition to vouchers, Directors [proper names of school board members] have sought to prey upon [the student] and her mother to advance their cause. Complainants' Response at page 1. Italics added by the Federal Complaints Officer.

In her response to this Complaint, school district's counsel states:

From September 2004 until the present, Director [proper name] and/or [proper name], another member of the District's Board of Education, have distributed written materials and/or have made statements in Board meetings, to the press and on a radio talk show, expressing their beliefs that: (i) Director [the complainant, a school board member, and the student's mother] abused her power as a Board member to obtain District-paid private tutoring for her child; (ii) Director [the complainant, a school board member, and the student's mother] was able to obtain District-paid private tutoring only because of her status as a Board member; and (iii) Director [the complainant, a school board member, and the student's mother] received from the district what amounts to a school voucher for her child even though [the complainant, a school board member, and the student's mother] had voted against school vouchers in an earlier Board meeting. Director [the complainant, a school board member, and the student's mother] denies engaging in any wrongdoing. School District's Response at page 3.

School districts are required to maintain the integrity of the Individualized Education Program (IEP) process under the IDEA. Doing so includes maintaining the integrity of the individualized educational decision making that is fundamental in the IDEA. As stated by the school district's counsel, in an email to the school board members, and copied to the school district's superintendent, dated September 27, 2004, and submitted by the complainants as a part of their Complaint:

I do want to point out that the whole question of whether the District is providing particular students with excessive or inappropriate levels of benefits may be a difficult and very subjective question to pin down. Special education is by definition a program granting individualized and specialized programs to certain students, but not others, and the District is required to routinely make subjective judgments as to the level of special education benefits provided to each eligible student. If it were possible to determine conclusively that two identically situated students were treated differently by the system with the intent to prefer one student over the other, then that would obviously raise issues. But since two students seldom have identical situations and characteristics, there could be a whole host of very legitimate reasons for different treatments. I am not suggesting that concerns should not be investigated, but am merely pointing out some of the difficulties that the District would face in conducting any such investigation. Book 1, Attachment 10, back of page 6, of the complainants' submissions.

The "subjective judgments" referred to by the school district's counsel, and any investigation of those judgments, must be, respectively, made and conducted, consistent with the requirements of the IDEA, including maintaining the independence and integrity of the decision making authority of the IEP team, which includes meeting the confidentiality requirements of the IDEA and FERPA when exercising this decision making authority. Neither the complainants nor the school district, in the determination of the Federal Complaints Officer, acted sufficiently to keep these subjective judgments within the confines of the IEP process. The tutoring services provided to the complainants' daughter was not made a part of complainants' daughter's IEP. No allegation was made, as a part of this Complaint, that the independence and integrity of the decision-making authority of the IEP team for this student, or any other student, was compromised by the school district. However, there should be no question that the school district, and the school board, has a legal obligation to protect and maintain that independence and integrity.

This Decision is final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached

Dated today, May 23, 2005.

Charles M. Masner, Esq.
Federal Complaints Officer