

September 13, 2005

Mr. Gary S. Mathews
Superintendent
Carroll Independent School District
3051 Dove Road
Grapevine, Texas 76051

Dear Mr. Mathews:

A (Parent) filed a complaint with the Department of Education alleging that the Carroll Independent School District (District) has an ongoing practice of destroying and refusing to allow parents to inspect and review education records in violation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. FERPA protects the privacy interest of parents and students in education records maintained by educational agencies and institutions. This Office administers FERPA and provides technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations, which are codified at 34 CFR Part 99.

We are not initiating an investigation under FERPA because the Parent has not alleged facts giving reasonable cause to believe a violation of FERPA has occurred, as required under 34 CFR § 99.64(a). However, we are providing this letter of technical assistance because the District's submissions to the Texas Education Agency (TEA), as discussed below, indicate that the District may lack a sufficient understanding of FERPA requirements to avoid future violations.

This complaint involves records that are also subject to regulations promulgated under Part B of the Individuals with Disabilities Education Act (IDEA). Part B includes confidentiality of information requirements (at 34 CFR §§ 300.560-300.577) that contain many of the same provisions that exist in FERPA and apply, along with FERPA, to any public school district that provides services to students with disabilities under Part B of IDEA. The term "education records" has the same meaning in the Part B confidentiality of information regulations as it does in FERPA. See 34 CFR § 300.560(b).

Parents of children receiving services under IDEA may file a complaint with their State educational agency (SEA) for alleged violations of the Part B confidentiality of information regulations using the State complaint procedures under 34 CFR §§ 300.660-300.662. (Proposed regulations to implement 2004 amendments to IDEA were published in the Federal Register on June 21, 2005, and include proposed changes to the complaint procedures at §§ 300.150-300.152.) This Office does not enforce or investigate violations of the Part B confidentiality of information regulations but is available to provide technical assistance to an SEA to ensure that it interprets and enforces those requirements in a manner that does not conflict with FERPA. We do not attempt to describe or discuss any allegations that this Office is not authorized to investigate under FERPA.

According to the Parent, her son, (Student) is a special education student at Carroll High School. The Parent filed a complaint against the District with TEA on April 12, 2004, alleging that the District had failed to provide her with access to all of the Student's education records, as she had requested on October 27, 2003, and destroyed some of his records in violation of § 300.573 of Part B, IDEA regulations. (The Parent's complaint to TEA contained another allegation not relevant to the current matter.)

The allegation regarding destruction of records was based on the District's failure to provide the Parent with access to various tests, questionnaires, surveys, inventories, etc., that were used to evaluate the Student's eligibility for special education services. It is our understanding that public schools in Texas use professionals to conduct a "Full Individual Evaluation" or FIE in order to determine whether a student qualifies for special education services and to identify areas of strength and need. Information provided by the Parent indicates that the, Director of Special Education for the District, advised the Parent on January 22, 2004, that the District does not keep the underlying tests or test protocols after the FIE has been completed, and that the FIE report alone serves as the District's document of test information that was gathered about a student for evaluation purposes.

TEA's amended final decision, issued on August 5, 2004, concluded (at page 3) that the District violated § 300.573 of the Part B regulations because the "the Parent was not informed when personally identifiable information that was collected, maintained, or used under Part B of the IDEA, [i.e., test protocols used to prepare the FIE report] was destroyed." In response, the District's Director of Special Education wrote to the Deputy Associate Commissioner for Special Education at TEA on August 26, 2004, stating that the District disagrees with the opinion of this Office, issued in a letter to Ms. Mary Lou Philbin on October 2, 1997, that completed test instruments that identify a student are "education records" under FERPA based on the U.S. Supreme Court's ruling in Owasso Independent School District v. Falvo, 534 U.S. 426 (2002). The District said that it would nonetheless notify parents that test protocols would not be maintained by the District "once the information has been included in the *Comprehensive Test Report*."

Parents have a right under FERPA to inspect and review their children's "education records." See 34 CFR Part 99, Subpart B. The term "education records" is defined as information that is directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 34 CFR § 99.3. ("Education records"). As explained in our October 2, 1997, letter, referenced above, test instruments, question booklets, answer sheets, evaluations, surveys, inventories, and other materials that identify a student (by name or number) and that are maintained by the District – or by a party acting for the District, such as a psychologist conducting an FIE – are "education records" under this definition. The Falvo opinion is limited to the narrow holding that "peer grading" does not violate FERPA because "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book."

There is no provision in FERPA comparable to § 300.573 of the Part B, IDEA regulations, requiring a "public agency [to] inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child" before it destroys that information. (In regard to the TEA's August 5, 2004, decision, we note that the Part B, IDEA provision in question refers not to "education records"

but “personally identifiable information collected, maintained, or used” under Part B.) In fact, unlike Part B of the IDEA, FERPA does not require an educational agency or institution to maintain any particular record or notify a parent if it intends to destroy an education record. Nor does FERPA require an agency or institution to refrain from destroying education records except when a parent has asked to inspect and review the records. See 34 CFR § 99.10(e).

However, so long as an educational agency or institution, such as the District, maintains education records, which includes test protocols and other records that are personally identifiable to a student and maintained by professionals conducting FIEs for the District, then it is required to comply with a parent’s request to inspect and review those records in accordance with § 99.10(b) of the FERPA regulations. This means that under FERPA, the District must allow a parent to inspect and review personally identifiable test protocols and other records maintained by professionals conducting an FIE for the District if the request is received before the District has destroyed the records. FERPA also requires the District to respond to reasonable requests for explanations and interpretations of those records so long as they are maintained. 34 CFR § 99.10(c).

For your information, parents do not have a right under FERPA to inspect and review records that are not directly related or personally identifiable to a student. For example, a test protocol or question booklet that is separate from the sheet on which a student records answers and that is not personally identifiable to the student is not considered the student’s “education record” under FERPA. However, both FERPA and Part B provide that an educational agency or institution (under FERPA) and a participating agency (under Part B) must respond to reasonable requests for explanations and interpretations of education records. 34 CFR § 99.10(c); 34 CFR § 300.562(b)(1). Accordingly, if an educational agency or institution or participating agency maintains a copy of a student’s test answer sheet, then it must provide the parent with an explanation and interpretation of the record, which could involve showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the responses in some other manner adequate to inform the parent.

I trust that you find this information helpful in understanding how FERPA applies to records maintained by the District and its agents. Please note that this Office will investigate any complaint that the District has refused to allow parents to inspect and review their children’s education records in accordance with the explanation set forth in this letter.

Sincerely,

/s/

LeRoy S. Rooker

Director

Family Policy Compliance Office

cc:Parent

Gene Lenz, Deputy Associate Commissioner for Special Education
Texas Education Agency

Troy Justesen, Acting Director, Office of Special Education Programs
U.S. Department of Education