



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Judith A. Gran
Catherine Merino Reisman
Reisman Carolla Gran LLP
19 Chestnut Street
Haddonfield, New Jersey 08033

NOV 30 2012

Dear Ms. Gran and Ms. Reisman:

This letter is in response to your July 13, 2012 correspondence to the Office of Special Education Programs (OSEP) in the Office of Special Education and Rehabilitative Services (OSERS), U.S. Department of Education (Department). In your letter, you request that OSEP provide guidance related to due process hearings conducted by the Pennsylvania Office of Dispute Resolution under Part B of the Individuals with Disabilities Education Act (Part B or IDEA). Specifically, we interpret your inquiry as follows:

In cases where a parent does not open the due process hearing to the public (i.e., a closed hearing), may a State have a rule that allows local educational agency (LEA) employees, who are not directly involved in the hearing or the education of the child who is the subject of the hearing, to attend the entire hearing?

Under 34 CFR §300.512(c)(2), parents involved in hearings must be given the right to open the hearing to the public. In addition, any party to a hearing has the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities and to compel the attendance of witnesses. 34 CFR §300.512(a)(1)-(2). IDEA does not specifically address attendance at a closed hearing by school district personnel who do not meet these criteria. While OSEP believes that States may establish their own criteria for attendance by school district personnel whose attendance is not authorized under 34 CFR §300.512(a)(1)-(2), the State's criteria must be implemented consistent with all other rights accorded to children with disabilities and their parents, including the confidentiality of information provisions in 34 CFR §§300.611 through 300.626 and the requirements of the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations in 34 CFR part 99. OSEP wishes to emphasize that under such circumstances, parents who choose to exercise their right to a closed due process hearing should not be forced to relinquish their confidentiality rights under these two federal laws. It is also important to note that some States may provide additional protections for personally identifiable information and this letter is not intended to address issues of State law.

IDEA Part B provisions protecting the confidentiality of information require parental consent before State or local educational agencies (SEAs and LEAs) can release personally identifiable data, information, and records that they collect or maintain, unless permitted to do so without parental consent in accordance with 34 CFR §300.622. Such consent must meet requirements in 34 CFR §300.9 and must be sufficient to indicate that the parent understands and agrees in

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writing to the carrying out of the activity for which his or her consent is sought. For purposes relevant to your inquiry, 34 CFR §300.622(b)(1) permits personally identifiable information to be released to officials of participating agencies for the purpose of meeting a requirement of part 300 (the regulations for Part B of the IDEA). Because due process hearings involve testimony and evidence and other discussions of personally identifiable information about the child who is the subject of the hearing, the confidentiality provisions are applicable in the hearing context. Thus, OSEP interprets this provision to mean that, absent parental consent, officials of participating agencies who are not authorized to attend the hearing under 34 CFR §300.512(a)(1)-(2) may not attend or have access to personally identifiable information from a closed hearing, unless such disclosure is necessary to meet a requirement of part 300 with respect to the child who is the subject of the hearing. 34 CFR §300.622(b)(1). In implementing State criteria for attendance, or in the absence of such criteria, OSEP believes that the hearing officer is in the best position to ensure that the confidentiality of personally identifiable information is properly protected and that standard legal practice is followed in the due process hearing. See 71 Fed. Reg. 46705 (Aug. 14, 2006).

As previously noted, the requirements of FERPA also are relevant to your inquiry because personally identifiable information from the education records of the child who is the subject of the due process hearing would be disclosed at the hearing. Under FERPA, the term “education records” is broadly defined to mean those records directly related to a student and maintained by an educational agency or institution (such as a school or school district) or by a party acting for the agency or institution. FERPA is administered by the Department’s Family Policy Compliance Office (FPCO) and that office has provided the following information with respect to your inquiry.

Under FERPA, an educational agency or institution may not disclose education records, or personally identifiable information from education records, without the parent or eligible student’s written consent, unless an exception to the prior consent requirement applies. (An “eligible student” is a student who has reached 18 years old or is attending a postsecondary institution at any age.) FERPA requires that the consent for disclosure of education records be signed and dated. The consent must also specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made. 34 CFR §99.30.

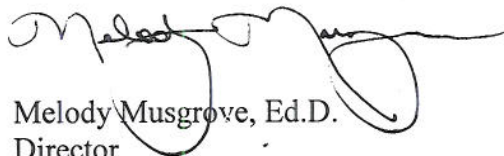
One of the exceptions to FERPA’s prior written consent requirement (§99.31(a)(1)) permits the disclosure of personally identifiable information from education records to school officials, within the agency or institution, whom the agency or institution has determined to have “legitimate educational interests.” Typically, a school official has a “legitimate educational interest” if the official needs to review an education record in order to fulfill his or her professional responsibility. Section 99.7(a)(3)(iii) of the FERPA regulations requires an educational agency or institution to include in its annual notification of rights under FERPA a statement indicating whether it has a policy of disclosing personally identifiable information under §99.31(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. Accordingly, in order for LEA employees who are not directly involved in the hearing or the education of the child, i.e., who do not have a legitimate educational interest in the

student's education records, to be permitted access to those records in the closed hearing, the parent or eligible student would have to provide written consent.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have any further questions, please do not hesitate to contact Melissa Turner, of my staff, at 202-245-6415 or by email at Melissa.Turner@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Melody Musgrove", with a large, stylized flourish extending to the right.

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

Cc: State Director of Special Education