



The Commonwealth of Massachusetts

Department of Education

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December 27, 2007

Dr. Thomas Jefferson
Superintendent of Schools
Harvard Public Schools
39 Massachusetts Avenue
Harvard, MA 01451

RE: Intake #08-0047
Group Name: All Special Education Students

Dear Dr. Jefferson:

On August 2, 2007, the Massachusetts Department of Education received a written statement of concern from Maria Kaufmann involving the Harvard School District ("Harvard"). A copy of the signed statement was also forwarded to the district by the Department. As the Educational Specialist inquiring into this matter, I have taken the following steps:

- I have spoken with the complainant and with the individual who requested the complaint forms (prior PAC chair);
- I have spoken with the superintendent and the school finance director;
- I have requested that the district complete a local report and submit certain documentation;
- I have reviewed the district's report and accompanying documentation;
- I reviewed relevant state and federal laws and regulations;
- I have consulted with staff in the Department's Program Quality Assurance Services Unit and the Department's Legal Office; and
- I am issuing this letter of finding.

The Department's inquiries indicate that Harvard violated the state student records law, the Individuals with Disabilities Act ("IDEA"), and the Family Education Rights and Privacy Act ("FERPA"). This letter advises the school district of this finding of noncompliance and the required corrective action that must be implemented. The concerns included in the signed statement, the Department's findings and required corrective actions are addressed below in more detail.

CONCERNS AND FACTS

The complainant alleges that the district released records containing student-related information in response to a request made by an attorney hired by unnamed parties. The complainant alleges that the district redacted student identities, but not parent identities, from the information released.

The district submitted a copy of the information released to the attorney, along with written statements from the district superintendent and the town finance director. The finance director indicated that she had received a public records request,¹ which included payments to parents for reimbursements for tuition and transportation. In responding to this request, the finance director redacted the names of the students, but not the parents, because payments were made to parents and she did not believe that reimbursements to parents were part of the student record. In addition, according to the finance director, since public funds were used to pay parents, it would be a violation of the Public Records Law not to release the information.

The superintendent explains in his Local Report that the town finance director is responsible for the payment of bills from out of district placements, and that these bills, which often contain the initials or name/initial of a student, are processed by the town accountant through the town warrant system. Additionally, the superintendent notes that parents who are reimbursed for transportation are similarly reimbursed directly through this system, as parents have been reimbursed for summer camp expenses when camps are recommended as part of students' IEPs. The superintendent further states that "no student records, per se, are transmitted to the business office."

With respect to the role of the town finance director, the superintendent states that she is an employee of the town, and not the school. However, he also indicated that she is evaluated by the town administrator and Board of Selectmen with input from the school superintendent, and that many of her responsibilities are school related, including preparing reports at the direction of the superintendent and school committee.

Among the information released by the town finance director to the attorney is documentation that contains the names of parents who were reimbursed for special education costs, including tuition and transportation. More specifically, documentation includes the following:

- Various documents entitled *Schedule of Departmental Bills Payable - School* concerning the bills of the special education department. These documents include the names of parents next to comments such as mileage, tuition, spec. ed. tuition – legal agreement, reimburse, settlement agreement and names of private schools.

¹ Student records are exempt from the definition of "public record" in G.L. c. 4, § 7, clause 26 because they are "(a) specifically or by necessary implication exempted from disclosure by statute." Both the state student records law and FERPA exempt from disclosure records concerning a student kept by the public schools that would permit the student to be individually identified.

These documents are signed by the special education director and school committee members.

- Various documents entitled *Encumbrance/Carry Forward Request* for the special education department, which include parent names next to amounts paid and the notation tuition.
- Letters from parents pertaining to payment of tuitions, attached to tuition bills addressed to parents. The student's name has been redacted from the bills, but the parent's name, the student's ID number, and grade have not been redacted.
- Various documents entitled *Town of Harvard – Budget Report* which concern special education and contain lines regarding reimbursement of identified parents for such items as tuition and tuition agreements.
- Various documents entitled *Town of Harvard – Invoice browse* which include parent names and invoice amounts.
- Copies of two checks written to a private special education school from the account of named parents for, according to memo lines, tuition.
- Copies of checks written to parents by the town.
- A settlement agreement relating to the placement of a student at a special education private school, including the names of parents as well as the grade level and school of the student.²
- A letter from the special education director to parents that has been redacted in part, and iterates the terms of a settlement agreement concerning a student at a private school. The student's name has been redacted.

FINDINGS

Requirements Regarding Student Records

The complainant's allegations and the district's response implicate various provisions of the state student records law, G.L. c. 71, § 34D, and 603 CMR § 23.00; the IDEA regulations, 34 CFR 300.611(b); and FERPA, 20 U.S.C. §§ 1232 et seq., and 34 CFR § 99.30. We review the FERPA issue in this complaint only insofar as it relates to the IDEA. For the reasons discussed below, we determine first, that the town finance director violated the state student records law, IDEA, and FERPA when she released records containing information from which individual students could be identified. Second, we find that the school committee's role in approving expenditure does not necessarily require access to confidential student

² Settlement agreements between parents and school districts are education records that are subject to FERPA, as determined by the Family Policy Compliance Office ("FPCO") in *Letter re: Anchorage School District*, 104 LRP 44410 (June 3, 2004) (settlement agreement resolving litigation between former student and district was education record under FERPA because it's material directly related to student and maintained by the district).

information. And third, we find that the superintendent is responsible for ensuring compliance with the student records law by the town finance director. "Student record" is defined under Massachusetts student records regulations as follows:

The student record shall consist of the transcript and the temporary record, including all information recording and computer tapes, microfilm, microfiche, or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth. The term as used in 603 CMR 23.00 shall mean all such information and materials regardless of where they are located, except for the information and materials specifically exempted by 603 CMR 23.04.

603 CMR § 23.02 (emphasis added).

The regulations under IDEA define education record consistent with the FERPA definition. See 34 CFR § 300.611(b). Regulations implementing the Family Education Rights and Privacy Act (20 USC §§ 1232 et seq.), state, in relevant part, as follows:

"Education records"

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 CFR § 99.3 (emphasis added). 34 CFR § 99.3 also addresses exceptions to the definition of education record; none of which apply here.

Town Finance Director

Applying the law to the facts in this matter, the Department finds that the town finance director is a party acting for the education agency or institution within the meaning of the state student records law, IDEA, and FERPA. According to the superintendent's statements, this individual does a great deal of work for the school department under the direction of the superintendent and school committee. Any attempt to distinguish the town and school district is unpersuasive, as the district and the town are, for purposes of these types of special education expenditures, one and the same. The town is considered an "institution to which funds have been made available under any program administered by the Secretary" within the meaning of FERPA regulations. See 34 CFR § 99.1(a).

The documentation released by the town finance director constitutes student records under the state regulations. The information listed above certainly concerns students, is organized in a way that such students may be individually identified, and is kept by the public school.

Similarly, under IDEA and FERPA, the documentation listed above is documentation maintained by the institution or agency of Harvard Public Schools/Town of Harvard and by the town finance director. Some of this documentation unquestionably contains information "directly related to" students, such as settlement agreements, special education line items in which parents were reimbursed for tuition, transportation and summer camp, and tuition bills

addressed to parents concerning students. Accordingly, this type of information constitutes education records within the meaning of IDEA and FERPA.

Because the records released constitute education records or student records, certain protections apply. The Massachusetts student records regulations, and the FERPA regulations in particular, make it clear that information that is “personally identifiable” is protected from disclosure without parental consent. Personally identifiable, as defined in FERPA regulations 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.*

34 CFR § 99.3.

Under various state and federal student records laws and regulations, parental consent is generally required before an agency may disclose personally identifiable information from education records or special education records to a third party, unless an exception applies. See 34 CFR § 99.30; 603 CMR § 23.07(4); 34 CFR § 300.622. None of the exceptions found in the FERPA or the state student records regulations apply in this matter. See 34 CFR § 99.31 and 603 § 23.07(4)(a)-(h).

The district recognizes that there were legal concerns related to the release of the names and initials of students in the documentation released to the attorney, and accordingly redacted that information from the documentation. The district, however, did not redact the names of parents from the documentation. In addition, the district did not redact other information that would make the student easily identifiable, for example, students' grade levels (in settlement agreements and the bill from one school pertaining to one student), student identification number (in a bill concerning payment of one student's tuition), and students' placements (in various information, including settlement agreements). Accordingly, the Department finds that, in releasing education records that contain personally identifiable information without parent consent, the district violated the Massachusetts student records regulations, IDEA, and FERPA. See 34 CFR § 99.30; 603 CMR 23.07(4).

School Committee

In addition to the allegation raised by the complainant, it appears that the town's mechanism for processing payments under its special education budget raises other issues under FERPA and state student records regulations. Specifically, various pieces of documentation submitted by the district indicate that the special education budget payments and reimbursements are submitted to the town accountant only after signature of school committee members.

603 CMR 23.07(3) permits *authorized school personnel* to have access to the student records of students to whom they are providing services, when such access is required in the performance of their official duties, and states that in these circumstances, the consent of the eligible student or parent shall not be necessary. 603 CMR 23.02 defines authorized school personnel as follows:

Authorized school personnel shall consist of three groups:

(a) School administrators, teachers, counselors and other professionals who are employed by the school committee or who are providing services to the student under an agreement between the school committee and a service provider, and who are working directly with the student in an administrative, teaching, counseling, and/or diagnostic capacity. Any such personnel who are not employed directly by the school committee shall have access only to the student record information that is required for them to perform their duties.

(b) Administrative office staff and clerical personnel, including operators of data processing equipment or equipment that produces microfilm/microfiche, who are either employed by the school committee or are employed under a school committee service contract, and whose duties require them to have access to student records for purposes of processing information for the student record. Such personnel shall have access only to the student record information that is required for them to perform their duties.

(c) The Evaluation Team which evaluates a student.

603 CMR 23.02 (emphasis added).

In accordance with the definition set forth above, school committee members generally are not authorized school personnel.

FERPA provides in pertinent part that:

[a]n educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

- (1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

* * *

34 CFR § 99.31(a)(1).

While school committee members might perhaps be considered “school officials” within the meaning of FERPA, school officials are only permitted to have access to education records if they have a legitimate interest in the information being released. Specific details about students such as those in the documentation listed on pages 2-3 do not fall within the legitimate interest of school committee members. Accordingly, the Department finds that because the district’s mechanism for payment of special education expenditures currently involves releasing documentation that includes personally identifiable education records to the school committee for signature, the district is in further non-compliance with 34 CFR § 99.31 and 603 CMR § 23.07.

Superintendent

Finally, under Massachusetts student records regulations, the superintendent

shall be responsible for the privacy and security of all student records that are not under the supervision of a school principal, for example, former students' transcripts stored in the school department's central administrative offices or student records of school-age children with special needs who have not been enrolled in a public school.

[and]

...shall insure that student records under their supervision are kept physically secure, that authorized school personnel are informed of the provisions of 603 CMR 23.00 and M.G.L. c. 71, § 34H and are educated as to the importance of information privacy and confidentiality; and that any computerized systems employed are electronically secure.

603 CMR § 23.05(2) and (3).

The Department finds that the town finance director was not provided appropriate education regarding the importance of the privacy and confidentiality of such information.

REQUIRED CORRECTIVE ACTION

As corrective action, Harvard must complete the following activities:

1. Provide training for the superintendent, members of the Harvard school committee, and the town finance director on the state student records law at G.L. c. 71, § 34D, and 603 CMR § 23.00; the IDEA regulations at 34 CFR 300.611(b); and FERPA at 20 U.S.C. §§ 1232 et seq., and 34 CFR § 99.30. Provide the agenda, training materials, and signed attendance sheets, as well as the identity and qualifications of the person providing the training.
2. Create a new system of oversight for the processing of district expenditures by the town finance director. The new system should be designed to prevent reoccurrences of the types of violations of state and federal records law as found in this matter, including preventing school committee members from having access to student records in the processing of district expenditures. Provide the Department with a description of the new system of oversight including names and roles of staff responsible for implementing the new system, and the name and role of staff responsible for ensuring appropriate implementation.

Provide the Department of Education with the required Corrective Action Report pursuant to these findings **no later than February 28, 2008**. A standard response form is enclosed for your use in responding to this request. **A copy of your Report must not be sent to the person who registered this concern.**

Also note that for matters related to special education the parties may seek mediation and/or a hearing through the Bureau of Special Education Appeals (BSEA) on the same issues addressed in this letter. Such a hearing, however, is a new proceeding and is not for the purposes of reviewing the Department's decision on this concern. Any order or decision issued by the BSEA on the issues raised in this complaint would be binding. Additionally, complaints concerning FERPA may be filed with the Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202-5920 (<http://www.ed.gov/policy/gen/guid/fpco/index.html>).

The Educational Specialist would be pleased to provide further clarification of all information and requirements noted above if you find it necessary. The Educational Specialist may be reached at 781-338-3755.

Sincerely,



Michelle Griffin, Educational Specialist
Program Quality Assurance Services



Vani Rastogi-Kelly, Supervisor
Program Quality Assurance Services

enclosures: Signed Statement
Response Form

c: Maria Kaufmann, Complainant
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