

NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to FERPA@ed.gov.

January 11, 2008

The Honorable Lucille E. Davy
Commissioner
New Jersey Department of Education
100 River View Plaza
P.O. Box 500
Trenton, New Jersey 08625

Dear Commissioner Davy:

This Office has received information that raises concerns whether the new student database known as "New Jersey Standards Measurement and Resource for Teaching" (NJSMART) complies with the requirements of the Family Educational Rights and Privacy Act (FERPA). FERPA protects the privacy interests of parents in their children's education records. This Office is responsible for administering FERPA and under that authority we investigate, process and review complaints and alleged violations and provide technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations, 20 U.S.C. 1232g and 34 CFR Part 99. The Secretary of Education is charged with taking appropriate actions to enforce FERPA. As explained further below, I am writing to ask you to provide us with information about the State's agreements with the Public Consulting Group (PCG) in regard to databases that contain education records so that we may determine whether the State complies with applicable FERPA requirements.

Under FERPA, no funds administered by the Secretary of Education shall be made available to an educational agency or institution that has a policy or practice of disclosing education records, or personally identifiable information from education records, without the prior written consent of a parent except as authorized by law. 20 U.S.C. § 1232g(b)(1) and (b)(2). FERPA regulations specify that a parent (or eligible student, as defined in § 99.3) must provide a signed and dated written consent in accordance with the requirements of § 99.30 before education records are disclosed, unless the disclosure falls within one of the exceptions, which are generally set forth in § 99.31.

One of the exceptions to the consent requirement in FERPA allows educational agencies and institutions, such as local school districts, to disclose education records to authorized representatives of State and local educational authorities, such as the New Jersey Department of Education (NJDOE), in connection with an audit or evaluation of Federal or State supported education programs or for the enforcement of or compliance with Federal legal requirements that

related to those programs. 34 CFR §§ 99.31(a)(3)(iv) and 99.35. Under § 99.35(b), information that is collected under this provision must be protected in a manner that does not permit personally identification of individual by anyone except the officials listed in § 99.31(a)(3) and destroyed when no longer needed for audit, evaluation or compliance and enforcement purposes.

A memorandum issued by the Deputy Secretary of Education on January 30, 2003 (available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>), explains that an “authorized representative” under this exception must be under the “direct control” of the State educational authority (or other official listed in § 99.31(a)(3)(iv)), e.g., an employee or contractor. In regard to the use of contractors as “authorized representatives” under this exception, you may wish to review our February 18, 2004, letter to the California Department of Education (available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/ca21804.html>), which explains:

"Contractor" in this sense means outsourcing or using third-parties to provide services that the State educational authority would otherwise provide for itself, in circumstances where internal disclosure would be appropriate under § 99.35 if the State educational authority were providing the service itself, and where the parties have entered into an agreement that establishes the State educational authority's direct control over the contractor with respect to the service provided by the contractor. Any contractor that obtains access to personally identifiable information from education records in these circumstances is bound by the same restrictions on redisclosure and destruction of information that apply to the State educational authority itself under § 99.35, and the State educational authority is responsible for ensuring that its contractor does not redisclose or allow any other party to have access to any personally identifiable information from education records.

In other words, a party qualifies as a “contractor” under this FERPA exception not because of a contract or agreement per se, but by virtue of a contract or agreement to perform services that the State educational authority (or other official listed in § 99.31(a)(3)) would otherwise provide for itself and where the disclosure of information from education records would be lawful under § 99.35(a) if employees were performing the service. Further, as noted above, a State educational authority must maintain direct control over its contractor’s access to and use of personally identifiable information from education records for these purposes. This includes access by the contractor’s own employees and subcontractors, as well as any other person whom the contractor permits to have access to education records. In order to meet this requirement, the State educational authority must be able to show that its contractor (and any subcontractors) have reasonable controls in place to ensure that personally identifiable information from education records is disclosed only in accordance with FERPA requirements applicable to the State educational authority itself. If a State educational authority is unable to do so, then it may not disclose (or instruct school districts to disclose) personally identifiable information from education records to a contractor as its “authorized representative” under this FERPA exception to the written consent requirement.

The Star-Ledger reported on September 6, 2007, that the new State database tracks student achievement for New Jersey’s 1.4 million students through a secure, 10-digit identification number that will allow the State to follow enrollment, test scores and other data. According to

the paper, NJSMART was launched as part of a wider State system used to recover unclaimed federal Medicaid dollars for special education students. The paper reports further that some individuals have criticized the security of student information in the system, which contains within each file an assortment of “‘unique student identifiers’ for each child, including name, birth date and birthplace.”

One of the critics of the system, Professor Joel Reidenberg of Fordham University School of Law and a member of the Millburn board of education, provided us with information about this matter that he obtained as a result of two government records requests. In the first request (#W25011), Professor Reidenberg asked for a copy of the “contract between the Department of Education and Public Consulting Group for the creation and maintenance of the NJSMART database” and any advisory opinion provided by the Attorney General’s Office to the Department of Education in connection with the legality of NJSMART, including any opinion on compliance with FERPA. Information provided by Professor Reidenberg indicates that the request was denied on December 5, 2006, because “NJDOE does not maintain copies of a contract with Public Consulting Group (PCG) as requested...” and “[a]ny opinion from the Attorney General is protected from disclosure under the attorney-client privilege.” Professor Reidenberg was advised that he may wish to contact the New Jersey Department of Treasury Government Records Access Unit for information about the PCG contract.

In response to Professor Reidenberg’s second request for records (#W25145), the Treasury Department’s Government Records Access Unit apparently provided him with a copy of “Amendment Number One to Contract A61236” but failed to provide a copy of the contract itself. Through this inquiry Professor Reidenberg also learned about the existence of a second amendment to Contract A61236 titled “Addition of Statewide Single Student Initiative (SSID).” Amendment Number Two requires PCG to develop the SSID and collect student data handbook elements.

Thereafter, the Barbara O’Hare, Manager of the Government Records Access Unit for the Treasury Department, advised Professor Reidenberg by letter dated January 31, 2007, that the State’s “contract” with PCG for the creation and maintenance of the NJSMART database for NJDOE consists of the following documents:

- Waiver of Advertising Z-083 and all attachments
- Public Consulting Group’s proposal and all attachments
- Purchase Order number 6179639 to PCG along with any change orders (drawn against requisition number R103172)
- Amendment Number One to Contract A61236

Ms. O’Hare explained that Contract A61236 is a contract between PCG and the State for “SEMI [Special Education Medicaid Initiative] and MAC [Medicaid Administrative Claiming] in Schools” (discussed below) and that the contract for “‘the creation and maintenance of the NJSMART database for the [NJDOE]” is Amendment Number One to Contract A61236.”

Amendment Number One to Contract A61236 provides for a three-year performance period, unless the contract is terminated early, ending on August 14, 2008 with specified compensation

and contains a brief reference to the installation of EasyIEP and implementation of Edsmart (discussed below). However, neither Amendment Number One, which Ms. O’Hare identified as the State’s contract with PCG for creation and maintenance of the NJSMART database, nor any other information that Professor Reidenberg was able to obtain in regard to the NJSMART database, demonstrates that NJDOE has direct control over its contractor, PCG, that would qualify PCG as an “authorized representative” of NJDOE for purposes of receiving the personally identifiable information from education records maintained in the database.

The “whereas” clauses in Amendment Number One to Contract A61236 refer to consulting services PCG provides to the State to assist with the SEMI and MAC. This part of Amendment Number One also refers to PCG’s web-based data warehouse and data mining application known as Edsmart and its web-based special education management system known as EasyIEP, which is intended to facilitate SEMI and MAC Medicaid claiming, and to EasyTrac, a component of EasyIEP, which is intended to help school districts maximize SEMI and MAC revenues. It is unclear from this summary information whether NJDOE is disclosing personally identifiable information from education records to unauthorized parties in connection with its SEMI and MAC claiming activities, which apparently formed the basis for the NJSMART initiative.

In order to ensure that the educational agencies and institutions in the State remain in compliance with FERPA requirements and may continue to disclose personally identifiable information to NJDOE without parental consent, please provide this Office detailed information regarding the contractual relationship between PCG and NJDOE, including the basis on which PGC obtains access to information from education records. Please also provide us with a description of the SEMI and MAC Medicaid claiming systems, including a specification of all parties that obtain access to personally identifiable information in connection with those systems. You should direct your response within four weeks of your receipt of this letter to Frances Moran of my staff. The name, address, and telephone number of this Office are:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-5901
(202) 260-3887

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office