



December 30, 2022

Sent via US Mail and/or SMFTS

Parent

Superintendent

**THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION**

RE: **FINAL REPORT** for In the Matter of \*\*\*\*, 2022-09

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. \*\*\*\* (Complainant) filed the Complaint on behalf of her son, \*\*\*\* (Student), and all similarly situated students in the \*\*\*\* Public School District (District). The Complainant alleges the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. 1400 et seq., the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99, Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulation at 34 C.F.R. Part 300 and ARM 10.16.3007 et seq. The Complaint alleges the following issues:

**Issue 1.** Whether the District improperly disclosed personally identifiable information in violation of ARM 10.16.3560 and 34 C.F.R. § 300.610.

**Issue 2.** Whether the District failed to allow parents to inspect and review educational records relating to their children that are collected, maintained or used by the District under Part B of the IDEA in violation of 34 C.F.R. § 300.613.

### **Procedural History**

1. The Office of Public Instruction (OPI) Dispute Resolution Office received the signed Complaint filed by the Complainant on October 31, 2022.
2. The OPI Dispute Resolution Office issued a Notice of Filing Complaint on November 4, 2022, to the District and Complainant.

3. The Early Assistance Program (EAP) attempted to assist the parties in resolving the dispute without success. On November 16, 2022, the OPI Dispute Resolution Office determined that any attempt to mutually resolve the matters alleged in the Complaint would be futile and requested the District's written response to the Complaint within 10 calendar days.
4. On November 16, 2021, OPI notified the parties that a complaint investigator had been appointed to conduct the complaint investigation.
5. On November 23, 2022, the District submitted a request for a two-day extension to file the District's written response. OPI granted the request on November 25, 2022.
6. The District submitted a written response to the issues in the Complaint on November 30, 2022.

**Investigatory Process**

The investigator reviewed the following records:

- The original letter of Complaint and all supporting documentation;
- The District's original response to the Complaint and all exhibits; and
- The education records relevant to this investigation.

The investigator interviewed the Complainant via Zoom.

The investigator interviewed the District Special Education Director and District Director of Student Services with the District's legal counsel present via Zoom.

All parents that submitted record requests titled "FERPA requests" to the District were contacted via email.

OPI provided the Complainant and the District the opportunity to submit additional information for consideration during the complaint investigation.

**Applicable Federal Regulations, State Statutes or Rules**

34 C.F.R. § 300.610	Confidentiality
34 C.F.R. § 300.611	Definitions
34 C.F.R. § 300.612	Notice to Parents
34 C.F.R. § 300.613	Access Rights
34 C.F.R. § 300.615	Records on More Than One Child
34 C.F.R. § 99	FERPA
ARM 10.16.3560	Special Education Records

### **Relevant Time Period for Investigation**

Pursuant to 34 C.F.R. § 300.153(c) and ARM 10.16.3662, OPI has the authority to investigate alleged violations of IDEA and Montana special education laws that occurred within one year prior to the date the complaint was filed. In accordance with this limitation, the investigation and any findings of noncompliance will be limited to the period of time commencing October 31, 2021, through October 31, 2022. Additional information beyond this timeframe was considered for the purpose of fully investigating the complaint.

### **Findings of Fact**

1. Prior to the filing of this Complaint, the parents of seven students, including the Complainant in this matter, submitted FERPA record requests to the District. All seven requests were submitted between March 24 and 28, 2022, and included requests for 27 different types of documentation. *November 30, 2022 District Response.*
2. The Complainant filed this Complaint on behalf of the named Student, who attends tenth grade, and all similarly situated students in the District, alleging violations of IDEA and Montana law based on the District's response to the FERPA requests. *October 31, 2022 Complaint.*
3. Although the Complaint contains hundreds of pages of documentation, the concerns are focused in three main areas: the District's practice of releasing special education students' addresses to the school board and the public when the District adopted school bus routes on October 15, 2022; disclosure of other students' information to unrelated parents in the District's FERPA responses; and the length of time the District took to fulfill the FERPA requests was beyond the 45 days permitted by law. *October 31, 2022 Complaint.*
4. As part of the investigation, all of the other parents who submitted FERPA requests that are relevant to this investigation were contacted for additional information. The responses received from the other parents are summarized below:
  - a. Parent 1 indicated that she "never had any issues receiving any documents or records from the school. They've always gotten them to me in a timely manner. All requests I've made have always been fulfilled." *December 20, 2022 Email.* This parent later recanted this statement and submitted a vastly different email stating that she received none of her child's records. *December 21, 2022 Email.*
  - b. Parent 2 indicated that one of her child's records was disclosed to the Complainant, that her other child's information was disclosed publicly when the District published the special needs bus routes, and that it took multiple follow-up

attempts to obtain all requested records, well in excess of the 45 days required. However, all records had been provided and no requests were outstanding. *December 20, 2022 Email.*

### **Bus Routes**

5. On October 17, 2022, the District school board approved bus routes for the upcoming school year. In preparation for that action, the school board provided a list of all special education students' addresses who ride the school bus. *Complaint Exhibit 32.*
6. The District's Superintendent emailed the school board the day after the October 17, 2022 meeting, explaining that, "All references to this information have been or will shortly be removed from the District's website." Further the Superintendent's email stated that "special education stops will be provided to the Board under seal and not be provided to the general public," and "any board discussion of those special education stops will be in closed session." *November 30, 2022 District Response.*
7. The complaint investigator verified that the 2022-2023 special education bus routes containing individual student addresses were removed from the website. However, the special education bus routes with student addresses were readily accessed for the following years in the school board's online documents:
  - a. 2017-2018 (155 pages);
  - b. 2018-2019 (138 pages);
  - c. 2019-2020 (138 pages);
  - d. 2020-2021 (137 pages); and
  - e. 2021-2022 (128 pages).
8. The District confirmed that none of the parents who filed FERPA requests with the District had opted out or submitted a written objection to release of student addresses as directory information. *December 21, 2022 Email.*

### **Disclosure of Other Student Personally Identifiable Information**

9. The Complainant provided documentation of instances in which other students' names were provided with Complainant's FERPA request, as summarized below:
  - a. District emails contained approximately 256 instances in which other students' names were included; and
  - b. Six other instances where the District included other students' records with the named Student's records.

*October 31, 2022 Complaint, Exhibits 1-16.*

10. The District acknowledged that the records provided by Complainant show that the District “inadvertently disclosed student names to [Complainant]. *November 30, 2022 District Response and December 16, 2022 interview.*
11. The District indicated that the inadvertent disclosure from emails occurred only in the named Student’s records, and offered the following explanation, in summary:

While going through emails a link within the email was missed. The link opened up a file that contained IEP meetings (scheduling) for other students. The files were given to the Complainant on a thumb drive. The link was live in the downloaded version so Complainant could open it.

*December 16, 2022 District Interview.*
12. The District stated that it felt “overwhelmed” by the sheer volume of the requests. District staff reviewed over 100,000 emails in order to respond to the FERPA requests. *December 16, 2022 District Interview.*
13. The other parents that responded during this investigation did not report receiving any other student’s records or personally identifiable information, in response to their FERPA requests. The other parents only received information pertaining to their own children. *Responses to December 20, 2022 email questions.*

#### **45 Day Requirement**

14. The Complainant indicated that she did not receive the named Student’s records in entirety within the 45-day limit. Some records took considerably more time for the District to produce. *October 31, 2022 Complaint.*
15. On June 3, 2022, one of the parents who submitted a FERPA request sent an email asking when the parent would receive the remainder of the documentation. The District responded by stating that the emails were being redacted by staff, and redaction is time consuming. *District’s Response, Exhibit MM-1.*
16. The District informed the Complainant on June 8, 2022, that a flash drive was available for pick up at the main office containing requested documentation. *District’s Response, Exhibit NN-2.*
17. On June 22, 2022, the Complainant sent the District an email inquiry about the named Student’s ELL file, which had not yet been received. The District responded on June 23, 2022, and indicated it would “track it down.” *District’s Response, Exhibit PP-1.*
18. An August 1, 2022 email to the District from one of the parents who submitted a FERPA request followed up with the District regarding 12 outstanding documents. The District responded by saying the file was being delivered to the student’s school that day. The District

staff stated: "I had to wait until after today to take it up there because there were no staff consistently in the building." *District's Response, Exhibit LL-1 and 2.*

19. On August 2, 2022, the District emailed the same parent and indicated the psychological file was delivered to the school that morning. *District's Response, Exhibit LL-6.*
20. After a series of email exchanges, the District notified the Complainant in an August 24, 2022 email that an electronic copy of the Student's ELL file was attached. *District's Response, Exhibit RR-1 to 5.*
21. One of the other parents also indicated that multiple follow-up attempts were needed in order to obtain all requested documentation pertaining to two children. The documentation was ultimately received "well in excess of the 45 days required." *December 20, 2022 Email.*

### **Conclusions**

1. The IDEA and Montana Rules incorporate the rights afforded to parents in FERPA. 34 C.F.R. § 300.612 and ARM 10.16.3560.
2. The IDEA and implementing regulations protect the confidentiality of any personally identifiable data, information and records collected or maintained by school districts. 34 C.F.R. § 300.610.
3. Education records means the type of records covered under the definition of "education records" in FERPA at 34 C.F.R. Part 99. 34 C.F.R. § 300.611.
4. According to FERPA, *education records* mean 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. *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 members;
  - c. The address of the student or student's family;
  - d. A personal identifier, such as the student's social security number, student number, or biometric record;
  - e. Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
  - f. Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

- g. Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3.

- 5. The District must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. 34 C.F.R. § 300.623.
- 6. Prior to a district releasing personally identifiable information from a student's record, parental consent must be obtained unless the disclosure is authorized without parental consent under 34 C.F.R. part 99. 34 C.F.R. § 300.622 and 34 C.F.R. § 99.30.

### **Bus Routes**

- 7. One relevant exception exists with respect to the prohibition on disclosure of personally identifiable information in FERPA.

*Directory information* means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

34 C.F.R. § 99.3

- 8. The District may disclose personally identifiable information from an education record without parent consent, if the disclosure is information the educational agency or institution has designated a "directory information." 34 C.F.R. § 99.31(a)(11).
- 9. The District may disclose directory information, if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:
  - a. The types of personally identifiable information that the agency or institution has designated as directory information;
  - b. A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
  - c. The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

34 C.F.R. § 99.37.

10. The District's approved policy from the District's website regarding directory information contained the following information: (Emphasis in original.)

**The right to prohibit the release of directory information concerning the parent's/guardian's child.**

Throughout the school year, the District may release directory information regarding students, limited to: name; address; gender; grade level; birth date and place; names and addresses of parents or guardians; academic awards, degrees, and honors; information in relation to school- sponsored activities, organizations, and athletics; major field of study; and period of attendance in school.

*Any parent(s) or guardian(s) or eligible student may prohibit the release of any or all of the above information by delivering a written objection to the building principal on or before the student's first day of school.*

*FERPA Annual Notification, Form 3600-F1 (2005).*

11. The Annual FERPA Notice was included in the District's Student/Parent Handbook located on the District's website.
12. The District's Annual FERPA Notice defined the type of information that could be released as directory information, informs a parent that he/she has the right to refuse the release of directory information, and provides a date by which the parent must notify the District.
13. The special education student addresses contained in the annual submission to the school board are encompassed in the definition and application of directory information. No parents relevant to this complaint investigation filed a written objection to the release of directory information. Therefore, neither the IDEA nor FERPA requires parental consent before releasing that information to the public.

**Disclosure of Other Students' Personally Identifiable Information**

14. If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information. 34 C.F.R. § 300.615. Any other student's information or data must be redacted.
15. It is uncontroverted that the District disclosed other students' personally identifiable information to the Complainant in the named Student's records via an email link. The District indicated that the email link was missed in the over 100,000 emails reviewed.

16. The District made its obligation to produce emails more onerous than the law required. The Ninth Circuit Court of Appeals (controlling in Montana) ruled that a parent's right to inspect and review education records directly relating to their child only applies to records that are "maintained" by a district. In relevant part, the Court explained that a school district can satisfy its FERPA obligation by providing copies of emails that were printed and added to a student's physical file rather than kept on a separate email server:

An "education record" under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). Under FERPA, an education record includes records, files, and documents that "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The Supreme Court has interpreted the word "maintained" in FERPA as "to keep in existence or continuance; preserve; retain" and reasoned that "[t]he word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database." *Owasso Indep. Sch. Dist. No 1-011 v. Falvo*, 534 U.S. 426, 432-33 (2002). Since the District turned over the emails it "maintained" as part of a student's educational records, we agree with the district court that in responding to the [parent's] request for a copy of [student's] education records, it did not commit a procedural violation.

*S.B. V. San Mateo-Foster City Sch. Dist.*, 739 Fed.Appx. 87, 873-874, 72 IDELR 147 (9th Cir. 2018).

17. However, once the District determined that it would release all emails, the confidentiality provisions in the IDEA and FERPA applied. The emails had to be redacted and purged of any other students' information prior to disclosure to each of the parents. The failure to do so with respect to the Complainant is a violation of IDEA and FERPA.

18. It does not appear to be a systemic violation, as the other parents who submitted FERPA requests did not confirm receipt of information pertaining to other students in their own child's records.

19. With respect to the Complainant and the named Student's record, the District failed to protect personally identifiable information in contravention of IDEA's requirements.

#### **45 Day Requirement**

20. The District indicated that it "materially" complied with the FERPA requests within 45 days. However, material compliance is not the standard. FERPA states that an educational agency shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after the request is received. 34 C.F.R. § 99.10. The IDEA adds to the time limitation:

The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, **and in no case more than 45 days after the request has been made.** (Emphasis added.)

34 C.F.R. § 300.613(a).

21. The Complainant and one other parent reported that obtaining the requested documents took multiple follow up attempts, with records received well beyond the 45-day limit. The second parent who responded to this complaint investigation provided two vastly different responses, making it impossible to consider either response in this Final Report.
22. Email exchanges provided by the District with two additional parents confirm that documents were not produced within 45 days of the FERPA requests.
23. It is clear from all information reviewed during this investigation that the District failed to produce all requested information within 45 days of the parents' requests, with some requests lingering into August 2022, nearly 150 days after the initial FERPA request.

### **Decision**

**Issue 1:** Whether the District improperly disclosed personally identifiable information in violation of ARM 10.16.3560 and 34 C.F.R. § 300.610.

**OPI finds the District in violation. The District released other students' personally identifiable information to the Complainant.**

**Issue 2:** Whether the District failed to allow parents to inspect and review educational records relating to their children that are collected, maintained or used by the District under Part B of the IDEA in violation of 34 C.F.R. § 300.613.


**OPI finds the District in violation. The District failed to respond to all FERPA requests within the 45-day requirement imposed by FERPA and the IDEA.**

### **Corrective Action**

The District shall provide all special education teachers, case managers, related service providers and administrators with two hours of training on the confidentiality requirements of IDEA and FERPA. The District shall comply with the following conditions:

1. The training shall be conducted by an independent professional with expertise in the confidentiality requirements of IDEA and FERPA. The name and credentials of the trainer shall be provided to OPI's Early Assistance Program Director by January 30, 2023.

2. The training shall be completed by March 15, 2023.
3. The District shall submit a list of all staff members required to take the training and evidence of their completion of the training, including sign-in sheets with the name of all participants, date(s) of training, and copies of all training material to OPI's Early Assistance Program Director by March 31, 2023.



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JP Williams  
State Director of Special Education

- c: Mandi Gibbs, Dispute Resolution/EAP Director (via SMFTS only)  
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