Colorado Department of Education
Decision of the Federal Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA)

Federal Complaint 2004:502

Douglas County School District RE-1

Decision

I. INTRODUCTION

This Complaint was dated April 5, 2004, and received by the Federal Complaints Officer on April 6, 2004. The school district's response was dated April 26, 2004, and received on April 26, 2004. The complainants' response to the school district's response to their Complaint was dated May 3, 2004, and received by the Federal Complaints Officer on May 6, 2004. The Federal Complaints Officer then closed the record.

II. COMPLAINANTS' ALLEGATIONS

The complainants' allege that the school district violated 34 CFR 300.571(a)(1) of the Individuals with Disabilities Education Act (IDEA). This regulatory provision, entitled **Consent**, states:

(a) Except as to disclosures addressed in § 300.529(b) for which parental consent is not required by Part 99, parental consent must be obtained before personally identifiable information is –
(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section …

Part 99 refers to the regulations implementing The Family Education Rights and Privacy Act (FERPA) of 1974, which is incorporated by reference into the IDEA.

The complainants further allege that, as a result of this violation, their son has been placed in an unsafe educational environment, and, as a consequence, denied a free appropriate public education (FAPE) under the IDEA.

III. SCHOOL DISTRICT'S RESPONSE

The school district denies any violation of law. The bases for the school district's denial is summarized by the Federal Complaints Officer, using excerpts from the school district's response, as follows:

> The comment alleged to have been made by [the building principal] to the parents of another [student's attendance center] student related to [the student's] cognitive and social emotion levels did not violate the provisions of the IDEA related to disclosure of personally identifiable information. The information allegedly shared was such that it would be known by [the building principal], as principal of [the student's attendance center], and not obtained from [student's] educational record. Further, it was made in the context of following up on a discipline incident, a circumstance specifically recognized by the courts as an appropriate forum to discuss such information. School district's response at pages 3 and 4.
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> The nondisclosure provisions of the IDEA which are based on similar provisions in FERPA are intended to address institutional policy and practice and not individual instances of disclosure. Further, when looking at whether a District's policy and practice violates the nondisclosure provisions of the law, the District is held to the standard of substantial compliance. *See Gonzaga v. Doe*, 536 U.S. 273, 288 (2002). School district's response at page 5.

IV. FINDINGS AND DISCUSSION

The Federal Complaints Officer finds that the school district violated 34 CFR 300.571(a)(1), with regard to this student. The Federal Complaints Officer makes no finding as to whether this student was placed in an unsafe environment by the school district, and, consequently, no finding as to whether this student was denied a FAPE by the school district.

As the Federal Complaints Officer interprets the Complaint, the parent complainants based their determination that the school district violated 34 CFR 300.571(a)(1) upon the building principal's statement to them that: "[The building principal] told us that he told these parents that [our son] was neither on the same cognitive or social/emotional level as the other student." Complaint, page 1. As previously cited, the school district agrees that the comments allegedly made by the building principal to another set of parents were related to the complainants' son's cognitive and social emotion levels. The Federal Complaints Officer is finding that the alleged comments, as characterized by the complainants and the school district, were made. However, also as previously cited, the school district argues that this alleged disclosure of information did not violate the IDEA, or FERPA, because: "The information allegedly shared was such that it would be known by [the building principal] and not obtained from [the student's] educational record." The school district continues this argument on page 5 of its response:

> Further, it has been a longstanding legal interpretation that the prohibition against disclosure of personally identifiable information from educational records does not extend to information derived from a source independent of school records, even if it may be the very same information contained in school records. In *Frasca v. Andrews,* 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979), the court stated

> "Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independent of his school records." In *Daniel S. v. Bd. of Educ.*, 152 F. Supp.2d 949, 954 (N.D. Ill. 2001), the court, citing *Frasca*, stated that "FERPA does not protect information which might appear in school records but would also be [']known by members of the school community through conversation and personal contact.['] [The building principal] has personal knowledge about [the student] based upon his interactions with [the student] at school. Any information shared in the comment to the other student's parents was not based on information [the building principal] got from [the student's] education record. School district's response, at page 5.

Frasca and *Daniel S.*, to the extent that they are authority, are persuasive authority, not mandatory authority. A Federal Complaints Officer in Colorado is not bound by them, and, in any case, the Federal Complaints Officer finds them distinguishable from the facts of this Complaint. The parents to whom information was disclosed in this Complaint are members of the complainants' and their son's "school community", and these parents did not know about the student's limited cognitive social/emotional abilities. The crux of the disagreement between the parent complainants and the school district is that these other parents were provided information about complainants' son that they did not know, and which they were not entitled to know. While in general terms a building principal certainly knows students have differing abilities, the building principal here was disclosing information about this student's limited cognitive social/emotional abilities as a means of explaining to other parents this student's behavior. The Federal Complaints Officer does not find it credible that the building principal would have done so without relying upon evaluation information derived from the student's educational records, which established, to the building principal's satisfaction, limited cognitive social/emotional abilities sufficient to explain the student's behavior, such that the principal thought it would be justifiable and helpful to disclose this information to other parents.

The school district also argues, as previously cited, that there was no violation of IDEA or FERPA on the facts of this Complaint because:

> [The information allegedly shared] was made in the context of following up on a discipline incident, a circumstance specifically recognized by the courts as an appropriate forum to discuss such information.
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> [T]he nondisclosure provisions of the IDEA which are based on similar provisions in FERPA are intended to address institutional policy and practice and not individual instances of disclosure. Further, when looking at whether a District's policy and practice violates the nondisclosure provisions of the law, the District is held to the standard of substantial compliance. *See Gonzaga v. Doe,* 536 U.S. 273, 288 (2002). School district's response at pages 4 and 5.

The school district further stated:

> The Tenth Circuit Court of Appeals addressed the issue of whether a discreet one-time disclosure of personally identifiable information constitutes a violation of FERPA, which is precisely the circumstance here, and held that it did not. School district's response at page 5.

The school district cites the Federal Complaints Officer no court authority, controlling or otherwise, for the argument that there is an IDEA or FERPA exception for disclosure in incidents involving discipline, unless *Jensen V. Reeves*, 3 Fed. Appx. 905, 910 (10th Cir. 2001), which the school district cites as a Tenth Circuit Court of Appeals opinion finding no violation of FERPA for a "discreet one-time disclosure" is meant to be that authority. *Jensen* involved a discipline incident. In any case, whether the school district is relying on *Jensen* for support of no violation of FERPA involving incidents of discipline, or incidents of "discreet one-time disclosure[s]", the Federal Complaints Officer finds *Jensen* distinguishable from the facts of this Complaint. In *Jensen*, the complainant was the alleged bully, not the alleged victim, as in this Complaint, and the disclosure was for the purpose of protecting the victim, and was made to the victim student's parents. There was not only a "discreet one-time disclosure" in *Jensen*, there was a broader disclosure. The Court did not reach the issue of whether the broader disclosure could have been a FERPA violation, because the Court found that the disclosed information was not educational record information.

None of the information disclosed in *Jensen* pertained to any student's limited cognitive or social/emotional abilities, as is the case in this Complaint. The information disclosed was instead designed to inform parents how the school district was disciplining an alleged bully. As to the release of similar information to the individual student who was alleged to have been the bully's victim, the Court stated: "Like the district court, we conclude that the contemporaneous disclosure to the *parents of a victimized child* of the results of any investigation and resulting disciplinary actions taken against an alleged child perpetrator does not constitute a release of an 'education record' within the meaning of 20 U.S.C. § 1232g(a)(4)(A)." *Jensen*, online, page 4, italics added. The Court's statement here can be read consistent with the intent of FERPA at 34 CFR 99.36(b)(2), which specifically allows for disclosure of disciplinary action taken <u>against</u> a student to that student's teachers, and other school officials, in order, in an emergency, to protect the health or safety of the disciplined student, or other students. FERPA at 34 CFR 99.36(c) indicates that this provision is to be "strictly construed." Whatever the intent of the building principal in this Complaint, the disclosure he made was not to the "parents of a victimized child" about disciplinary action taken against another student, but was instead to one set of parents, and potentially through them to other parents, whose children, if only in theory, might be victimizers, rather than victims.

The school district's reliance on *Gonzaga*, addressing disclosure of information about a former undergraduate student at Gonzaga University, a private university in Spokane, Washington, is

also misplaced. The school district relies on *Gonzaga* to argue that the non-disclosure provisions of FERPA, and by reference the IDEA, are intended to address "institutional policy and practice" and not "individual instances of disclosure"; and, that the standard for determining whether the district has violated those provisions is "substantial compliance". The plaintiff in *Gonzaga* brought a Section 1983 action in federal district court to enforce FERPA. The U.S. Supreme Court held that FERPA provided no such private right of action to enforce personal rights under the law. However, the Court also stated:

> Our conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions. Congress expressly authorized the Secretary of Education to "*deal with violations"* of the Act, §1232g(f) (emphasis added), and required the Secretary to "establish or designate [a] review board" for investigating and adjudicating such violations, §1232g(g). Pursuant to these provisions, the Secretary created the Family Policy Compliance Office (FPCO) "to act as the Review board required under the Act and to enforce the Act with respect to all applicable programs." 34 CFR §§99.60(a) and (b) (2001). The FPCO permits students and parents who suspect a violation of the Act to file individual written complaints. §99.63. If a complaint is timely and contains required information, the FPCO will initiate an investigation, §§99.64(a) – (b), notify the educational institution of the charge, §99.65(a), and request a written response, §99.65. If a violation is found, the FPCO distributes a notice of factual findings and a "statement of the specific steps that the agency or institution must take to comply" with FERPA. §§99.66(b) and (c)(1). These administrative procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism, see s*upra*, at 5, and further counsel against our finding a congressional intent to create individually enforceable private rights. *Gonzaga,* online version, at pages 7 and 8, footnote citation omitted.

The Federal Complaints Officer finds that *Gonzaga*, and the FPCO Complaint process it describes, are consistent with the resolution of individual Complaints contemplated by the IDEA. Moreover, even if this were determined not to be true, the Federal Complaints Officer finds that the Federal Complaint process under the IDEA is controlling in this Complaint, and that process does not limit complainants to allegations of "institutional policy and practice" violations, and it does permit allegations of "individual instances of disclosure". Also, the Federal Complaints Officer does not read *Gonzaga* as directing a standard of "substantial compliance" to be used by the FPCO under FERPA for determining whether there have been violations of FERPA, and no such standard exists in the IDEA. In any case, even assuming that the use of such a standard is required, the Federal Complaints Officer finds that on the facts of this Complaint the school district has not met that standard.

The Federal Complaints Officer does not find, however, that the building principal's disclosure in this Complaint resulted in an unsafe environment for this student, or in a denial of FAPE for this student because of any alleged unsafe environment. In their response to the school district's response to their Complaint, the complainants stated:

> Our feeling, despite the district's assurance that everything was being done to address the bullying of our son, was that day after day, [our son] was in an environment in which he could not access the general curriculum and make progress with his peers due to the overwhelming anxiety he felt. It was only after the filing of this complaint and [our son's] subsequent IEP review on April 21, 2004 that our concerns were fully addressed. …
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> The district maintains that [our son] was and is being provided education services in a safe environment. We would agree that after the IEP review of April 21st, 2004, and the subtle changes made to the 2003-2004 IEP, as well as heightened awareness on the part of the [school's] staff, that the concerns are now rectified. Nonetheless, for the first 3 semesters of [the] 2003-2004 school year, [our son's] safety was **not** adequately addressed. Complainants' response at pages 2 and 3, emphasis in original.

If the complainants wish to pursue an allegation against the school district that their son was denied a FAPE because he was placed in an unsafe environment prior to the April 21st, 2004 IEP, they are entitled to do so in a due process hearing. In a due process hearing witnesses and evidence can be subpoenaed and witnesses can be required to testify under oath, and be subject to cross-examination. None of that is possible in the Federal Complaint process under the IDEA, except, under current law in Colorado, at the discretion of the administrative law judge on appeal. It would not be fair to the complainants, the school district, and most importantly, the complainants' son, for the Federal Complaints Officer to render a decision on this allegation absent the rights and protections afforded by the hearing process.

V. REMEDY

Within thirty (30) days of the date of this Decision the Director of Instructional Support Services for the School District shall submit to the Federal Complaints Officer a written statement of assurance. The statement of assurance shall assure that the School District has acted as necessary to avoid any further violation of the law which the Federal Complaints Officer has found the school district to have violated.

VI. CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached to this Decision.

Dated today, June 2, 2004.

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Charles M. Masner, Esq.
Federal Complaints Officer