Docket ID: ED-2017-OS-0074

August 24, 2017

Hilary Malawer

U.S. Department of Education

400 Maryland Avenue SW., Room 6E231

Washington, DC 20202-2800

**Re: Comments Regarding Federal Regulations**

Dear Ms. Malawer:

The Texas Association of School Boards (TASB) appreciates the opportunity to provide feedback on federal regulations. We commend the Department on its receptiveness in listening to stakeholders.

On behalf of the nearly 7,000 locally elected school board members in the state of Texas, we are writing to share our input regarding regulations that may be appropriate for repeal, replacement, or modification.

We request that the Department:

1. **Modify FERPA regulations to clarify electronic records and define “records directly related to a student.” 34 C.F.R. part 99. 3.**

The Federal Educational Rights and Privacy Act (FERPA), 34 CFR § 99.3, defines an *education* *record* as a record that is directly related to a student and maintained by an educational agency or institution or a party acting for such agency or institution. A *record* means any information recorded in any way, including, but not limited to hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche. The definition of *record* was written before several advances in technology that affect today’s schools including email, text messaging, social media, cloud computing, and third-party education service providers such as virtual classroom technology providers and educational apps. Although it is likely that districts understand that almost any document in any medium might be considered within the protections of FERPA, the limitations of the dated references exemplify the need to update this section of the Code of Federal Regulations. More clearly defining when technology is an education record may help clarify when an electronic record that has a complicated technology status is considered a record subject to FERPA.

Because the presence and significance of new technologies in public schools has greatly expanded, the amount of records that may be considered FERPA-protected has grown exponentially. Because of this growth, it is particularly important to have a clear definition of when records are “directly related to a student,” and therefore, provided protection under FERPA. For example, does a teacher posting to social media a picture of a group of students on a field trip violate FERPA? If a security camera captures a student fight in a crowded hallway, whose education record is that video?

In 2007, Family Policy Compliance Office (FPCO) provided an informal letter to Ron Harder, Policy Service and Advocacy Director, Arkansas School Board Association, which appears to take the position that when a video includes one or more students, it is only the education record of the students who are the “focus” of the video, while the other students are “set dressing.” For example, a security video that captures a student fight is only the FERPA-protected record of the students involved in the fight, not nearby students walking the halls. FPCO representatives have repeatedly shared this interpretation with school attorneys in informal discussions and email correspondence. We request that this informal position be formalized or codified and further clarified. In Texas, districts are required to record video and audio surveillance in certain special education classrooms. Similar laws have passed or are being considered in other states. Parents may feel strongly that a recording of their child receiving special education in a classroom is different in nature than a recording of students in a bus or cafeteria, yet the record may be viewed by parents in certain circumstances and most districts have limited ability to redact the other students in the video.

The lack of clarity on these issues often results in districts needing to consult with outside attorneys, which is a costly expenditure of public funds. When parents wish to view security footage or special education camera footage, the districts often have to hire legal counsel. In addition, districts opting to redact bystander students (“set dressing”) have little assurance that their actions comply with a rule that has not been formalized. We request that the department clarify when an incident turns a student into the focus so as to create a record as described in the informal letter. Formalization of this guidance will save districts time, money, and confusion.

2. **Repeal the FAPE standard for Section 504, 34 C.F.R. § 104.33.**

Two federal statutes govern the duties of school districts with respect to educating students with disabilities: Section 504 of the 1973 Rehabilitation Act (“Section 504”) and the Individuals with Disabilities Education Act (IDEA). While these statutes contain overlapping requirements in some instances, the laws have distinctly different purposes.

IDEA requires that each public school provide free appropriate public education (FAPE) to students with qualifying disabilities. Under IDEA, FAPE must be provided in the least restrictive environment and in accordance with the student's individualized education program; it requires affirmative action to educate students with disabilities. By contrast, Section 504 is a nondiscrimination statute which allows for general education with modifications: “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”

Regulations implementing Section 504 of the Rehabilitation Act require school districts to provide a free appropriate public education (FAPE) to qualified students with disabilities in the district’s jurisdiction. 34 C.F.R. §104.33. In other words, FAPE has been joined to IDEA standards by regulation. We believe that the Section 504 FAPE standard goes beyond what is required by Section 504. In both IDEA and Section 504, students with qualifying disabilities should not be excluded from the participation in, denied the benefits of, or be subject to discrimination in any education programs. The FAPE standard under the Section 504 federal regulation goes further and requires districts to implement certain procedural protections that go beyond nondiscrimination. Moreover, the Office of Civil Rights often applies IDEA standards to investigations of alleged violations of a student’s Section 504 rights. But IDEA and Section 504 have different purposes. IDEA requires affirmative action to educate students with disabilities, while Section 504 serves as nondiscrimination statute, which should allow for general education with modifications. In addition, IDEA comes with federal funding while Section 504 does not.

Repealing or modifying the FAPE standard does not remove the district’s duty to provide access to educational benefits, as Section 504 intended. Districts retain the duty to identify students with disabilities and provide reasonable accommodations. However, repealing the FAPE standard for Section 504 would clarify the district’s responsibilities to students under federal law and relieve the burden of an unnecessary federal regulation.

Sincerely,



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President, Texas Association of School Boards (TASB)