



UNITED STATES DEPARTMENT OF EDUCATION

STUDENT PRIVACY POLICY OFFICE

March 28, 2025

Honorable Pender Makin
Commissioner
Maine Department of Education
23 State House Station
Augusta, Maine 04333-0023

Via email: [REDACTED]

Complaint No. 25-0282
Family Educational Rights
and Privacy Act

Dear Commissioner Makin:

It has come to the attention of the U.S. Department of Education's (Department) Student Privacy Policy Office (Office or SPPO) that numerous local educational agencies (LEAs) in Maine may be implementing policies and practices that violate the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99. FERPA provides that parents have a right to inspect and review their children's education records, which are defined as records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR Part 99, Subpart B, and § 99.3 ("Education records"). Once a student reaches 18 years of age or attends a postsecondary institution, all FERPA rights transfer from parents to the student. 34 CFR §§ 99.3 ("Eligible student") and 99.5. We assume for purposes of this letter that the students in question are not "eligible students" and that the parents retain their right to inspect and review their children's education records under FERPA.

Given the number of LEAs potentially involved and to better inform our determination, SPPO is initiating an investigation to ascertain if the Maine Department of Education (MDOE) played a role, either directly or indirectly, in the LEAs' adoption of these practices. As a reminder, in the Maine Consolidated State Plan under the Every Student Succeeds Act, and supplemental assurances, the MDOE affirmed that it "will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program" as a recipient of Department funds. In addition, this Office has also identified an apparent conflict between Maine law and FERPA that may further inhibit the parental right to inspect and review student education records.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

This Office, pursuant to its authority under 34 CFR § 99.60 and 20 U.S.C. §1232g(f), is taking appropriate actions to enforce FERPA by conducting an investigation in accordance with, among others, the procedures outlined in 34 CFR §§ 99.64 and 99.65¹. These sections state, in summary and relevant part:

- The Office conducts its own investigation, when no complaint has been filed, to determine whether an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with FERPA. 34 CFR § 99.64(b).
- The Office notifies in writing the complainant, if any, and the educational agency or institution, the recipient of Department funds under any program administered by the Secretary, or the third party outside of an educational agency or institution if it initiates an investigation under § 99.64(b).
- The written notification under this section includes the substance of the allegations against the educational agency or institution, other recipient, or third party; and directs that agency or institution, other recipient, or third party to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

This letter serves as the written notification discussed above, and to provide you the opportunity to submit a written response as requested below.

On February 26, 2025, *The Maine Wire* reported that nearly 30% of Maine’s LEAs are concealing students’ “health information from parents as it relates to gender dysphoria or transgender treatments,” described as “gender affirming care.”² On the same date, February 26, 2025, *The Federalist* stated in an article entitled “Exclusive: 57 Maine School Districts Hide Kids’ Gender Dysphoria From Parents” the following: “According to documents reviewed by The Federalist and obtained by Parents Defending Education through public records requests, a significant portion of Maine’s public school districts – including its most populous ones – hide students’ critical medical and social information from parents if they are unwilling to allow their child to ‘transition’ genders.”³ In doing our due diligence, SPPO did a preliminary review of information publicly available on the MDOE website. On the “LGBTQ+ Resources” page⁴ we noted the following content:

Maine SAUs [LEAs] are expected to abide by the Maine Human Rights Act (MHRA), which prohibits discrimination on the basis of protected class in employment, housing, places of public accommodation, education, and extension of credit. Protected classes include: race, color, ancestry, national origin, sex, sexual orientation (which includes

¹ <https://studentprivacy.ed.gov/node/548/>.

² <https://www.themainewire.com/2025/02/report-57-maine-school-districts-hide-kids-gender-dysphoria-from-parents/>.

³ <https://thefederalist.com/2025/02/26/exclusive-57-maine-school-districts-hide-kids-gender-dysphoria-from-parents/>.

⁴ <https://www.maine.gov/doe/lgbtq>.

gender identity and expression), physical or mental disability, religion, age, and other categories in certain contexts. The MHRA also prohibits retaliation for asserting MHRA-protected rights.

Further, we found the following text in a memorandum⁵ written by the Maine Human Rights Commission (MHRC), the “quasi-independent state agency” that enforces Maine’s anti-discrimination laws:

In the event that the student and their parent/legal guardian do not agree with regard to the student’s sexual orientation, gender identity, or gender expression, the educational institution should, whenever possible, abide by the wishes of the student with regard their gender identity and expression while at school.

While the inclusion of “whenever possible” may infer some deference for other factors that could include federal laws such as FERPA, the overall memorandum on its face appears to give school officials discretion that would infringe on the rights of a parent under FERPA. Although outside the purview of this Office, this same rhetoric may lead to Title IX violations if applied in a school environment. When parents are denied access to records in a way that denies parents information about how their children are being treated based on their sex then the parent’s ability to report any Title IX violations to OCR is stifled. Therefore, SPPO will also refer this matter to our colleagues in the Office for Civil Rights (OCR) as appropriate.

As we noted above, this letter also serves to notify you of an apparent conflict between Maine law and FERPA, and the resulting violation of FERPA by LEAs in the State. Section 99.61 of the FERPA regulations provides that an educational agency or institution that determines that it cannot comply with FERPA due to a conflict with State or local law shall notify this Office within 45 days and include the text and citation of the conflicting law. In general, an actual conflict of laws arises if it is impossible for a party to comply with both federal and State law, or when a State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law. *Taubman Realty Group Ltd. Partnership v. Norman Mineta*, 198 F.Supp. 2d 744, 761 (E.D. Va. 2002), citing *English v. General Electric*. 496 U.S. 72 (1990).

It has come to our attention that § 4008 of Title 20-A: Education, Part 3: Elementary and Secondary Education, Chapter 201: General Provisions – 2. Privileged communication⁶ may conflict with FERPA. That provision states:

A school counselor or school social worker may not be required, except as provided by this section, to divulge or release information gathered during a counseling relation with a client or with the parent, guardian or a person or agency having legal custody of a minor client. A counseling relation and the information resulting from it shall be kept confidential consistent with the professional obligations of the counselor or social worker.

State law conflicts with FERPA to the extent that § 4008 of Title 20-A effectively prevents

⁵ https://www.maine.gov/mhrc/sites/maine.gov/mhrc/files/inline-files/20160113_g.pdf.

⁶ <https://www.mainelegislature.org/legis/statutes/20-A/title20-Asec4008.html>.

parents from exercising their right to inspect and review education records relating to their child's counseling with a school counselor or school social worker. Assuming for purposes of this determination that this law prevents LEAs from allowing parents to have access to these records, the resulting system wide FERPA violation would also constitute a breach of the assurances in the consolidated application submitted by your agency to this Department to receive federal funds.

As noted in *United States v. Miami University, Ohio State University*, 294 F.3d 797 (6th Cir. 2002), Congress provided in FERPA that "no funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records" except as provided in FERPA. The court explained that legislation, like FERPA, enacted pursuant to the constitutional spending power (art. I, § 8, cl. 1) "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 294 F.3d at 808, citing *Pennhurst State School and Hospital*. 451 U.S. 1, 17 (1981) (holding that Congress may fix the terms on which it disburses Federal money to the states, and likening the relationship to a contract where the receipt of Federal monies is conditioned upon a state's compliance with Federal laws). That is, "Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states." 294 F.3d at 808, citing *Wheeler v. Barrera*, 417 U.S. 402, 427 (1974), modified on another ground, 422 U.S. 1004 (1975). Accordingly, the State must ensure that all LEAs comply with FERPA regarding parents' rights to inspect and review any education records maintained by the LEA relating to their child's counseling with a school counselor or school social worker.

There are a number of enforcement options available to the Department in achieving compliance with FERPA, including withholding further payments, issuing a cease and desist order, and recovering funds. See 34 CFR § 99.67 and 20 U.S.C. § 1234c. The court of appeals in *Miami University, supra*, also concluded that the United States has the inherent power to sue to enforce conditions imposed under FERPA on the recipients of federal grants. 294 F.3d at 808. However, this Office is committed to working with your office and with LEAs to ensure voluntary compliance with FERPA as provided under § 99.66(c)(2) of the regulations. As part of that effort, please report to me in writing by April 11, 2025, the steps MDOE has taken, or will take, including the submission of relevant policy statements or other communications, to ensure that LEAs in Maine comply with FERPA requirements as described in this letter, or provide a statement and justification explaining why you believe this action is unwarranted.

In an effort to expedite the processing of this investigation, please email your response to FERPA.ComplaintResponse@ed.gov, including the complaint number in the subject line. In lieu of sending your response electronically, you may send your written response to the following address:

Student Privacy Policy Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202 – 8520

You may also forward questions specific to this investigation to FERPA.Complaints@ED.Gov, or contact this Office, referencing your complaint number, via phone at 202-260-3887. For general information concerning FERPA and the Office's complaint procedures, please visit our website at <https://studentprivacy.ed.gov/>.

We look forward to working with you to resolve this issue as expeditiously as possible. Should you have any questions, do not hesitate to contact me directly at the address noted above.

Sincerely,

/s/

Frank E. Miller Jr.
Acting Director
Student Privacy Policy Office