

OPINION NO. 92-071**Syllabus:**

Because R.C. 5123.62(T) grants mentally retarded persons and developmentally disabled persons the right to confidential treatment of all information in their personal and medical records, a county board of mental retardation and developmental disabilities may not disclose to a parent organization the names of the board's clients or the names, addresses, and phone numbers of the parents of the board's clients unless proper consent is obtained.

To: Timothy A. Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Lee Fisher, Attorney General, December 30, 1992

You have requested an opinion as to the legality of the release of information relating to adults and children who are being served by a county board of mental retardation and developmental disabilities ("county MR/DD board"). The board has received a request for the names of the clients of the board and also for their parents' names, addresses, and telephone numbers. The request comes from a parent organization that wishes to contact the parents for informational purposes and not for commercial purposes.¹ You have asked that this opinion specifically consider R.C. 5123.62, R.C. Chapter 1347, and R.C. 149.43, and you have also inquired about the release of directory information.

Ohio Public Records Law

It is clear that a county MR/DD board is a county unit whose records must be made available to any person in accordance with R.C. 149.43, unless the records come within one of the exceptions to the definition of "public record" contained in R.C. 149.43(A)(1). See R.C. Chapter 5126. While there is no obligation to create a document compiling the client data sought, to the extent documents reflecting this information are created or maintained by the board, those documents would meet the definition of "record"² and would, therefore, be subject to disclosure unless they fall within one of the exceptions. The only exception that may be applicable to such records is the exception for "records the release of which is prohibited by state or federal law." R.C. 149.43.

Ohio Law Provides for Confidentiality of Records Relating to Mentally Retarded Persons and Developmentally Disabled Persons

R.C. 5123.62 provides mentally retarded persons and developmentally disabled persons with certain specified rights, including "[t]he right to confidential treatment of all information in their personal and medical records." R.C. 5123.62(T). See also R.C. 149.431;³ R.C. 5123.89 (providing for the confidentiality of certain records that directly or indirectly identify a resident or former resident of an institution for the mentally retarded or person whose institutionalization has been sought under R.C. Chapter 5123). The information

¹ R.C. 3319.321 prohibits the disclosure of the names or other personally identifiable information concerning students attending a public school to any person or group for use in a profit-making plan or activity. Since the proposed use of the information in question is not for a profit-making purpose, that provision is clearly not relevant to the facts here under consideration.

² For purposes of R.C. Chapter 149:

"Records" includes any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

R.C. 149.011(G).

³ R.C. 149.431 provides, with certain exceptions, that when a governmental entity or agency or a nonprofit corporation or association enters into a contract or other agreement with the federal government, a unit of state government, or a political subdivision or taxing unit of Ohio for the provision of services, the contract or agreement and financial records of

about which you have inquired - *i.e.*, the names of clients of a county MR/DD board and their parents' names, addresses, and telephone numbers - is information that, if it exists, would be expected to appear in the personal record of a client. That information is, by R.C. 5123.62(T), made confidential as a matter of state law. *See also* 11 Ohio Admin. Code 5123:2-1-02(O)(3) (requiring a county MR/DD board to adopt policies and have written procedures that address the access of individual record information, and further requiring that the policies and procedures "ensure confidentiality"). Because the information in question is confidential under state law, it is not subject to disclosure pursuant to R.C. 149.43. *Cf. State ex rel. Renfro v. Cuyahoga County Department of Human Services*, 54 Ohio St. 3d 25, 560 N.E.2d 230 (1990) (statement in R.C. 2151.421 that child abuse investigation report is confidential clearly removes such a report from the mandatory disclosure provisions of R.C. 149.43). *See generally* 1990 Op. Att'y Gen. No. 90-007, at 2-28 n. 2 (discussing meaning of "confidentiality").⁴

Federal and State Provisions Governing the Disclosure of Information by an Educational Agency or Institution Do Not Provide a Basis for Disclosing Information that Is Confidential Under R.C. 5123.62(T)

The Federal Family Educational Rights and Privacy Act ("FERPA") provides in part that, if an educational agency or institution has a policy or practice of permitting the release of student records or personally identifiable information, other than directory information, to unauthorized persons, federal funds will be withheld from that educational agency or institution. *See* 20 U.S.C.A. §1232g(b)

moneys expended in relation to the performance of the services are public records subject to disclosure under R.C. 149.43, except that:

Any information directly or indirectly identifying a present or former individual patient or client or his diagnosis, prognosis, or medical treatment, treatment for a mental or emotional disorder, treatment for mental retardation or a developmental disability, treatment for drug abuse or alcoholism, or counseling for personal or social problems is not a public record....

R.C. 149.431(A)(1). This provision extends the public records law to nonprofit corporations and associations that provide services pursuant to contract, while clearly recognizing the confidentiality interest addressed in R.C. 5123.62(T). The information at issue directly or indirectly identifies clients of a county MR/DD board and, when it appears in contracts, agreements, or financial records subject to R.C. 149.431, is not subject to disclosure to the general public pursuant to R.C. 149.43.

⁴ Recent legislation requires the chairman of a county MR/DD board to appoint an ethics council consisting of three members of the board. R.C. 5126.032; *see* Am. Sub. S.B. 156, 119th Gen. A. (1992) (eff. Jan. 10, 1992). The ethics council is responsible for reviewing all direct services contracts of the board to determine whether the amounts are reasonable and whether any preferential treatment or unfair advantage is being granted. The ethics council submits its recommendations to the county MR/DD board; the board may not enter into a contract that is not recommended by the ethics council. Action taken by the ethics council on direct services contracts must be in public, and the council must afford an affected party the opportunity to meet with the council. The board must keep minutes of its actions, and those minutes constitute public records. R.C. 5126.032.

There are questions concerning the implementation of R.C. 5126.032 in light of the rights guaranteed by R.C. 5123.62(T). *See also* R.C. 149.431;

(1990). No other penalty is provided for disclosure of items that are protected under FERPA (also known as the Buckley Amendment). *See Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 599, 239 S.E.2d 415, 419 (1977) ("[t]he Buckley Amendment does not forbid...disclosure of information concerning a student...The Buckley Amendment simply cuts off Federal funds, otherwise available to an educational institution which has a policy or practice of permitting the release of such information").

FERPA applies to public or private educational agencies or institutions that are the recipients of federal funds under certain educational programs. *See* 20 U.S.C.A. §1232g(a)(3) (1990); 34 C.F.R. §99.1 (1992). An educational agency or institution is included if it receives federal funds by grant, cooperative agreement, contract, subgrant, or subcontract. 34 C.F.R. §99.1(d)(1) (1992). If a county MR/DD board receives such funds, it is subject to the provisions of FERPA.

Disclosure provisions that are somewhat analogous to FERPA appear in R.C. 3319.321. That provision prohibits the release of personally identifiable information, other than directory information, concerning a student in a public school unless consent is obtained, except as authorized by statute.

FERPA permits an educational agency or institution to designate certain categories of information as "directory information" that it will make available to the public without consent. 20 U.S.C.A. §1232g(a)(5) (1990). Pursuant to 20 U.S.C.A. §1232g(a)(5)(A), "directory information" relating to a student includes:

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C.A. §1232g(a)(5)(A) (1990). R.C. 3319.321(B)(1) adopts a similar definition. The definition appearing in 34 C.F.R. §99.3 is somewhat different, stating that "directory information" means "information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed" and that it "includes, but is not limited to" the items listed in 20 U.S.C.A. §1232g(a)(5)(A). 34 C.F.R. §99.3 would, thus, permit additional items to be included as directory information if their disclosure would not be considered harmful or an invasion of privacy.

The language in the definitions stating that directory information "includes" the specified items is somewhat misleading for, under federal law, an educational agency or institution has the discretion to select the items that it chooses to

11 Ohio Admin. Code 5123:2-1-02(O)(3). Resolution of those issues exceeds the scope of this opinion. Even if certain information must be disclosed by the ethics council pursuant to R.C. 5126.032 in specified circumstances, the fact of such disclosure would not affect the general grant of confidentiality that is made by R.C. 5123.62(T) and its applicability to the release of records to the general public pursuant to R.C. 149.43. *See generally State ex rel. Renfro v. Department of Human Services*, 54 Ohio St. 3d 25, 560 N.E.2d 230 (1990) (confidential information may be disseminated as authorized by statute and rule and retain its confidential nature for purposes of R.C. 149.43); 11 Ohio Admin. Code 5123:2-1-02(O)(3); 1990 Op. Att'y Gen. No. 90-007.

designate as directory information. Federal regulations permit an educational agency to disclose directory information if it has given public notice to students and parents of:

- (1) The types of personally identifiable information that the agency or institution has designated as directory information;
- (2) 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
- (3) 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(a) (1992); *see also* 20 U.S.C.A. §1232g(a)(5)(B) (1990). FERPA has been construed by the courts as permitting an educational agency or institution to choose not to designate as directory information items, such as students' names and addresses, that are listed in 20 U.S.C.A. §1232g(a)(5)(A) (1990). *See Krauss v. Nassau Community College*, 122 Misc. 2d 218, 469 N.Y.S.2d 553 (Sup. Ct. 1983). If the items are designated as directory information by a particular educational agency or institution, their disclosure is not barred by FERPA; if the items are not so designated, their disclosure without prior parental consent,⁵ or without a court order, will run counter to FERPA and result in the forfeiture of federal funds. *See* 20 U.S.C.A. §1232g(b)(2) (1990); *Krauss v. Nassau Community College*.

With respect to the items at issue in your request, it is clear that the names of students come within the class of items that may be classified as directory information. There is no express authority for the inclusion of the parents' names, addresses, or telephone numbers as directory information.⁶ That information might, however, be included pursuant to 34 C.F.R. §99.3 because its disclosure is not generally considered harmful or an invasion of privacy, or it might be included incidentally if the student and parent have the same address and telephone listing. Thus, at least some of the information that is the subject of the instant request would be eligible for disclosure as directory information under FERPA. *See also* R.C. 3319.321.

FERPA permits the disclosure of personally identifiable information other than directory information, without parental consent, to certain persons for specified purposes – such as to other school officials within the educational agency or institution who have legitimate educational interests, or in connection with a student's application for, or receipt of, financial aid. 20 U.S.C.A. §1232g(b)(1) (1990); *accord* 34 C.F.R. §99.31 (1992). The federal provisions do not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student in the specified circumstances, or to designate any information as directory information, but merely permit the

⁵ Consent required of a parent may be exercised by the student after the student has attained age eighteen or is attending an institution of postsecondary education. 20 U.S.C.A. §1232g(d) (1990). Of course, the student may consent only if he is competent to take such action. For purposes of this opinion, reference to consent by the parent includes consent by the student or the student's guardian as may be appropriate in particular circumstances. *See, e.g.*, 11 Ohio Admin. Code 5123:2-1-02(O)(3)(a)(i).

⁶ The name of a student's parent and the address of the student or the student's family are included as "personally identifiable information." *See* 34 C.F.R. §99.3 (1992).

educational agency or institution to do so, if it chooses, without forfeiting federal funds. 34 C.F.R. §99.31(a)(11), (b) (1992).

As noted above, rules adopted by the Department require a county MR/DD board to have policies and procedures protecting the confidentiality of individuals whom they serve. 11 Ohio Admin. Code 5123:2-1-02(O)(3)(a). With respect to individuals placed in a county MR/DD program by the local education agency, the policies and procedures must comply with standards for the education of handicapped children set forth in rule 3301-51-02. 11 Ohio Admin. Code 5123:2-1-02(O)(3)(a)(i). A county MR/DD board must also require that written permission be obtained from an individual, or his parent or guardian, before information is released to persons not authorized to receive the information pursuant to rule 3301-51-02 and 34 C.F.R. §99.31. 11 Ohio Admin. Code 5123:2-1-02(O)(3)(a)(i).⁷ Rule 3301-51-02, adopted by the Department of Education and applicable to the education of handicapped students, incorporates certain of the provisions contained in 34 C.F.R. §99.31, permitting disclosure of personally identifiable information from the education records⁸ of a student without written parental consent in specified circumstances. 3 Ohio Admin. Code 3301-51-02(B)(6); *see also* R.C. 3319.321. Rule 3301-51-02(B)(6)(b) requires that each educational agency adopt written procedures for obtaining written consent of the parent before disclosing personally identifiable information, other than directory information, except as provided in the rule. The required consent must specify the records to be disclosed, the purpose of disclosure, and the persons to whom disclosure may be made. 3 Ohio Admin. Code 3301-51-02(B)(6)(b); *accord* 34 C.F.R. §99.30 (1992).

FERPA and the provisions of Ohio law pertaining to directory information do not mandate that any of the information referenced in your request be disclosed to the general public. Those provisions appear to permit at least some of the information to be designated as directory information and to be disclosed as such. In determining whether to designate particular items as directory information, a county MR/DD board must, however, comply with other applicable provisions of state law, including R.C. 5123.62(T). *See, e.g., Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Association, Local 11*, 59 Ohio St. 3d 177, 572 N.E.2d 71 (1991). In the instant case, R.C. 5123.62(T) makes it clear that all information in a client's personal and medical record is entitled to confidential treatment. Disclosure of a client's name or a parent's name, address, or telephone number would clearly breach that confidence. *See, e.g., Op. No. 90-007*. It follows that the disclosure of any of that information would violate state law and, therefore, its

⁷ 11 Ohio Admin. Code 5123:2-1-02(O)(3)(a)(i) references "rule 3301-52-02 of the Administrative Code" and "34 CFR regulation 99.3." It is apparent that the references are erroneous and that rule 3301-51-02 and 34 C.F.R. §99.31 were intended. *See* 3 Ohio Admin. Code 3301-51-02(B); 11 Ohio Admin. Code 5123:2-1-02(O)(3)(a)(vi). 34 C.F.R. §99.3 contains definitions that are relevant to 34 C.F.R. Part 99; 34 C.F.R. §99.31 outlines the conditions under which prior consent is not required for the disclosure of information. 34 C.F.R. §§99.3, .31 (1992).

⁸ 3 Ohio Admin. Code 3301-51-01(R) defines "education records" as "those records which are directly related to a student and are maintained by an educational agency or institution," excluding records that are excluded under 34 C.F.R. §99.3. *See also* 20 U.S.C.A. §1232g(a)(4)(A) (1990). Records held by a county MR/DD board that relate to a mentally handicapped or developmentally disabled person may thus be both education records for purposes of 3 Ohio Admin. Code Chapter 3301-51 and personal records for purposes of R.C. 5123.62.

disclosure is prohibited, regardless of whether the disclosure would trigger a forfeiture of federal funds under FERPA or would conflict with the provisions of R.C. 3319.321 or rule 3301-51-02(B).⁹ See, e.g., *Kestenbaum v. Michigan State University*, 97 Mich. App. 5, 294 N.W.2d 228 (1980) (names and addresses of students that were subject to disclosure under FERPA could not be disclosed because of privacy provisions of state law); *aff'd*, 414 Mich. 510, 327 N.W.2d 783 (1982). The conclusion that a county MR/DD board may not disclose any information that identifies its clients, even if such disclosure would be permitted under FERPA, is consistent with provisions of federal law protecting the privacy of handicapped students and their parents. See 20 U.S.C.A. §1417(c) (1990); 34 C.F.R. §§300.571-572 (1992); *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1375 (8th Cir. 1990).¹⁰

Disclosure of Confidential Information is Permitted when Proper Consent Is Obtained

Even though the disclosure of the information in question is not required by R.C. 149.43 or permitted under R.C. 5123.62(T) without proper consent, the information relating to a particular client may be disclosed if that client, or a parent or guardian, as appropriate, expressly consents to the particular disclosure.¹¹ See, e.g., 20 U.S.C.A. §§1232g(b)(2), 1417(c) (1990); 34 C.F.R. §300.571 (1992); 3 Ohio Admin. Code 3301-51-02(B)(6)(b); 11 Ohio Admin. Code 5123:2-1-02(O)(3). Thus, the county MR/DD board may ask whether its clients and their parents wish to

⁹ In this regard, an opportunity for the parent of a client of a county MR/DD board to refuse to permit information about the client to be designated as directory information is not sufficient to protect the confidentiality interest recognized under R.C. 5123.62(T). The disclosure of directory information is permitted unless the parent objects in writing, within a specified period of time after the notice of the designation of directory information, to the disclosure of some or all types of information designated as directory information, and the disclosure is permitted with regard to former students without any requirement for notice and an opportunity to object. 20 U.S.C.A. §1232g(a)(5)(B) (1990); 34 C.F.R. §99.37 (1992); see also R.C. 3319.321. Permitting a county MR/DD board to disclose the names of its clients and the names, addresses, and telephone numbers of their parents in those circumstances is not "confidential treatment" as that term is used in R.C. 5123.62(T) and is commonly understood. See, e.g., 1990 Op. Att'y Gen. No. 90-007, at 2-28 n. 2. Rather, as discussed in this opinion, state law prevents a county MR/DD board from disclosing that information to the general public without proper consent. See 11 Ohio Admin. Code 5123:2-1-02(O)(3)(a).

¹⁰ 3 Ohio Admin. Code 3301-51-02(B)(6)(b) appears to recognize the existence of directory information relating to handicapped children and to authorize its disclosure, without consent, by a school district or other educational agency. This opinion does not consider whether a school district or educational agency may designate categories of directory information that relate to handicapped children and do not violate R.C. 5123.62(T). See R.C. 3319.321(B)(2); see also 20 U.S.C.A. §1417(c) (1990); 34 C.F.R. §300.571 (1992). This opinion concludes only that a county MR/DD board is precluded from releasing to the public the names of its clients or their parents' names, addresses, or telephone numbers.

¹¹ Where release of a parent's name is sought, it is assumed that consent of the parent is obtained.

have the requested information disclosed to a parent group. In those instances in which proper consent is given, the county MR/DD board may disclose the information.

Personal Information Systems Act Does Not Provide for Disclosure of Personal Information Except to the Subject of the Information

R.C. Chapter 1347 governs state and local agencies that maintain personal information systems¹² and, with certain exceptions, provides persons who are the subject of personal information in a personal information system with rights to inspect the personal information, to be informed of the purposes for which the information is used, and to dispute the information and cause it to be corrected. R.C. 1347.03-.09. R.C. Chapter 1347 does not provide for the disclosure of personal information to anyone other than the subject of the information, an individual of his choice who accompanies him, his legal guardian, or an attorney who represents him. *See* R.C. 1347.08. Therefore, R.C. Chapter 1347 does not grant any authority for a county MR/DD board to disclose any information to a parent organization.

R.C. Chapter 1347 imposes limits upon the types of personal information that may be maintained in a personal information system and the purposes for which the information may be used. *See* R.C. 1347.05(H), .07. Further, R.C. 1347.10 provides a legal remedy in certain circumstances to a person who is harmed by the use of personal information. R.C. Chapter 1347 does not, however, affect the release of public records under R.C. 149.43. R.C. 1347.04(B) states expressly: "The disclosure to members of the general public of personal information contained in a public record, as defined in [R.C. 149.43], is not an improper use of personal information under this chapter."

"No provision of R.C. Chapter 1347 makes personal information confidential. Confidentiality is, instead, granted by specific statutory provisions," such as R.C. 5123.62(T). 1990 Op. Att'y Gen. No. 90-099, at 2-436; *see also* Op. No. 90-007. Accordingly, R.C. Chapter 1347 does not affect the analysis set forth above.

¹² The following definitions are applicable to R.C. Chapter 1347:

(E) "Personal information" means any information that describes anything about a person, or that indicates actions done by or to a person, or that indicates that a person possesses certain personal characteristics, and that contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person.

(F) "System" means any collection or group of related records that are kept in an organized manner and that are maintained by a state or local agency, and from which personal information is retrieved by the name of the person or by some identifying number, symbol, or other identifier assigned to the person. "System" includes both records that are manually stored and records that are stored using electronic data processing equipment. "System" does not include collected archival records in the custody of or administered under the authority of the Ohio historical society, published directories, reference materials or newsletters, or routine information that is maintained for the purpose of internal office administration, the use of which would not adversely affect a person.

R.C. 1347.01(E), (F).

Conclusion

It is, therefore, my opinion, and you are advised, that because R.C. 5123.62(T) grants mentally retarded persons and developmentally disabled persons the right to confidential treatment of all information in their personal and medical records, a county board of mental retardation and developmental disabilities may not disclose to a parent organization the names of the board's clients or the names, addresses, and phone numbers of the parents of the board's clients unless proper consent is obtained.