UNDERSTANDING AUTHORITY OF JUDGE OF DISTRICT COURT SUPERVISING JUVENILES TO ENFORCE FEDERAL RIGHTS

- Summary Memorandum
- J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999)

THE ROLE OF STATE JUDGES TO ENFORCE THE FEDERAL RIGHTS OF CHILDREN WITH DISABILITIES IN STATE CUSTODY

Children with mental or developmental disabilities in the custody of New Mexico brought a court action alleging that state officer had failed to provide protections and therapeutic services required by federal statutes and the Constitution. The United States District Court in New Mexico denied class certification and abstained from hearing the case. The Tenth Circuit affirmed and said, among other things, that abstention was justified. *J. B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999).

The federal statutes and Constitution involved in this case were:

- ★ Rehabilitation Act of 1973
- ★ Americans with Disabilities Act of 1990
- ★ Medicaid Act
- ★ Alcohol, Drug Abuse and Mental Health Reorganization Act
- ★ Individuals with Disabilities Education Act (IDEA)
- ★ Fourteenth Amendment

The Tenth Circuit concluded that federal courts on rare occasions must abstain from exercising their jurisdiction in order to "avoid undue interference with states' conduct of their own affairs." They cited U. S. Supreme Court cases resting on "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." The Tenth Circuit followed the *Younger* doctrine which requires abstention when federal proceedings would (1) interfere with an ongoing state judicial proceeding (2) that implicates important state interests and (3) that affords an adequate opportunity to raise the federal claims.

(1) In this case of children in state custody, neither party could dispute that the state has an important interest in the care, disposition, and welfare of children with disabilities in its custody. The children in New Mexico were subject to dispositional and biannual hearings before the Children's Court. Although less than full adversarial hearings, they were judicial in nature and exist as long as the child remains in state custody.

(2) The federal court action would interfere with the state proceedings by fundamentally changing the dispositions and oversight of the children. The federal court would, in effect, assume an oversight role over the

entire state system for children with disabilities. The lawsuit in federal court would prevent the New Mexico Children's Court from carrying out its function.

(3) The Tenth Circuit was less certain about whether the children could have adequately raised their federal statutory and constitutional claims in these state proceedings. The Tenth Circuit said, "This uncertainty, however, militates in favor of abstention." The plaintiffs bear the burden of proving that state procedural law barred presentation of their claims in the Children's Court. Abstention is appropriate unless state law clearly bars the interposition of the federal statutory and constitutional claims."[1]

The Tenth Circuit concluded, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." 186 F.2d at 1293.

In other words, so long as the Oklahoma judges hearing juvenile cases will hear and render judgment on federal rights assured to children with disabilities in state custody, the federal court is compelled, without discretion, to abstain.

[1]Since court reform in the 1960's, Oklahoma District Courts are courts of general jurisdiction, without any explicit bar on what type claims or issues may be heard by judges of the District Court hearing juvenile cases.

jority concedes that Richardson is entitled only to recover the additional increment of damages caused by the aggravation of his 1986 injury. To support this conclusion, the majority cites *Stevens v. Bangor and Aroostook R.R. Co.,* 97 F.3d 594, 601 (1st Cir.1996). Yet *Stevens* held that an employer is liable for *all* of an injured employee's damages under FELA when the jury cannot apportion damages caused by the employee's pre-existing condition and the new injury. *Id.* In this case, it is the language of the release—which prevents Richardson from recovering again for his pre-existing injury—that precludes application of the rule set forth in *Stevens* and limits Richardson's recovery to damages caused by any aggravation of his earlier condition. In other words, the majority's statement regarding the limitation of Richardson's damages is true only because the express language of the release makes it true.

The majority further concludes that "evidence of release does not assist" Union Pacific's defense because the 1988 release "does not absolve" Union Pacific of liability for aggravation of the 1986 injury if that aggravation was caused by a new accident. This principle, even if true, has no application here. Union Pacific does not contend the release shielded it from liability for unrelated post–1986 injuries, but only for liability from those injuries that constituted mere manifestations of the 1986 injury or for those injuries "arising out of" the 1986 injury. None of the cases cited by the majority prevent Union Pacific from raising this release defense or compel exclusion of evidence of the release. *Babbitt v. Norfolk & Western Ry. Co.* involved only the validity of a release, not its admissibility, *see* 104 F.3d 89, 92–93 (6th Cir.1997); *Stevens v. Bangor and Aroostook R.R. Co.* apparently did not involve a release at all, *see* 97 F.3d at 601; and *Wilson v. CSX Transp., Inc.,* far from finding the release inadmissible, held it was for the jury to determine if the plaintiff had "suffered 'new' injuries after signing the release" or if the plaintiff's condition was due to the "progression of his pre-existing disease," 83 F.3d 742, 745–46 (6th Cir.1996).

J.B., a child, by Frederic M. HART, his next friend; Y.A., D.A., E.A., F.A., V.C., and C.C., by Ella Joan Fenoglio, their next friend; R.E., C.E., J.E., and E.E., children, by Barbara E. Bergman, their next friend; J.S., a child, by Peter H. Johnstone, his next friend; on behalf of themselves and all others similarly situated, Plaintiffs—Appellants,

v.

J. Alex VALDEZ, Secretary of the New Mexico Department of Health; William H. Johnson, Jr., Secretary of the New Mexico Human Services Department; Heather Wilson, Secretary of the New Mexico Children, Youth and Families Department; Michael J. Davis, State Superintendent of Public Instruction; Eleanor Ortiz, President of the State Board of Education; Van W. Witt, Vice President of the State Board of Education; Marlis E. Mann; Emmalou Rodriguez, Secretary of the State Board of Education; Rudy Castellano; Wallace Davis; Roger Lenard; Lynn Medlin; Darl Miller; Beverly R. O'Dell; Millie Pogna; Steven Schmidt; Catherine M. Smith; Flora Sanchez; and David Steinborn, members of the State Board of Education, Defendants—Appellees.

Children's Rights, Inc., Amicus Curiae.

No. 96–2278.

United States Court of Appeals,
Tenth Circuit.

Aug. 12, 1999.

Mentally or developmentally disabled children in the custody of New Mexico

brought action for declaratory and injunctive relief, alleging that state officers had failed to provide protections and therapeutic services required by federal statutes and the Constitution. The United States District Court, District of New Mexico, Bruce D. Black, J., denied class certification and further abstained from hearing the case. Children appealed. The Court of Appeals, Tacha, Circuit Judge, held that: (1) Eleventh Amendment did not bar action; (2) commonality requirement for class certification was not met; and (3) *Younger* abstention was warranted.

Affirmed.

Briscoe, Circuit Judge, filed concurring and dissenting opinion.

1. Federal Courts ⚿265

Because of its jurisdictional nature, defendants could raise defense of Eleventh Amendment immunity at any stage of the proceedings. U.S.C.A. Const.Amend. 11.

2. Federal Courts ⚿265, 274

Eleventh Amendment generally bars suits against a state in federal court commenced by citizens of that state or citizens of another state. U.S.C.A. Const.Amend. 11.

3. Federal Courts ⚿265, 267, 269, 272

There are three primary methods for circumventing the Eleventh Amendment and allowing federal courts to ensure state compliance with federal laws: state may consent to the action; Congress may clearly and expressly abrogate the states' immunity; and a party may sue a state official pursuant to *Ex Parte Young* doctrine, under which the Eleventh Amendment generally does not bar a suit against a state official in federal court which seeks only prospective equitable relief for violations of federal law, even if the state is immune. U.S.C.A. Const.Amend. 11.

4. Federal Courts ⚿269, 272

State's interest in administering a welfare program at least partially funded by the federal government was not such a core sovereign interest as to preclude the application of *Ex parte Young* doctrine, and thus, Eleventh Amendment did not bar action for declaratory and injunctive relief, alleging that state officers had failed to provide requisite protections and therapeutic services to mentally or developmentally disabled children in state's custody. U.S.C.A. Const.Amend. 11.

5. Federal Courts ⚿269, 272

Challenge to the administration of a welfare program is not the equivalent of a suit for money damages, nor does it strike at a state's fundamental power, such as the power to tax, for purposes of determining the applicability of the *Ex parte Young* exception to Eleventh Amendment immunity. U.S.C.A. Const.Amend. 11.

6. Federal Civil Procedure ⚿162
Federal Courts ⚿817

Decision to grant or deny certification of a class belongs within the discretion of the trial court, and Court of Appeals will not interfere with that discretion unless it is abused; there is no abuse of discretion when the trial court applies the correct criteria to the facts of the case.

7. Federal Civil Procedure ⚿181

Commonality requirement for class certification was not met by proposed class defined as children who were, or would be, in or at risk of State custody and determined by state officers and/or their agents to have any form of mental and/or developmental disability for which they required some kind of therapeutic services or support; ways in which the children came into state custody as well as their particular placements once in custody differed drastically, there was no statutory or constitutional claim common to all named plaintiffs and all putative class members, and commonality was not established via an allegation of "systematic failures." Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

8. Federal Civil Procedure ⚿165

Commonality prerequisite for class certification requires only a single issue common to the class; thus, the commonality requirement is met if plaintiffs' griev-

ances share a common question of law or of fact. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

9. Federal Civil Procedure ⚿165

Under the rule requiring that injunctive or declaratory relief be appropriate with respect to the class as a whole, the fact that the claims of individual class members may differ factually should not preclude class certification of a claim seeking the application of a common policy. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

10. Federal Civil Procedure ⚿165

For a common question of law to exist, the putative class must share a discrete legal question of some kind. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

11. Federal Courts ⚿776

Court of Appeals reviews the appropriateness of *Younger* abstention de novo.

12. Federal Courts ⚿41

Although federal courts have a virtually unflagging obligation to exercise jurisdiction granted them, they must on rare occasions abstain from exercising their jurisdiction in order to avoid undue interference with states' conduct of their own affairs.

13. Federal Courts ⚿41, 46

Younger doctrine requires abstention when federal proceedings would interfere with an ongoing state judicial proceeding that implicates important state interests and that affords an adequate opportunity to raise the federal claims; while a case warrants *Younger* abstention only if each of these three criteria are satisfied, abstention is not discretionary once those conditions are met, absent extraordinary circumstances that render a state court unable to give state litigants a full and fair hearing on their federal claims.

14. Federal Courts ⚿47.1

Younger abstention was warranted as to claims that New Mexico had failed to provide disabled children in state custody the protections and therapeutic services required by federal statutes and the Constitution; continuing jurisdiction of the New Mexico Children's Court to modify a child's disposition, coupled with mandatory six-month periodic review hearings, was an ongoing state judicial proceeding, the federal action would interfere with that proceeding by changing the dispositions and oversight of the children, and it was not shown that the claims could not be raised at the review hearings. NMSA 1978, §§ 32A–4–24, 32A–4–25, subd. H(6).

Joseph Goldberg, Freedman, Boyd, Daniels, Hollander, Guttman & Goldberg, Abuquerque, New Mexico (Jane B. Wishner, Browning & Peifer, Albuquerque, New Mexico, and Peter Cubra, Albuquerque, New Mexico, with him on the briefs), appearing for Plaintiffs–Appellants.

John H. Clough, Assistant Attorney General, (Robert T. Booms, Assistant Attorney General, State of New Mexico, Santa Fe, New Mexico, with him on the brief), appearing for Defendants–Appellees.

Marcia Robinson Lowry and Suzanne Nossel, for Children's Rights, Inc., New York, New York, filed an amicus curiae brief.

Before TACHA, BALDOCK, and BRISCOE, Circuit Judges.

TACHA, Circuit Judge.

Plaintiffs, sixteen mentally or developmentally disabled children who are or were in the custody of the state of New Mexico, brought this action for declaratory and injunctive relief alleging that defendants have failed to provide protections and therapeutic services required by federal statutes and the United States Constitution. Plaintiffs sought to certify a class comprised of "[a]ll children who are now or in the future will be (a) in or at risk of State custody and (b) determined by defendants and/or their agents to have any form of mental and/or developmental disability for which they require some kind of therapeutic services or support." Appellants' App., Vol. 2, at 226. The district court denied

class certification and further abstained from hearing the case. Twelve of the sixteen original plaintiffs appeal these rulings.[1] We affirm.

I. Procedural History

Plaintiffs, through their next friends, seek structural reform of New Mexico's system for evaluating and treating children with mental and developmental disabilities in its custody. The stories of the named plaintiffs reveal a child welfare system having terrible difficulties providing the children with the kind of care and treatment they deserve.

In an effort to improve the services and protections provided by the state and to effect system-wide change, plaintiffs initiated this action in November 1993 by filing a class action complaint. They amended the complaint in March 1994, alleging that the defendants, several New Mexico state officers,[2] had violated the Rehabilitation Act of 1973, the Americans with Disabilities Act ("ADA"), the Medicaid Act, the Alcohol, Drug Abuse and Mental Health Reorganization Act ("ADAMHRA"), the Individuals with Disabilities Education Act ("IDEA"), and the Fourteenth Amendment. In essence, plaintiffs charged the state with failing to provide them services, benefits, and protections guaranteed by federal statutory and constitutional law. In May 1995, the parties entered into a stipulation of additional facts to provide the district court with an update regarding the custodial status of the named plaintiffs. The parties informed the court that they intended it to consider this stipulation as part of the complaint. On October 6, 1995, the district court dismissed with prejudice plaintiffs' claims under the ADAMHRA and certain claims under the IDEA, as well as some claims against the Secretary of the New Mexico Department of Health, the Secretary of the New Mexico Human Services Department, and members of the State Board of Education. In addition, the district court dismissed without prejudice certain claims under the Rehabilitation Act, the ADA, and the Fourteenth Amendment. Plaintiffs do not appeal from these rulings.

In March 1994, plaintiffs moved for class certification. The district court *sua sponte* ordered the parties to stipulate to additional facts regarding the current status of each named plaintiff. The parties filed this second stipulation of facts on May 10, 1996. On June 26, 1996, after all of the above filings and order of dismissal, the district court denied class certification. In October 1996, the district court granted reconsideration of its previous denial of defendants' February 1995 motion to abstain. Upon reconsideration, the district court found abstention appropriate based on *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1970), and its progeny.

Plaintiffs appeal the district court's denial of class certification and decision to abstain. Defendants, for the first time on

1. The district court entered judgment on C.E., J.E., E.E., J.S., Y.A., D.A., E.A., F.A., V.C., C.C., R.E., and J.B. pursuant to Fed.R.Civ.P. 54(b), finding no just reason for delay in this case. The district court did not, however, make any mention of K.L. or M.H., and the parties agree that they are not parties to this appeal. The court also did not enter judgment on A.S. and R.W.'s claims because it did not abstain from hearing their individual cases as it did the others. R.W.'s case is now moot, and he has not appealed. Furthermore, we denied the motion of A.S. to consolidate his appeal with the current one, and his claims have since become moot. Therefore, neither R.W. nor A.S. are parties to this appeal.

2. Plaintiffs sued the officers in their official capacities. Those named in plaintiffs' second amended complaint include: the Governor; Secretary of the New Mexico Department of Health; Secretary of the New Mexico Human Services Department; Secretary of the New Mexico Children, Youth and Families Department; State Superintendent of Public Instruction; President of the State Board of Education; Vice President of the State Board of Education; Secretary of the State Board of Education; and members of the State Board of Education.

appeal, additionally argue that the Eleventh Amendment precludes us from hearing this case.

II. Factual Background

Plaintiffs estimate, and defendants do not dispute, that New Mexico has approximately 3000 children in its custody and that at least 1000 have mental or developmental disorders. Children with disabilities in state custody may receive a range of treatments, from in-home support services for the family to complete institutionalization. As shown by the complaint and succeeding stipulations of fact, the named plaintiffs have varied backgrounds, needs, and custodial situations. For the purposes of this appeal, we take the allegations contained in the complaint as true. *See* 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 7.26 (3d ed.1992). Moreover, because the complaint does not tie any of its broad allegations with the individual named plaintiffs, we have liberally construed, with the help of the district court's order of dismissal, the violations that pertain to each child.

J.B. has at least six mental and developmental disabilities. Fourteen years old at the time of the complaint, the state had placed him in custody two years earlier because of parental abuse. The state first placed him in a children's psychiatric hospital for evaluation and treatment before moving him to a special needs foster home, two private psychiatric hospitals, a group home, a residential treatment center, a homeless shelter, and a regular foster home. At the time of the complaint, J.B. resided in a special needs foster home. However, according to the 1995 stipulation, New Mexico had placed him in eleven separate facilities or programs since then. He frequently ran away from these environments and was once arrested for shoplifting. According to the 1996 stipulation of facts, the state placed J.B. in a juvenile detention center for a period of time. At the latest update, he resided in a motel and received social worker and parole officer services. Plaintiffs allege that defendants violated the ADA and Rehabilitation Act by placing J.B. in an overly restrictive environment, failing to facilitate a permanent placement for him, and failing to provide him with an appropriate educational program. They further claim a violation of the IDEA because J.B. received no appointed surrogate parent to protect his educational rights.

Y.A., D.A., E.A., F.A., V.C., and C.C. are siblings who each have several developmental, emotional, and behavioral disabilities. The state took them into custody in 1990 and has moved them repeatedly, never placing more than two of the siblings together. According to the 1995 stipulation, Y.A. had received eleven placements since the complaint. By 1996, Y.A. had turned eighteen, and the state had discharged her from custody. She currently receives social security benefits. The state initially placed D.A. in a residential treatment center. The 1995 stipulation indicates that he lived with his mother, except for a week spent at a juvenile detention center after an arrest. By May 1996, a judicial order had discharged him from state custody at the age of sixteen. At that time, D.A. lived in the family home and received social security benefits while his family received support services from defendants. E.A., F.A., V.C., and C.C. received placements in foster homes. The subsequent stipulations of facts indicate that the state returned them to their mother's care and discharged them from state custody.

Plaintiffs argue that defendants violated the rights of each of these siblings under the ADA and Rehabilitation Act because they placed them in overly restrictive settings and failed to provide them with appropriate educational programs. They further claim that defendants violated these children's Fourteenth Amendment right to family integrity by placing them in separate locations. They allege an additional violation to Y.A., D.A., E.A., and F.A.'s rights for failure to facilitate a permanent placement.

The state took custody of siblings R.E., C.E., J.E., and E.E. because of abuse and neglect, returning them to their mother after one year. R.E. suffers from emotional and behavioral disabilities, while C.E., J.E., and E.E. have developmental and behavioral disabilities. With respect to R.E., her mother did not want her returned because the state did not provide in-home services and three disabled sons overwhelmed her. By May 1995, a judicial order discharged R.E. from state custody although she remained under the protective supervision of the Children, Youth and Families Department ("CYFD"). She also received Medicaid services. The other siblings were placed in a variety of locations. According to the 1995 stipulation, C.E. had resided in foster homes, psychiatric hospitals, and a companion home operated by the Association of Retarded Citizens and had a treatment guardian. J.E. also lived in the companion home. Meanwhile, E.E. resided in various foster homes, a temporary respite home, and the companion home and has had a treatment guardian appointed. By the 1996 update, C.E. and J.E. resided in a foster home operated by the Association of Retarded Citizens, have had a surrogate appointed, and received social security benefits and case management, psychological, and special education services. E.E. resided in a different foster home and received services similar to his siblings. Plaintiffs allege that New Mexico officials violated the ADA and Rehabilitation Act by failing to provide in-home services to R.E., C.E., J.E., and E.E., and appropriate educational and therapeutic services to R.E. and C.E. They further claim that defendants failed to preserve the siblings' family integrity by placing them in different settings.

J.S. suffers from physical, developmental, and behavioral disabilities. In custody for one year at the time of the complaint, J.S. initially received a foster home placement but was returned to his mother briefly. His mother placed him back in state custody because the state provided no in-home support and stopped paying for his medication. J.S. resided in a foster home at the time of the complaint. By the 1995 stipulation, the state had appointed a surrogate parent and treatment guardian and, by 1996, placed J.S. in a state foster home which provided services such as psychological and medical treatment. Plaintiffs allege a violation of the ADA and Rehabilitation Act because J.S. did not receive adequate in-home services. They further claim that defendants violated the Medicaid Act by failing to inform J.S. of the availability of Medicaid screening and not administering entitled tests. Finally, defendants allegedly violated J.S.'s right to family integrity because they made no reasonable attempt to return him to his home.

III. Eleventh Amendment

[1] Defendants assert, for the first time on appeal, Eleventh Amendment immunity from this federal court suit. Because of its jurisdictional nature, defendants may raise this defense at any stage of the proceedings. *See Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1231 (10th Cir.1999); 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3524 (2d ed. 1984 & Supp.1998). We must address this jurisdictional question to determine whether we can reach the class certification and abstention issues.

[2, 3] "The Eleventh Amendment generally bars suits against a state in federal court commenced by citizens of that state or citizens of another state." *Elephant Butte Irrigation Dist. of N.M. v. Department of the Interior*, 160 F.3d 602, 607 (10th Cir.) (citing *Hans v. Louisiana*, 134 U.S. 1, 13–15, 10 S.Ct. 504, 33 L.Ed. 842 (1890)), *cert. denied sub nom. Salisbury v. Elephant Butte Irrigation Dist. of N.M.*, —— U.S. ——, 119 S.Ct. 1255, 143 L.Ed.2d 352 (1999). However, three primary methods exist "for circumventing the Eleventh Amendment and allowing federal courts to ensure state compliance with federal laws." Erwin Chemerinsky, *Federal Jurisdiction*

389 (3d ed.1999); *see also Elephant Butte,* 160 F.3d at 607; *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1187–88 (10th Cir.), *cert. denied,* —— U.S. ——, 119 S.Ct. 904, 142 L.Ed.2d 902 (1999). First, a state may consent to the action. *See, e.g., Elephant Butte,* 160 F.3d at 607; *ANR Pipeline,* 150 F.3d at 1188. Second, "Congress may clearly and expressly abrogate the states' immunity." *Elephant Butte,* 160 F.3d at 607; *see also, e.g., ANR Pipeline,* 150 F.3d at 1188. Third, a party may sue a state official pursuant to *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *See Elephant Butte,* 160 F.3d at 607. Under the *Ex Parte Young* doctrine, "the Eleventh Amendment generally does not bar a suit against a state official in federal court which seeks only prospective equitable relief for violations of federal law, even if the state is immune." *Id.* at 607–08 (citing *Ex parte Young,* 209 U.S. at 159–60, 28 S.Ct. 441). Thus, because plaintiffs in this case name state officers as defendants and seek only prospective injunctive relief, it seems to fit squarely within the traditional application of *Ex parte Young.*

The defendants, however, argue that the Supreme Court in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), limited the application of *Ex parte Young* and recognized the appropriateness of Eleventh Amendment immunity in this type of case. In *Coeur d'Alene Tribe,* the Court found that the Eleventh Amendment barred the tribe's action seeking declaratory judgment and prospective injunctive relief to establish its ownership and control over submerged lands that lie within the 1873 boundaries of the reservation. *See Coeur d'Alene Tribe,* 521 U.S. at 264–65, 286–88, 117 S.Ct. 2028. The majority found that the requested relief "is the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281, 117 S.Ct. 2028. In examining the significance of *Coeur d'Alene Tribe,* we recently explained:

> After cataloguing the deep historical roots, and the legal importance, of state regulatory control over, and public ownership of, streams and lakes, the Court ruled that the Ex parte Young doctrine may not be used to support prospective federal court injunctive relief against state officials when that relief is just as much an intrusion on state sovereignty as an award of money damages[.]

ANR Pipeline, 150 F.3d at 1190 (citing *Coeur d'Alene Tribe,* 521 U.S. at 286–87, 117 S.Ct. 2028). Therefore, *Coeur d'Alene Tribe* imposes an important additional requirement. "We must examine whether the relief Plaintiffs seek against the state officials 'implicates special sovereignty interests,' and 'whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment.' " *Elephant Butte,* 160 F.3d at 609 (quoting *ANR Pipeline,* 150 F.3d at 1190).

We have noted that the result in *Coeur d'Alene Tribe* "reflects the extreme and unusual case in which, although the doctrine of *Ex parte Young* under traditional principles is applicable, the suit is prohibited because it involves 'particular and special circumstances' that affect 'special sovereignty interests' and cause 'offense to [the state's] sovereign authority.' " *Id.* at 612 (quoting *Coeur d'Alene Tribe,* 521 U.S. at 281–82, 287, 117 S.Ct. 2028). Our conclusion that *Coeur d'Alene Tribe* imposes a narrow limitation on *Ex parte Young* is reinforced by the fact that seven Justices rejected a reformulation of the Eleventh Amendment doctrine that would have sharply limited *Ex parte Young. See Coeur d'Alene Tribe,* 521 U.S. at 291–92, 117 S.Ct. 2028 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 297–98, 117 S.Ct. 2028 (Souter, J., dissenting). Our recent decision in *ANR Pipeline* reflects the limited scope of the additional *Coeur d'Alene Tribe* factors. In that case, we held that the power to assess and levy personal property taxes on land

within the state of Kansas constituted a special sovereignty interest. *See ANR Pipeline Co.*, 150 F.3d at 1190–94. After declaring that "a state's sovereign power to tax its citizens has been a hallmark of the western legal tradition," *id.* at 1193 n. 16, and that "Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system," *id.* at 1193, we stated: "We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, . . . it is impossible to imagine that a state government could continue to exist without the power to tax," *id.*

[4, 5] In the instant case, no comparable special sovereignty interests are at stake.[3] A state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*. *See Doe v. Chiles*, 136 F.3d 709, 720 (11th Cir.1998) (asserting, without addressing special sovereignty interest' requirement, that case in which developmentally disabled individuals brought § 1983 action against officials for failure to furnish Medicaid assistance with reasonable promptness "fit neatly within the Ex parte Young exception"); *Marie O. v. Edgar*, 131 F.3d 610, 616–17 & n. 13 (7th Cir.1997) (finding no important sovereignty interests such as those at issue in *Coeur d'Alene Tribe* in suit brought by infants with disabilities against state officials alleging that state did not comply with early intervention requirements of IDEA and seeking to enforce compliance with the federal program under which the officials had accepted funds); *cf. Elephant Butte*, 160 F.3d at 612–13 (holding state's property interest in right to profits from a recreational land lease did not rise to the level of a "special sovereignty interest"). Additionally, a challenge to the administration of a welfare program is not the equivalent of a suit for money damages, nor does it strike at a state's fundamental power, such as the power to tax. *Cf. ANR Pipeline*, 150 F.3d at 1193.

Because we find that the present suit does not impinge upon the sort of special sovereignty interest contemplated by the Supreme Court in *Coeur d'Alene Tribe*, we hold that the *Ex parte Young* doctrine precludes defendants' Eleventh Amendment immunity defense. Furthermore, as the Eleventh Amendment poses no bar to any claim in this action, we need not address whether the ADA, Section 504 of the Rehabilitation Act, and/or the IDEA contain valid statutory abrogations of Eleventh Amendment immunity under § 5 of the Fourteenth Amendment.

IV. Class Certification

[6] As we have jurisdiction to hear this suit, we must next address class certification. "The decision to grant or deny certification of a class belongs within the discretion of the trial court. We will not interfere with that discretion unless it is abused. There is no abuse of discretion when the trial court applies the correct criteria to the facts of the case." *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir.1988) (internal citations and quotation marks omitted); *see also, e.g., Boughton v. Cotter Corp.*, 65 F.3d 823, 826 (10th Cir.1995). After carefully reviewing the record and the district court's opinion, we hold the district court did not abuse its discretion in denying class certification.

[7] Plaintiffs in this case sought to certify a class composed of "all children who are now or in the future will be (a) in or at risk of State custody and (b) determined by defendants and/or their agents to have any form of mental and/or developmental disability for which they require some kind of therapeutic services or support." Appellants' App., Vol. 2, at 226. The trial court may certify a class only if, after rigorous analysis, it determines that the proposed class satisfies the prerequisites

3. Defendants only fleetingly mention that this lawsuit affects the state's sovereignty to administer its various child welfare programs and provide no argument or reasoning why this interest should enjoy special status.

of Federal Rule of Civil Procedure 23(a). *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Reed*, 849 F.2d at 1309. Rule 23(a) imposes four prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, those seeking declaratory or injunctive relief must meet the requirements of Rule 23(b)(2), which states that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2).

The district court in this case found plaintiffs had failed to meet the Rule 23(a) requirements for commonality and typicality. Plaintiffs contest the validity of the district court's reasoning and conclusions regarding those class action prerequisites.

[8, 9] As the district court observed, "commonality 'requires only a single issue common to the class.' " *K.L. v. Valdez*, 167 F.R.D. 688, 690 (D.N.M.1996) (citing Newberg & Conte, *supra*, at § 3.12); *see also In re American Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir.1996); *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994). Thus, "[t]he commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997); *see also* Newberg & Conte, *supra*, at § 3.10. Further, "[t]hat the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir.1988); *see also Milonas v. Williams*, 691 F.2d 931, 939 (10th Cir.1982).[4]

The diverse situations of the named plaintiffs show there is no question of fact common to the class. Even plaintiffs note:

> These children come into the custody of the state in a variety of ways. Most are taken out of their natural homes by the Department of Children, Youth and Families (CYFD) because of abuse and neglect determinations. These children then are placed in foster homes, residential treatment centers, group homes, temporary shelters, or psychiatric hospitals. Some children are taken into the custody of the State through the juvenile corrections system and they are placed in the Boys School or Girls School, the Youth Diagnostic and Development Center, the Sequoyah diagnostic and treatment facility, or sometimes, in psychiatric hospitals.

Appellants' App., Vol. 2, at 230–31. Thus, the ways in which these children come into

4. The district court in this case correctly set forth these principles, but it concluded by holding, "In the present matter, the Court finds that the members of the proposed class do not satisfy the prerequisite of commonality because they are insufficiently subject to the risk that they may suffer from all of Defendants' alleged violations." *K.L.*, 167 F.R.D. at 693. Plaintiffs claim this shows the court applied an improper heightened standard requiring the class to have commonality on all legal claims.

Although imprecise, the above statement, in light of the entire opinion, does not support the allegation that the judge applied the wrong legal standard to support his decision. Thus, this phrase alone does not warrant reversal. Instead, we interpret this statement to simply reiterate the court's earlier finding:

> that there is no one statutory or constitutional claim common to all named Plaintiffs and putative class members. Rather, each statutory and constitutional claim is common to an imprecisely defined subset of some named Plaintiffs and some putative class members. Thus, there can be no one legal theory or factual issue common to all Plaintiffs and all putative class members. Nor can the claims of the class representatives and the class members be based on the same legal or remedial theory.

K.L., 167 F.R.D. at 691 (citations omitted). Therefore, the district court applied the correct legal standards to the facts of this case.

state custody as well as their particular placements once in custody differ drastically. For example, the state took J.B., R.E., C.E., J.E., and E.E. into custody because of parental abuse or neglect. In contrast, some children in the proposed class entered state custody after conviction of a criminal offense. R.W., a named plaintiff before the district court but who did not appeal from the denial of class certification, illustrates this; he entered state custody as a convicted sex offender. The complaint does not even note why Y.A., D.A., E.A., F.A., V.C., C.C., and J.S. became wards of New Mexico. Similarly, some children have resided primarily in residential treatment centers and boys' schools, while others have stayed with foster families and parents during the course of state custody. Many have moved frequently among the various living arrangements and programs in the state of New Mexico.

Hence, as these examples and the factual background provided above demonstrate, the circumstances of these children vary greatly. Other than all being disabled in some way and having had some sort of contact with New Mexico's child welfare system, no common factual link joins these plaintiffs. We cannot say that the district court abused its discretion in finding no factual commonality in the proposed class.

[10] We also affirm the district court's finding of no common question of law. The court concluded that "there is no one statutory or constitutional claim common to all named Plaintiffs and all putative class members." *K.L.*, 167 F.R.D. at 691. Plaintiffs respond that the common claim is "that systemic failures in the defendants' child welfare delivery system deny all members of the class access to legally-mandated services which plaintiffs need because of their disabilities." Appellants' Br. at 25. We refuse to read an allegation of systematic failures as a moniker for meeting the class action requirements. Rule 23(a) requires a common question of law or fact. For a common question of law to exist, the putative class must share a discrete legal question of some kind. For example, in *Wilder v. Bernstein*, a class action child welfare case on which plaintiffs rely, the plaintiffs, black Protestant children, challenged New York's law for providing child welfare services as unconstitutionally discriminatory. *See* 499 F.Supp. 980, 982 (S.D.N.Y.1980). All class members claimed the system denied them placements because of their race and religion. *See id.* Here, rather than adequately advancing a discrete question of law, plaintiffs merely attempt to broadly conflate a variety of claims to establish commonality via an allegation of "systematic failures." We refuse to hold, as a matter of law, that *any* allegation of a systematic violation of various laws automatically meets Rule 23(a)(2). The district court retains discretion to determine commonality because it is "in the best position to determine the facts of the case, to appreciate the consequences of alternative methods of resolving the issues of the case and . . . to select the most efficient method for their resolution." *Boughton*, 65 F.3d at 825. Given the complex facts and legal issues involved in this case, we cannot say the district court abused its discretion when it refused to characterize plaintiffs' claims as a systematic violation.[5]

Plaintiffs do not rely solely on their "systematic" theory of commonality, however. They contend that, at the very least, all putative class members suffer, or will suffer, violations of the Medicaid Act, the ADA, and the Rehabilitation Act. We have closely reviewed plaintiffs' second amended complaint in an effort to match legal claims with each plaintiff.[6] This proved

5. We recognize that this conclusion differs from that reached by the Third Circuit in a similar case. *See Baby Neal v. Casey*, 43 F.3d 48, 60–62 (3d Cir.1994).

6. Plaintiffs informed the district court that they intended for the court to integrate the first stipulation, filed on May 19, 1995, into the complaint. *See* Appellees' Supp.App. at 13. We have treated the stipulation as supplementing the facts in the complaint. We

difficult because the complaint fails to specifically tie the particular allegations with individual children. Instead, it states the factual circumstances of each child and then, in very general terms, alleges violations of the ADA, Rehabilitation Act, Title XIX of the Social Security Act (Medicaid Act), IDEA, and the Fourteenth Amendment. When feasible, and with help from the district court's order of dismissal from which neither party appealed, we have paired the alleged violations under each claim with the recited facts of the individual children in an effort to review the district court's failure to find commonality.[7]

Our work reveals no common allegation of a Medicaid Act violation for all named plaintiffs. Similarly, only a few of the named plaintiffs asserted claims under the IDEA and the Fourteenth Amendment. As for the ADA and Rehabilitation Act claims, all named plaintiffs appear to have asserted that defendants denied them benefits, services, or adequate care because of their disabilities. Even if this were sufficient to establish a common legal question as to the named plaintiffs, plaintiffs have not shown that it is common to all putative class members under their proposed class definition. Plaintiffs sought to certify a class of *all* children in state custody who "have any form of mental and/or developmental disability for which they require some kind of therapeutic services or support." Appellants' App., Vol. 2, at 226. This broad definition would include not just children whom New Mexico improperly denied assistance, but also children who actually receive all services required under the ADA and Rehabilitation Act. Children receiving appropriate services have no claim under these statutes. Thus, the district court correctly stated that "there is no one statutory or constitutional claim common to all named Plaintiffs and putative class members." *K.L.*, 167 F.R.D. at 691.

In sum, given the divergent circumstances, legal claims, and corresponding remedy for each child, we hold that the district court did not abuse its discretion in failing to find a single issue of law or fact common to all class members. Because we find no abuse of discretion regarding commonality, we need not reach the district court's finding on typicality.

Our affirmance of the denial of class certification requires us to rule on the continuing viability of plaintiffs' individual claims. As noted previously, K.L., M.H., R.W., and A.S. are not parties to this appeal. Moreover, we grant defendants' motions to dismiss J.B., Y.A., D.A., E.A., F.A., V.C., C.C., R.E., and J.E. because they have reached the age of majority or otherwise fallen outside of state custody and their claims are now moot. It appears that only C.E., E.E., and J.S. continue to have viable individual claims. Thus, we must determine whether the district court erred in granting New Mexico's motion for abstention as to these parties.

V. Abstention

[11] The district court, upon reconsideration, abstained from deciding Plaintiff's claims based on *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Moore v. Sims,* 442 U.S. 415,

did not, however, rely on the updated status of the children in the second stipulation, entered by court order in May 1996, when that status would have the effect of mooting a claim from the complaint. *See Reed v. Heckler,* 756 F.2d 779, 786 (10th Cir.1985) (holding purposeful action of defendants in giving plaintiffs what they seek may not make moot plaintiff's claim in a class action).

7. We recognize that, when deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 691 F.2d 1335, 1342 (9th Cir.1982); *Shelter Realty Corp. v. Allied Maintenance Corp.,* 574 F.2d 656, 661 n. 15 (2d Cir.1978); Newberg & Conte, *supra,* at § 7.26. However, it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements [and] may ... consider the legal and factual issues presented by plaintiff's complaints." Newberg & Conte, *supra,* at § 7.26 (citing cases).

99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). We review the appropriateness of *Younger* abstention de novo. *See Taylor v. Jaquez,* 126 F.3d 1294, 1296 (10th Cir.1997); *Seneca–Cayuga Tribe v. Oklahoma,* 874 F.2d 709, 711 (10th Cir.1989).

[12] Although federal courts have a "virtually unflagging obligation" to exercise jurisdiction granted them, *see Deakins v. Monaghan,* 484 U.S. 193, 203, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)); *Seneca–Cayuga Tribe,* 874 F.2d at 711, they must on rare occasions abstain from exercising their jurisdiction in order to "avoid undue interference with states' conduct of their own affairs," *Seneca–Cayuga Tribe,* 874 F.2d at 711. In *Younger,* the Supreme Court held that a federal court should not enjoin a pending state criminal proceeding unless an injunction is necessary to prevent great and immediate irreparable injury. *See* 401 U.S. at 43–45, 91 S.Ct. 746. This decision rested on "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). Later cases have expanded *Younger* abstention principles to civil proceedings in which important state interests are involved, *see, e.g., Moore v. Sims,* 442 U.S. 415, 423, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979), and to administrative proceedings that are judicial in nature and involve important state interests, s*ee Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986); *Middlesex County,* 457 U.S. at 432, 102 S.Ct. 2515.

[13] The *Younger* doctrine, as developed, requires abstention when federal proceedings would (1) interfere with an ongoing state judicial proceeding (2) that implicates important state interests and (3) that affords an adequate opportunity to raise the federal claims. *See, e.g., Middlesex County,* 457 U.S. at 432, 102 S.Ct. 2515; *Taylor,* 126 F.3d at 1297; *Seneca–Cayuga Tribe,* 874 F.2d at 711. A case warrants *Younger* abstention only if each of these three criteria are satisfied. However, "*Younger* abstention is not discretionary once the above conditions are met absent extraordinary circumstances that render a state court unable to give state litigants a full and fair hearing on their federal claims." *Seneca–Cayuga Tribe,* 874 F.2d at 711 (internal citations omitted).

[14] In this case, neither party disputes that the state has an important interest in the care, disposition, and welfare of disabled children in its custody. Instead, the parties' dispute revolves around whether there is an ongoing state judicial proceeding in which the plaintiffs had an adequate opportunity to raise their federal claims.

Plaintiffs acknowledge that C.E., E.E., and J.S., as children in the custody of the state, are or were subject to dispositional and biannual review hearings before the New Mexico Children's Court. These proceedings, while admittedly less than full adversarial hearings, are judicial in nature. Moreover, they exist as long as the child remains in state custody, so they are ongoing. We hold that the continuing jurisdiction of the Children's Court to modify a child's disposition, *see* N.M. Stat. Ann. § 32A–4–24 (Michie 1978 & Supp.1998), coupled with the mandatory six-month periodic review hearings, *see id.* § 32A–4–25, constitutes an ongoing state judicial proceeding. *See Nelson v. Murphy,* 44 F.3d 497, 501–02 (7th Cir.1995) (finding continuing criminal court supervision of persons found not guilty by reason of insanity, which includes mandatory review of treatment plan every sixty days, is an ongoing proceeding for *Younger* analysis).

Moreover, plaintiffs' federal action would interfere with this proceeding by fundamentally changing the dispositions and oversight of the children. The federal court would, in effect, assume an oversight role over the entire state program for

children with disabilities. This places the federal court in the role of making dispositional decisions such as whether to return the child to his parents in conjunction with state assistance or whether to modify a treatment plan. These are the kind of decisions currently made by the New Mexico Children's Court through the periodic review process. *See, e.g.,* N.M. Stat. Ann. §§ 32A–4–25(H)(2), (6) (Michie Supp.1998). The current suit would prevent the Children's Court from carrying out this function. *But see Marisol A. v. Giuliani,* 929 F.Supp. 662, 689 (S.D.N.Y.1996) (finding class action seeking systematic reform of child welfare program would not "improperly challeng[e] a state court proceeding through the federal courts"); *Norman v. Johnson,* 739 F.Supp. 1182, 1189–90 (N.D.Ill.1990) (finding class action challenging child welfare system did not interfere with ongoing proceeding).

While we find plaintiffs were engaged in an ongoing state proceeding, we are less certain about whether they could have adequately raised their federal statutory and constitutional claims in these state proceedings. This uncertainty, however, militates in favor of abstention. Even though plaintiffs have not raised their federal claims below, the "pertinent issue is whether appellees' [federal] claims *could have been raised* in the pending state proceedings." *Moore,* 442 U.S. at 425, 99 S.Ct. 2371 (emphasis added). Plaintiffs bear the burden of proving that state procedural law barred presentation of their claims in the New Mexico Children's Court. *See Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 14–15, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Moore,* 442 U.S. at 432, 99 S.Ct. 2371. "Certainly, abstention is appropriate unless state law clearly bars the interposition of the [federal statutory] and constitutional claims." *Moore,* 442 U.S. at 425–26, 99 S.Ct. 2371. In this case, plaintiffs have failed to clearly show that they could not have raised their claims during the periodic review proceedings.

Plaintiffs argue that the "New Mexico Children's Court is a court of limited jurisdiction which can hear only matters arising under the Children's Code." Appellants' Br. at 43. However, even assuming that the Children's Court "is only permitted to do what is specifically authorized by the statute," *In re Angela R.,* 105 N.M. 133, 729 P.2d 1387, 1391 (Ct.App.1986); *accord State v. Adam M.,* 124 N.M. 505, 953 P.2d 40, 45 (Ct.App.1997), plaintiffs fail to clearly show that the Children's Court could not have adjudicated these federal claims during the periodic review process. The New Mexico Children's Code specifically provides for the periodic review of dispositional judgments in the Children's Court. *See* N.M. Stat. Ann. § 32A–4–25. Under this provision, the court may "make ... orders regarding the treatment plan or placement of the child to protect the child's best interests if the court determines the department has failed in implementing any material provision of the treatment plan or abused its discretion in the placement or proposed placement of the child." *Id.* § 32A–4–25(H)(6). Thus, the Children's Code seemingly grants the Children's Court wide power to determine the needs and claims of children during the periodic review proceeding.[8]

Furthermore, the Children's Court constitutes a division of the state district court, with a designated district judge presiding. *See id.* § 32A–1–5(A). Defendants argue that the Children's Court has the full constitutional powers of the district court, a court of general jurisdiction. If this is the case, the Children's Court may hear plaintiffs' claims. The answer to this question is uncertain, but, as the Supreme Court stated in *Pennzoil:*

> We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims. Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a feder-

8. In addition, the Children's Court can modify dispositional judgments at any time on motion of a party or the child's guardian ad litem. *See id.* § 32A–4–24.

> al court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.

481 U.S. at 15, 107 S.Ct. 1519 (internal citations omitted).

We find no "unambiguous authority to the contrary" that informs us the New Mexico Children's Court lacks the jurisdiction or ability to adjudicate federal statutory and constitutional claims during authorized periodic review proceedings. In this sense, the case before us differs from other cases in which federal courts have refused to abstain. For example, in *LaShawn A. v. Kelly,* 990 F.2d 1319 (D.C.Cir. 1993), the court based its decision not to abstain in a child welfare class action on the fact that the District of Columbia Family Division "has explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on federal law." *Id.* at 1323. Similarly, in *Baby Neal v. Casey,* 821 F.Supp. 320, 332 (E.D.Pa.1993), *rev'd on other grounds,* 43 F.3d 48 (3d Cir.1994), the district court denied abstention in a child welfare case against state officials because state law did not give the Philadelphia Family Court jurisdiction to hear cases against the Commonwealth. *See id.* at 332. We hold, therefore, that plaintiffs failed to prove that they could not have brought this action during the periodic review proceedings for these children. Thus, the third and final prong of the *Younger* inquiry is met. Accordingly, we affirm the district court's decision to abstain from hearing the individual claims in this case.[9]

9. The dissent asserts: "[T]he majority in essence assumes *Younger* precludes the coexistence of federal and state suits involving abused or neglected children in the custody of the State of New Mexico. This sweepingly broad rule would bar any abused or neglected child in State custody from obtaining federal court access to vindicate violations of federal constitutional and statutory rights." *Infra,* at ——. We make no such assumption or ruling. We merely hold that on this record, plaintiffs have failed to demonstrate that the Children's Court cannot hear their federal statutory and constitutional claims. We do not preclude federal courts from hearing cases such as these if the Children's Court, when presented with the controversy, states that it cannot or will not adjudicate the claims. If that occurs, we would face the situation confronted by our sister circuit in *LaShawn A.,* 990 F.2d at 1323.

V. Conclusion

The Eleventh Amendment does not bar our review of this case. We AFFIRM the district court's denial of class certification and GRANT the defendants' motion to dismiss J.B., Y.A., D.A., E.A., F.A., V.C., C.C., R.E., and J.E. We also AFFIRM the district court's order abstaining from hearing the individual claims of C.E., E.E., and J.S. Finally, we DENY defendants' motion to strike portions of the appendix and appellants' brief-in-chief and GRANT, in part, their motion to revise the caption. **AFFIRMED.**

BRISCOE, Circuit Judge, concurring and dissenting:

I concur in part and dissent in part. I agree with the majority that plaintiffs' suit is not barred by the Eleventh Amendment. I disagree, however, with the majority's conclusions regarding *Younger* abstention and class certification. I would conclude that *Younger* abstention is not warranted because plaintiffs do not ask the federal courts to interfere in the periodic reviews in New Mexico Children's Court, because the periodic reviews do not constitute "ongoing proceedings" sufficient to require abstention, and because the periodic reviews in any event do not afford plaintiffs an adequate forum and opportunity in which to raise their federal claims. Similarly, I would conclude the district court abused its discretion in denying class certification by applying an incorrect legal standard and misstating the nature of plaintiffs' alleged class claim.

I. *Younger* abstention

I begin with the premise that abstention under *Younger* is appropriate only if the

relief sought by plaintiffs in a federal action will require a federal court to interfere with or enjoin a state proceeding that is judicial in nature. *Younger* abstention remains the exception rather than the rule, and should be invoked rarely and only in extraordinary circumstances. *See Ankenbrandt v. Richards,* 504 U.S. 689, 705, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). If interference in a state action is sought by plaintiffs, or if not sought will nonetheless occur, *Younger* abstention is appropriate if: (1) the state judicial proceeding is ongoing; (2) an important state interest is at stake; and (3) there is an adequate opportunity in the state proceeding to raise federal claims. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *Seneca–Cayuga Tribe of Oklahoma v. Oklahoma,* 874 F.2d 709, 711 (10th Cir.1989).

The majority finds that plaintiffs' federal actions would interfere with purportedly ongoing state judicial proceedings in New Mexico Children's Court by "fundamentally changing the disposition and oversight of the children." The New Mexico Children's Court has jurisdiction over proceedings brought under the New Mexico Children's Code where an individual is eighteen years of age or younger and is alleged to be, among other things, delinquent, neglected, abused, or subject to placement for a developmental disability or a mental disorder. *See* N.M. Stat. Ann. § 32A–1–8(A). Pursuant to its jurisdiction, the Children's Court, after finding a child has been abused or neglected, may direct that the child remain with his or her parent, place the child under the State's protective supervision, or transfer legal custody of the child to a noncustodial parent, an appropriate state agency, or a child-placement agency. *See id.* § 32A–4–22(B). Dispositions of the Children's Court are reviewed every six months. *See id.* § 32A–4–25(A). These dispositional periodic reviews are the "ongoing and pending state court proceedings" claimed by the majority to justify abstention.

I cannot discern how the relief sought by plaintiffs in their federal action will alter a Children's Court disposition that a specific child is neglected or abused or should be taken into state custody, the bases on which the Children's Court makes such determinations, or the manner in which New Mexico oversees children in its care. It is disingenuous to suggest, as the majority does, that plaintiffs seek to "place[ ] the federal court in the role of making dispositional decisions such as whether to return the child to his parent in conjunction with state assistance or whether to modify a treatment plan." Throughout this litigation, plaintiffs have emphasized nothing more clearly than their intent *not* to interfere with child placement or the specifics of an individual child's treatment plan. Plaintiffs' solitary goal is to obtain injunctive relief requiring defendants to make *available* for inclusion in *any* child's treatment plan benefits to which plaintiffs claim a constitutional and statutory entitlement. *Younger* abstention is not warranted merely because New Mexico's service delivery system will be affected if a federal court grants plaintiffs their requested relief. *See New Orleans Pub. Serv., Inc. v. New Orleans,* 491 U.S. 350, 373, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

The very posture of this case is inconsistent with *Younger* abstention. As noted, interference is the touchstone of *Younger:* "[A]bstention under *Younger* presumes that the federal action would interfere with the ongoing state proceedings since, typically, the federal plaintiff's object in filing the federal action is either to seek an injunction against the state proceedings themselves or to challenge the law being applied in those proceedings." *Gwynedd Properties, Inc. v. Lower Gwynedd Township,* 970 F.2d 1195, 1200–01 (3d Cir.1992). Every Supreme Court abstention decision we have found reinforces this general premise and involves a request to enjoin or directly interfere with some state judicial action. *See, e.g., Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d

1 (1987) (federal plaintiff sought to enjoin enforcement of state court judgment); *Ohio Civil Rights Comm'n v. Dayton Christian Schools,* 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (federal plaintiff sought to enjoin pending administrative proceeding); *Middlesex,* 457 U.S. 423, 102 S.Ct. 2515 (plaintiff sought to enjoin disciplinary rules instead of filing answer in state court to ethics charges); *Trainor v. Hernandez,* 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (federal plaintiff sought to enjoin enforcement of state writ of attachment); *Juidice v. Vail,* 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (federal plaintiffs sought to enjoin state contempt proceeding).

This case arises in an altogether different context. Plaintiffs do not seek to enjoin any proceeding in the Children's Court, annul a prior Children's Court decision, or prevent the Children's Court from making future determinations. *Cf. Wooley v. Maynard,* 430 U.S. 705, 711, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (abstention inappropriate where federal suit not "designed to annul the results of a state trial"); *Citizens for a Better Env't v. Union Oil Co.,* 83 F.3d 1111, 1119 (9th Cir.1996) (*Younger* "doctrine is simply not relevant where the federal action is not seeking a ruling on the validity of the state action."). Absent a threat of disruption to New Mexico's judicial process, the comity and federalism concerns that underlay *Younger* are not implicated. *Cf. Marks v. Stinson,* 19 F.3d 873, 884 (3d Cir.1994) ("This is not a case in which the federal plaintiffs are seeking relief which will in any way impair the ability of the state courts . . . to adjudicate anything that is currently before them."); *Crawley v. Hamilton County Comm'rs,* 744 F.2d 28, 30 (6th Cir.1984) ("In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. . . . [P]laintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for *Younger* abstention in this case.")

As did the district court, the majority in essence assumes *Younger* precludes the coexistence of federal and state suits involving abused or neglected children in the custody of the State of New Mexico. This sweepingly broad rule would bar any abused or neglected child in State custody from obtaining federal court access to vindicate violations of federal constitutional and statutory rights. For any such child, a Children's Court proceeding would *always* be pending or ongoing. The appropriateness of abstention, however, turns neither on the mere availability of a state judicial forum nor on the existence of parallel federal and state court proceedings. *See, e.g., Pennzoil,* 481 U.S. at 14 n. 12, 107 S.Ct. 1519 ("Our opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court."). As noted, *Younger* abstention springs from notions of comity, federalism, and respect for state sovereignty, and turns on whether a federal court is called upon to interfere in a state judicial process. The healthiest respect for this rule does not dictate abstention here. Numerous federal courts have exercised jurisdiction over similarly broad child welfare cases, many of them expressly finding *Younger* abstention inappropriate notwithstanding the presence of periodic reviews in state family courts. *See, e.g., LaShawn A. v. Kelly,* 990 F.2d 1319 (D.C.Cir.1993); *Marisol A. v. Giuliani,* 929 F.Supp. 662 (S.D.N.Y.1996), *aff'd on other grounds,* 126 F.3d 372 (2d Cir.1997); *Baby Neal v. Casey,* 821 F.Supp. 320 (E.D.Pa.1993), *rev'd on other grounds,* 43 F.3d 48 (3d Cir.1994); *Norman v. Johnson,* 739 F.Supp. 1182 (N.D.Ill.1990); *Wilder v. Bernstein,* 645 F.Supp. 1292 (S.D.N.Y.1986).

Even assuming there is a legitimate basis for invoking the *Younger* abstention doctrine, I am unpersuaded that its application is appropriate in these circumstances. The periodic reviews, which occur every six months, and which are extremely limited in scope, are not "ongoing proceedings" for purposes of *Younger* abstention. An "ongoing pro-

ceeding" implies a proceeding that is continuing and actively in process. Further, and more important, the Children's Court is not an adequate forum in which plaintiffs' federal claims could either be raised or fully and fairly adjudicated. New Mexico courts have expressly reiterated that the Children's Court "is only permitted to do what is specifically authorized by the statute." *In re Angela R.*, 105 N.M. 133, 729 P.2d 1387, 1391 (App.1986); *see State v. Adam M.*, 124 N.M. 505, 953 P.2d 40, 45 (App.1997). The applicable statute, i.e., the Children's Code, provides the Children's Court with jurisdiction to consider only proceedings that arise under the Children's Code. *See* N.M. Stat. Ann. § 32A–1–8(A). As relevant here, the Children's Code explicitly authorizes the Children's Court to make initial determinations of a child's status, conduct periodic dispositional reviews of the child's placement and treatment plan, and alter the treatment plan. *See id.* § 32A–4–25. There is no language in the Children's Code that reasonably may be construed as permitting any child in state custody to initiate a federal statutory or constitutional claim in Children's Court, nor is there any statutory language suggesting jurisdiction of the Children's Court extends to officials in any state agencies other than the Department of Children, Youth, and Families. Given the lack of such specific statutory authorization, I would conclude plaintiffs have clearly shown their claims were not cognizable in Children's Court.

In *LaShawn A.*, 990 F.2d 1319, the D.C. Circuit considered an analogous issue. There, a class action on behalf of foster care children was brought challenging the practices of the District's Department of Human Services. In *LaShawn A.*, the children were subject to periodic review proceedings every six months, or, in certain circumstances, every year. In affirming the district court's order finding abstention unwarranted, the court characterized the periodic review proceedings as "an inadequate or inappropriate forum for pursuing these claims." *Id.* at 1322. The court was particularly concerned with the limited scope of the hearings, which were intended to periodically reassess the disposition of the child, not resolve a "challenge to the District of Columbia's administration of its entire foster-care system." *Id.* at 1323.

These same deficiencies are present here. The purpose of the periodic dispositional reviews is not to determine a state official's compliance with federal laws mandating the provision of specific services, or the constitutional adequacy of New Mexico's entire service delivery system, but rather to reassess the Children's Court's previous determinations regarding custody and treatment. *See* N.M. Stat. Ann. § 32A–4–25(G); *In re Jacinta M.*, 107 N.M. 769, 764 P.2d 1327, 1328 (App.1988) ("The periodic review is a proceeding to determine whether a change in an initial disposition is warranted by a change in circumstances."). These determinations are intensely individual, focusing only on the child and his or her family or guardian. The nature of the proceedings does not permit a prolonged, critical, and adversarial examination of the gamut of services being provided to a child in state custody. Moreover, many procedural safeguards that are present in a typical adversarial proceeding, and that are designed to ensure fundamental fairness and the reliability of admitted evidence, are noticeably absent in Children's Court hearings. For example, the court itself is not required to conduct the review hearing, but may designate that task to a special master, who in turn submits recommendations to the court. *See* N.M. Stat. Ann. § 32A–4–25(A). And, although evidence may be presented and witnesses cross-examined at the hearing, discovery is limited and the rules of evidence do not apply.[1] *See id.*

1. Plaintiffs have taken the unusual step of obtaining two affidavits from Children's Court judges who attest the Court historically has not handled cases involving the federal rights of children. The judges also claim clogged dockets, limited discovery, and the summary nature of the proceedings render the court a

§ 32A–4–25(C) & (D). The Children's Court is not suited to adjudicate the complex constitutional, statutory, and systemic claims raised by plaintiffs. *See Wooley,* 430 U.S. at 710, 97 S.Ct. 1428 ("*Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress ... for an alleged deprivation of federal rights.").

In summary, I believe the district court erroneously invoked *Younger.* Plaintiffs do not seek to enjoin an ongoing state court proceeding or annul a previously determined state court judgment or order. In addition, the dispositional review hearings in the New Mexico Children's Court do not constitute ongoing proceedings and do not present plaintiffs an adequate forum in which to air their federal statutory and constitutional grievances.

II. Class certification

The denial of class certification is a more difficult question given that our scope of review is limited to whether the district court abused its discretion. However, I conclude plaintiffs have satisfied that burden here. An abuse of discretion is established where, as here, the district court errs in its legal interpretation of plaintiffs' class claim and misapplies the Rule 23 factors used to determine if class certification is appropriate. *See Boughton v. Cotter Corp.,* 65 F.3d 823, 826–27 (10th Cir. 1995) (abuse of discretion standard employed only if district court applied correct criteria to facts of case).

Before addressing the merits of the district court's class certification order and the majority's resolution of the class certification issues, it is necessary to elaborate on the nature of the class claim brought by plaintiffs. Plaintiffs do not seek redress for any individual state decisionmaker's determination that services need not be provided to a specific child. Indeed, the specific services that are or are not being provided to a particular child apparently are not at issue in this lawsuit. Plaintiffs' complaint instead is systemic: They contend the entire gamut of support programs and services for children in state custody is deficient.

> The central theory in the complaint is that, when children with mental and behavioral disabilities are brought into state custody, defendants have failed to develop a system which has the capacity to meet the special needs these children have because of their disabilities. Plaintiffs allege that these systemic failures constitute violations of various federal laws, and result in discrimination against them because of their disabilities.

Aplt.'s Br. at 29. Plaintiffs do not seek money damages, but only declaratory and injunctive relief requiring defendants to provide a sufficient "care and program delivery system." In essence, plaintiffs seek an injunction requiring defendants to put into place policies and plans to ensure that children matriculating into state custody receive the screening and other services to which they are entitled under federal law. Bearing in mind the nature of plaintiffs' class claim, I turn to the merits of the district court's decision denying certification.

I am not convinced that the district court applied the appropriate legal standard in concluding the commonality and typicality prongs of Rule 23(a) were not satisfied. The district court stated as follows in its order:

> In the present matter, the sixteen named Plaintiffs have stated claims under the Rehabilitation Act, the ADA, the Medicaid Act, and the IDEA. They also assert violations of their substantive due process rights to minimally adequate treatment, family integrity, and access to judicial process. Some named Plaintiffs and putative class members have allegedly suffered violations of only one of the statutory and constitutional rights listed above. Other named Plaintiffs and putative class members have allegedly suffered violations of two or three of the statutory or constitutional rights

poor forum in which to adjudicate matters of such magnitude. Aplt.'s App. at 762–65.

> listed above. However, to the Court's knowledge, no named Plaintiff and no putative class member has allegedly suffered violations of all or even most of the statutory and constitutional rights listed supra.
>
> The Court must therefore conclude that there is no one statutory or constitutional claim common to all named Plaintiffs and all putative class members. Rather, each statutory and constitutional claim is common to an imprecisely defined subset of some named Plaintiffs and some putative class members. Thus, there can be no one legal theory or factual issue common to all Plaintiffs and all putative class members. Nor can the claims of the class representatives and the class members be based on the same legal or remedial theory. . . .
>
> . . . . . .
>
> . . . [T]he Court finds that the members of the proposed class do not satisfy the prerequisite of commonality because they are insufficiently subject to the risk that they may suffer from all of Defendants' alleged violations.

K.L. v. Valdez, 167 F.R.D. 688, 691–93 (D.N.M.1996) (citations omitted).

The insinuation in the district court's statement-that all class members must suffer or be at risk of suffering from all (or even more than one) of defendants' alleged violations-is not only contrary to well-settled law but inconsistent with the court's earlier recognition that one issue of common fact or law is sufficient for commonality purposes. Pursuant to the rule applied by the district court, no action could proceed as a class unless each named plaintiff uniformly asserted the same legal claims or suffered the same injuries at the same time. The district court's analysis is more akin to one applied to a Rule 23(b)(3) class action than a Rule 23(b)(2) class action. The differences are significant. Rule 23(b)(3) is a broad catch-all provision allowing the district court to certify a class in its discretion when to do so would conserve the resources of the judiciary and the parties by resolving the dispute via a class action rather than numerous individual suits. Class certification under Rule 23(b)(3) is appropriate only if the "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members." (Emphasis added). This predomination requirement makes sense in a Rule 23(b)(3) context because these cases generally involve highly individualized claims or require an individualized plaintiff-by-plaintiff determination of monetary damages. *See* 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1777, at 516–17 (1986). The nature of a Rule 23(b)(2) action obviates the need for common issues to predominate because injunctive relief is sought that, if granted, will cure the ills suffered by every named plaintiff and class member. Few, if any, individualized determinations need be made in a Rule 23(b)(2) class action. *See id.* § 1763, at 201 ("Class suits for injunctive or declaratory relief by their very nature often present common questions satisfying" commonality.).

The district court compounded its error by disregarding the complaint and relying on a stipulation that it directed the parties to craft. The court required the parties to "stipulate to as many facts as possible" as to "the present custodial status of each named Plaintiff and the services currently being provided to those Plaintiffs." Aplt.'s App. at 114. The parties presented a stipulation to the court which set forth each service each named plaintiff was receiving. In denying class certification, the district court essentially ignored the allegations of the complaint and, based on this stipulation, determined exactly what services it appeared each named plaintiff was allegedly being deprived of in violation of federal law. This was, first and foremost, an independent determination of the merits of plaintiffs' claims. It is well-settled that the district court may not examine the merits in deciding a motion for class certification. *See Anderson v. City of Albu-*

querque, 690 F.2d 796, 799 (10th Cir.1982). Even more unsettling is that the stipulation is useless in determining whether common issues exist, or whether the claims of the named plaintiffs are typical of the claims of the absentee class members. The district court's misuse of this stipulation renders its entire certification analysis suspect. The stipulation does not reveal, as does the complaint, that plaintiffs were seeking systemic relief and not just asserting individual violations of federal statutes.

Applying the appropriate legal standards to the facts alleged in the complaint, I would conclude the commonality and typicality requirements are satisfied and a class should have been certified. As previously stated, plaintiffs do not seek redress for individual deprivations, but seek systemic relief that, if obtained, will remedy every violation suffered by any child in state custody. Hence, the dominant common legal theme asserted by every plaintiff is that the systemic deficiencies in the defendant's treatment service system deprive all children in state custody who suffer from mental and developmental disorders of rights guaranteed them by statute or the Constitution. This satisfies Rule 23(a)(2)'s commonality requirement. *See Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir.1994) ("Because the requirement may be satisfied by a single common issue, it is easily met.") (citing H. Newberg & A. Conte, 1 Newberg on Class Actions § 3.10, at 3–50 (1992)).

Typicality is also present. Rule 23(a)(3) precludes certification unless "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality does not require that the claims of class members be identical to the claims of the class plaintiffs. *See Anderson,* 690 F.2d at 800. "[D]iffering fact situations of class members do not defeat typicality ... so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson v. Bowen,* 855 F.2d 668, 675 (10th Cir.1988).

In concluding plaintiffs failed to show typicality, the district court stated "there are potential conflicts of interest between the named Plaintiffs and the putative class." 167 F.R.D. at 692. The district court saw potential conflicts in that some named plaintiffs were pursuing statutory claims that were not being pursued by other named plaintiffs. Thus, according to the district court, if one plaintiff was pursuing only an IDEA claim and another was pursuing only a Medicaid Act claim, each would be tempted to ignore the statutory claim of the other in vigorous pursuit of their own claim.

The potential conflict perceived by the district court is minimal, if it exists at all. As noted, the district court did not accurately characterize the nature of plaintiffs' complaint. The court reads the complaint as asserting causes of actions under particular federal statutes alleging a particular child has been deprived of a particular service or treatment to which the child is entitled under federal law. The court ignores that the crux of the complaint is the claim alleging the very process that occurs in the course of a child's matriculation into state custody is discriminatory and unconstitutional. Plaintiffs seek comprehensive, not individual, relief.

When viewed in this light, the named plaintiffs have an incentive to show every facet of treatment or services provided by defendants is inadequate and is a byproduct of a system-wide deficiency. Emphasis by a named plaintiff on a claim alleged by that plaintiff but not by another named plaintiff or class member would be inconsistent with this incentive and would serve only to demonstrate a failure to provide a particular federally-mandated service or type of treatment, not a systemic inadequacy. This would undermine *every* plaintiff's claims that there are systemic deficiencies in the process employed by defendants to determine what services are needed, are required by federal law, and are to be provided to a child upon entry into state custody. *See Baby Neal,* 43

F.3d at 58 (noting "a typicality requirement is almost automatically satisfied in actions primarily seeking injunctive relief").

Finally, I find troubling the majority's unexplained rejection of two cases from our sister circuits that have dealt with this precise issue. Both *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir.1997) and *Baby Neal*, 43 F.3d 48, were systemic child welfare cases in which class certification was sought. In *Marisol A.*, the Second Circuit permitted a class to be certified; in *Baby Neal*, the Third Circuit required a class to be certified.

In *Marisol A.*, a class action was brought on behalf of New York City children alleging the New York City child welfare system was systemically deficient in failing to provide adequate services in violation of a number of federal and state laws and the United States Constitution. With some reservations, a panel of the Second Circuit upheld the district court's decision to certify a class. Defendants, not surprisingly, contended commonality was present only at the "grossest level of generality," and typicality was entirely nonexistent:

> The defendants point out that each named plaintiff challenges a different aspect of the child welfare system. These include allegations of inadequate training and supervision of foster parents, the failure to properly investigate reports of suspected neglect and abuse, unconscionable delay in removing children from abusive homes, and the inability to secure appropriate placements for adoption.... The claimed deficiencies implicate different statutory, constitutional, and regulatory schemes. Further, the defendants note that no single plaintiff (named or otherwise) is affected by each and every legal violation alleged in the complaint, and that no single specific legal claim identified by the plaintiffs affects every member of the class.

126 F.3d at 376–77. The district court had rejected these arguments by characterizing the common questions of law as "whether defendants systematically have failed to provide ... legally mandated services." *Id.* at 377. "The unique circumstances of each child do not compromise the common question of whether ... defendants have injured all class members by failing to meet their federal and state law obligations." *Id.* On appeal, the court held that "conceptualizing the common legal and factual questions at this high level of abstraction"—by aggregating them into a "super-claim"—did not constitute an abuse of discretion. *Id.* The court conceded this generalized characterization "stretche[d] the notions of commonality and typicality," but found it convincing that plaintiffs' injuries allegedly derived from a single deficient system's unitary course of conduct. *Id.*

One apparently significant factor in the Second Circuit's decision in *Marisol A.* was the Third Circuit's decision in *Baby Neal*. In *Baby Neal*, a class action was brought on behalf of children in the custody of the Philadelphia Department of Human Services, which operated the City's child welfare system. The complaint alleged systemic claims very similar to those in *Marisol A.* and those here. Unlike in *Marisol A.*, the district court in *Baby Neal* denied class certification on grounds that plaintiffs had failed to show commonality and typicality. The district court's order in the instant case is essentially a verbatim copy of the district court's order in *Baby Neal*. For example, the district court in *Baby Neal* found commonality was not satisfied because not "one of the common legal issues asserted by plaintiffs applies to every member of the proposed class.... The children's claims are based upon different legal theories depending on the individual circumstances of that child.... The services required to meet the needs of one child are vastly different from that of another child." 43 F.3d at 60. Similarly, the district court found no typicality because "the plaintiffs were not challenging precisely the same conditions and practices because the services required by

law differ depending on a child's individual situation." *Id.* at 63.

The Third Circuit in reviewing this ruling held denial of certification was an abuse of discretion. In rejecting the district court's finding of no commonality, the court characterized plaintiffs' complaint as "challenging common conditions and practices under a unitary regime." *Id.* at 60. The district court had overly fragmented the claims, emphasizing factual and legal individual differences that were "largely irrelevant" in light of the nature of injunctive relief sought. *Id.* Significantly, the district court in *Baby Neal* failed to recognize that remedying the systemic deficiencies would of necessity cure each plaintiffs' alleged injuries regardless of what services were being deprived that plaintiff. It was therefore a sufficiently common legal basis for class certification purposes that plaintiffs attacked the "systemic deficiencies in providing legally mandated child care services." *Id.* at 61. In short, the "violations exist[ed] independently of individual children's circumstances." *Id.* at 62. The Third Circuit found the district court's typicality findings equally unpersuasive. The systemic deficiencies, not individual differences, were central to the claims of the named plaintiffs and class members. There was "no danger . . . that the named plaintiffs have unique interests that might motivate them to litigate against or settle with the defendants in a way that prejudices the absentees." *Id.* at 63.

The facts of this case are as compelling as those in *Baby Neal.* The district court here denied class certification by citing factual differences that are largely irrelevant to the class issue and misconstruing the unitary systemic claim on which plaintiffs' proposed class rests. If the requirements of Rule 23(a) are met and one of the requirements of Rule 23(b) is met, then the district court lacked discretion not to certify a class. When this case is analyzed under the appropriate legal framework, plaintiffs' claims satisfy the Rule 23 requirements. I would reverse the district court's denial of class certification and remand the case to the district court.

III. Conclusion

I concur in the majority's conclusion that plaintiffs are not barred by the Eleventh Amendment from proceeding in federal court. I dissent from the majority's conclusions both that *Younger* abstention is warranted under the facts of this case and that the district court did not abuse its discretion in denying class certification.

Marion S. BULLINGTON, Plaintiff–Appellant,

v.

UNITED AIR LINES, INC., Defendant–Appellee.

National Employment Lawyers Association; Air Transport Association of America, Amici Curiae.

No. 98–1125.

United States Court of Appeals, Tenth Circuit.

Aug. 12, 1999.

Unsuccessful applicant for position of line pilot/flight officer with airline brought suit against airline under Title VII and Age Discrimination in Employment Act (ADEA). The United States District Court for the District of Colorado dismissed in part and entered summary judgment on remaining claims. Applicant appealed. The Court of Appeals, Brorby, Circuit Judge, held that: (1) applicant could not rely on continuing violation theory to avoid statutory time bar for failure to hire claim based on incident occurring more than three years before she filed Equal Employment Opportunity Commission (EEOC) charge; (2) applicant's statistical applicant flow data was sufficiently reliable

UNDERSTANDING
OKLAHOMA DISABILITY LAW CENTER, INC.

federally funded protection and advocacy system for people with disabilities

- Priorities and Objectives for ODLC
- Explanation of programs of ODLC
- Access Authority of Protection and Advocacy System (2nd Circuit Opinion)
- U. S. Government Brief Explaining Access Authority of Protection and Advocacy System
- Access Authority of Protection and Advocacy System (10th Circuit Opinion)

Priorities and Objectives
For Programs of
Oklahoma Disability Law Center, Inc.

(1) Prevention of abuse and neglect (PADD, PAIMI, PAIR, PATBI)

(2) Prevention of discrimination based on disability(PADD, PAIMI, PAIR, PATBI)

(3) Understand and receive procedural due process rights in public benefits (PADD, PAIMI, PAIR)

(4) Receive a free appropriate public education (PADD, PAIMI, PAIR, PATBI, PAAT)

(5) Educate and improve self-advocacy for persons with disabilities (PADD, PAIMI, PAIR, PATBI, PABSS, PAAT)

(6) Advocate for persons with disabilities seeking employment (PABSS)

(7) Educate public about legal rights of people with disabilities to have equal access to vote and monitor Oklahoma's progress in implementing the Help America Vote Act (PAVA)

(8) Advocate for access to appropriate assistive technology (PAAT)

Oklahoma Disability Law Center, Inc.
a system of protection and advocacy

PROGRAMS OF THE LAW CENTER
PADD, PAIMI, PAIR, PAAT, PABSS, PATBI, PAVA

PROTECTION AND ADVOCACY FOR DEVELOPMENTAL DISABILITIES (PADD)

PADD Purpose

Protect and advocate for the rights of people with developmental disabilities who may be eligible for treatment, services, habilitation; or who are being considered for a change in living arrangements.

Investigate abuse and neglect if reported to the system or if probable cause exists to believe such incident occurred.

PADD Eligibility

1. An individual with a severe chronic disability that is attributable to a mental or physical impairment or combination of mental and physical impairments;

AND▼

2. Is manifested before the individual attains age 22;

AND ▼

3. Is likely to continue indefinitely;

AND▼

4. Results in substantial functional limitations in 3 or more of the following areas of major life activity:
   - i. Self-care
   - ii. Receptive and expressive language
   - iii. Learning
   - iv. Mobility
   - v. Self-direction
   - vi. Capacity for independent living
   - vii. Economic self-sufficiency

AND▼

5. Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

OR

An individual from birth to age 9, inclusive, who has a substantial developmental delay or specific congenital or acquired condition, may be considered to have a developmental disability without meeting 3 or more of the criteria described in 1- 5 above, if the individual, without services, and supports, has a high probability of meeting those criteria later in life.

PADD Services

1. PADD has authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements (with particular attention to members of ethnic and racial minority groups);

2. Provide information on and referral to programs and services addressing the needs of individuals with developmental disabilities;

3. Investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

PROTECTION AND ADVOCACY FOR INDIVIDUALS WITH MENTAL ILLNESS (PAIMI)

PAIMI Purpose

Protect people with a diagnosis of mental illness from abuse and neglect, and to advocate for their rights as established in our federal and state constitutions and laws.

PAIMI Eligibility

Individuals who have a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State;
AND▼
Inpatient or resident of facility rendering care and/or treatment
OR
90 days post discharge from a facility
OR
In transport to a facility
OR

In process of being admitted to a facility

OR

Involuntarily confined to a municipal detention facility without a criminal conviction

OR

Lives in a community setting including their own home

AND▼

alleged abuse or neglect or rights violation.

PAIMI Services

1. Provide information and referral;
2. Protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes;
3. Investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

PROTECTION AND ADVOCACY FOR INDIVIDUAL RIGHTS (PAIR)

PAIR Purpose

To support the P&A system in each state to protect the legal and human rights of people with disabilities who are not eligible for PADD, PAIMI, and CAP[1].

Eligibility

People with a disability which substantially limits one or more of their major life activities and who have experienced a violation of their civil rights because they have a disability.

Services

1. Provision of information and referral
2. Investigation of allegations of abuse and neglect
3. Use of administrative, legal and other remedies to protect rights

[1]The Client Assistance Program (CAP) is located in the Office of Disability Concerns.

PROTECTION AND ADVOCACY FOR ASSISTIVE TECHNOLOGY (PAAT)

Purpose

To "assist individuals with disabilities and their family members, guardians, advocates and authorized representatives in accessing technology devices and assistive technology services" through case management, legal representation and self-advocacy training.

Eligibility

People with disabilities who are eligible for funding of assistive technology devices and services through the Rehabilitation Act, Medicaid, Medicare, Special Education, or private insurers or other possible sources of payment.

Services

1. Information and Referral
2. Advocacy, including informal, administrative and legal remedies to obtain assistive technology for our client

PROTECTION AND ADVOCACY FOR BENEFICIARIES OF SOCIAL SECURITY (PABSS)

Purpose

Provide P&A services to disabled beneficiaries of the Social Security Act.

Eligibility

Beneficiaries of the Social Security Act who have disabilities (must be in current pay status)

Services

1. Information and advice about obtaining vocational rehabilitation and employment services; and
2. Advocacy or other services that a disabled beneficiary may need to secure or regain gainful employment.

PROTECTION AND ADVOCACY FOR INDIVIDUALS WITH TRAUMATIC BRAIN INJURY (PATBI)

Purpose

Enable P&A systems to serve people with Traumatic Brain Injury.

Eligibility

People with Traumatic Brain Injury (TBI), as defined in the HRSA regulations.

Services

1. Information, Referrals and Advice
2. Individual and Family Advocacy
3. Legal Representation
4. Assistance with Self-Advocacy

PROTECTION AND ADVOCACY FOR VOTER ACCESS (PAVA)

Purpose

Ensure full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote and accessing polling places.

Eligibility

People with disabilities as defined in the Americans with Disabilities Act (ADA).

Services

1. Support training in the use of voting systems and technologies
2. Demonstrate and evaluate the use of such systems and technologies, by individuals with disabilities (including blindness) in order to assess the availability and use of such systems and technologies for such individuals.

Zelnik's other claims and find them to be without merit.

CONCLUSION

In accordance with the foregoing, the summary judgment entered in the District Court dismissing Zelnik's Complaint is hereby affirmed.

STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES and James McGaughey, Executive Director, State of Connecticut, Office of Protection & Advocacy for Persons with Disabilities, Plaintiffs–Appellees,

v.

HARTFORD BOARD OF EDUCATION, Hartford Public Schools and Robert Henry, Supt. of Schools, Defendants–Appellants.

Docket No. 05–1240 CV.

United States Court of Appeals,
Second Circuit.

Argued: Feb. 28, 2006.

Final Submission: June 20, 2006.

Decided: Sept. 15, 2006.

Background: Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) sued school district, seeking to compel access to students and records of transitional learning academy for special needs students, to carry out investigation of abuse claims in its capacity as advocate for persons sought to be helped by federal Developmental Disabilities and Bill of Rights Act (DD Act), Protection and Advocacy of Human Rights Act (PAIR), and Protection and Advocacy for Individuals with Mental Illness Act (PAIMI). The United States District Court for the District of Connecticut, Janet C. Hall, J., 355 F.Supp.2d 649, 195 Ed. Law Rep. 863, granted permanent injunction. District appealed.

Holdings: The Court of Appeals, Sotomayor, Circuit Judge, held that:

(1) district's deference to Department of Education's (DOE) view of Family Educational Rights and Privacy Act (FERPA) did not moot appeal;

(2) school was a "facility" to which OPA had to have reasonable access under PAIMI;

(3) under PAIR and DD Act, OPA was authorized to have reasonable access to school and its students during school hours both to investigate specific allegations of abuse and to monitor whether the school was respecting students' rights and safety;

(4) neither DD Act nor PAIMI conditioned access to school on the consent of a student's parents or guardians;

(5) OPA was authorized to obtain the names of students and contact information for their parents or guardians; and

(6) district court did not exceed its allowable discretion in ordering school district to disclose the names and contact information of all students attending school.

Affirmed.

1. Federal Courts ⚿814.1

Court of Appeals reviews a permanent injunction for abuse of discretion, which occurs when a district court relies on clearly erroneous findings of fact or an error of law.

2. Federal Courts ⚿724

School district's letter to court consenting to dismissal, in light of the fact that district was already in compliance with district court's injunction, was insufficient to dismiss and, thus, moot appeal from order granting permanent injunction, requiring district to grant Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) access to students and records of transitional learning academy for special needs students. F.R.A.P.Rule 42(b), 28 U.S.C.A.

3. Federal Courts ⚿724

School district's deference to Department of Education's (DOE) view of Family Educational Rights and Privacy Act (FERPA) did not moot appeal from order granting permanent injunction, requiring district to grant Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) access to students and records of transitional learning academy for special needs students; as district continued to press arguments with respect to the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), the Developmental Disabilities Assistance and Bill of Rights Act, and the Protection and Advocacy of Individual Rights Act (PAIR), the parties remained adverse with respect to at least some of the issues on appeal. Family Educational Rights and Privacy Act of 1974, § 444, 20 U.S.C.A. § 1232g; Rehabilitation Act of 1973, § 509, 29 U.S.C.A. § 794e; Protection and Advocacy for Individuals with Mental Illness Act, § 101 et seq., 42 U.S.C.A. § 10801 et seq.; Developmental Disabilities Assistance and Bill of Rights Act of 2000, § 101 et seq., 42 U.S.C.A. § 15001 et seq.

4. Federal Courts ⚿12.1

The mootness doctrine provides that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.

5. Federal Courts ⚿12.1

That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered judgment, cannot substitute for the actual case or controversy the Constitution requires for Court to exercise its jurisdiction.

6. Federal Courts ⚿723.1

A case does not become moot, if an appellant retains some interest in the case so that a favorable decision could redound to its favor.

7. Mental Health ⚿20

Court of Appeals would defer to reasonable interpretation advanced by Department of Health and Human Services (HHS), that the term "facilities" for purposes of Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) included non-residential facilities that provided care or treatment to individuals with mental illness, such that school that provided a therapeutic educational program for students who were seriously emotionally disturbed was a "facility" to which Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) had to have reasonable access under PAIMI. Protection and Advocacy for Individuals with Mental Illness Act, §§ 102(3), 105(a)(3), 42 U.S.C.A. §§ 10802(3), 10805(a)(3); 42 C.F.R. § 51.2.

See publication Words and Phrases for other judicial constructions and definitions.

8. Statutes ⚿219(1)

Where an agency advances a statutory interpretation in an amicus brief that has not been articulated before in a rule or regulation, Court of Appeals does not apply the high level of deference due under *Chevron*; that does not mean, however,

that Court give no deference to the agency's view.

9. Statutes ⚖219(1)

A reasonable agency statutory interpretation, when advanced in an amicus brief that is not a post hoc rationalization, may be entitled to some deference on account of the specialized experience and information available to the agency.

10. Administrative Law and Procedure ⚖741

The weight the Court of Appeals gives an agency's judgment is based on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

11. Mental Health ⚖20

To the extent that school was a location that provided care or treatment to individuals with disabilities within the meaning of Protection and Advocacy of Human Rights Act (PAIR) and the Developmental Disabilities and Bill of Rights Act (DD Act), Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) was authorized to have reasonable access to school and its students during school hours both to investigate specific allegations of abuse and to monitor whether the school was respecting students' rights and safety. Rehabilitation Act of 1973, § 509, 29 U.S.C.A. § 794e; Developmental Disabilities Assistance and Bill of Rights Act of 2000, § 143(a)(2)(B, H), 42 U.S.C.A. § 15043(a)(2)(B, H).

12. Mental Health ⚖20

The requirement in Developmental Disabilities Assistance and Bill of Rights Act (DD Act) that a protection and advocacy (P & A) system for individuals with mental illness have the authority under the Act to investigate specific incidents does not limit a P & A system to that power alone. Developmental Disabilities Assistance and Bill of Rights Act of 2000, § 143(a)(2)(B), 42 U.S.C.A. § 15043(a)(2)(B).

13. Mental Health ⚖20

Nothing in the statutory language of either the Developmental Disabilities and Bill of Rights Act (DD Act), or the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) conditioned access to school that provided a therapeutic educational program for students who were seriously emotionally disturbed on the consent of a student's parents or guardians. Protection and Advocacy for Individuals with Mental Illness Act, § 105(a)(3), 42 U.S.C.A. § 10805(a)(3); Developmental Disabilities Assistance and Bill of Rights Act of 2000, § 143(a)(2)(H), 42 U.S.C.A. § 15043(a)(2)(H).

14. Mental Health ⚖21

Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) was authorized under Developmental Disabilities and Bill of Rights Act (DD Act), Protection and Advocacy of Human Rights Act (PAIR), and Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) to obtain the names of students and contact information for their parents or guardians; by conditioning access on the consent of an individual or, if the individual cannot consent, his or her legal guardian or representative, the Acts required that P & A systems contact the guardians of individuals with disabilities or mental illness if they had the requisite prior cause to believe that abuse or neglect was occurring at the facility. Rehabilitation Act of 1973, § 509, 29 U.S.C.A. § 794e; Protection and Advocacy for Individuals with Mental Illness Act, § 105(a)(4), 42 U.S.C.A. § 10805(a)(4); Developmental Disabilities Assistance and

Bill of Rights Act of 2000, § 143(a)(2)(I–J), 42 U.S.C.A. 15043(a)(2)(I–J).

15. Mental Health ⚿21

District court did not exceed its allowable discretion in ordering school district to disclose the names and contact information of all students attending school that provided a therapeutic educational program for students who were seriously emotionally disturbed; Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) submitted evidence that it had complaints about the operation of particular policies that led to inappropriate restraint and seclusion and that those policies operated school-wide, and vast majority of students were minors whose parents or guardians had strong interest in the protection of their rights and well-being. Protection and Advocacy for Individuals with Mental Illness Act, § 101(a)(2), 42 U.S.C.A. § 10801(a)(2).

16. Federal Courts ⚿767

Injunction ⚿1

District courts have broad authority in crafting equitable remedies such as injunctions; accordingly, appellate review is correspondingly narrow.

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Before: SOTOMAYOR and RAGGI, Circuit Judges, and CEDARBAUM, District Judge.*

SOTOMAYOR, Circuit Judge.

This appeal raises the question of whether the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. §§ 10801–10851 (2000),[1]

* The Honorable Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

1. Enacted in 1986 as the "Protection and Advocacy for Mentally Ill Individuals Act of 1986," Pub.L. No. 99–319, 100 Stat. 478 (May 23, 1986), the Act was commonly referred to by the acronym "PAMII." *See, e.g., Ctr. for Legal Advocacy v. Hammons,* 323 F.3d 1262, 1263 (10th Cir.2003). In 1991, amendments to the Act substituted "individuals with mental illness" for "mentally ill individuals" wherever it appeared in the Act. *See* Pub.L. No. 102–173, § 10(2), 105 Stat. 1217, 1219 (Nov. 27, 1991). The short title, however, remained unchanged. In 2000, Congress amended the short title so that the Act is now known as the "Protection and Advocacy for Individuals with Mental Illness Act" or "PAIMI." *See* Pub.L. No. 106–310, 114 Stat. 1101, 1193–94 (Oct. 17, 2000).

the Developmental Disabilities Assistance and Bill of Rights Act of 2000 ("DD Act"), 42 U.S.C. §§ 15001–15115 (2000), and the Protection and Advocacy of Individual Rights Act ("PAIR"), 29 U.S.C. § 794e (2000) (collectively, the "P & A Acts") authorize plaintiffs-appellees the State of Connecticut Office of Protection and Advocacy ("OPA") and its executive director, James McGaughey, (1) to observe and interview students at the Hartford Transitional Learning Academy (the "Academy"), a therapeutic school for students who are seriously emotionally disturbed, in order to investigate complaints of abuse and neglect at the school, and (2) to obtain a directory of students with contact information for their parents or guardians. For the reasons that follow, we hold that the P & A Acts authorize OPA to access the Academy during school hours and to obtain a directory of students and contact information for their parents or guardians.

Defendants-appellants Hartford Board of Education, Hartford Public Schools, and Superintendent of Schools Robert Henry (collectively, "defendants") initially argued on appeal that, even if the P & A Acts authorize OPA to access the Academy and its students and to obtain a list of students and contact information for their parents or guardians, the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g (2000 & Supp. IV), and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400–1487 (2000 & Supp. IV), nonetheless bar their compliance with OPA's requests. Following oral argument and the submission of a joint amicus brief by the United States Departments of Education and Health and Human Services, however, defendants abandoned their arguments based on FERPA and the IDEA, and we therefore do not address them. We affirm the injunction.

BACKGROUND

I. Factual Background

The Academy is a public school in Hartford, Connecticut, that is under defendants' authority. The Academy provides a "therapeutic educational program" for children who are seriously emotionally disturbed and who present challenging behavioral problems. All students enrolled at the Academy have been identified as requiring special education or related services under the IDEA. The parents or guardians of students enrolled there are required to sign a document acknowledging the school's use of physical restraints and seclusion.

OPA is a state-created agency that is authorized to investigate suspected abuse or neglect of individuals with disabilities or mental illness in Connecticut and to advocate on their behalf. *See* Conn. Gen.Stat. §§ 46a–10 to 46a–11 (2004). It serves as Connecticut's protection and advocacy system ("P & A system") for purposes of PAIMI, 42 U.S.C. § 10801(b)(2), the DD Act, *id.* § 15043(a), and PAIR, 29 U.S.C. § 794e(f), which provide federal funding only for states with qualifying P & A systems that monitor the care of and advocate on behalf of individuals with mental illness and developmental or other disabilities. *See* 29 U.S.C. § 794e(a)(1), (f); 42 U.S.C. §§ 10801, 15001.

OPA alleges that it received complaints from parents of students at the Academy about the inappropriate use of physical restraints and seclusion at the school.[2] Parents also complained that students had been injured during the restraint process.

2. Under regulations promulgated pursuant to PAIMI and the DD Act, the use of excessive force when placing an individual in physical restraints is considered to be abuse. *See* 42 C.F.R. § 51.2 (PAIMI); 45 C.F.R. § 1386.19 (the DD Act).

As a result of these complaints, as well as allegations that students had been placed at the Academy without proper behavioral assessments or adequate individualized educational plans as required by the IDEA, OPA determined that it had probable cause to suspect that Academy students had been, or were at risk of being, subject to abuse and neglect. In conjunction with the State of Connecticut Office of the Child Advocate ("OCA"), OPA opened an investigation into possible abuse and neglect at the Academy. OCA is a state-created agency charged with monitoring services provided to children by the State of Connecticut or by organizations, such as school districts, that receive state funds, and with reviewing complaints about those services. *See* Conn. Gen.Stat. § 46a–131(a)(1)–(3) (2004).

On February 3, 2004, OPA and OCA sent Superintendent Henry a letter informing him that they had received complaints about the treatment of students at the Academy and would be investigating the alleged "programmatic deficiencies and violations of student rights" pursuant to their authority under federal and state law. The letter further informed Superintendent Henry that OPA and OCA intended to make an initial visit to the Academy at nine o'clock on the morning of February 10, 2004, and that the investigation would include "policy review, record review, interviews and direct observation of practices."

On February 10, 2004, representatives from OPA and OCA visited the Academy as promised. The Academy refused them access to the facility, the students, and the documents they had requested. Representatives from OPA, OCA, and defendants, including Superintendent Henry, met to discuss the matter on April 7, 2004. At the meeting, defendants agreed to, and later did, provide certain documents to OPA and OCA. These documents, however, did not contain any personal information regarding Academy students. Specifically, defendants did not provide the directory information—a list of students and contact information for their parents or guardians—that OPA sought. Defendants also refused to allow OPA and OCA access to the Academy during school hours to observe or interview students. They claimed that access to students and the disclosure of directory information was not authorized by the P & A Acts and was prohibited by FERPA and the IDEA.

II. Procedural History

A. The District Court

On August 11, 2004, OPA filed suit in the United States District Court for the District of Connecticut (Janet C. Hall, J.) seeking (1) a declaration that it was entitled to observe and interview students at the Academy during school hours and to obtain a list of the names and contact information for all the students and their parents and (2) a corresponding injunction. Because the parties stipulated to the relevant facts, the district court consolidated the hearings on the preliminary and permanent injunctions. *See Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 355 F.Supp.2d 649, 652 (D.Conn.2005) ("*OPA* ").

In a thorough and thoughtful opinion, the district court granted the relief OPA sought. Courts have concluded that a P & A system's inability to meet its federal statutory mandate to protect and advocate for the rights of individuals with disabilities is an irreparable harm for purposes of injunctive relief. *Id.* at 653. With respect to the merits, the district court first concluded that the Academy students fall within the protections of the P & A Acts

on the basis of defendants' concession that most students would be classified as individuals with mental illness within the definition of PAIMI, and OPA's reasonable belief that some, if not most, of the students had developmental or other disabilities given that all the students are diagnosed as "substantially emotionally impaired" and in need of special education and related services. *Id.* at 665–66. The court next held that the Academy was a "facility" under PAIMI that OPA is authorized to access. *Id.* at 657–60. In doing so, the court rejected defendants' assertion that PAIMI does not apply to non-residential facilities or to individuals with disabilities who live at home. *Id.* at 658–59.

The court further held that, under the P & A Acts, OPA is entitled to a list of students and the contact information for their parents or guardians. *Id.* at 661–64. The court concluded that a minor student's parents can be considered his or her "legal guardian[s]" for purposes of the P & A Acts so that OPA can contact them in order to secure consent to view that student's records. *Id.* at 661–62. Finally, the district court held that neither FERPA nor the IDEA bars OPA from obtaining the names and contact information of students and their parents or guardians. *Id.* at 662–63.

The district court thus declared that defendants' refusal to provide OPA with the names and phone numbers of Academy students violated PAIMI, PAIR and the DD Act. It entered a permanent injunction ordering defendants "to grant both physical access and names and contact information such that OPA can perform its statutory duty to investigate suspected abuse and neglect." *Id.* at 664.

Defendants thereafter filed this timely appeal, but they did not seek a stay of the injunction and have complied with its terms.

B. The Appeal

On appeal, defendants assert that the district court erred in concluding that the Academy is a "facility" to which OPA is entitled to have reasonable access under PAIMI because the implementing regulations limit the term "facility" to residential facilities, which the Academy is not. They also claim that even if the Academy is a facility for purposes of PAIMI, OPA cannot access it or speak with students without the consent of the students' parents or guardians. They further challenge the district court's holding that the P & A Acts authorize OPA, once it has probable cause to believe that abuse or neglect has occurred at the facility, to obtain a general list of Academy students and the contact information for their parents or guardians. Defendants also maintain that the P & A Acts authorize OPA to obtain contact information only for Academy students about whom they have received a specific complaint.

Initially, defendants also asserted that FERPA and the IDEA prohibited them from allowing OPA to access the Academy, its students or the students' contact information. Specifically, they argued that, regardless of any authority OPA might have under the P & A Acts, FERPA and the IDEA prohibit them from allowing OPA to be present at the Academy during school hours or to interview Academy students without the consent of their parents or guardians.[3] Similarly, without such per-

3. The IDEA requires schools that receive federal funds for special education, such as the Academy, to abide by the terms of FERPA. *See* 20 U.S.C. § 1417(c). It does not impose any further non-disclosure requirements. We therefore discuss defendants' non-disclosure argument only with reference to FERPA.

mission, defendants asserted, the release of the names of students and contact information for their parents or guardians is prohibited by FERPA. For the reasons we will explain, defendants have since abandoned these arguments.

Following oral argument, we invited the United States Departments of Education ("DOE") and Health and Human Services ("HHS") to file amicus briefs in this case providing their interpretations of the relevant statutory provisions. DOE and HHS accepted our invitation and filed a joint brief with the Court, which, in significant part, rejects defendants' arguments. With respect to defendants' FERPA defense, the agencies explain that FERPA's non-disclosure requirements are limited to tangible records and information derived from records and that FERPA does not prohibit an OPA representative from observing a classroom or speaking with students. They note that DOE has previously adopted this interpretation in informal guidance. Brief for Amici Curiae Department of Education & Department of Health & Human Services ("United States Br.") at 12–13 & n.5 (citing Dep't of Educ., Dec. 8, 2003 Letter to S. Mamas). DOE and HHS also explain that, to the extent FERPA prohibits defendants from releasing the names and contact information for students who OPA has probable cause to believe were subject to abuse or neglect, the P & A Acts should be construed "as a limited override of FERPA's non-disclosure requirements" in the circumstances presented by this case. United States Br. at 18.

In response to the agencies' submission, defendants notified this Court that, although they do not agree with the view articulated in the joint amicus brief, they will defer to the agencies' interpretation of FERPA. In light of the fact that they are already in compliance with the district court's injunction, defendants state that they consider this appeal to be moot and consent to its dismissal. Bird Letter, June 20, 2006, at 2. Defendants' letter, however, neither makes reference to the agencies' arguments based on the P & A Acts nor expresses similar deference to the agencies' interpretation of those statutes.

OPA responds that the case is not moot. It claims that it still needs the ability to access the Academy and monitor conditions at the school in the future. It also asserts that defendants' prosecution of the appeal, at least until their receipt of the agencies' joint amicus brief, indicates that defendants do not want OPA to have access to the Academy and that absent a ruling on defendants' arguments, they would be free to interpose their objections to OPA's investigations at the Academy based on FERPA in the future. Alisberg Letter, June 20, 2006, at 3–4.

DISCUSSION

[1] This Court reviews a permanent injunction for abuse of discretion, *see Advance Pharm., Inc. v. United States,* 391 F.3d 377, 398 (2d Cir.2004), which occurs when a district court relies on clearly erroneous findings of fact or an error of law, *see S.C. Johnson & Son, Inc. v. Clorox Co.,* 241 F.3d 232, 237 (2d Cir.2001). Questions of statutory construction and the appropriate level of deference to accord an agency's interpretation of a statute are questions of law, which we review *de novo. See Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.,* 448 F.3d 119, 123 (2d Cir.2006).

I. Mootness

The first question we must address is whether defendants' deference to DOE's view of FERPA and their consent to dismiss the appeal moots the appeal. We address the latter question first.

[2] Under Federal Rule of Appellate Procedure 42(b), parties may seek the voluntary dismissal of a docketed appeal in two ways. Parties may obtain a voluntary dismissal by signing and filing a "dismissal agreement specifying how costs are to be paid and pay[ing] any fees that are due." Fed. R.App. P. 42(b). Alternatively, an appeal may be dismissed on appellant's motion "on terms agreed to by the parties or fixed by the court." *Id.* Here, there is no signed dismissal agreement and defendants have not moved to dismiss the appeal. Their letter to the Court consenting to dismissal is therefore insufficient to dismiss, and thus moot, the appeal. *Cf. British Int'l Ins. Co. v. Seguros La Republica, S.A.,* 354 F.3d 120, 123 (2d Cir.2003) (finding that an appeal was not moot because the parties had failed to file a signed stipulation with the Clerk of the Court as required by Rule 42(b)).

[3–6] That we do not view defendants' letter as a motion to dismiss their appeal, however, does not address the question of whether their deference to DOE's views now moots the appeal. "The mootness doctrine provides that 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Id.* at 122 (quoting *Steffel v. Thompson,* 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 n. 10 (1974)). "That the dispute between the parties was very much alive when suit was filed, or at the time [the court of appeals rendered judgment], cannot substitute for the actual case or controversy" the Constitution requires in order for us to exercise our jurisdiction. *Honig v. Doe,* 484 U.S. 305, 317, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). A case does not become moot, however, if an appellant retains some interest in the case so that a favorable decision could redound to its favor. *See Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 569–70, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984); *Stolt–Nielsen SA v. Celanese AG,* 430 F.3d 567, 576 n. 6 (2d Cir.2005).

Here, because defendants continue to press their arguments with respect to the P & A Acts, the parties remain adverse with respect to at least some of the issues on appeal. There is no question that if we were to render a favorable decision for defendants, they would obtain relief because they would no longer have to comply with the terms of the injunction, which, as noted, requires defendants "to grant both physical access and names and contact information such that OPA can perform its statutory duty to investigate suspected abuse and neglect" and thus has a continuing effect. *See Tory v. Cochran,* 544 U.S. 734, 737, 125 S.Ct. 2108, 161 L.Ed.2d 1042 (2005) (explaining that a case is not moot where it "appears from [the] 'terms' of the injunction that it is 'still in force' and 'unless set aside must be complied with' " (quoting *Firefighters Local Union No. 1784,* 467 U.S. at 569, 104 S.Ct. 2576)). Hence, defendants' deference to DOE's view of FERPA does not moot their appeal.

Although defendants' agreement to defer to the views of DOE does not moot the appeal, it does serve to abandon certain arguments that defendants advanced initially on appeal—that FERPA should be read to bar OPA from accessing the Academy and its students during school hours and from obtaining directory information for students. Accordingly, we do not address defendants' arguments with respect to FERPA (and the IDEA).[4] *See 24/7*

4. OPA's apparent concern that defendants' abandonment of their FERPA claims on appeal will allow defendants to challenge the injunction or similar requests for access and information by OPA on this ground in the future seems misplaced. As an initial matter,

Records, Inc. v. Sony Music Entm't, Inc., 429 F.3d 39, 43 (2d Cir.2005) (declining to consider arguments abandoned on appeal). We therefore turn to defendants' remaining claims on appeal.

II. Access to the Academy

Defendants contend that the district court erred in finding that the P & A Acts authorize OPA to access the Academy and speak with its students for investigatory purposes. They argue that PAIMI authorizes OPA to have reasonable access only to residential facilities and that PAIR and the DD Act do not authorize the investigation of an entire school.

A. PAIMI

PAIMI authorizes P & A systems such as OPA to "investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. § 10805(a)(1)(A). It further provides that a P & A system "shall . . . have access to facilities in the State providing care or treatment." *Id.* § 10805(a)(3). Under PAIMI, the term "facilities" "may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." *Id.* § 10802(3).

[7] Defendants do not dispute that the Academy is a facility that provides care or treatment to individuals with mental illness—specifically, children who are seriously emotionally disturbed. Instead, defendants argue that, on the basis of the statute's plain language and its implementing regulations, the term "facilities" under PAIMI includes only residential facilities. They point to the illustrative list of facilities at § 10802(3), which they claim consists solely of residential facilities.

Defendants assert further that we must defer to HHS's regulation defining a "facility" under PAIMI as "any public or private residential setting that provides overnight care accompanied by treatment services." 42 C.F.R. § 51.2. Defendants contend that this definition is reasonable because, unlike residential facilities such as hospitals or jails, day facilities like the Academy do not isolate students from their families or the community such that they would require the services of a P & A system. Defendants further note that school children have a number of sources of protection and advocacy available to them, including the rights conferred on parents by the IDEA and the requirement that teachers and most school district employees report suspected cases of abuse.

OPA responds that this argument does not acknowledge that, after HHS promul-

we note that defendants' deference to DOE and their abandonment of their FERPA arguments on appeal mean that they do not challenge so much of the district court ruling as rejected those claims.

Moreover, although a determination of whether defendants are precluded from raising FERPA to refute any of OPA's future requests to investigate allegations of abuse or neglect must abide that event, we note that defendants' abandonment of their FERPA arguments on appeal does not alter the fact that the FERPA arguments have been litigated in this case, were decided by the district court, were necessary to the judgment on the merits, and were not challenged on appeal. *See Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 146 (2d Cir.2005) ("[I]ssue preclusion[ ] applies where: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." (internal quotation marks and citation omitted)).

gated its regulatory interpretation of the term "facilities" in 1997, Congress amended PAIMI in 2000 to extend its protection to individuals with mental illness who live in the community. *See* Children's Health Act of 2000, Pub.L. No. 106–310, § 3206(b)(1)(B), 114 Stat. 1101, 1194 (2000). That is, prior to 2000, the definition of an "individual with mental illness" for purposes of the Act was limited to individuals who were inpatients or residents of a care or treatment facility. *See* Pub.L. No. 99–319, Title I, § 102(3)(B), 100 Stat. 478, 479 (1986). In 2000, however, Congress amended the definition of "an individual with mental illness" under the Act to include "an individual—(A) who has a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State; and . . . (ii) . . . lives in a community setting, including [his or her] own home." 42 U.S.C. § 10802(4).

OPA contends that these amendments make clear that PAIMI's protections extend to individuals who attend day programs like the one at the Academy. Because the Academy is a "community facilit[y] for individuals with mental illness" that "provid[es] care or treatment," *id.* §§ 10802(3), 10805(a)(3), OPA argues, it is a facility to which OPA is empowered to have reasonable access under PAIMI.

HHS, which is charged with issuing regulations interpreting and implementing PAIMI, *see id.* § 10826, also maintains that the term "facilities" in the statute includes non-residential facilities that provide care and treatment of individuals with mental illness. The amicus brief HHS filed with DOE in this case states that it "interprets the investigatory authority of a P & A pursuant to the PAIMI Act as extending to any facility providing care and treatment to the mentally ill, regardless of whether the facility is residential." United States Br. at 10. It asserts that this interpretation is most consistent with the text of PAIMI and the legislative purpose of the 2000 amendments, which were passed to "strengthen community-based mental health services and enable children with severe emotional disturbances to 'remain in local communities rather than being sent to residential facilities.' " United States Br. at 9 (quoting S.Rep. No. 106–196, at 6 (1999)). In consequence, HHS rejects defendants' argument that the definition of "facility" codified at 42 C.F.R. § 51.2 controls here.

[8–10] Where, as here, an agency advances a statutory interpretation in an amicus brief that has not been articulated before in a rule or regulation, we do not apply the high level of deference due under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See In re New Times Sec. Servs., Inc.,* 371 F.3d 68, 80, 82 (2d Cir.2004) (concluding that an informal opinion in an amicus brief by the SEC does not have the force of law and therefore does not warrant *Chevron* deference). That does not mean, however, that we give no deference to the agency's view. *See United States v. Mead Corp.,* 533 U.S. 218, 234–35, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Rather, a reasonable agency determination, when advanced in an amicus brief that is not a "*post hoc* rationalizatio[n]," *Auer v. Robbins,* 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (internal quotation marks omitted), may be entitled to some deference on account of the "specialized experience" and information available to the agency. *Skidmore v. Swift & Co.,* 323 U.S. 134, 139, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *see also Mead,* 533 U.S. at 234–35, 121 S.Ct. 2164; *In re New Times Sec. Servs.,* 371 F.3d at

82–83. Under *Skidmore,* the weight we give an agency's judgment is based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140, 65 S.Ct. 161.

Evaluating the *Skidmore* factors here, we conclude that HHS's interpretation merits deference. The definition of "facilities" set forth in § 10802(3) does not distinguish between residential and day facilities. Although many of the examples of facilities included in Congress's illustrative list are of a residential character, Congress also included "community facilities for individuals with mental illness." The rubric "community facilities" does not appear, on its face, to be limited to residential programs. Moreover, reading the facility-access provision as limited to residential facilities is contrary to Congress's clearly expressed intent to provide protection and advocacy services for individuals with mental illness living in their own homes. *See* 42 U.S.C. § 10802(4). We therefore conclude that the regulatory interpretation of "facilities" HHS promulgated in 1997 is no longer consistent with PAIMI after the 2000 amendments. We defer instead to the reasonable interpretation advanced by HHS in this case—that the term "facilities" for purposes of PAIMI includes nonresidential facilities that provide care or treatment to individuals with mental illness.

Here, the Academy is a school that provides a therapeutic educational program for students who are seriously emotionally disturbed. It is therefore a facility to which OPA must have reasonable access under PAIMI.

B. PAIR and the DD Acts

[11] PAIR and the DD Act also grant access to certain facilities providing services to individuals with developmental disabilities. The DD Act provides that a P & A system must "have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual, in order to carry out the purpose of this part." 42 U.S.C. § 15043(a)(2)(H). The Act provides further that the "purpose of this part is to provide for allotments to support a protection and advocacy system . . . in each State to protect the legal and human rights of individuals with developmental disabilities in accordance with this part." *Id.* § 15041. PAIR incorporates these provisions of the DD Act. *See* 29 U.S.C. § 794e(f) (providing that a P & A system has the same authority under PAIR as under the DD Act for individuals who are disabled but neither have mental illness within the meaning of PAIMI nor developmental disabilities within the meaning of the DD Act).

Defendants argue that § 15043(a)(2)(H) authorizes a P & A system to speak only with specific individuals in a service location, and not to *all* individuals served by that location. That is, they contend that, because § 15043(a)(2)(H) provides OPA with access to "any individual . . . in a location . . . in order to carry out the purpose of this part" and that the purpose of this part is to " 'investigate incidents of abuse and neglect of individuals,' " Appellant's Br. at 14 (quoting 42 U.S.C. § 15043(a)(2)(B)), OPA has authority only to observe or speak with those students it has reason to believe have been subject to abuse or neglect. In short, they maintain, the DD Act does not give OPA generalized access to the Academy facility and its students. We disagree.

Defendants conflate § 15043(a)(2)(B) with § 15043(a)(2)(H). The former subsection provides P & A systems access to

facilities and permits them to speak with individuals in order to investigate specific incidents of suspected abuse or neglect. The latter subsection provides more generalized access to any individual with a disability in a location that provides services in order to carry out the statutory purpose of protecting the rights of such persons. Defendants' argument that a P & A system has the authority to access a service location under § 15043(a)(2)(H) only for the purpose of investigating a specific incident—a right conferred by § 15043(a)(2)(B)—would render § 15043(a)(2)(H) meaningless because it would authorize only those activities authorized by subsection (B). We decline to read the statute in a way that would create a redundancy. *See Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("It is ... a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (citation and internal quotation marks omitted)).

In addition, the DD Act's implementing regulations clearly provide that P & A systems have the authority to interview all individuals at a particular facility:

> A system shall have reasonable unaccompanied access to public and private facilities which provide services, supports, and other assistance for individuals with developmental disabilities in the State when necessary to conduct a full investigation of an incident of abuse or neglect under section 142(a)(2)(B) of the [DD] Act. This authority shall include the opportunity: to interview any facility service recipient, employee, or other person, including the person thought to be the victim of such abuse, who might be reasonably believed by the system to have knowledge of the incident under investigation; and to inspect, view and photograph all areas of the facility's premises that might be believed by the system to have been connected with the incident under investigation.

45 C.F.R. § 1386.22(f); *see also id.* § 1386.22(g) (noting that the system "shall have unaccompanied access to all residents of a facility at reasonable times, which at a minimum shall include normal working hours and visiting hours" for the purposes of fully investigating alleged abuse and neglect).[5] *See Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 497 (11th Cir. 1996) ("It is clear that [the DD] Act provides express authority for P & As to gain broad access to records, facilities, and resi-

5. Like PAIMI, the DD Act was amended by Congress after this regulation was promulgated to extend its protections to individuals not living in residential facilities. *See* Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub.L. No. 106–402, § 143(a)(2)(H), 114 Stat. 1677, 1715 (2000). The prior version of the DD Act, pursuant to which HHS promulgated its regulation, limited a P & A system's access to residents of a facility for persons with disabilities. *See* 42 U.S.C. § 6042(a)(2)(H) (1994) (repealed) (providing that P & A systems shall "have access at reasonable times and locations to any resident who is an individual with a developmental disability in a facility that is providing services, supports, and other assistance to such resident"). To the extent that HHS's regulation interprets the statute's former language to limit P & A systems' access only to individuals with developmental disabilities in residential locations, the regulation has been superseded by congressional enactment and is not controlling.

In the joint amicus brief, HHS implicitly reads the regulation promulgated at 45 C.F.R. § 1386.22(g) to provide access to any individual with a developmental disability in a location that provides services, regardless of whether the individual is a resident of the location. Although we are not called upon to defer to this interpretation, we note that it is consistent with the plain language of the DD Act, as amended, which authorizes OPA to have physical access to all individuals in the location for monitoring purposes.

dents to ensure that the Act's mandates can be effectively pursued."); *Pennsylvania Prot. & Advocacy, Inc. v. Royer–Greaves Sch. for the Blind*, 1999 WL 179797, at *6 (E.D.Pa. Mar.25, 1999) (holding that "reasonable access includes general facility access without notice, and patient access with twenty-four hour notice"); *Mississippi Prot. & Advocacy System, Inc. v. Cotten*, 1989 WL 224953, at *8–9 (S.D.Miss. Aug.4, 1989) (noting that P & A systems must have "frequent personal contact" with individuals receiving services, and that "[c]entral to the concept of authority to investigate is the ability to interview witnesses"), *aff'd*, 929 F.2d 1054, 1059 (5th Cir.1991) (noting court's "full accord" with district court's conclusions regarding necessity of P & A access to individuals).

[12] Moreover, the "purpose" of this part of the DD Act is not as limited as defendants maintain, but rather aims to protect the legal and human rights of individuals with developmental disabilities. *Id.* § 15041 (defining the "purpose of this part"). To this end, the statute provides access to service recipients for both investigatory and monitoring purposes, i.e., to investigate past instances of suspected abuse or neglect and to monitor to ensure current respect for the rights and safety of service recipients. *Id.* § 15043(a)(2)(B), (H). Simply put, the requirement in § 15043(a)(2)(B) that a P & A system have the authority under the Act to investigate specific incidents does not limit a P & A system to that power alone.

The records-access provision of the DD Act also supports the view that a P & A system has the authority to have physical access to a location and to observe and speak with service-recipients for monitoring purposes. It provides that a P & A system may view the records of an individual with a disability when, *inter alia*, "as a result of *monitoring or other activities*, there is probable cause to believe that such individual has been subject to abuse or neglect." 42 U.S.C. § 15043(a)(2)(I)(iii)(II) (emphasis added). This language indicates that Congress intended P & A systems not simply to respond to reports of maltreatment, but also to monitor facilities in order to prevent abuse or neglect.

In sum, to the extent that the Academy is a location that provides care or treatment to individuals with disabilities within the meaning of PAIR and the DD Act, OPA is authorized to have reasonable access to the Academy and its students during school hours both to investigate specific allegations and to monitor whether the school is respecting students' rights and safety.

C. Parental Permission

[13] Defendants next argue that even if PAIMI, PAIR and the DD Act generally authorize OPA to access a facility such as the Academy, OPA cannot do so here without permission from the students' parents or guardians. For this argument, they rely on the P & A Acts' records-access provisions, which require a P & A system, except in certain emergency situations, to obtain consent from the individual, if he or she is an adult and can consent, or the individual's legal guardian prior to obtaining an individual's records. *See* 42 U.S.C. §§ 10805(a)(4) (PAIMI), 15043(a)(2)(I) (DD Act).

This argument need not detain us long. The DD Act and PAIMI distinguish between a P & A system's authority to speak with an individual and its authority to obtain an individual's records. As discussed above, the DD Act provides that a P & A system must have reasonable access to individuals. *See* 42 U.S.C. § 15043(a)(2)(H). Similarly, PAIMI provides that OPA must have reasonable access to individuals in facilities that provide

care or treatment for individuals with mental illness. *See* 42 U.S.C. § 10805(a)(3). Nothing in the statutory language of either the DD Act or PAIMI conditions this access on the consent of an individual's parents or guardians.

That parental consent is not required is also supported by the regulations interpreting and implementing this section. PAIMI's implementing regulations define "reasonable access" for monitoring purposes to include reasonable unaccompanied access to programs and individuals in order to ensure that their rights are being protected, including the right to speak or otherwise communicate with individuals, including minors. 42 C.F.R. § 51.42(c). As noted in the previous section, this regulation refers to "residents," which reflects the statutory definition of an "individual with mental illness" at the time the regulation was promulgated. In the joint amicus brief, HHS reads this provision to apply to Academy students, who plainly are not "residents" of the facility. United States Br. at 12 ("Under the statute and implementing regulations, a P & A's authority to access individuals or facilities is not conditioned on parental notification or consent." (citing 42 C.F.R. § 51.42(d)-(e))). We read this regulation consistently with HHS's interpretation in the joint amicus brief. *See generally In re New Times Sec. Servs., Inc.,* 371 F.3d at 82–83; *accord McCormick ex rel. McCormick v. Sch. Dist.,* 370 F.3d 275, 290 (2d Cir.2004) (noting that courts generally defer to an agency's reasonable interpretation of its regulation).

Contrary to the access provisions, PAIMI and the DD Act are very explicit about what type of authorization is required for a P & A system to view an individual's records: they detail from whom a P & A system must have authority to access records and when prior consent is necessary. *See* 42 U.S.C. §§ 15043(a)(2)(I), 10805(a)(4). That Congress provided explicit and detailed authorization provisions with respect to an individual's records but did not do so with respect to a P & A system's right to access a facility suggests that it did not intend to require a P & A system to obtain authorization prior to visiting a facility to observe conditions or interact with the individuals receiving services in that facility. *See Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation marks and citation omitted; alteration in original)); *see also Burlington N. & Santa Fe Ry. Co. v. White,* —— U.S. ——, ——, 126 S.Ct. 2405, 2412, 165 L.Ed.2d 345 (2006) (explaining that where Congress uses different words, it is presumed that Congress intended the different words to make a legal difference). We therefore decline defendants' invitation to read a parental-consent provision into the statute where none exists.

III. Parent/Guardian Contact Information

Defendants next argue that the district court erred in ordering it to release to OPA a directory of students containing contact information for their parents or guardians. The only arguments they press on appeal are that the P & A Acts do not require the release of this information and that, even if they do, the district court erred in requiring them to release the information for all students. We consider these arguments in turn.

A. The P & A Acts Authorize the Disclosure of Contact Information

[14] Defendants assert that the district court erred in requiring them to give OPA

the names and contact information for Academy students because the P & A Acts do not expressly require them to disclose this information.

The DD Act, PAIR and PAIMI each permit OPA to access records in certain situations. Although there are some differences among the Acts, they require, broadly speaking, that a P & A system have access to an individual's records upon the consent of the individual or his or her guardian and in certain emergency situations. *See* 42 U.S.C. §§ 10805(a)(4), 15043(a)(2)(I)-(J). They also permit a P & A system to have access to an individual's records if the individual's representative fails to act after a P & A system has received contact information for the representative, contacted that person concerning possible abuse or neglect of the individual, and offered assistance in resolving the situation. Specifically, the DD Act provides that a P & A system must have access to an individual's records where there is probable cause to believe that the individual has been subject to abuse or neglect, the individual's representative "has been contacted by such system, upon receipt of the name and address of such representative; ... such system has offered assistance to such representative to resolve the situation; and ... such representative has failed or refused to act on behalf of the individual." 42 U.S.C. § 15043(a)(2)(I)(iii)(III)-(V). PAIMI has a similar provision, but requires that a P & A system have probable cause to believe that the "health or safety of the individual is in serious and immediate jeopardy." 42 U.S.C. § 10805(a)(4)(C). The implementing regulations for the DD Act and PAIMI further provide that if a P & A system is denied access to an individual's records for, *inter alia*, alleged lack of authorization, it shall be provided with the name of the guardian of that individual. 42 C.F.R. § 51.43; 45 C.F.R.. § 1386.22(i).

OPA concedes that none of the P & A statutes explicitly requires that the Academy give it a list of students and contact information for their parents or guardians. Nonetheless, it contends that because a P & A system cannot obtain consent to access a student's records from the student's guardian without the guardian's name or contact information, but it can obtain the guardian's name if it is denied access to an individual's records for lack of authorization pursuant to the governing regulations, it is therefore entitled to a list of students and contact information for their parents or guardians. OPA further asserts that the Academy's failure to disclose this information impedes its statutory duty under the P & A Acts and is contrary to the clear spirit, if not the exact letter, of the laws.

In the joint amicus brief filed in this case, HHS and DOE take the position that the records-access provisions of the P & A Acts "expressly contemplate that a school or other facility will provide contact information to a P & A in order to allow the P & A to carry out its responsibility to investigate abuse or neglect." United States Br. at 14. The agencies assert that, to the extent that OPA has made the requisite probable cause determinations, OPA has a clear right to contact information for those students' parents or guardians. *Id.* at 14–15.

We find persuasive the agencies' view that Congress intended a P & A system to be able to obtain the names and contact information for the parents or guardians of students at the Academy. By conditioning access on the consent of an individual or, if the individual cannot consent, his or her legal guardian or representative, the Acts require that P & A systems contact the guardians of individuals with disabilities or mental illness if they have the requisite prior cause to believe that abuse or neglect

is occurring at the facility. This interpretation is consistent with Congress's view that "family members of individuals with mental illness play a crucial role in being advocates for the rights of individuals with mental illness where the individuals are minors." 42 U.S.C. § 10801(a)(2). Hence, we conclude that OPA is authorized under PAIMI, the DD Act and PAIR to obtain the names of Academy students and contact information for their parents or guardians.[6]

B. Scope of the Injunction

[15] Similar to its argument with respect to whether OPA can speak with students, defendants maintain that the district court erred in requiring that they disclose the names and contact information for all Academy students. Defendants assert that the P & A Acts require the release of the names and contact information only for those particular individuals whom OPA has reason to believe have been victims of an incident of abuse or neglect, not for an "entire school of individuals." In short, they contend that the injunction is overly broad in scope.

[16] District courts have broad authority in crafting equitable remedies such as injunctions. *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir.2004) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973)). Accordingly, "appellate review is correspondingly narrow." *Lemon*, 411 U.S. at 200, 93 S.Ct. 1463. The question, therefore, is whether the district court exceeded its allowable discretion in ordering defendants to disclose the names and contact information of all Academy students.

Here, the district court concluded that OPA had probable cause to obtain the disclosure of this information. *See OPA*, 355 F.Supp.2d at 661. Defendants do not advance any arguments that this determination was in error, and we see none. Although OPA presumably did not receive a specific complaint about each student, it submitted evidence that it had complaints about the operation of particular policies that led to inappropriate restraint and seclusion and that those policies operated school-wide. Given that these allegations are system-wide, OPA could have reason to believe that all students at the school had been, were being, or were at risk of being neglected or abused.

Further, although the P & A Acts speak in terms of the "individual" or "an individ-

6. In the district court, defendants also asserted that the access provisions discussed in the text do not apply because Academy parents are not the legal guardians, conservators or legal representatives of the Academy students. *See* 42 C.F.R. 51.2 (defining these terms under PAIMI to include only those persons whose appointment is made and regularly reviewed by the State); 45 C.F.R. § 1386.19 (same under the DD Act). *But see* 62 Fed. Reg. 53,548, 53,552 (Oct. 15, 1997) (explaining in the comments to the final rule that, with respect to minor children, the "natural or adoptive parents are legal guardians unless the State has appointed another legal guardian under applicable State law"). "[C]rediting the agency's interpretation of its own regulation," and noting that the P & A Acts expressly contemplated a role for family members, the district court held that it could not conclude that "parents are excluded from the definition of a 'Legal Guardian, Conservator, and Legal Representative.'" *OPA*, 355 F.Supp.2d at 662.

On appeal, defendants initially asserted that the district court erred in this holding because it conflicts with FERPA's prohibition on the disclosure of parental identities without giving notice to parents and an opportunity for them to request that their identities not be disclosed. Because defendants abandoned their FERPA arguments after oral argument in this case, and advance no other argument with respect to the district court's reasoning, we also deem this argument abandoned and do not address it further. *See State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 172 (2d Cir.2004).

ual," nothing in the statute suggests that OPA cannot seek authorization for a number of individuals if it has made a probable cause determination that multiple individuals have been subjected to abuse or neglect at a facility. As HHS has noted, "neither the Act nor case law imposes an individual-specific probable cause requirement," and a probable cause determination could be made on the basis of "general conditions or problems that affect many or all individuals in a facility." Substance Abuse and Mental Health Services Administration; Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness; Final Rule, 62 Fed.Reg. 53,548, 53,559 (Oct. 15, 1997); *see also Pa. Prot. & Advocacy, Inc. v. Royer–Greaves Sch. for Blind*, 1999 WL 179797, at *9–10 (E.D.Pa. Mar.25, 1999) (finding that a P & A system was authorized to obtain a list of the names and addresses of the guardians of the students at a residential school for children with developmental disabilities and blindness where the P & A system had received complaints of "systemic neglect" at the school); *see also Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs, L.L.C.*, 152 F.Supp.2d 1150, 1171–72 (N.D.Ia.2001) (suggesting that probable cause to believe that widespread abuse is occurring justifies generalized access to records).

Finally, defendants' assertion that the district court erred in ordering the disclosure of the names of all Academy students and the contact information for their parents and guardians rings hollow in light of their simultaneous argument that OPA must have parental consent prior to undertaking any investigative or monitoring activities at the school. Given that the vast majority of Academy students are minors whose parents or guardians have a strong interest in the protection of their rights and well-being, *see* 42 U.S.C. § 10801(a)(2), we cannot say that the district court abused its discretion in requiring defendants to provide the names and contact information for all Academy students.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

Valerie KRIMSTOCK, Charles Flatow, Ismael Delapaz, Clarence Walters, James Webb, Michael Zurlo, Sandra Jones, individually and on behalf of all other persons similarly situated, Plaintiffs–Appellants,

v.

Raymond KELLY, in his official capacity as Commissioner of the New York City Police Department, Property Clerk, New York City Police Department, the City of New York, District Attorneys for the City of New York, Defendants–Appellees.

Docket No. 05–6691–CV.

United States Court of Appeals,
Second Circuit.

Argued: June 21, 2006.

Decided: Sept. 15, 2006.

Background: Owners of vehicles which were seized by city as instrumentalities of crimes brought § 1983 action challenging city's post-seizure, pre-judgment retention of the vehicles without a prompt opportunity to challenge probable validity of and justification for that deprivation. Following grant of city's motion to dismiss, the Court of Appeals, 306 F.3d 40, vacated and re-

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05-1240-CV

UNITED STATES COURT OF APPEALS
FILED
JUN - 2 2006
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES; and JAMES McGAUGHEY, EXECUTIVE DIRECTOR, STATE OF CONNECTICUT, OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES,
Plaintiffs-Appellees,

v.

HARTFORD BOARD OF EDUCATION; HARTFORD PUBLIC SCHOOLS; and ROBERT HENRY, SUPERINTENDENT OF SCHOOLS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR AMICI CURIAE THE DEPARTMENT OF EDUCATION AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes and Public Laws:

Regulations:

Legislative Materials:

Pursuant to 28 U.S.C. § 517, Fed. R. App. P. 29(a), and this Court's March 13, 2006, invitations to the Department of Education (DOE) and the Department of Health and Human Services (HHS), we hereby submit this brief as *amici curiae*. Congress has charged HHS and DOE with administering and enforcing the federal statutes at issue in this litigation. The agencies' construction of those statutes — as set out both in implementing regulations and in this brief — is entitled to substantial deference by this Court. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 227-228 (2001).

STATEMENT OF ISSUES ADDRESSED

1. Whether the "facilities" subject to oversight under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.* (PAIMI Act), include a non-residential public school for severely emotionally disturbed children.

2. Whether an Office of Protection and Advocacy (P&A) in a participating State shall have authority under the PAIMI Act, the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.* (the DD Act), or 29 U.S.C. § 794e, as implemented, to interview a minor suspected of being subject to abuse or neglect without the prior consent of a parent or guardian.

3. Whether a school for severely emotionally disturbed children must provide a P&A with the names of and contact information for parents of students

suspected of being subject to abuse or neglect, notwithstanding restrictions on the release of information from student records imposed by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA).

BACKGROUND

A. Statutory and regulatory background.

This case involves four federal statutes: FERPA and 29 U.S.C. § 794e, enforced by DOE; and the PAIMI Act and the DD Act, enforced by HHS.

1. Family Educational Rights and Privacy Act (FERPA). FERPA denies federal funding to an educational institution with a policy or practice of releasing information from a minor student's records without a parent's or guardian's prior written consent. *See* 20 U.S.C. § 1232g. Covered records include "records, files, documents, and other materials" maintained by a school containing "information directly related to a student." *Id.* § 1232g(a)(4)(A).

FERPA contains several potentially relevant exceptions to the bar on release of information from student records. Disclosure is permitted to "authorized representatives" of "State educational authorities," as "may be necessary in connection with * * * the enforcement of the Federal legal requirements which relate to [Federally-supported education programs]." *Id.* § 1232g(b)(3).

FERPA also contains a "directory information" provision, which exempts certain information (including a student's name, address, and telephone number)

from the ban on disclosure so long as the educational institution gives prior notice of the type of information to be made public and provides a reasonable opportunity for parents to direct "that any or all of the information designated shall not be released." *Id.* § 1232g(b)(5)(A)-(B). "Directory information" is information in a student's record "that would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3.

FERPA permits the disclosure of information from student records where "furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena." 20 U.S.C. § 1232g(b)(2)(B). FERPA also permits the disclosure of information from student records "in connection with an emergency * * * if the knowledge of such information is necessary to protect the health or safety of the student or other persons." *Id.* § 1232g(b)(1)(I).

2. Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act). The PAIMI Act seeks to protect the rights of individuals with mental illness by requiring, as a condition of federal funding, that States establish protection and advocacy systems (P&As) with authority to investigate and remedy suspected abuse or neglect at facilities rendering care or treatment to the mentally ill. *See* 42 U.S.C. § 10801(b). The "facilities" covered by the PAIMI Act include, but are not limited to, nursing homes, community facilities, board and care homes, homeless shelters, and prisons. 42 U.S.C. § 10802(3). Since 2000, the individuals

with mental illness sought to be protected have included individuals who "live[] in a community setting, including their own home." *Id.* § 10802(4)(B)(ii).

The PAIMI Act provides that P&As shall have broad investigatory access to carry out their responsibility to protect individuals with mental illness and to advocate on their behalf, 42 U.S.C. § 10805(a)(1). P&As shall have a right of "access to facilities * * * providing care or treatment" to the mentally ill, 42 U.S.C. § 10805(a)(3), and also to "reasonable unaccompanied access to residents at all times necessary to conduct a full investigation" of suspected abuse or neglect. 42 C.F.R. § 51.42(b). A P&A shall also have "reasonable unaccompanied access to facilities," programs, and residents of a facility in order to monitor whether rights and safety are adequately safeguarded. *Id.* § 51.42(c); *see also* 42 U.S.C. § 10805(a)(3). Finally, a P&A shall have authority to access "all records of individuals with mental illness" where (1) the individual's parent or guardian has consented to access; (2) the individual has no parent or guardian and the P&A has determined there is probable cause[1] to believe that the individual has been or may be subject to abuse or neglect; or (3) the P&A has probable cause to believe that an individual's health or safety is in serious and immediate jeopardy,

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[1] Under both the PAIMI Act and the DD Act, "probable cause" means reasonable grounds to believe that an individual "has been, or may be at significant risk of being subject to abuse or neglect." 42 C.F.R. § 51.2; 45 C.F.R. § 1386.19.

has notified the individual's guardian or other legal representative "upon receipt of the name and address of such representative," has offered assistance to resolve the situation, and the representative has failed or refused to act. 42 U.S.C. § 10805(a)(4); *see also* 42 C.F.R. § 51.41(b)(3).[2]

If a P&A is denied access to facilities, programs, individuals, or records, it must "be provided promptly with a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name, address and telephone number of the legal guardian, conservator, or other legal representative of an individual with mental illness." 42 C.F.R. § 51.43.

3. Developmental Disabilities Assistance and Bill of Rights Act (DD Act). The DD Act directs States, as a condition of federal funding, to establish P&As "to protect the legal and human rights of individuals with developmental disabilities." *See* 42 U.S.C. § 15001(b)(1). The DD Act seeks to ensure that publicly funded programs, including educational programs serving individuals with developmental disabilities, provide care that is free of abuse or neglect. *Id.* § 15009(a)(3)(B)(i). In relevant part, the DD Act provides that P&As shall protect

[2] Under both the PAIMI Act and the DD Act, as implemented, a P&A that obtains medical records must maintain their confidentiality. *See* 42 U.S.C. § 10806(a); 45 C.F.R. § 1386.22(e)(1).

and advocate for the rights of individuals with developmental disabilities, including investigating "incidents of abuse and neglect." *Id.* § 15043(a)(2).

The DD Act's access provisions are similar to those under the PAIMI Act. P&As shall be given "access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided." *Id.* §§ 15043(a)(2)(H), 15041; *see also* 45 C.F.R. § 1386.22(f)-(h) (P&A shall have reasonable unaccompanied access to facilities and individuals, in order to investigate suspected abuse or neglect and to monitor rights and safety). P&As also shall have access to the records of a developmentally disabled individual where (1) a parent or guardian has consented; (2) the individual has no parent or guardian and the P&A has probable cause to believe that the individual has been subject to abuse or neglect; or (3) the P&A has probable cause to believe that the individual has been subject to abuse or neglect, has notified the individual's guardian or other legal representative "upon receipt of the name and address of such representative," has offered assistance to resolve the situation, and the representative has failed or refused to act. 42 U.S.C. § 15043(a)(2)(I). If the P&A has probable cause "to believe that the health or safety of the individual is in serious and immediate jeopardy," it shall have access to records immediately without notice to or consent from a parent or guardian. *Id.* § 15043(a)(2)(J)(ii).

If a P&A is denied access, it must be given a written explanation, including the name of and contact information for a parent or guardian in cases of alleged lack of authorization. 45 C.F.R. § 1386.22(i).

4. 29 U.S.C. § 794e.

In 29 U.S.C. § 794e, Congress provides funding to States to establish P&As to protect the legal and human rights of disabled individuals not covered by the PAIMI Act or the DD Act. Section 794e provides that P&As shall pursue legal, administrative, and other remedies to protect the rights of disabled individuals, and shall have the same "general authorities, including access to records," as under the DD Act. *Id.* § 794e(f)(2); *see also* 34 C.F.R. § 381.10(a)(2).

B. Factual and Procedural Background.

This case arises out of the Connecticut P&A's investigation of suspected abuse or neglect at the Hartford Transitional Learning Academy (Academy), a non-residential public school in Connecticut that serves seriously emotionally disturbed children. *See* J.A. 10, 64. After the Academy denied the P&A access to students and refused to provide the names of and contact information for students' parents or guardians, the P&A brought this action in district court, which ordered the Hartford Board of Education to provide the access and information sought. 355 F. Supp. 2d 649 (D. Conn. 2005).

ARGUMENT

I. UNDER THE PAIMI ACT, A P&A SHALL HAVE AUTHORITY TO INVESTIGATE ABUSE OR NEGLECT AT A NON-RESIDENTIAL FACILITY PROVIDING CARE OR TREATMENT TO THE MENTALLY ILL.

The PAIMI Act provides that P&As shall have authority to "investigate incidents of abuse and neglect of individuals with mental illness" committed by employees or staff of "facilities" rendering care or treatment. 42 U.S.C. §§ 10805(a)(1)(A), (3), 10802(1), (5). HHS reasonably interprets the statute to apply to a broad range of facilities, including non-residential facilities, that render care or treatment to mentally ill individuals. A non-residential school for severely emotionally disturbed children is thus within the scope of the PAIMI Act.[3]

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[3] We note, however, that the Court need not decide this question because, as the district court correctly held, the Connecticut P&A was authorized pursuant to the DD Act and 29 U.S.C. § 794e to investigate abuse or neglect at the Academy, which serves numerous children with developmental and other disabilities. 355 F. Supp. 2d at 654, 656-657. The DD Act recognizes that public funds should support only "community programs, including educational programs in which individuals with developmental disabilities participate," providing care that is free from abuse or neglect, and also that non-residential programs should provide appropriate care to the individuals they serve. 42 U.S.C. § 15009(a)(3)(B)(i), (a)(4)(B)(iii). In order to protect these "legal and human rights of individuals with developmental disabilities," the DD Act requires that P&As be authorized to have "access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual." *Id.* § 15043(a)(2)(H), 15001(b)(2); *see also* 29 U.S.C. § 794e(f)(2) (incorporating same access rights).

As originally enacted in 1986, the PAIMI Act applied only to mentally ill individuals who were inpatients or residents of facilities rendering care or treatment. *See* Pub. L. No. 99-319, Title I, § 102, 100 Stat. 478, 479. In 1991, Congress amended the statute to define explicitly the "facilities" covered by the statute, which "may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." Pub. L. No. 102-173, § 4, 105 Stat. 1217; *see also* S. Rep. No. 114, 102d Cong., 1st Sess., 2-3, 4 (1991).

In 2000, Congress again broadened the reach of the Act to include within its scope mentally ill individuals who "live[] in a community setting, including their own home." Pub. L. No. 106-310, Div. B, Title XXXII, § 3206(b)(1)(B), 114 Stat. 1194. The statutory change was part of a set of amendments to strengthen community-based mental health services and enable children with severe emotional disturbances to "remain in local communities rather than being sent to residential facilities." S. Rep. No. 196, 106th Cong., 1st Sess. 1, 6 (1999). The specific change to the PAIMI Act was intended to ensure that P&As could "work on behalf of [mentally ill] persons living at home," who might "be subject to abuse or neglect or discrimination in housing, health care, employment or benefits." *Id.* at 25-26. It was also intended to ensure that P&As would have the same authority as provided pursuant to the DD Act, *see id.* at 26 — which, as we have explained

(at n. 3, *supra*), directs that a P&A shall be authorized to investigate suspected abuse or neglect at *any* location providing services or support. *See* 42 U.S.C. § 15043(a)(2)(H).

In light of this statutory text and history, HHS reasonably interprets the investigatory authority of a P&A pursuant to the PAIMI Act as extending to any facility providing care and treatment to the mentally ill, regardless of whether the facility is residential.[4] The agency's interpretation is fully consistent with the statutory definition of "facilities," both because the definition's list of the types of facilities covered by the statute is non-exhaustive, and because, in any event, the definition includes "community facilities for individuals with mental illness." *Id.* § 10802(3). Construing the PAIMI Act to apply to non-residential facilities also effectuates Congress' intent that protection and advocacy services be provided to *all* individuals with mental illness, including those living at home. The defendants' narrower construction of the PAIMI Act is inconsistent with its text, history, and purpose.

[4] As the district court correctly recognized, to the extent that HHS's 1997 regulations are inconsistent with the agency's current construction of the PAIMI Act, the regulations have been legislatively superseded. 355 F. Supp. 2d at 659.

II. A P&A MAY INTERVIEW A MINOR STUDENT SUSPECTED OF BEING SUBJECT TO ABUSE OR NEGLECT WITHOUT PRIOR CONSENT FROM A PARENT OR GUARDIAN.

Under the PAIMI Act, the DD Act, and 29 U.S.C. § 794e, a P&A shall be authorized to interview a minor student at a school for severely emotionally disturbed children, if the P&A determines that the student is subject to abuse or neglect. In exercising its authority, the P&A is not required to provide advance notice to a parent or guardian, or to obtain prior consent.

The DD Act provides that a P&A "shall * * * have the authority to have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such individual," in order to protect the individual's legal and human rights. 42 U.S.C. §§ 15043(a)(2)(H), 15041. The DD Act also provides that a P&A shall "have the authority to investigate incidents of abuse and neglect." *Id.*§ 15043(a)(2)(B). The DD Act does not condition these rights of access to individuals — which are also incorporated by reference in 29 U.S.C. § 794e(f)(2), with regard to other disabled individuals — on notice to and consent from an individual's parent or guardian. In contrast, where a P&A seeks records, the DD Act requires parental notification and, in some circumstances, an attempt to obtain parental consent, as a condition of access. *Id.* § 15043(a)(2)(I)(iii), (J). The clear import is that Congress intended for P&As to have authority to interview disabled individuals suspected of being

subject to abuse or neglect, with no requirement of prior parental notification or consent.

Similarly, the PAIMI Act provides that a P&A shall have authority to "have access to facilities * * * providing care or treatment" to individuals with mental illness, and also shall have authority to "investigate incidents of abuse and neglect." 42 U.S.C. §§ 10805(a)(3), (a)(1)(A). As implemented by HHS, the statutes require that a P&A have a right of reasonable unaccompanied access to an individual served by a covered program "at all times necessary to conduct a full investigation of an incident of abuse or neglect." 42 C.F.R. § 51.42(b)-(c). Under the statute and implementing regulations, a P&A's authority to access individuals or facilities is not conditioned on parental notification or consent — unlike access to records, where notice and consent are usually required. *See* 42 U.S.C. § 10805(a)(1)(A), (a)(3); 42 C.F.R. § 51.42(d)-(e).

Finally, the defendants are incorrect to assert (at Def. Br. 9-10) that P&A interviews of minor students implicate FERPA's restrictions on the release of information from education records. FERPA applies only to the disclosure of tangible records and of information derived from tangible records. It does not

apply to a P&A's discovery of information about a student as a result of physical access to that student or the student's school.[5]

III. A SCHOOL MUST PROVIDE A P&A WITH THE NAME OF AND CONTACT INFORMATION FOR THE PARENT OR GUARDIAN OF A STUDENT FOR WHOM THE P&A HAS THE REQUISITE DEGREE OF PROBABLE CAUSE TO OBTAIN RECORDS UNDER THE DD ACT OR THE PAIMI ACT.

A. The DD Act — and, by incorporation, 29 U.S.C. § 794e — require that a P&A be authorized to obtain names and contact information for the parent or guardian of a disabled student reasonably believed by the P&A to be subject to abuse or neglect. The PAIMI Act requires that a P&A have authority to obtain that information for a mentally ill student whose health or safety the P&A believes to be in serious and immediate jeopardy.

In relevant part, the PAIMI Act requires a P&A to have authority to access records of an individual with a mental illness where the P&A has probable cause to believe that the individual's health or safety is in serious and immediate jeopardy, and the individual's parent, guardian, or other legal representative has

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[5] *See* Dep't of Educ., Dec. 8, 2003, Letter to S. Mamas (explaining that FERPA does not prohibit a parent or professional from observing a child in a classroom, because FERPA "does not protect the confidentiality of information in general," but only "tangible records" and information derived from them); Dep't of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities, at 4 (Apr. 12, 2002) ("Nothing in FERPA prohibits a school official from disclosing * * * information that is based on that official's personal knowledge or observation * * *.").

failed to act after being contacted by the P&A "upon receipt of the name and address of such representative." 42 U.S.C. § 10805(a)(4)(C). The DD Act requires that a P&A have authority to access records in similar circumstances, following "receipt of the name and address" of the individual's representative. *Id.* § 15043(a)(2)(I)(iii). These provisions thus expressly contemplate that a school or other facility will provide contact information to a P&A in order to allow the P&A to carry out its responsibility to investigate abuse or neglect. Regulations promulgated under the statutes accordingly require that, where a facility or location denies a P&A access to records, it must provide "a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name, address and telephone number" of the individual's guardian or other representative. *See* 42 C.F.R. § 51.43; 45 C.F.R. § 1386.22(i).[6]

Thus, to the extent that the Connecticut P&A had probable cause to believe that the health or safety of mentally ill students at the Academy was in serious or

[6] As a practical matter, a P&A might be unaware, when it requests access to records, whether the affected individual has a parent, guardian, or other legal representative. If not, or if the individual's legal representative is the State, the P&A is entitled to access based on its probable cause determination. *See* 42 U.S.C. §§ 10805(a)(4)(B), 15043(a)(2)(I)(ii). The P&A would only learn of the legal representative's existence — and his or her name and contact information — when the facility or location resists access on the ground of lack of authorization.

immediate jeopardy, or that disabled students were subject to abuse or neglect,[7] the P&A had a clear right to the name and contact information of those children's parents, guardians, or other legal representatives.

B. FERPA does not bar a P&A from obtaining access to the name of and contact information for a parent, guardian, or other legal representative of a minor student with a disability or mental illness, where the P&A's probable cause determination satisfies the requirements for access to records under the PAIMI Act and the DD Act. To the extent that the statutes are in conflict, the specific access provisions of the PAIMI Act and the DD Act (and 29 U.S.C. § 794e, by incorporation) are properly understood as a limited override of FERPA's generally applicable non-disclosure requirements.

In some circumstances, disclosures from student records to a P&A might fall under FERPA's health and safety exception. The facts supporting a P&A's determination that a mentally ill student's health or safety is in serious and immediate jeopardy, *see* 42 U.S.C. § 10805(a)(4)(C), for example, might also support a school's determination that an "emergency" existed in which disclosure

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[7] HHS and DOE take no position on the issue whether the Connecticut P&A's probable cause determination extends to all students at the Academy. As HHS has previously noted, however, "neither the Act nor case law imposes an individual-specific probable cause requirement," and probable cause may appropriately be based on "general conditions or problems that affect many or all individuals in a facility." 62 Fed. Reg. 53,548, 53,559 (Oct. 15, 1997).

of information was "necessary to protect the health or safety of the student or other persons." 20 U.S.C. § 1232g(b)(1)(I).

As a categorical matter, however, a P&A's request for name and contact information under the PAIMI Act and the DD Act would not always satisfy a FERPA exception to non-disclosure. If a P&A seeks to investigate past abuse or neglect, or abuse or neglect that does not place students' health or safety in serious and immediate jeopardy, there might be no "emergency" necessitating disclosure under FERPA. *See* 34 C.F.R. § 99.36(c) (exception to be strictly construed).

Nor would the FERPA provision permitting disclosure of information to "State educational authorities" apply. A state educational authority is an agency or other entity with educational expertise and experience, charged with regulating, planning, or supervising state educational programs and services. *See* Dep't of Educ., Jul. 11, 2005, Letter to D. Wilkins. In contrast, P&As — which might be private organizations rather than state authorities — need not be educational experts and are not charged with planning or regulating educational programs *per se*.

Release of record information to a P&A under FERPA's directory information exception would not be proper, because that exception contemplates that parents can opt out of disclosure. *See* 20 U.S.C. § 1232g(a)(5)(B). Furthermore, the exception would not permit a P&A to seek information regarding

students identified by their disability status or receipt of a particular treatment, because it does not permit the disclosure of directory information which would also disclose non-directory information, such as a student's assignment to a class for developmentally disabled students or receipt of a particular form of therapy. *See* 65 Fed. Reg. 41,852, 41,855 (July 6, 2000).

Finally, it would be inappropriate to require a P&A to obtain parental consent or a court order as a necessary condition to seeking access to student records pursuant to the PAIMI Act or the DD Act. Those statutes require a P&A to contact an individual's parent or guardian as a condition of access to records. If a school or other facility could refuse to provide name and contact information, it could interfere substantially with a P&A's investigation of abuse or neglect, thereby thwarting Congress' intent that P&As act to protect vulnerable populations from abuse or neglect. And requiring a P&A to seek a court order as a condition of access would be inconsistent with a statutory scheme providing for speedy access to records, *see* 42 U.S.C. § 15043(a)(2)(J), based on a determination of possible abuse or neglect made by a P&A rather than a judicial officer,[8] and

[8] Although HHS and DOE agree that a P&A is not required as a condition of access to obtain a judicial determination of probable cause, we disagree with the suggestion that a P&A's probable cause determination is immune from judicial review. *See* 62 Fed. Reg. at 53,552; 61 Fed. Reg. 51,142, 51,145 (Sept. 30, 1996).

under a substantive standard different from Fourth Amendment requirements for a judicial warrant. *See* 42 C.F.R. § 51.2; 45 C.F.R. § 1386.19.

Given the conflict between the access rights afforded to a P&A pursuant to the PAIMI Act and the DD Act, and the non-disclosure requirements imposed by FERPA, this Court should reject the defendants' invitation to constrain the P&A's broad investigatory authority to those limited circumstances set forth in FERPA's exceptions. Instead, the Court should construe the PAIMI Act and the DD Act as a limited override of FERPA's non-disclosure requirements, in the narrow context where those statutes require that a P&A have authority to obtain student records held by an institution servicing disabled and/or mentally ill students.

When Congress enacted the relevant access provisions of the PAIMI Act in 1991 and the DD Act in 2000, it did so against an existing background of student record privacy pursuant to FERPA, enacted in 1974. There is no indication that Congress believed that the carefully tailored access rights required under those later-enacted statutes would be subordinate to the general privacy requirements of FERPA. *Cf. United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (treating "later" and "more specific statute" as governing); *Radzanower v. Touche Ross Co.*, 426 U.S. 148, 153 (1976) (statute dealing with "narrow, precise, and specific subject" should be given effect in preference to "statute covering a more generalized spectrum"); *see also* Dep't of Educ., Nov. 29, 2004, letter to M. Baise,

University of New Mexico (federal statute conditioning funding on States' adoption of mandatory reporting requirements for child abuse and neglect superseded inconsistent provisions of FERPA); Dep't of Educ., Nov. 25, 1997, letter to J. Talisman, Department of the Treasury (concluding that federal law requiring educational institutions to report certain tuition payment information to IRS was inconsistent with FERPA but, "as the later enacted and more specific statute," reflected Congress' intent to supersede applicable FERPA provisions).

Furthermore, the construction of the statutes that gives greatest effect to their provisions is to read the record access provisions of the PAIMI Act and the DD Act as a limited override of FERPA. Congress' intent that P&As have broad investigatory authority would be thwarted if the P&A's right of access to parental contact information or other information from student records were limited to circumstances that satisfy a FERPA exception to non-disclosure. On the other hand, permitting access as provided for under the PAIMI Act and the DD Act is generally consistent with Congress' intent relating to student privacy. FERPA permits disclosure of information to state and federal officials in certain circumstances where disclosure is necessary for enforcement of federal legal requirements. *See* 20 U.S.C. § 1232g(b)(3). FERPA also permits disclosure of parents' names and contact information, indicating Congress' view that such information is less sensitive than other information contained in student records.

And FERPA permits disclosure of information to protect students' health and safety in emergency situations. Although none of these precise exceptions applies here, taken together they suggests that disclosure of contact information to a P&A — which, significantly, functions as an advocate for a student rather than as a disinterested outsider — would be generally consistent with FERPA's requirements. Furthermore, because a P&A is required to maintain the confidentiality of any student records it receives, *see* 42 U.S.C. § 10806(a); 45 C.F.R. § 1386.22(e), there is little risk of the public disclosure of information that FERPA is intended to prevent. In those circumstances, the proper construction of the statutes is that the PAIMI Act and the DD Act provide for a limited override of FERPA to permit a P&A to access names and contact information for the parents or guardians of disabled or mentally ill students, where the P&A's determination of probable cause satisfies the substantive standards for record access.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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JUNE 2006

CERTIFICATE OF SERVICE

I certify that on June 2, 2006, I filed the foregoing Brief for Amici Curiae the Department of Education and the Department of Health and Human Services by causing it to be sent to the Court and the following counsel by overnight delivery:

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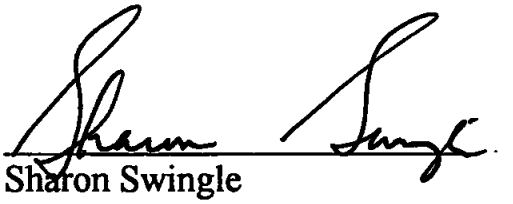

Sharon Swingle

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: State of Connecticut Office of Protection and Advocacy v. Hartford Bd. of Educ.

DOCKET NUMBER: 05-1240-CV

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Date: June 2, 2006

ADDENDUM

For the Court's convenience, we have attached the following administrative materials cited in the brief:

Dep't of Educ., Dec. 8, 2003, Letter to S. Mamas

Dep't of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities (Apr. 12, 2002)

Dep't of Educ., Jul. 11, 2005, Letter to D. Wilkins

Dep't of Educ., Nov. 29, 2004, letter to M. Baise, University of New Mexico

Dep't of Educ., Nov. 25, 1997, letter to J. Talisman, Department of the Treasury

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INNOVATION AND IMPROVEMENT

Ms. Shari A. Mamas
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DEC 8 2003

Dear Ms. Mamas:

This is in response to your letter to this Office and also to the Office of Special Education Programs (OSEP) regarding the Family Educational Rights and Privacy Act (FERPA). Specifically, you ask whether FERPA prohibits a parent of a child with disabilities, or a professional working with a parent of a child with disabilities, from observing the child in a special or regular education classroom. I apologize for the delay in responding to your inquiry.

FERPA is a Federal law that protects a parent's privacy interest in his or her child's "education records." In particular, FERPA provides that an educational agency or institution may not have a policy or practice of denying parents the right to: inspect and review their children's education records; seek to amend education records; or consent to the disclosure of information from education records, except as provided by law. The term "education records" is defined as:

> [T]hose records, files, documents, and other materials, which (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). See also 34 CFR § 99.3 "Education records." Moreover, the records of a student which pertain to services provided to that student under the Individuals with Disabilities Education Act (IDEA) are "education records" under FERPA and are subject to the confidentiality provisions under IDEA (see 34 CFR § 300.560-300.576) and to all of the provisions of FERPA. (Part B of IDEA incorporates and cross-references FERPA.)

With regard to your specific question, FERPA does not specifically prohibit a parent or professional working with the parent from observing the parent's child in the classroom. This is because FERPA would generally prohibit a teacher from disclosing information from a child's education records to other students in the classroom, as well as prohibit a teacher from disclosing information from a child's education records to the parents of another child who might be observing the classroom. Further, FERPA does not protect the confidentiality of information in general; rather, FERPA applies to the disclosure of tangible records and of information derived from tangible records.

With regard to your request that OSEP provide you with an opinion on whether IDEA "guarantees parents and their representatives a reasonable opportunity to observe their children's classrooms and proposed placement options," OSEP will contact you directly. I trust this is responsive to your inquiry.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Stephanie Lee
Director, OSEP

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities

April 12, 2002

Dear Colleague:

The purpose of this guidance is to provide you with an overview of recent changes made by Congress to the Family Educational Rights and Privacy Act (FERPA) in response to the September 11th terrorist attacks on the United States. In so doing, we also will provide an overview of the relevant provisions of current law. The changes to FERPA became effective on October 26, 2001, when the President signed into law the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001." (Public Law 107-56; 115 Stat. 272.) Section 507 of the USA PATRIOT ACT amends FERPA, and is attached for your convenience at the end of this letter.

Overview of FERPA

FERPA is a federal law that applies to educational agencies and institutions that receive federal funds under any program administered by the Secretary of Education. 20 U.S.C. § 1232g; 34 C.F.R. Part 99. Generally, FERPA prohibits the funding of an educational agency or institution that has a policy or practice of disclosing a student's "education record" (or personally identifiable information contained therein) without the consent of the parent. When a student turns 18 years old or attends a postsecondary institution at any age, the rights under FERPA transfer from the parent to the student ("eligible student").

FERPA defines "education records" as "those records, files, documents and other materials which –

(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)(i) and (ii).

FERPA generally requires prior written consent from the parent or eligible student before an educational agency or institution may disclose personally identifiable information from education records to a third party. However, the law contains 16 exceptions to this general rule. Pertinent exceptions that allow release of personally identifiable information without prior written consent are discussed below.

Ex Parte Orders

Significantly, the recent amendment to FERPA permits educational agencies and institutions to disclose – without the consent or knowledge of the student or parent – personally identifiable information from the student's education records to the Attorney General of the United States or to his designee in response to an *ex parte* order in connection with the investigation or prosecution of terrorism crimes specified in sections 2332b(g)(5)(B) and 2331 of title 18, U.S. Code.[1] An *ex parte* order is an order issued by a court of competent jurisdiction without notice to an adverse party.

In addition to allowing disclosure without prior written consent or prior notification, this provision amends FERPA's record keeping requirements (20 U.S.C. § 1232g(b)(4); 34 C.F.R. § 99.32). As a result, FERPA, as amended, does not require a school official to record a disclosure of information from a student's education record when the school makes that disclosure pursuant to an *ex parte* order. Further, an educational agency or institution that, in good faith, produces information from education records in compliance with an *ex parte* order issued under the amendment "shall not be liable to any person for that production."

A copy of the new statutory language follows this guidance. The Department will be working with the Department of Justice in the implementation of this new provision. In addition to this guidance, we will be amending and updating the FERPA regulations to include this new exception to the written consent requirement. You should address any questions you have on the new amendment to FERPA@ED.Gov.

Lawfully Issued Subpoenas and Court Orders

FERPA permits educational agencies and institutions to disclose, without consent, information from a student's education records in order to comply with a "lawfully issued subpoena or court order" in three contexts. 20 U.S.C. § 1232g(b)(1)(J)(i) and (ii), (b)(2)(B); 34 C.F.R. § 99.31(a)(9). These three contexts are:

1. Grand Jury Subpoenas – Educational agencies and institutions may disclose education records to the entity or persons designated in a Federal grand jury subpoena. In addition, the court may order the institution not to disclose to anyone the existence or contents of the subpoena or the institution's response. If the court so orders, then neither the prior notification requirements of § 99.31(a)(9) nor the recordation requirements at 34 C.F.R. § 99.32 would apply.

2. Law Enforcement Subpoenas – Educational agencies and institutions may disclose education records to the entity or persons designated in any other subpoena issued for a law enforcement purpose. As with Federal grand jury subpoenas, the issuing court or agency may, for good cause shown, order the

[1] These statutes define Federal crimes of terrorism as offenses calculated to influence the conduct of government such as destruction of aircraft, assassination, arson, hostage taking, destruction of communications lines or national defense premises, and use of weapons of mass destruction.

institution not to disclose to anyone the existence or contents of the subpoena or the institution's response. In the case of an agency subpoena, the educational institution has the option of requesting a copy of the good cause determination. Also, if a court or an agency issues such an order, then the notification requirements of § 99.31(a)(9) do not apply, nor would the recordation requirements at 34 C.F.R. § 99.32 apply to the disclosure of education records issued pursuant to the law enforcement subpoena.

3. All other Subpoenas – In contrast to the exception to the notification and record keeping requirements described above, educational agencies or institutions may disclose information pursuant to any other court order or lawfully issued subpoena only if the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action. Additionally, schools must comply with FERPA's record keeping requirements under 34 C.F.R. § 99.32 when disclosing information pursuant to a standard court order or subpoena.

Health or Safety Emergency

FERPA permits non-consensual disclosure of education records, or personally identifiable, non-directory information from education records, in connection with a health or safety emergency under § 99.31(a)(10) and § 99.36 of the FERPA regulations. In particular, § 99.36(a) and (c) provide that educational agencies and institutions may disclose information from an education record "to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals" and that the exception will be "strictly construed." Congress' intent that the applicability of this exception be limited is reflected in the *Joint Statement in Explanation of Buckley/Pell Amendment*, 120 Cong. Rec. S21489 (Dec. 13, 1974).

Accordingly, the Department consistently has limited the health and safety exception to a specific situation that presents imminent danger to a student, other students, or other members of the school community – or to a situation that requires the immediate need for information from education records in order to avert or diffuse serious threats to the safety or health of a student or other individuals. For example, the health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of a smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attack such as the September 11 attack. However, any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student's education records.

Under the health and safety exception school officials may share relevant information with "appropriate parties," that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36(a). Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception. FERPA's record keeping requirements (§ 99.32) apply to disclosures made pursuant to the health or safety exception.

The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individuals. However, the Department is available to work with institutions to assist them in making such decisions in order to ensure that the disclosure comes within the exception to FERPA's requirement of prior written consent.

In short, the health or safety exception will permit the disclosure of personally identifiable information from a student's education record without the written consent of the student in the case of an immediate threat to the health or safety of students or other individuals. Of course, a school official, based on his or her own observations, may notify law enforcement officials of suspicious activity or behavior. Nothing in FERPA prohibits a school official from disclosing to federal, State, or local law enforcement authorities information that is based on that official's personal knowledge or observation and not from an education record.

Law Enforcement Unit Records

Under FERPA, schools may disclose information from "law enforcement unit records" to anyone – including federal, State, or local law enforcement authorities – without the consent of the parent or eligible student. FERPA specifically exempts from the definition of "education records" – and thereby from the privacy restrictions of FERPA – records that a law enforcement unit of a school district or postsecondary institution creates and maintains for a law enforcement purpose. A "law enforcement unit" is an individual, office, department, division, or other component of a school district or postsecondary institution – such as a unit of commissioned officers or noncommissioned security guards – that is officially authorized or designated by the school district or institution to: (1) enforce any federal, State, or local law; or (2) maintain the physical security and safety of the school. See 34 C.F.R. § 99.8.

FERPA narrowly defines a law enforcement record as a record that is: (i) created by the law enforcement unit; (ii) created for a law enforcement purpose; and (iii) maintained by the law enforcement unit. 34 C.F.R. § 99.8(b). While other components of an educational institution generally can disclose, without student consent, student education records to school law enforcement units (under FERPA's exception for school officials with legitimate educational interests), these records are not thereby converted into law enforcement unit records because the records were not created by the law enforcement unit. Thus, a law enforcement unit cannot disclose,

without student consent, information obtained from education records maintained by other components of an educational institution.

Directory Information

FERPA's regulations define "directory information" as information contained in an education record of a student "that would not generally be considered harmful or an invasion of privacy." 34 C.F.R. § 99.3. Specifically, "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, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate, full-time or part-time), participation in officially recognized activities or sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended. Id. A school may disclose "directory information" from the education records without prior consent only after giving notice to the student of its directory information policy, and providing parents and eligible students with an opportunity to opt out of having their "directory information" disclosed. See 34 C.F.R. § 99.37.

Under FERPA, a school may not comply with a request for "directory information" that is linked to other non-directory information. For instance, a school cannot disclose "directory information" on students of a certain race, gender, or national origin. However, the school could disclose "directory information" on *all* students (who have not opted out) to law enforcement authorities who may be requesting "directory information."

Disclosures to the Immigration and Naturalization Service (INS)

The Immigration and Naturalization Service (INS) requires foreign students attending an educational institution under an F-1 visa to sign the Form I-20. The Form I-20 contains a consent provision allowing for the disclosure of information to INS. The consent provision states that, "I authorize the named school to release any information from my records which is needed by the INS pursuant to 8 C.F.R. 214.3(g) to determine my nonimmigrant status." This consent is sufficiently broad to permit an educational institution to release personally identifiable information of a student who has signed a Form I-20 to the INS for the purpose of allowing the INS to determine the student's nonimmigrant status. Students that have an M-1 or J-1 visa have signed similar consents and education records on these students may also be disclosed to the INS.

Finally, we anticipate there may be a need for additional guidance in the future on other INS disclosure issues.

Technical Assistance on FERPA

For additional guidance on these or other provisions of FERPA contact the Family Policy Compliance Office at the following address and telephone number:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-4605
(202) 260-3887 – Telephone
(202) 260-9001 – Fax

Additionally, schools officials may contact the Family Policy Compliance Office by e-mail for quick, informal responses to routine questions about FERPA. That address is: FERPA@ED.Gov. The Web site address is: www.ed.gov/offices/OM/fpco.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

Public Law 107-56, October 26, 2001; 115 Stat. 272
"Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001"

SEC. 507. DISCLOSURE OF EDUCATIONAL RECORDS. [115 Stat. 367-68]

Section 444 of the General Education Provisions Act (20 U.S.C. 1232g), is amended by adding after subsection (i) a new subsection (j) to read as follows:

``(j) Investigation and Prosecution of Terrorism.—

``(1) In general.--Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--

``(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and

"(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

``(2) Application and approval.--

``(A) In general.--An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

``(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

``(3) Protection of educational agency or institution.—An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

``(4) Record-keeping.--Subsection (b)(4) does not apply to education records subject to a court order under this subsection.".

FERPA applies to an educational agency or institution that receives funds under any program administered by the Secretary of Education. See 34 CFR § 99.1(a). We assume for purposes of this discussion that WKU (like EKU) is an educational agency or institution subject directly to FERPA requirements. Eligible students (i.e., those who have reached 18 years of age or attend a postsecondary institution) have a right under FERPA to inspect and review the student's education records and to seek to have them amended in certain circumstances. 34 CFR Part 99, Subparts B and C. In addition, an eligible student must generally provide a signed and dated written consent in accordance with § 99.30 of the FERPA regulations before an educational agency or institution discloses education records, or personally identifiable information from education records. Exceptions to this requirement are set forth in § 99.31 of the regulations.

One of the exceptions to FERPA's prior written consent requirement allows an educational agency or institution to disclose education records to "authorized representatives" of

(1) The Comptroller General of the United States;
(2) The Attorney General of the United States;
(3) The Secretary [of Education]; or
(4) State and local educational authorities,

34 CFR § 99.31(a)(3), provided the disclosure is in connection with an audit or evaluation of Federal or State supported education program, or for the enforcement of or compliance with Federal legal requirements that relate to those programs. 34 CFR § 99.35(a). Information that is collected under this provision must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

34 CFR § 99.35(b).

The phrase "State and local educational authorities" is not defined in FERPA or elsewhere in Federal law or regulations. However, this Office has generally interpreted the term to mean an agency or other party with educational expertise and experience that is responsible for and authorized under State or local law to regulate, plan, coordinate, advise, supervise or evaluate elementary, secondary, or postsecondary education programs, services, agencies, or institutions in the State. (Note that "State or local educational authorities" need not exercise the "direction and control" that characterizes the relationship between an "educational agency" and an "educational institution" under 34 CFR § 99.1(a)(2).)

CPE is a 16 member public agency composed of the Commissioner of Education, a faculty member, a student member, and 13 citizen members. KRS § 164.011. Among its various duties, CPE is required to develop, plan, implement, and revise the strategic postsecondary agenda (with

the advice and counsel of the Strategic Committee on Postsecondary Education); review, revise, and approve the missions of the State's universities and the Kentucky Community and Technical College System; and ensure that all postsecondary institutions in the state provide cooperatively for an integrated system of postsecondary education by promoting transferability of credits and easy access of information among institutions. KRS § 164.020(1), (2), (4) and (5). CPE leads and provides staff support for the biennial budget process and advises the Governor on recommendations to the General Assembly on appropriations for postsecondary institutions and devises policies for allocation of funds among these institutions. KRS § 164.020(9) and (10).

CPE constitutes the State's representative agency in all matters of postsecondary education that are not otherwise delegated to one or more postsecondary institutions. KRS § 164.020(21). CPE determines tuition and approves the minimum qualifications for admission to the State postsecondary educational system. KRS § 164.020(8). It defines and approves the offerings of all public postsecondary education degree, certificate or diploma programs; eliminates or makes changes in existing programs; approves the teacher education programs in public institutions; and recommends to the Governor the establishment of new institutions within the State. KRS § 164.020(14), (15), (17) and (20). CPE maintains a uniform financial reporting procedure used by all state postsecondary institutions and procedures for the approval of a designated receiver to maintain student records of specified public institutions that cease to operate. KRS § 164.020(22) and (25). The executive officer of each institution may be required to submit reports to CPE as needed for the effective performance of CPE's duties. KRS § 164.020(12).

CPE is directed to develop a system of public accountability related to the postsecondary strategic agenda by evaluating the performance and effectiveness of the State's postsecondary system. KRS § 164.020(3). In that vein, CPE is required to engage in analyses and research to determine the overall needs of postsecondary and adult education in the State and develop and implement a system of accountability for postsecondary institutions that measures educational quality and outcomes; student progress in the postsecondary system; research and service activities; use of resources; other performance or outcomes that support achievement of the strategic agenda, including involvement in quality enhancement of elementary and secondary education; and other indicators as deemed appropriate by CPE. KRS §§ 164.020(6) and 164.095(3). The postsecondary education accountability process requires CPE to "collect information, maintain a comprehensive database, and publish reports on the condition of the postsecondary education system that include but are not limited to student enrollments, utilization of facilities, and the finances of the institutions." KRS § 164.095(4). Each year, CPE must submit to the Governor and the Legislative Research Commission an "annual accountability report" providing information on the implementation of performance standards and the achievement of performance goals during the prior year. KRS § 164.095(4).

You also provided a memorandum from CPE President Thomas D. Layzell dated September 9, 2004, regarding collection of final grades. Mr. Layzell's memo states that CPE "currently [collects] final grades for all first-time freshmen for purposes of the high school feedback report" and was ready to move forward, starting with the 2004 fall semester, with collecting final grades as part of the "comprehensive database." The memo explains further:

Increasingly, we are asked to address factors that contribute to or detract from student success. State leaders want to know what factors contribute to a successful transition from high school to college. Student-specific final grade information is necessary for us to evaluate the relationship of performance in remedial education courses to performance in credit bearing courses, retention, and ultimately to graduation. Final grades also will help determine predictors of success for two-year transfer students. More broadly, final grades will help determine what courses and what performance (grades) in what types of courses (math, writing, general education core, technical courses), for what types of students (minority, first time college goers, adult learners, full/part time) predict success (retention, graduation rate, time to degree, level of learning, transition to the workplace). These questions require student level performance data, more specifically grades, that show the level of success.

In addition, Katherine M. Coleman, then University Counsel for EKU, indicated in her February 22, 2002, letter to this Office that CPE would begin requiring institutions to submit "End of Term Credit Reports" that would include students' SSNs and final grade data. At that time, a representative of CPE had indicated to EKU that the data would be used as follows:

> [to] ... avoid making increasing numbers of specialized grade requests for special cohorts of students. Already we know we currently need or will require grade reports for:
>
> - High school feedback report
> - Monitoring the Mandatory Placement Policy
> - Validating CATS scores as a predictor of college performance
> - Providing the KCTCS] Kentucky Community and Technical College System] feedback report
> - Evaluating the KEES [Kentucky Educational Excellence] scholarship program.
>
> With this one data report we can handle these and other coming analysis from here. The alternative would be recurring requests for data in various forms from you.
>
> Our focus will be on statewide issues related to student success: P-12 factors that predict student success in college, success of remedial programs in enabling students to succeed in college, links between adult education programs and college success, links between college performance and employment 1 and 5 years out, links between student performance and civic engagement, alumni satisfaction, employer satisfaction, etc.

Based on our review of statutory authority, we conclude that CPE qualifies as a "State or local educational authority" under §99.31(a)(3)(iv) of the FERPA regulations because it is an agency with educational expertise and experience that is responsible for and authorized under State law to regulate, plan, coordinate, advise, supervise and evaluate postsecondary education programs, services, agencies, and institutions in the State. We conclude further that WKU (and EKU) may

provide CPE with the information requested, without prior written consent, under § 99.35(a) of the FERPA regulations because of CPE's stated purposes, as described in the Layzell memo and Ms. Coleman's letter, of using the information in connection with CPE's evaluation of Federal and State funded education programs.

The Layzell memo noted CPE's commitment to protection and security of the data, as required by Federal and State law, and attached a draft "Data Access Policy" (Attachment A) and a separate "formal document describing the purpose for the data collection and analysis, and detailing [CPE's] commitment to conforming to the federal privacy statute" (Attachment B). We note that many of the security and confidentiality requirements in these policies comply with FERPA requirements, as asserted in section 3 of the Data Access Policy. However, as explained in more detail below, some of CPE's plans for using and redisclosing information in the comprehensive database would fail to comply with the requirements of § 99.35(b) of the regulations (and we are aware of no other exception to the written consent requirement in FERPA that would apply to the disclosure of education records to CPE as requested). Therefore, since WKU is the responsible party for compliance with FERPA, it should not disclose personally identifiable information from education records to CPE without assurances that CPE will not redisclose information in personally identifiable form except in accordance with FERPA requirements.

Under § 99.35 of the FERPA regulations, CPE may not redisclose information from education records it has received from WKU (or any other educational agency or institution), in personally identifiable form, to State health, labor, employment or other non-educational agencies, as suggested in section 3, paragraph 2 of the Data Access Policy, and in material quoted from Ms. Coleman's letter (i.e., "links between college performance and employment 1 and 5 years out, links between student performance and civic engagement, ..., employer satisfaction, etc."). As explained in our February 18, 2004, letter to the California Department of Education (available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/ca21804.html):

> Earlier this year, the Department issued guidance regarding whether FERPA permits a State or local educational authority, such as an SEA [State educational agency], to authorize or designate another State agency as its "authorized representative" in order to conduct data matching with the other entity. This memorandum was issued to all Chief State School Officers on January 30, 2003, by former Deputy Secretary William D. Hansen and is available on this Office's website (www.ed.gov/offices/OII/fpco). The Deputy Secretary's memorandum ..... grew out of concern that unlimited discretion to appoint or designate an "authorized representative" for data matching purposes essentially vitiates the specific conditions for nonconsensual disclosure under §§ 99.31(a)(3) and 99.35 and, more generally, FERPA's prohibition on disclosure without written consent. The memo explains that multiple references to "officials" in the statutory text for this exception reflect congressional concern that the "authorized representatives" of a State educational authority (or other official listed in § 99.31(a)(3)) must be under the *direct control* of that authority, which means an employee, appointed official, or "contractor."

In regard to CPE's use of contractors to perform CPE functions, as noted in section 5.C.6 of the Data Access Policy, the letter explained further:

> "Contractor" in this sense means outsourcing or using third-parties to provide services that the State educational authority would otherwise provide for itself, in circumstances where internal disclosure would be appropriate under § 99.35 if the State educational authority were providing the service itself, and where the parties have entered into an agreement that establishes the State educational authority's direct control over the contractor with respect to the service provided by the contractor. Any contractor that obtains access to personally identifiable information from education records in these circumstances is bound by the same restrictions on redisclosure and destruction of information that apply to the State educational authority itself under § 99.35, and the State educational authority is responsible for ensuring that its contractor does not redisclose or allow any other party to have access to any personally identifiable information from education records.

We note also that KRS § 164.283(7) provides that "[a]ll student academic records shall be made available upon request to a public or private junior college from which the individual student was graduated or to a public or private secondary school from which the individual student was graduated." In that vein, KRS § 164.020(5) directs CPE to "[promote] transferability of credits and easy access of information among institutions" in the State. CPE may permit staff of a postsecondary institution to have access to data from education records that it disclosed to the comprehensive database, as indicated in section 5.C.7.a. of the Data Access Policy. However, § 99.35(b) of the FERPA regulations does not permit CPE to redisclose personally identifiable information from education records to a school previously attended by a student, for example in order to report on a student's subsequent progress, unless that school qualifies as a "State or local educational authority" that is auditing or evaluating Federal or State supported education programs. Accordingly, WKU may not disclose information from education records to CPE with the understanding that CPE will redisclose information, in personally identifiable form, to other educational institutions.

Finally, CPE's Data Access policy provides in section D.1 for release of personally identifiable data in five levels of access, including Level 2, which –

> allows researchers, education groups, and other parties who express legitimate educational interests to read all records and fields in the database to further the understanding of educational practices, methods, or theory that would be expected through acceptable research practice. Level 2 access will be granted only after approval of a data request form. The CPE will notify institutions when a level 2 data request has been approved for a third party.

Section D.2. provides further that –

Researchers, education groups, and other parties who express legitimate education interests in using personally identifiable data shall submit a Data Request Form that explains what data are requested, and how the data are to be stored, used, maintained, disseminated, and ultimately destroyed.

There is no exception to the prior written consent requirement in FERPA that allows a State educational authority, such as CPE, to redisclose information from education records, in personally identifiable form, to outside researchers, whether or not they demonstrate "legitimate education interests." Educational agencies and institutions themselves may disclose education records, without prior written consent, to organizations conducting studies for them or on their behalf, for the improvement of instruction and other purposes set forth in § 99.31(a)(6) of the regulations. However, this exception does not apply to a State educational authority that has received information from education records under § 99.31(a)(3) and is subject to the specific limitations on redisclosure of information set forth in § 99.35, as described above. The Department recognizes, of course, the importance of research-based decision making and has outlined a method for removing personally identifiable information from education records, including information that would make a student's identity "easily traceable," so that it may be disclosed for education research purposes. See our November 18, 2004, letter to the Tennessee Department of Education on the use of "anonymous" data from education records available at www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html.

Finally, please note that WKU is required to comply with the recordkeeping requirements in § 99.32(a) of the regulations with respect to its disclosure of information to CPE. In lieu of recording every single disclosure, this Office has advised that an educational agency or institution may maintain with each student's records a notice of the annual or other schedule under which personally identifiable information is disclosed to CPE for the purposes specified.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to your inquiry.

Sincerely,
/s/
LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Joanne K. Glasser, President, Eastern Kentucky University
Cheryl Harris, University Counsel, Eastern Kentucky University
Dennis Taulbee, General Counsel, Kentucky Council on Postsecondary Education

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Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements

FERPA Online Library

November 29, 2004

Ms. Melanie P. Baise
Associate University Counsel
The University of New Mexico
Scholes Hall 152
Albuquerque, New Mexico 87131-0056

Dear Ms. Baise:

This responds to your letters of February 4 and July 9, 2003, in which you asked about a potential conflict between the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and State laws that impose mandatory reporting requirements on university health care providers and other school officials. This Office administers FERPA and is responsible for providing technical assistance to ensure that educational agencies and institutions comply with the statute and regulations codified at 34 CFR Part 99. An educational agency or institution that determines that it cannot comply with FERPA due to a conflict with State or local law is required to notify this Office within 45 days, providing the text and citation of the conflicting law. 34 CFR § 99.61.

Issues

The first letter concerns operation of the University of New Mexico's Student Health Center, which provides medical services to students. You explained that New Mexico Health Department regulations provide for mandatory reporting to the State Department of Health of "a range of diseases and injuries, including sexually transmitted diseases, HIV, AIDS, communicable diseases, infectious diseases, health conditions related to environmental exposures and certain injuries and cancer." 7 NMAC 4.3. Communicable diseases must be reported "immediately" to the State Office of Epidemiology. 7 NMAC 4.3.12(A). You noted that reports must include personal information about the student-patient, including name; date of birth/age; sex; race/ethnicity; address; and telephone number, and that all reports are confidential. 7 NMAC 4.3.12(C), 4.3.9(I), 4.3.10(F). Your concern is that if students refuse to provide written consent, or do not provide it in a timely manner, these mandatory reporting requirements may conflict with FERPA if the disclosures do not fall within the exception for disclosure of education records "in connection with a health or safety emergency."

Your second letter identified two additional State mandatory reporting requirements that may conflict with FERPA. The first is the Abuse and Neglect Act, NMSA 1978 Sec. 32A-4-1 et seq., (1999 Repl. Pamp.) codified in the New Mexico Children's Code. According to your letter, this law requires "every person" who "knows or has a reasonable suspicion that a child is an abused or a neglected child [to] report the matter immediately to "local law enforcement, the Department of Children, Youth and Family, or tribal law enforcement or social services agencies for any Indian child residing in Indian country. The second law is the Adult Protective Services Act, which provides that "any person having reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited shall immediately report that information to the [Department of Children, Youth and Families]." NMSA 1978 Sec. 27-7-30(A)(1999 Repl. Pamp.) The report must include the name, age, and address of the incapacitated adult, any person responsible for the adult's care, and other relevant information. In both cases, failure to report abuse as required may be punished as a misdemeanor. Your concern is that university health care providers who submit reports about students under these statutes might violate FERPA.

Applicable FERPA Provisions

FERPA protects the privacy interests of parents and students in a student's "education records." Educational agencies and institutions subject to FERPA may not have a policy or practice of disclosing "education records, or personally identifiable information contained therein other than directory information ... without the written consent of their parents..." except as provided by statute. 20 U.S.C. § 1232g(b)(1); 34 CFR 99.30. All FERPA rights transfer from parents to students when the student reaches 18 years of age or attends a postsecondary institution. 20 U.S.C. § 1232g(d); 34 CFR § 99.3 ("Eligible student").

Under FERPA, "education records" are defined as

> those records, files, documents, and other materials which -
> (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); 34 CFR § 99.3 ("Education records"). The term "student"

> includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

20 U.S.C. § 1232g(a)(6); 34 CFR § 99.3 ("Student").

FERPA excludes four categories of information from the term "education records" including

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. § 1232g(a)(4)(B); 34 CFR § 99.3 ("Education records"). These are commonly known as "treatment records" of eligible students.

FERPA applies to an educational agency or institution that receives funds under programs administered by the U.S. Secretary of Education. 34 CFR § 99.1(a). If an agency or institution receives funds under one or more of these programs, FERPA applies to the recipient as a whole, including each of its components, such as a department within a university. 34 CFR § 99.1(d).

Records maintained on students at a campus health center are "education records" subject to FERPA because they are directly related to a student and maintained by the institution or by a party acting for the institution. The records of a campus-based student health center would not be subject to FERPA if the center is funded, administered and operated by or on behalf of a public or private health, social services, or other non-educational agency or individual. (We note that final regulations promulgated under the 1996 Health Insurance Portability & Accountability Act (HIPAA), codified at 45 CFR Parts 160 and 164, provide that health care information that is maintained as an "education record" under FERPA is not subject to the HIPAA Privacy Rule precisely because it is protected under FERPA. See 45 CFR § 164.501, *Protected health information*. A campus health care provider that is not subject to FERPA may be subject to the HIPAA Privacy Rule instead.) As explained further below, based on the information provided in your letters, we agree with your conclusion that student health records maintained by the University's Student Health Center are "education records" subject to FERPA.

Under the provisions cited above, records maintained by the University's Student Health Center on student-patients are excluded from the definition of "education records" under FERPA only if they are made, maintained, and used only in connection with the student's treatment and not disclosed to anyone other than individuals providing treatment to the student. If these records are disclosed in personally identifiable form to the State Department of Health or other agencies for reasons other than the student's "treatment," then the records are no longer excluded from the statutory definition of "education records" and may only be disclosed in accordance with FERPA requirements. That is, the student must provide a signed and dated written consent in accordance with section 99.30 of the FERPA regulations or the disclosure must fall within one of the exceptions to that requirement as set forth in section 99.31(a).

State Law Reporting Requirements

1. Reporting of Notifiable Conditions and Cancer.

Regulations issued by the New Mexico Department of Health for "Control of Disease and Conditions of Public Health Significance" impose mandatory reporting requirements for "notifiable conditions," which include both "communicable diseases" and "conditions of public health significance." 7 NMAC 4.3.7 J. "Communicable disease" means "an illness caused by infectious agents or their toxic products which may be transmitted to a susceptible host." "Condition of public health significance" means "a condition dangerous to public health or safety." 7 NMAC 4.3.7 D & E.

Certain communicable diseases require immediate reporting on an "emergency basis." These include vaccine preventable diseases, such as measles, mumps, haemophilus influenzae, invasive infections, rubella, tetanus, etc., and other diseases such as anthrax, botulism, cholera, E.coli infections, Hantavirus, rabies, smallpox, tuberculosis, yellow fever, as well as suspected food and waterborne illnesses and those suspected to be caused by release of biologic or chemical agents. 7 NMAC 4.3.12 A. "Routine" (i.e., non-emergency) reporting is required for various infectious diseases, including but not limited to Colorado tick fever, encephalitis, hepatitis, Legionnaires' disease, Lyme disease, malaria, Reye syndrome, toxic shock syndrome, etc.; sexually transmitted diseases, such as chlamydia, gonorrhea, syphilis, HIV, and AIDS; birth defects; and health conditions related to environmental exposures and certain injuries, such as asbestosis, firearm injuries, lead blood levels, pesticide-related illness, silicosis, spinal cord injuries, traumatic brain injuries, and other environmentally-induced health conditions. 7 NMAC 4.3.12 B.

State health regulations provide that health care professionals, laboratories, and "any other person ... having knowledge of any person having or suspected of having a notifiable condition, shall immediately report the instance to the Office [of Epidemiology of the Department of Health]." 7 NMAC 4.3.8. "Other person" includes but is not limited to an official in charge of any health facility, the principal or person in charge of any private or public school or child care center, teachers and school nurses. 7 NMAC 4.3.7 L. All reports must include the patient's name, date of birth/age, sex, race/ethnicity and telephone number, along with the problem

reported. 7 NMAC 4.3.12 C. In addition, the Department of Health may have access to all medical records of persons with, or suspected of having notifiable diseases or conditions of public health significance. 7 NMAC 4.3.9 H. (The Department of Health may also require exclusion of infected and non-immune persons, including students, patients, employees, or other persons, and order closure and discontinuance of operations in specified circumstances, where any case of communicable disease occurs or is like to occur in public, private, or parochial school or health care facility. 7 NMAC 4.3.9 D.)

State health regulations also designate the New Mexico Tumor Registry as the agency responsible for operating a statewide cancer registry. 7 NMAC 4.3.10 A. Hospitals and other facilities providing screening, diagnostic or therapeutic services to patients must report cancer cases to the cancer registry. 7 NMAC 4.3.10 B. Health care professionals (such as a school nurse) diagnosing or providing treatment for cancer patients, except for cases directly referred to or previously admitted to a hospital or other facility, must also report cancer cases to the registry. 7 NMAC 4.3.10 C. The cancer registry is authorized to access all records of physicians and surgeons, hospitals, outpatient clinics, nursing homes, and all other facilities, individuals or agencies providing cancer related services. 7 NMAC 4.3.10 D.

All reports of notifiable conditions and cancer case data are confidential. Disclosure to any person of reported information that identifies or could lead to the identification of an individual is prohibited except for purposes of prevention, control, or research or, in the case of cancer reporting, for reporting to other state cancer registries and local and state health officers. 7 NMAC 4.3.9 I and 4.3.10 F.

2. Reporting of Abuse and Neglect

You also asked about two other State laws. The first is the Abuse and Neglect Act, part of the New Mexico Children's Code, which requires every person, including a nurse, schoolteacher, or school official, who "knows or has a reasonable suspicion that a child is an abused or a neglected child [to] report the matter immediately" to local law enforcement, the county department of children, youth and family, or tribal law enforcement or social services agencies (for Indian children residing in Indian country). NMSA 1978 § 32A-4-3 A. This section also provides that these agencies are entitled to have access to "any of the records pertaining to a child abuse or neglect case maintained by any of the persons [required to report abuse or neglect under this statute]" except as otherwise provided. NMSA 1978 § 32A-4-3 E. You pointed out that the law does not enumerate what items of information must be reported, but undoubtedly the institutional official making the report would be asked to provide the name of the student. Failure to report abuse as required is a misdemeanor under § 32A-4-3 F.

The second State law is the Adult Protective Services Act, which provides that "any person having a reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited shall immediately report that information to the department [of children, youth and families]." NMSA 1978 § 27-7-30 A. The report must contain the name, age and address of the adult, the name and address of any other person responsible for the adult's care, the extent of the adult's condition, the basis of the reporter's knowledge, and other relevant information. NMSA 1978 § 27-7-30 B. Failure to report abuse as required is a misdemeanor under § 27-2-30 C.

In both cases, these reports may require the disclosure of personally identifiable, non-directory information from education records. You indicated that University health care providers may obtain information about students that would require them to submit a report under these State laws.

Discussion

As noted above, health or medical "treatment records" of postsecondary students are excluded from the FERPA definition of education records provided they are disclosed only to individuals providing treatment. Our review of the mandatory State reporting requirements described above indicates that any "treatment records" maintained by the University would lose that status if they were disclosed pursuant to any of these State laws. In particular, the mandatory reporting of notifiable conditions and cancer cases addresses general concerns of public health and safety and not treatment for the individual who is the subject of the disclosure. Similarly, while the reporting requirements established under the State's abuse and neglect laws are intended to protect the subject individuals, the disclosure of information to law enforcement, social services, legal assistance, and other agencies cannot be considered "treatment" under this FERPA exception to the definition of "education records" in FERPA. Accordingly, we find that personally identifiable information from education records that is disclosed pursuant to any of these State laws may not be considered "treatment records" and is subject to all FERPA requirements.

FERPA provides that prior written consent is not required to disclose properly designated "directory information" from education records. 34 CFR §§ 99.31(a)(11) and 99.37. "Directory information" means information that would not generally be considered harmful or an invasion of privacy if disclosed, including the student's name, address, telephone number, date of birth, and so forth. See 34 CFR § 99.3 ("Directory information"). Communicable diseases and other notifiable conditions about an individual student may not be designated and disclosed as directory information under FERPA because this is the type of information that would generally be considered an invasion of privacy if disclosed. This is consistent with the confidentiality requirements imposed under State law for the mandatory reporting of this information, as noted above.

Another FERPA provision allows an educational agency or institution to disclose personally identifiable information from education records, without prior written consent,

> in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) 99.36.

Congress added this exception to the written consent requirement when FERPA was first amended, on December 13, 1974. The legislative history demonstrates Congress' intent to limit application of the "health or safety" exception to exceptional circumstances --

> Finally, under certain emergency situations it may become necessary for an educational agency or institution to release personal information to protect the health or safety of the student or other students. In the case of the outbreak of an epidemic, it is unrealistic to expect an educational official to seek consent from every parent before a health warning can be issued. On the other hand, a blanket exception for "health or safety" could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception.

Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21489, Dec. 13, 1974. (These amendments were made retroactive to November 19, 1974, the date on which FERPA became effective.)

Section 99.31(a)(10) of the regulations provides that the disclosure must be "in connection with a health or safety emergency" under the following additional conditions:

> An educational agency or institution may disclose personally identifiable information from an education record to *appropriate parties* in connection with *an emergency* if knowledge of the information is necessary to protect the *health or safety* of the student or other individuals.

34 CFR § 99.36(a)(emphases added.) In accordance with Congressional direction, the regulations provide further that these requirements will be strictly construed. 34 CFR § 99.36(c).

The Department has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. While the exception is not limited to, emergencies caused by terrorist attacks, the Department's Guidance on "Recent Amendments to [FERPA] Relating to Anti-Terrorism Activities," issued by this Office on April 12, 2002, provides a useful and relevant summary of our interpretation (emphasis added):

> [T]he health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of a smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attach such as the September 11 attack. However, *any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student's education records.*

Under the health and safety exception school officials may share relevant information with "appropriate parties," that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals. (Citations omitted.) Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception...

The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individuals....

By way of example, in accordance with these principles we concluded in a 1994 letter that a student's suicidal statements, coupled with unsafe conduct and threats against another student, constitute a "health or safety emergency" under FERPA. However, we also noted that this exception does not support a general or blanket exception in every case in which a student utters a threat. More recently, in 2002 we advised that a school district could disclose information from education records to the Pennsylvania Department of Health, without written consent, where six students had died of unknown causes within the previous five months. These facts indicated that the district faced a specific and grave emergency situation that required immediate intervention by the Department of Health to protect the health and safety of students and others in the school district.

With regard to reports required under state law, in 2000 we advised a state senator about a potential conflict between FERPA and a state law that requires a school to notify the appropriate law enforcement agency immediately if it receives a request for the records of a child who has been reported missing, and then notify the requesting school that the child has been reported missing and is the subject of an ongoing law enforcement investigation. Once again noting that the "health and safety emergency" exception generally does not allow a blanket release of personally identifiable, non-directory information from education records, we concluded that FERPA would allow school personnel to comply with this law

> only if the school has made a case-by-case determination that there is a *present and imminent threat or danger* to the student or that information from education records is needed to avert or diffuse serious threats to the safety or health of a student...In the case of a missing child, we agree that law enforcement officials would constitute an appropriate party for the disclosure *assuming that the school has first determined that a threat or imminent danger to the child exists.*

May 8, 2000, letter to Pennsylvania State Senator Stewart J. Greenleaf (emphases added.)

In summary, the University may disclose personally identifiable, non-directory information from education records under the "health or safety emergency" exception only if it has determined, on a case-by-case basis, that a *specific situation presents imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. Any release must be *narrowly tailored* considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student's education records to comply with general requirements under State law.

The New Mexico Department of Health has made a reasonable determination, by regulation, which specific, communicable diseases require immediate reporting on an "emergency" basis. 7 NMAC 4.3.12(A). This Office will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational. We find that the State reporting requirement for communicable diseases satisfies the FERPA requirement for a case-by-case determination that a specific situation, i.e., an identified communicable disease, presents an imminent danger or threat to students or other members of the community, that the release is narrowly tailored to meet the emergency, and that reports are made to appropriate authorities within the health department. Therefore, the University may disclose personally identifiable information from education records, without written consent, to meet these State health reporting requirements.

We cannot come to the same conclusion with respect to the "routine" or non-emergency reporting that is required by regulation for other notifiable conditions, including the infectious diseases, injuries, environmental exposures, sexually transmitted diseases, HIV/AIDS, cancer, and birth defects specified in 7NMAC 4.3.12 B, as well as reports to the New Mexico Tumor Registry required under 7 NMAC 4.3.10. Indeed, in these cases, the State Department of Health has determined that the specified disease or condition *does not* constitute an imminent danger or threat or that emergency reporting or other action is necessary to address the concern. Consequently, the University may not disclose information from a student's education records to meet these "routine" health reporting requirements unless it has made a specific, case-by-case determination that a health or safety emergency exists, as described above, or the student provides prior written consent for the disclosure in accordance with section 99.30 of the FERPA regulations.

In regard to the reporting required under New Mexico's Abuse and Neglect Act, in 1997 this Office reviewed State laws in Maine and Texas that require schools to report known or suspected cases of child abuse or neglect to designated officials. While we first determined that the "health and safety emergency" exception in FERPA would not permit a blanket release of personally identifiable information from a student's education records in every case where a teacher "knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected," we also concluded that these state laws actually presented a conflict between FERPA and another, later-enacted Federal law that superseded FERPA and allowed these disclosures without consent.

In particular, the Federal Child Abuse Prevention, Adoption and Family Services Act of 1988 amended the Child Abuse Prevention and Treatment Act (CAPTA) by providing that a State must enact laws that require reporting of known and suspected instances of child abuse and neglect in order to receive grants for abuse prevention and treatment programs. See 42 U.S.C. § 5106a(b)(1)(A) and 45 CFR 1340.14(c). (States must also ensure that the disclosure and redisclosure of information concerning child abuse and neglect is made only to persons or entities determined by the State to have a need for the information. 42 U.S.C. § 5106a(b)(4)(A).) It is clear that in some instances the mandatory reporting may require the release of personally identifiable information from education records protected under FERPA. Congress enacted the basic privacy protections of FERPA in 1974. Following well-established standards of statutory construction, we were unable to interpret these two laws (CAPTA and FERPA) so that they did not conflict and concluded that Congress intended to supersede FERPA in this instance and allow reports of child abuse to take place, including disclosure of personally identifiable information from education records, without parental consent.

Under this analysis, University personnel may comply with the specific reporting requirements in New Mexico's Abuse and Neglect Act and regulations to the extent that these State requirements comply with CAPTA (including regulations promulgated pursuant to CAPTA) and conflict with specific provisions in FERPA. We would be pleased to answer any more detailed questions you may have in this regard about reporting requirements under this State law.

New Mexico's Adult Protective Services Act requires "[a]ny person having reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited" to "immediately report that information to the [department of children, youth and families]." Records created or maintained pursuant to investigations under this law are "confidential" and may not be disclosed directly or indirectly to the public. However, these records are open to inspection by numerous agencies and individuals other than the Department of Children, Youth and Families and the alleged victim, including court personnel; personnel of any State agency with a legitimate interest in the records; law enforcement officials; any State government social services agency in any other State; health care or mental health professionals involved with the alleged victim; parties and their counsel in all legal proceedings brought pursuant to the Adult Protective Service Act; persons who have been or will in the immediate future provide care or services to the adult (except the alleged abuser); persons appointed by the court to serve as guardian, visitor, or qualified health care professional; any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court; and protection and advocacy representatives pursuant to the Federal Developmental Disabilities Assistance and Bill of Rights Act and Protection and Advocacy for Mentally Ill Individuals Act. Records of substantiated cases are also provided to the State Department of Health, the District Attorney's Office, the Medicaid Fraud Control Unit, and the Office of the Long-Term Care Ombudsman for "appropriate additional action." N.M. Stat. Ann. § 17-7-29.

We are not aware of any Federal law comparable to CAPTA that applies to the reporting required under the Adult Protective Services Act. In regard to disclosing information from education records without prior written consent, there may well be many

instances in which a University official who has a legal responsibility to make a report about an incapacitated adult under State law, particularly one who appears "abused," could also conclude that a "health or safety emergency" exists under the FERPA exception as explained above. However, given the inclusion in the State reporting requirement of the standards of "neglect" and "exploitation," which may not present immediate risk to an incapacitated adult, or may not implicate the adult's "health or safety," we cannot conclude that the State has made a case-by-case determination that a "health or safety emergency" exists in these circumstances. In addition, the wide variety of parties who may obtain access to information disclosed initially to the Department of Children, Youth and Families may not meet the FERPA requirement that the information be redisclosed only in accordance with the requirements of 20 U.S.C. § 1232g(b)(4)(B) and 34 CFR § 99.33(a). Therefore, the University may not disclose personally identifiable information from education records to comply with the Adult Protective Services Act without the student's prior written consent unless it has made a specific, case-by-case determination that a "health or safety emergency" exists, as described above, or some other exception to the prior written consent requirement applies. Further, if such a determination is made, the University must also advise the Department of Children, Youth and Families that it may not redisclose any personally identifiable information from education records to any other party except in accordance with the requirements of 20 U.S.C. § 1232(b)(4)(B) and § 99.33 of the FERPA regulations. See also 34 CFR § 99.33(e), which provides a penalty for third-party redisclosure of education records in violation of FERPA requirements.

Finally, we note that under State law the Department of Health has authority to prescribe the duties of public health nurses and school nurses, and that all school health personnel (except physical education staff), "are under the direct supervision and control of the district health officer in their district. They shall make such reports relating to public health as the district health officer in their district requires." Public Health Act §§ 24-1-3 G and 24-1-4 D. These State laws do not remove records maintained by the University's Student Health Center from coverage under FERPA because it appears that health services are provided to students by, on behalf of, and under the control of the University, and not a separate health agency or health care provider. We would be pleased to evaluate any additional facts you wish to share on this point.

I trust that this is helpful in explaining the scope and limitations of FERPA as it pertains to your inquiry. Should you have any additional questions, please do not hesitate to contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

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November 25, 1997

Mr. Jonathan Talisman
Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Avenue, NW Room 1334
Washington, DC 20220

Mr. Stuart Brown
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Mr. Talisman and Mr. Brown:

This letter responds to your request for an opinion regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) to the reporting requirements of the Hope Scholarship Credit and the Lifetime Learning Credit provisions of the Taxpayer Relief Act of 1997 (the "Act"). Pub. L. No. 105-34, § 25A(c), 111 Stat. 788, 804 (1997). Specifically, on October 21, representatives of my Office and the Department's Office of General Counsel met with Ms. Catherine Livingston of the Department of the Treasury to discuss whether FERPA would prohibit educational agencies and institutions from complying with 26 U.S.C. § 6050S. This section amends the tax code and requires disclosure of certain information to the Internal Revenue Service (IRS). As discussed below, although the Act does not explicitly exempt institutions from complying with FERPA, we believe that Congress intended for institutions to disclose information from student education records, as required by the Act, without first obtaining the consent of the students in question.

Section 25A(c) of the Act states the following:

(c) Returns Relating to Tuition and Related Expenses

> (1) In General -- Subpart B of part III of subchapter A of chapter 61 . . . is amended by inserting after section 6050R the following new section:.
>
> Sec. 6050S. Returns Relating to Higher Education Tuition and Related Expenses.

(a) In General -- Any person--

> (1) which is an eligible educational institution which receives payments for qualified tuition and related expenses with respect to any individual for any calendar year, or
>
> (2) which is engaged in a trade or business and which, in the course of such trade or business, makes payments during any calendar year to any individual which constitute reimbursements or refunds (or similar amounts) of qualified tuition and related expenses of such individual,

shall make the return described in subsection (b) with respect to the individual at such time as the Secretary may by regulations prescribe.

(b) Form and Manner of Returns -- A return is described in this subsection if such return --

> (1) is in such form as the Secretary may prescribe,
>
> (2) contains --
>
> (A) the name, address, and [Taxpayer Identification Number (TIN)] of the individual with respect to whom payments

described in subsection (a) were received from (or were paid to),

(B) the name, address, and TIN of any individual certified by the individual described in subparagraph (A) as the taxpayer who will claim the individual as a dependent for purposes of the deduction allowable under section 151 for any taxable year ending with or within the calendar year, and

(C) the --

(I) aggregate amount of payments for qualified tuition and related expenses received with respect to the individual described in subparagraph (A) during the calendar year, and

(ii) aggregate amount of reimbursements or refunds (or similar amounts) paid to such individual during the calendar year, and

(D) such other information as the Secretary may prescribe.

(Emphasis added.) *Thus, the Act requires postsecondary institutions to collect information on any individual who has paid tuition or related expenses to the institution. Therefore, the Act's reporting requirements apply to all students who have paid tuition or related expenses to a postsecondary institution, and whether a student has applied to receive a tax credit under the Hope Scholarship Credit or the Lifetime Learning Credit provisions of the Act is not a consideration in our analysis of this issue as it relates to FERPA.*

Additionally, Ms. Livingston explained that the "other information as the Secretary [of the Treasury] may prescribe" will include:

- whether the student "is carrying at least 1/2 the normal full-time work load for the course of study the student is pursuing" (See § 25A(b)(3)(B));
- whether the student "has completed (before the beginning of such taxable year) the first 2 years of postsecondary education at an eligible educational institution" (See § 25A(b)(3)(C)); and
- the name and employment identification number of the institution.

FERPA protects the privacy interests of parents in their children's "education records," and generally prohibits the disclosure of education records without the consent of the parent. When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an "eligible student" under FERPA and all of the rights afforded by FERPA transfer from the parents to the student. The term "education records" is broadly defined as all records, files, documents and other materials which: contain information directly related to a student; and are maintained by the educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); See also 34 CFR § 99.3 "Education Records." Accordingly, information directly related to the student and maintained by the institution such as his or her TIN is information from an education record and is subject to FERPA.

FERPA generally provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining the prior written consent of the student. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A). See also 34 CFR § 99.30. Although there are 13 exceptions to the prohibition that personally identifiable information from education records may not be released without the students' consent, none of those exceptions are applicable here.

In short, the Act conflicts with FERPA because the Act requires postsecondary institutions to disclose information from education records to the IRS and, in some cases, to the parent(s) of students, and because FERPA generally prohibits a postsecondary institution from releasing educational records or personally identifiable information from those records without the consent of the student. See 20 U.S.C. § 1232g(b)(1) and Pub. L. No. 105-34, § 25A(c), 111 Stat. 788, 804

(1997).

In determining which of two conflicting federal laws controls, the United States Supreme Court has stated that it "must read the statutes to give effect to each if [it] can do so while preserving their sense of purpose." Watt v. Alaska, 451 U.S. 259, 266 (1981). If the statutes are in irreconcilable conflict, then the more recently enacted statute governs. Id. at 267, citing 2A C. Sands, Sutherland on Statutes and Statutory Construction § 51.02 (4th ed. 1973). See also Detweiler v. Pena, 38 F.3d 591, 594 (D.C. Cir. 1994). The Department believes that, as the later enacted and more specific statute, the Act reflects congressional intent that the information specified in 26 U.S.C. § 6050S be reported to the IRS notwithstanding FERPA's privacy provisions.

In addition, please note that FERPA limits the redisclosure of information from education records by third parties that receive such information. We do not believe that these provisions are superseded by the Act. Therefore, information from an education record that the IRS receives from an institution cannot generally be redisclosed without the student's prior written consent. Section 99.33 of the FERPA regulations outlines the limitations that apply to the redisclosure of education records. Section 99.33(a)(1) states:

An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

FERPA was amended in 1994 to include sanctions against a postsecondary institution should an improper redisclosure of information from education records occur. The statute states:

If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

20 U.S.C. § 1232g(b)(4)(B). Therefore, if the IRS improperly redisclosed information from a student's education record that it received from a particular institution, that institution could be precluded by FERPA from making further disclosures to the IRS for a period of at least five years.

Further, FERPA establishes certain recordkeeping requirements regarding requests for access to and disclosures of education records. In this regard, FERPA states:

Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals [except as provided below], agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. . . .

20 U.S.C. § 1232g(b)(4)(A). See 34 CFR § 99.32. FERPA also provides that an educational agency or institution does not have to keep a record if the request was from or the disclosure was to: 1) the parent or eligible student; 2) a school official within the educational agency or institution who is determined to have a legitimate educational interest; 3) a party with written consent; 4) a party seeking directory information; or 5) a party requesting or receiving the records as directed by a Federal grand jury or other law enforcement subpoena when the issuing court or agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed. 34 CFR § 99.32 (d).

It is our understanding that students will be notified of the disclosure to the IRS. In most cases, students will be asked to provide certain information on a form prepared by the IRS, and submit the form to the institution. The school will then forward information collected on the form to the IRS, as well as the student and, in some cases, the parent(s). The evident purpose of § 99.32 is to ensure that parents and eligible students will be able to learn about disclosures made from the student's education records. In this circumstance, the IRS' procedures will satisfy that purpose because the student will be provided actual notice of the release of information to the IRS.

Accordingly, and to reduce any burden on the public, we have determined that postsecondary institutions will not have to separately keep a record of the disclosure of the information from student education records to the IRS.

I trust that the above information is responsive to your inquiry. Should you have additional questions regarding FERPA or this matter, you may contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Catherine Livingston
Department of the Treasury

cc: Jasper Howard
Internal Revenue Service

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Last Modified: 02/11/2004

The offense of conviction in this case was possession of a firearm by a felon. Nothing about the status of the officers in any way motivated the commission of that offense, nor were the officers victims of that offense. We therefore hold that the district court erred in enhancing Mr. Blackwell's sentence under U.S.S.G. § 3A1.2(a). We recognize, of course, that in applying the enhancement, the district court did not have the benefit of this court's analysis in *Holbert*.

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. The matter is **REMANDED** with instructions to resentence Mr. Blackwell without the enhancement specified in U.S.S.G. § 3A1.2(a).

CENTER FOR LEGAL ADVOCACY dba The Legal Center for People with Disabilities and Older People aka The Legal Center, Colorado's Protection and Advocacy System, P & A System, Plaintiff–Appellant,

v.

Marva Livingston HAMMONS, in her official capacity as Executive Director of the Colorado Department of Human Services; Robert B. Rossi, in his official capacity as Manager, Office of Direct Services of the Colorado Department of Human Services; Robert L. Hawkins, in his official capacity as Superintendent of the Colorado Mental Health Institute at Pueblo; and Colorado Mental Health Institute at Pueblo, Defendants–Appellees.

National Association of Protection and Advocacy Systems, Amicus Curiae.

No. 01–1574.

United States Court of Appeals,
Tenth Circuit.

March 27, 2003.

Advocacy organization that was directed to investigate incidents of abuse and neglect of individuals with mental illness, pursuant to Protection and Advocacy for Mentally Ill Individuals Act (PAMII), brought action against state officials, seeking a declaratory judgment and an injunction requiring access to peer review and quality assurance records relevant to suicides and attempted suicide it was investigating at a state mental health facility. The United States District Court for the District of Colorado, Clarence A. Brimmer, Jr., J., held that the advocacy organization was not entitled those records, and organization appealed. As an issue of first impression, the Court of Appeals, Stephen H. Anderson, Circuit Judge, held that: (1) PAMII required disclosure of peer review and quality assurance records to organization; (2) federal regulation interpreting PAMII as not preempting state law protecting from disclosure records produced by medical care evaluation or peer review committees was unreasonable interpretation of PAMII; and (3) PAMII preempted state statutes barring disclosure of peer review and quality assurance records.

Reversed and remanded.

1. Federal Courts ⊶776

Court of Appeals reviews de novo the entry of judgment on the pleadings. Fed. Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

2. Federal Courts ⚿776

Court of Appeals reviews de novo a district court's interpretation of a federal statute.

3. Statutes ⚿188

When interpreting the language of a statute, the starting point is always the language of the statute itself; if the language is clear and unambiguous, the plain meaning of the statute controls.

4. Statutes ⚿188, 205

In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.

5. Statutes ⚿219(2, 4)

If a statute is silent or ambiguous on a particular issue, the court must defer to the interpretation of the statute by the agency charged with administering it if that interpretation is based on a permissible construction, that is, unless it is arbitrary, capricious, or manifestly contrary to the statute.

6. Health ⚿270

Protection and Advocacy for Mentally Ill Individuals Act (PAMII) required disclosure to advocacy organization, which was directed to investigate incidents of abuse and neglect of individuals with mental illness, peer review and quality assurance records that organization sought from state officials concerning the suicides and attempted suicide of patients at state mental health facility; the plain meaning of the statutory language conferring access to "all records of...any individual" and "reports prepared by...staff of a facility" necessarily included peer review and quality assurance records relating to a patient and his or her care, and not just patient records. Protection and Advocacy for Mentally Ill Individuals Act of 1986, §§ 105(a)(4)(A), 106(b)(3)(A), 42 U.S.C.A. §§ 10805(a)(4)(A), 10806(b)(3)(A).

7. Health ⚿107
States ⚿18.15

Federal regulation interpreting Protection and Advocacy for Mentally Ill Individuals Act (PAMII) as not preempting state law protecting from disclosure records produced by medical care evaluation or peer review committees was unreasonable interpretation of PAMII, which granted qualified advocacy groups access to defined category of records, including peer review reports; statutory language could not reasonably be construed to encompass peer review reports in some states but not others. Protection and Advocacy for Mentally Ill Individuals Act of 1986, §§ 105, 106, 42 U.S.C.A. §§ 10805, 10806; 42 C.F.R. § 51.41(c)(4).

8. Health ⚿107
States ⚿18.15

Protection and Advocacy for Mentally Ill Individuals Act (PAMII) preempted state statutes barring disclosure of peer review and quality assurance records to the extent that state laws conflicted with PAMII and the access to peer review and medical assurance records which PAMII provides. Protection and Advocacy for Mentally Ill Individuals Act of 1986, §§ 105(a)(4)(A), 106(b)(3)(A), 42 U.S.C.A. §§ 10805(a)(4)(A), 10806(b)(3)(A).

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Validity Called into Doubt

42 C.F.R. 51.41(c)(4)

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Sandra L. Gomez, Protection & Advocacy System, Inc., Albuquerque, NM, and Gary P. Gross, National Association of Protection and Advocacy Systems, Washington, DC, filed an amicus curiae brief for the National Association of Protection and Advocacy Systems.

Before BRISCOE, ANDERSON, and LUCERO, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

This case involves the single issue of whether plaintiff, Center for Legal Advocacy ("CLA"), is entitled, under the Protection and Advocacy for Mentally Ill Individuals Act ("PAMII"), 42 U.S.C. §§ 10801–10851, to peer review and quality assurance records it seeks in connection with its investigation into the suicides and attempted suicide of mental health care patients, or whether such access is barred by Colorado statutes prohibiting access to such records. The district court held CLA was not entitled to those records. We reverse.

BACKGROUND

CLA is a non-profit Colorado corporation designated by the governor of Colorado as the state's Protection and Advocacy System ("P & A System") under the PAMII Act. Under the Act, P & A Systems like CLA are directed to "investigate incidents of abuse and neglect of individuals with mental illness," and to "protect and advocate the rights of such individuals." 42 U.S.C. § 10801(b)(2).

Defendant Colorado Mental Health Institute at Pueblo ("Institute") is a Colorado facility which treats individuals with mental illnesses. It is organized and operated under the Office of Direct Services of the Colorado Department of Human Services ("CDHS"). Defendant Robert Hawkins is the Institute's superintendent, defendant Robert Rossi is the manager of CDHS's Office of Direct Services, and defendant Marva Hammons is the executive director of CDHS.

After learning of the suicides of four patients at the Institute, and the attempted suicide of another Institute patient, CLA sought information under PAMII, including physician peer review and quality assurance/management materials, to assist in its investigation of those incidents.[1] PAMII authorizes P & A Systems like CLA to have access to certain records in order to conduct its investigations into incidents involving mentally ill individuals. Colorado, however, has two statutes which bar disclosure of physician peer review and hospital "quality management" review records in certain situations.[2] Defendants

1. PAMII authorizes P & A Systems like CLA to "investigate incidents of abuse and neglect of individuals with mental illnesses if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. § 10805(a)(1)(A).

2. Colo.Rev.Stat. § 25–3–109(4), concerning health care facility quality management review, provides as follows:

> The records, reports, and other information described in subsection (3) of this section shall not be subject to subpoena or discoverable or admissible as evidence in any civil or administrative proceeding. No person who participates in the reporting, collection, evaluation, or use of such quality management information with regard to a specific circumstance shall testify thereon in any civil or administrative proceeding.

Colorado's physician peer review provisions state, in relevant part, as follows:

> The records of a professional review committee, a governing board, or the committee on anticompetitive conduct shall not be subject to subpoena or discovery and shall not be admissible in any civil suit brought against a physician who is the subject of such records.

Colo.Rev.Stat. § 12–36.5–104(10)(a).

eventually provided CLA with all records relating to the patients under investigation, but refused to turn over peer review and quality assurance records.[3]

CLA seeks a declaratory judgment and an injunction requiring access to peer review and quality assurance records relevant to the suicides and attempted suicide it was investigating at the Institute, as well as a permanent injunction for future cases, along with attorney's fees.[4] Plaintiff and defendants filed motions pursuant to Fed. R.Civ.P. 12(c) for judgment on the pleadings, and the matter was referred to a magistrate judge. The magistrate judge concluded that PAMII's disclosure requirements applied to the professional review records sought by CLA and recommended that defendants grant CLA access to them. The district court disagreed, concluding that PAMII does not compel the disclosure of the records at issue and does not preempt Colorado's statutes barring disclosure of them. It therefore held that CLA could not compel access to those records, and it accordingly vacated the magistrate judge's recommendation and dismissed CLA's claims. CLA appeals.

DISCUSSION

[1, 2] We review *de novo* the entry of judgment on the pleadings. *Ramirez v. Dept. of Corrections*, 222 F.3d 1238, 1240 (10th Cir.2000); *Bishop v. Fed. Intermediate Credit Bank of Wichita*, 908 F.2d 658, 663 (10th Cir.1990). We also review *de novo* the district court's interpretation of a federal statute. *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir.2002).

A brief history of PAMII is necessary to understand the arguments of each side in this case. PAMII was enacted in 1986. Section 10805 of the Act authorizes P & A Systems like CLA to "in accordance with section 10806 ... have access to all records of ... any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access." 42 U.S.C. § 10805(a)(4).[5] In 1988, PAMII was amended and reauthorized, and subsection (b)(3) to § 10806, providing a definition of "records," was added:

> As used in this section, the term "records" includes reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the

3. Defendants have identified the records they refuse to turn over in their Fed.R.Civ.P. 26(b)(5) "Second Amended Privilege Log, and Submission of Documents Under Seal." These include both peer review materials and quality assurance materials.

4. CLA also alleged a violation of its federal rights under 42 U.S.C. § 1983. The magistrate judge to whom this case was initially referred stated that the court "need not address [the § 1983 claim] because plaintiff has not alleged sufficient facts to sustain such a claim." Recommendation on Pl.'s Mot. for J. on the Pleadings at 19, Appellant's App. at 144. CLA objected to that recommendation. The district court dismissed all of CLA's claims, presumably including the § 1983 claim, without any discussion of the § 1983 claim and CLA's objection to the magistrate judge's treatment of the claim. On appeal, CLA develops no argument about the § 1983 claim, but simply asks us to remand it to the district court for consideration.

5. Subsections (a)(4)(B) and (a)(4)(C) of § 10805 authorize CLA access to records of "any individual" without that individual's authorization, or authorization by the individual's representative, where CLA finds probable cause to believe that the individual has been abused or neglected and is unable to provide authorization, or when the individual's representative has failed to take appropriate action to protect the individual. 42 U.S.C. § 10805(a)(1), (4)(B), (C).

> steps taken to investigate such incidents, and discharge planning records.

42 U.S.C. § 10806(b)(3)(A). Section 10806 further provides that:

> If the laws of a State prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section, section 10805(a)(4) of this title and this section shall not apply to such system before—
>
> (i) the date such system is no longer subject to such a prohibition; or
>
> (ii) the expiration of the 2 year period beginning on May 23, 1986,
>
> whichever occurs first.

42 U.S.C. § 10806(b)(2)(C).

PAMII was again amended and reauthorized in 1991, although none of the 1991 amendments to the text of PAMII are relevant to this case. All parties agree that, prior to the 1991 amendments and reauthorization, the legislative history of the Act did not address the issue of access to peer review or quality assurance records. All parties also agree that the issue *was* raised during the 1991 reauthorization process. They disagree strongly on what, if anything, we should derive from those facts.

The mention of access to peer review records in connection with the 1991 amendment and reauthorization appeared in both the House and Senate Committee Reports:

> The Committee recognizes that almost all hospitals have established medical care evaluation or peer review committees as part of their Joint Commissions on Accreditation of Health Care Organizations (JCAHO) accreditation requirements. The purpose of these committees is to review and evaluate patient care in the facility in order to improve the quality of care.
>
> The Committee has been made aware that 46 states have statutes that protect the records produced by such committees from disclosure. It is the Committee's intent that the PAMII Act does not pre-empt State law regarding disclosure of peer review/medical review records relating to the proceedings of such committees.

H.R.Rep. No. 102–319, at 6 (1991), *reprinted in* 1991 U.S.C.C.A.N. 777, 782. The Senate Report contains virtually identical language. However, the 1991 reauthorization bill, Senate Bill 1475, was passed by both the Senate and the House of Representatives with no discussion of access to peer review records, and no change relating to record access was actually made in the text of the Act when it was reauthorized.[6]

Additionally, when Congress reauthorized PAMII in 1991 it provided that "the Secretary [of Health and Human Services] shall promulgate final regulations to carry out this title." Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991, § 9, Pub.L. No. 102–173, 105 Stat. 1217 (1991). Pursuant to that authority, the United States Department of Health and Human Services enacted a regulation which states that P & A Systems shall have access to the following:

> Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors or related entities, except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.

6. The Committee Reports refer to peer review and "medical care evaluation" or "medical review" records. They do not reference "quality assurance" records, as such.

42 C.F.R. § 51.41(c)(4). Thus, this regulation arguably implemented the language contained in the Committee Reports, excluding from access under PAMII peer review or medical care evaluation materials which are privileged under state law. CLA argues this regulation is invalid because it directly conflicts with the clear intent of Congress as expressed in the text of the PAMII Act. Defendants argue it is a valid regulation and reflects Congressional intent expressed in 1991 when the PAMII Act was reauthorized.

CLA argues that the district court erred in denying it access to peer review and quality assurance records, contending: (1) it impermissibly relied upon 42 C.F.R. § 51.41(c)(4), which conflicts with Congressional intent as expressed in the text of the Act itself; (2) it erred in failing to conclude that PAMII preempts the Colorado laws providing a privilege to peer review and quality assurance records; (3) it erred in concluding that the Act and 42 C.F.R. § 51.41(c)(4) recognize two distinct classes of records (patient records and hospital records) and that CLA may only have access to patient records, which do not include peer review and quality assurance records; and (4) the plain meaning of the statutory language conferring access to "all records of any individual" is expansive and necessarily includes peer review and quality assurance records.

Defendants respond: (1) § 10805 of PAMII grants access to all records of *patients*, which do not include peer review or quality assurance records, and § 10806 grants access only to certain records of *hospitals* and *agencies*, so that § 10805's arguably expansive language ("all") is inapplicable to § 10806 and does not compel the conclusion that peer review and quality assurance records are hospital records under § 10806; (2) the reauthorization of PAMII in 1991 was the equivalent of the reenactment of a new statute, so legislative history from 1991 accurately reflects Congressional intent; and (3) 42 C.F.R. § 51.41(c)(4) does not conflict with the express language of the Act, but, rather, is a valid regulation, consistent with the 1991 legislative history, and it protects peer review and quality assurance records from disclosure because they are privileged under Colorado law.

[3–5] "When interpreting the language of a statute, the starting point is always the language of the statute itself. If the language is clear and unambiguous, the plain meaning of the statute controls." *Quarrell*, 310 F.3d at 669 (citation omitted). " 'In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' " *United States v. Seminole Nation*, 321 F.3d 939, 944 (10th Cir.2002) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988)). If we find ambiguity, we "may seek guidance from Congress's intent, a task aided by reviewing the legislative history." *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002). Further, if a statute is silent or ambiguous on a particular issue, we must defer to the interpretation of the statute by the agency charged with administering it "if [that interpretation] is based on a permissible construction," that is, "unless it is arbitrary, capricious, or manifestly contrary to the statute." *Pharmanex v. Shalala*, 221 F.3d 1151, 1154 (10th Cir. 2000) (citing *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

[6] We begin with the statutory language. PAMII, by its terms, provides access to "all records of . . . any individual." 42 U.S.C. § 10805(a)(4)(A). Section 10806 further defines "access to records." It also specifically states, "[i]f the laws of a State prohibit an eligible system from ob-

taining access to the records of individuals with mental illness in accordance with section 10805(a)(4) ... and this section," then those sections shall not apply until the earlier of either the time the prohibition is removed or May 23, 1988. 42 U.S.C. § 10806(b)(2)(C). Finally, "[a]s used in this section, the term 'records' includes reports prepared by any staff of a facility ... or reports prepared by an agency charged with investigating reports of incidents ... [occurring at facilities] and discharge planning records." 42 U.S.C. § 10806(b)(3)(A). Thus, a plain reading of the statute as a whole indicates that CLA should have access to "all records of any individual" including "reports prepared by any staff of a facility" and "reports prepared by an agency" which investigates incidents occurring at facilities. What we must determine, however, is whether a rational and logical reading of the statute permits the conclusion that peer review and/or quality assurance records are encompassed by "all records of any individual" including "reports prepared by any staff of a facility," or "reports prepared by an agency."

While this is an issue of first impression in our circuit, we do have the benefit of a few decisions from other courts. The Third Circuit addressed the issue of access to privileged peer review materials in *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun,* 228 F.3d 423 (3d Cir.2000). That court held that peer review reports fall within § 10805(a)(4)(A)'s provision of access to "all records of ... any individual." *Id.* at 426. It also held that they "fall squarely within the definition provided in" § 10806(b)(3)(A) as " 'reports prepared by ... staff of a facility rendering care and treatment.' " *Id.* (quoting 42 U.S.C. § 10806(b)(3)(A)).[7]

With respect to its conclusion that a peer review report was a record "of any individual," the Third Circuit rejected the defendant's argument that it could not be a record "of any individual" because peer review reports belong to the hospital, not the individual patient:

> [T]he preposition "of" may be used to show connection or association as well as ownership, and it seems clear that the term is used in the former sense here. Presumably, many, if not all, of Allentown State Hospital's records concerning Dolores L. are just as much its property as the peer review reports, but there is no doubt that PAMII was meant to require the hospital to give PP & A access to those records, as the hospital did.

Id. at 427 (citing *Random House Dictionary of the English Language* 999 (1967)).

The Third Circuit also rejected the argument that PAMII could not compel disclosure where state law restricted disclosure: "[t]here is nothing in the text of PAMII ... that supports the Commonwealth's contention that this federal stat-

7. It rejected the argument, which defendants here also make, that the definition of ''records'' contained in § 10806 is confined to that section alone because § 10806 begins its definition of ''records'' with the phrase, ''[a]s used in this section.'' The Third Circuit concluded, ''it is clear that the definition of 'records' in § 10806 controls the types of records to which [plaintiff] 'shall have access' under § 10805 because § 10805 provides that an eligible system 'shall ... *in accordance with section 10806 of this title,* have access to' certain records.'' *Id.* at n. 1. We agree with the Third Circuit that §§ 10805 and 10806 should not be read in isolation. Section 10806 amplifies and describes what kinds of records are included in those records to which a P & A System has access under §§ 10805 and 10806. *See Robbins v. Budke,* 739 F.Supp. 1479, 1489 (D.N.M.1990) (holding that §§ 10805(a)(4) and 10806 compelled disclosure of ''all records, including incident reports, medical referrals, seclusion and restraint logs, and internal investigation reports which may not be in residents' charts'').

ute does not require disclosure of peer review reports that are protected under state law. Indeed, there is not even any mention of peer review reports in the legislative history that accompanied the initial passage of the Act in 1986." *Id.* Further, the court held that "[t]he interpretation of PAMII set out in 42 C.F.R. § 51.41(c)(4) does not represent a reasonable interpretation of the statute, and we must therefore reject it." *Id.* (citing *Chevron, U.S.A., Inc.,* 467 U.S. at 843–44, 104 S.Ct. 2778). As the court explained:

> PAMII requires that groups such as PP & A be given access to a defined category of records. Peer review reports either fall within that definition or they do not. The statutory language cannot reasonably be construed to encompass identical peer review reports in some states but not others. If Congress wished to achieve that result, it needed to enact different statutory language. It could not achieve that result, in the face of the statutory language it enacted, simply by inserting a passage in a committee report. Nor could that result be achieved by means of a regulation.

Id. at 428. The Third Circuit therefore held that "PAMII preempts any state law that gives a healthcare facility the right to withhold such records." *Id.*

Finally, the court observed that, although PAMII would preempt any state law which in fact gave a facility the right to withhold peer review records, it noted that there was no actual conflict between PAMII's disclosure requirement and the particular state law at issue because the relevant state statute provided that peer review records " 'shall not be subject to discovery or introduction into evidence *in any civil action.*' " *Id.* (quoting Pa. Stat. Ann. tit. 63 § 425.4). The plaintiff in that case was not seeking disclosure in connection with a civil action; rather, like CLA in this case, it was "seeking the peer review reports in order to fulfill the advocacy and investigatory purposes of PAMII." *Id.; see also Iowa Protection and Advocacy Servs., Inc. v. Gerard Treatment Programs,* 152 F.Supp.2d 1150 (N.D.Iowa 2001) (following *Houstoun*).[8]

The New Hampshire Supreme Court reached the opposite conclusion in *Disabilities Rights Ctr., Inc. v. Comm'r,* 143 N.H. 674, 732 A.2d 1021 (N.H.1999). In that case, New Hampshire laws barred access to quality assurance records. A P & A System sought disclosure of those records under PAMII, notwithstanding the state bar. The New Hampshire court first held that § 10806(b)(2)(C) expressly preempts a state law barring disclosure of "records" as defined in PAMII. It then characterized 42 C.F.R. § 51.41(c)(4) as "a rule clarifying the definition of 'records' " contained in § 10806(b)(3)(A), *id.* at 677–78, 732 A.2d 1021, and declared it "reflective of Congress' intent to spare [the state law barring access to quality assurance records] from preemption." *Id.* at 678, 732 A.2d 1021. Then, relying upon the Committee Report language during the 1991 reauthorization of PAMII, the New Hampshire court concluded that "[t]he legislative history of PAMII states that Congress did not intend to preempt state laws protecting the records maintained by 'medical care evaluation or peer review committees' that are established by hospitals to achieve accreditation by the JCAHO." *Id.* It therefore concluded that "Congress did not intend to preempt RSA 151–D:2 [prohibiting access to quality assurance records]." *Id.* Finally, the court supported its reasoning by considering the purposes of both PAMII and the state law conferring a privilege on quality assurance records:

8. Although the Third Circuit in *Houstoun* addressed only peer review records, not quality assurance records, its reasoning would apply equally to quality assurance records.

> [I]t is significant that PAMII and RSA 151–D:2 serve a similar end. Both statutes benefit mentally ill individuals by fostering the improvement of services and conditions at medical and psychiatric care facilities. Were we to find preemption, the [facility] would no longer be encouraged to engage in self-critical review and the mentally ill individuals receiving services there would no longer benefit from the improvements that flow from its quality assurance program. In this sense, preemption would create a result contrary to the basic congressional purpose that underlies PAMII.

Id. at 678–79, 732 A.2d 1021.

We find the reasoning of the Third Circuit to be more persuasive, and we therefore agree that CLA should have access to peer review and quality assurance records. We begin by noting that the statutory phrase "all records of ... any individual" is quite broad. While defendants urge us to follow the district court and find that this addresses only "patient records," not "hospital records," and peer review and quality assurance records are not "patient records" because they do not "belong" to the patient, we agree with the Third Circuit's observation that "of" in this context need not be read so narrowly. Thus, a rational reading is that it refers to records pertaining to or relating to an individual. *See Houstoun*, 228 F.3d at 427 ("[T]he preposition 'of' may be used to show connection or association, as well as ownership."). Peer review or quality assurance records involving the care of an individual could easily fit within that definition of records, along with myriad other records relating to an individual and/or his or her care.

Additionally, we agree with the Third Circuit that § 10806(b)(3)(A)'s reference to records including "reports prepared by any staff of a facility rendering care and treatment" on its face encompasses peer review and quality assurance records.[9] In short, examining the language of the statute and according it a straightforward interpretation, we conclude, like the Third Circuit, that "all records of ... any individual" and "reports prepared by ... staff of a facility" include peer review and quality assurance records relating to a patient and his or her care.

Defendants make a number of arguments against this interpretation. First, they argue it "renders § 10805 internally inconsistent" because § 10805 states that patient authorization is a prerequisite to CLA access to the records of the patient, and, under Colorado law, "a patient has no right to obtain professional review records, and no authority to agree to their release." Answer Br. at 10. Further, defendants argue, if mental health patients have access to peer review and quality assurance records but other medical patients do not, mental health patients are unfairly advantaged. But, the fact that the patient's consent is required before a *P & A System* has access to the patient's records in order to conduct its investigation under PAMII into allegations of abuse or neglect does not mean that patients themselves thereby have unfettered access to peer review records. As discussed more fully, *infra*, § 10806 imposes an obligation of confidentiality on a P & A System "which, pursuant to section 10805(a)(4) ... has access to records which, under Federal or State law, are required to be maintained in a confidential manner by a provider of mental health services." 42 U.S.C. § 10806(a). Thus, if Colorado law imposes an obligation on the Institute to maintain a record in a confidential manner, that same confidentiality obligation is imposed on the

9. The description of the records at issue here, submitted under seal, demonstrates that many of them were prepared by, or involved, Institute staff. *See* Appellant's App. 98–110.

P & A System obtaining access to the record.[10]

Second, defendants argue that § 10806(b)(3), which was added in 1988, and includes within the definition of "records" "reports prepared by any staff of a facility" and "reports prepared by an agency charged with investigating incidents of abuse, neglect, and injury" would not have been necessary if § 10805 already included "hospital records." We disagree. We have held that "all records ... of any individual" in § 10805 include records, maintained by a treatment facility or hospital, which relate or pertain to an individual patient and could include peer review and quality assurance records relating to that patient's care. We do not hold that it necessarily includes all "hospital records," in whatever sense defendants would define that somewhat vague term. Section 10806(b)(3) expands the categories of records available to a P & A System to include reports prepared by facility staff, reports prepared by agencies investigating specific incidents, and discharge planning records. We fail to see why our interpretation makes that section redundant. The fact that peer review and quality assurance records could be covered by either section does not render § 10806(b)(3) completely unnecessary.[11]

Finally, defendants argue that PAMII is ambiguous as to whether peer review and quality assurance records are accessible, and, in the face of that ambiguity, we must examine legislative history and defer to any reasonable interpretation of the Act by the Secretary of Health and Human Services, the agency charged with administering the Act. They further assert that the Committee Report language in connection with the 1991 reauthorization provides clear indicia of congressional intent, and 42 C.F.R. § 51.41(c)(4) is a valid regulation expressing that intent and reasonably interpreting the Act, and is entitled to deference.

In support of the argument that the Congressional Report comments in 1991 are an authoritative expression of congressional intent, defendants cite *Rothe Dev. Corp. v. United States Dep't of Defense*, 262 F.3d 1306, 1322 n. 15 (Fed.Cir.2001) for the proposition that "for the purpose of considering congressional motivation, the process of reauthorization is equivalent to simultaneously allowing a statute to lapse and re-enacting it."

While we acknowledge that language contained in a committee report is an expression of legislative intent, it is not, by itself, sufficient to alter our reasonable interpretation of the statute, particularly in view of the fact that Congress chose not to amend the text of the Act in 1991 to reflect or implement in any way the committee report remarks. And, as the committee report remarks themselves indicate, Congress can hardly have been unaware of the existence of peer review committees and the fact that virtually all states had statutes protecting peer review records from disclosure. But, despite that, the text of the Act regarding record access was not amended, although other amendments were made, and no amendment was made to § 10806(b)(2)(C), which specifically addresses the situation where laws of a

10. Defendants argue that § 10806(b)(1) and (2) compel P & A Systems to disclose any records they obtain, including peer review materials, to the patients to whom the records pertain. They assert that CLA has never denied any such obligation. Whether that section in fact compels such disclosure is not before us.

11. We disagree with defendants' suggestion that "[s]ubsection (b)(3) appears to be geared toward the reports of outside investigative agencies, and the reports the facility prepares for these agencies." Answer Br. at 12. On its face the statute sweeps more broadly than that.

state "prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4)." 42 U.S.C. § 10806(b)(2)(C).

[7] We agree with the Third Circuit that "[t]he interpretation of PAMII set out in 42 C.F.R. 51.41(c)(4) does not represent a reasonable interpretation of the statute." *Houstoun*, 228 F.3d at 427. We reiterate that court's succinct summary:

> PAMII requires that groups such as [plaintiff P & A System] be given access to a defined category of records. Peer review reports either fall within that definition or they do not. The statutory language cannot reasonably be construed to encompass identical peer review reports in some states but not in others. *If Congress wished to achieve that result, it needed to enact different statutory language. It could not achieve that result, in the face of the statutory language it enacted, simply by inserting a passage in a committee report. Nor could that result be achieved by means of a regulation.*

Id. at 428 (emphasis added). We therefore hold that PAMII requires disclosure to CLA of the peer review and quality assurance records it seeks from defendants.

[8] Finally, defendants next argue that, even if PAMII provides access to peer review and quality assurance records, Colorado's statutory privileges for such records shield them from disclosure to CLA. CLA responds that PAMII preempts state law on this issue.

> Federal law preempts state law in three circumstances: (1) when Congress explicitly defines the extent to which the enacted statute preempts state law; (2) when state law actually conflicts with federal law; or (3) when state law attempts to regulate "conduct in a field that Congress intended the Federal Government to occupy exclusively."

United States v. Wagoner County Real Estate, 278 F.3d 1091, 1096 (10th Cir.2002) (quoting *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir.2000)). Further, in analyzing preemption, "congressional intent is the 'ultimate touchstone.' " *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). CLA argues PAMII preempts Colorado's statutes barring disclosure of peer review and quality assurance records under any of the three tests.

The magistrate judge considering this case held that PAMII contains express preemption language:

> If the laws of a State prohibit an eligible system from obtaining access to records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section, section 10805(a)(4) of this title and this section shall not apply to such system before—
>
> (i) the date such system is no longer subject to such a prohibition; or
>
> (ii) the expiration of the 2 year period beginning on May 23, 1986, whichever occurs first.

42 U.S.C. § 10806(b)(2)(C). We agree that that language reveals a congressional intent to preempt state laws prohibiting access to records under § 10805 or § 10806. *See Iowa Prot. and Advocacy Servs., Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D.Iowa 2001) (citing § 10806(b)(2)(C) for its conclusion that state law is expressly preempted); *Wisconsin Coalition for Advocacy, Inc. v. Czaplewski*, 131 F.Supp.2d 1039, 1048–49 and n. 3 (E.D.Wis.2001) (citing § 10806(b)(2)(C) and stating "the express language of the federal statute[ ] demonstrate[s] that Congress intended [its] provisions to preempt contrary state law"); *cf. Oklahoma Disability Law Center, Inc. v. Dillon Family and Youth Servs.*, 879 F.Supp. 1110, 1111–

12 (N.D.Okla.1995) (noting that state law barring access to patient records without a court order is preempted by PAMII because it actually conflicts with PAMII).[12]

Furthermore, there is an actual conflict between PAMII and the Colorado privilege laws with respect to peer review and quality assurance/management records. We have held that PAMII permits P & A Systems to have access to peer review and quality assurance records in connection with its investigations. Colorado law, on the other hand, exempts them from disclosure in certain circumstances. There are thus situations when the federal law and the state law will conflict. To the extent Colorado's laws conflict with PAMII, and the access to peer review and medical assurance records which PAMII provides, they are preempted.[13]

CONCLUSION

For the forgoing reasons, we REVERSE the judgment of the district court and REMAND this case for further proceedings consistent herewith. We grant the motion to transmit records under seal.

David MINSHALL, Plaintiff–Appellee,

v.

McGRAW HILL BROADCASTING COMPANY, INC., doing business as KMGH, Channel 7, Defendant–Appellant.

Nos. 01–1576, 02–1049.

United States Court of Appeals,
Tenth Circuit.

March 28, 2003.

Former employee sued former employer under Age Discrimination in Em-

12. Defendants argue that § 10806(b)(2)(C) has no bearing on the record access provisions of § 10806(b)(3) because they argue § 10806(b)(2)(C) only mentions access to records under § 10805(a)(4) and because ''the two-year time period referenced in Subsection (b)(2)(C) had already expired before the § 10806 'hospital/agency records' provision was enacted in 1988.'' Answer Br. at 30. This argument ignores the fact that subsection (b)(2)(C) expressly refers to access to records under § 10805(a)(4) *and* ''this section'' (§ 10806), and the fact that when Congress added subsection (b)(3) in 1988 it made no change to subsection (b)(2)(C). In any event, defendants essentially concede that § 10806(b)(2)(C) preempts state laws interfering with access to records under § 10805(a)(4).

13. We note that the Third Circuit in *Houstoun* concluded that there was no actual conflict between PAMII and the state privilege laws at issue in that case because the state laws only exempted peer review materials from disclosure in any civil action, and the P & A System in that case sought those materials only to conduct its investigation. Similarly, in this case, the Colorado statutes state that the quality management materials ''shall not be subject to subpoena or discoverable or admissible as evidence in any civil or administrative proceeding,'' Colo.Rev.Stat. § 25–3–109(4), and peer review materials ''shall not be subject to subpoena or discovery, and shall not be admissible in any civil suit brought against a physician who is the subject of such records.'' Colo.Rev.Stat. § 12–36.5–104(10)(a).

CLA asserts, and repeated at oral argument of this appeal, that it would maintain the confidentiality of peer review records. Defendants argue that will be impossible, and asserts that the CLA would be obligated to reveal peer review records to patients under certain circumstances. That issue is not before us, however. Thus, we hold only that to the extent the Colorado laws in fact bar disclosure of peer review or quality assurance records to the CLA for its use in investigating incidents pursuant to its mandate under PAMII, they are preempted by PAMII.