



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INNOVATION AND IMPROVEMENT

July 26, 2005

Dr. Elaine Ryan
President
College of Southern Maryland
8730 Mitchell Road
La Plata, MD 20646

Complaint No. [REDACTED]
Family Educational Rights
and Privacy Act

Dear Dr. Ryan:

This Office advised you by letter dated January 27, 2005, that [REDACTED] (Parent) had filed a complaint alleging that the College of Southern Maryland (College) violated rights afforded students under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g and 34 CFR Part 99 and asked you to provide information to help us determine whether to initiate an investigation. The Parent alleged that the College violated FERPA on August 27, 2003, by requiring her [REDACTED], a [REDACTED] year old applying for admission at that time, to execute a blanket waiver of his FERPA rights as a condition for accepting his application. The "Home School Early Admission Form" in question states:

***NOTE:** The student's signature on this form gives College of Southern Maryland the authority to release information to high school officials, college officials, and student's parents.

We asked you to explain whether the "Note" is intended to apply only to information about an applicant that may be released before an individual's admission and enrollment, or whether it constitutes a general waiver covering information maintained by the institution after the applicant has become a "student" in attendance. We also asked that you explain how this provision was applied both in general and with respect to the Student in particular.

Mr. Stephen D. Goldman responded on your behalf by letter dated March 8, 2005. Mr. Goldman explained that the College is a comprehensive community college with an open access mission that admits students from diverse educational backgrounds, including persons who did not graduate from high school; obtained GEDs; graduated from high school; are concurrently enrolled in high school; or, are or have been home schooled. The form in question was provided to applicants who were home schooled and used primarily for the purpose of determining the type of program in which they participated.

Mr. Goldman's response clarified that the "Note" was intended to advise home school students and their parents that the student's signature on the form authorized the College to release information from records maintained after the individual had enrolled and become a student in attendance and, therefore, applied to "education records" under FERPA. In regard to the three categories of individuals to whom the student's education records would be released, Mr. Goldman explained that although the form stated that records could be disclosed to "college officials," the intent was to provide education records only to college employees with a legitimate educational interest in those records. Further, while the category "high school officials" was also listed in the "Note," Mr. Goldman pointed out that the College did not, in fact, disclose education records of home schooled students to high school officials because these students do not attend high school. With regard to the disclosure of records to parents or guardians, Mr. Goldman stated that it is the College's expectation that all but a small minority of home school students are dependents because they are almost invariably minors living with a parent or guardian. However, as required by FERPA, the College will require parents of home schooled students to establish that their child is a dependent for tax purposes before "education records" are shared with the parent and that if a parent fails to provide the requisite proof, records will not be shared unless the student signs a written consent that meets FERPA requirements.

More generally, Mr. Goldman added that the Applicant became a student at the College in the Spring 2004 semester, after the Parent filed her complaint, and that at no time have any of his "education records," as defined under FERPA, been disclosed as a result of the form that he signed. Mr. Goldman noted that the College has discontinued use of the "Note" on the form signed by the Applicant as it did not precisely reflect the intent of the College and was largely unnecessary.

As explained below, information provided by the Parent and Mr. Goldman indicates that a violation of FERPA occurred because the Applicant was required to waive his rights under FERPA in order to apply for admission. Additionally, based on the College's response to our letter, it appears that the College lacks a sufficient understanding of FERPA requirements to avoid future violations.

Under FERPA, a parent generally must provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's "education records," except as provided by statute or regulations. 20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 CFR §§ 99.30 and 99.31. The permission or consent required of parents, as well as the rights under FERPA to inspect and review education records, to seek amendment of those records under specified conditions, and to file a complaint with this Office transfer to the student once the student reaches 18 years of age or attends an institution of postsecondary education. 20 U.S.C. § 1232g(d); 34 CFR §§ 99.3 ("Eligible student") and 99.5. Accordingly, once a student enrolls in or otherwise becomes a student in attendance at the College, education records generally may not be disclosed unless the student has provided a signed and dated consent in accordance with the specific requirements of § 99.30 of the regulations.

It is well-established that, in general, nothing precludes a party from *knowingly and voluntarily*

waiving constitutional and statutory rights. See, e.g., United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992) citing Town of Newton v. Rumery, 480 U.S. 386, 394 (1987) and other cases. However, agreements to waive legal rights or protections are affirmed only when there is valid consideration in exchange for the waiver, as with a plea agreement in a criminal case where a defendant waives the statutory right to appeal or to file an action under 42 U.S.C. § 1983 in exchange for a reduced sentence. Id. The principle does not apply where a party is required to waive statutory rights or protections in exchange for the mere ability to participate in the activity the statute is designed to protect. (The Federal Arbitration Act allows employers to require, as a condition of employment, execution of an agreement to arbitrate all employment claims and waive the statutory right to sue in court for enforcement of Title VII of the Civil Rights Act of 1964 and other employment laws. In these cases, the employee has not been forced to waive the protections of State and Federal employment laws but agreed to utilize arbitration instead of judicial processes to resolve these types of disputes; there is no comparable provision affecting the rights and protections afforded to parents and students under FERPA.)

In general, then, an educational agency or institution may not require parents or students to waive the protections and rights afforded them under FERPA as a condition for acceptance into an institution or receipt of educational services. In support of this conclusion, we note that FERPA provides specifically that an eligible student may waive his or her right to inspect and review certain confidential statements and letters of recommendation, but only under specified conditions, which are set forth in § 99.12(b) and (c) of the regulations. (While the statute and regulations refer to confidential recommendations at the postsecondary level, this Office has applied the provision at the secondary level as well.) Importantly, even this limited statutory waiver is valid only if the agency or institution does not require it as a condition for admission to or receipt of a service or benefit from the agency or institution. 34 CFR § 99.12(c)(1)(i). There are no other waiver provisions in the statute or regulations.

FERPA regulations promulgated in 1976 recognized the validity of non-statutory waivers related to inspection of education records other than confidential letters and statements of recommendation as described in § 99.12(b) of the regulations, so long as the agency or institution does not *require* the waiver of any FERPA right. In 1988, with the purpose of reducing regulatory burdens on institutions, FERPA regulations were amended and all provisions relating to non-statutory waivers were deleted. However, the June 10, 1987, Notice of Proposed Rulemaking stated clearly that “the Secretary does not intend to forbid non-statutory waivers as provided in the current regulations . . .” 52 Fed. Reg. 22250. That is, an agency or institution may still use non-statutory waivers for certain purposes provided it does not *require* the waiver, i.e., that it is knowing and voluntary, and the waiver is in writing and signed by the student. Subsequently, this Office has advised that FERPA does not allow an agency or institution to seek or use unlimited non-statutory waivers and that, even though they must be voluntary, requests for waivers should be limited to the kinds of educational activities that traditionally rely on confidential recommendations or evaluations, such as review of prior learning experiences for academic credit.

Since that time we have identified limited circumstances in which a student may be effectively required to waive FERPA rights and protections. For example, this Office has determined that

the restriction in § 99.12(c)(1)(i) does not prevent individuals who write statements and letters of recommendation from refusing to do so unless the student agrees to waive his or her right to access the material. Similarly, FERPA does not prevent an outside organization, such as the National Collegiate Athletic Association (NCAA), from requiring students to consent to the release of certain information from their education records as a condition of participating in sports governed by this organization. This Office has also advised that educational agencies and institutions themselves may require students to consent to the release of certain information to their parents as a condition for participating in extracurricular sports and other activities. However, we believe that in no circumstances does FERPA permit an educational agency or institution to require a student to waive the rights and protections afforded under FERPA in order to apply for or receive educational training or services.

There is no exception to the prior written consent requirement in FERPA that allows an educational agency or institution to disclose education records, without consent, to a student's prior high school officials. Therefore, while the information about disclosure of records to "high school officials" on the form the Applicant was required to sign is ambiguous with respect to home schooled students, it appears that he was required to waive his rights and protections under FERPA with respect to these disclosure and that the College may have a policy or practice of requiring students who were not home schooled to do so as well.

One of the exceptions to the prior written consent requirement in FERPA permits the College to disclose education records to teachers and other "school officials" who have been determined by the College to have "legitimate educational interests." However, an agency or institution that discloses education records to school officials under this provision must provide in its annual notification of FERPA rights a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. See 34 CFR § 99.7(a)(3)(iii). The College indicated that this was the intent of its "Note" on the form the Applicant was required to sign, but there is no indication that parents and eligible students were notified as required under § 99.7 of the regulations. Further, a parent or eligible student does not have to provide written consent under § 99.30 for disclosures to school officials with a legitimate educational interest and, therefore, it would be confusing or misleading to ask them to sign a form authorizing these disclosures.

Similarly, § 99.31(a)(8) of the FERPA regulations permits an educational agency or institution to disclose an eligible student's education records to the student's parent or guardian without the student's prior written consent, but only if it has determined that the student is a "dependent" for Federal tax purposes as defined in § 152 of the Internal Revenue Code of 1986. An eligible student cannot be required to waive his or her right to consent to these disclosures if the institution has not made a reasonable determination that the student is, in fact, a dependent as required under this exception. It appears that in the course of responding to the Parent's allegations, the College established a policy of either requiring parents of home schooled students to demonstrate that their child is a dependent for tax purposes or obtaining the student's prior written consent before education records are disclosed. The College must also ensure that if it chooses to disclose education records to parents of other kinds of students it must take reasonable steps to ensure that the students are dependents for tax purposes, if the student has not provided written consent for the disclosure in accordance with § 99.30 of the regulations.

In order to close this matter, please provide this Office with written evidence that the College has 1) retracted or revised any forms in which parents or eligible students have been required to waive their rights under FERPA, except as described above; 2) complied with the requirements in § 99.7(a)(3) regarding the disclosure of education records to school officials with a legitimate educational interest; and 3) taken reasonable steps to ensure that students are dependents under § 152 of the Internal Revenue Code if the College plans to disclose education records to parents without a student's prior written consent under § 99.31(a)(8) of the regulations. Please provide this information within four weeks after you receive this letter and direct your response to Ms. Frances Moran of my staff.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Parent