

NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to FERPA@ed.gov.

June 9, 2005

Sharon N. Berlin, Esq.
Lamb & Barnosky, LLP
534 Broadhollow Road, Suite 210
PO Box 9034
Melville, New York 11747-9034

Dear Ms. Berlin:

This responds to your May 19, 2006, letter regarding the disclosure of information from education records under the Family Educational Rights and Privacy Act (FERPA). This Office investigates FERPA complaints and violations and provides technical assistance to ensure compliance with the statute and regulations, which are codified at 20 U.S.C. § 1232g and 34 CFR Part 99. 34 CFR § 99.60(b) respectively.

According to your letter, your firm is special labor counsel for the Middletown Enlarged School District (District) in Middletown, New York, which is prosecuting a disciplinary proceeding against a teacher pursuant to New York Education Law § 3020-a. You explained that in order to meet its burden in proving the disciplinary charges, the District must call as witnesses 14, 15, and 16 year old students to testify regarding the teacher's plans for a private sketching and drawing course involving nude models. The District is concerned that testimony and evidence about these students offered by both the District and the teacher will include the students' identities, grades, courses, performance, attendance, psycho-social status, and other personally identifiable information from education records. (You indicated, for example, that counsel for the teacher referred to one of the students as "borderline psychotic" in his opening statement.)

New York Education Law § 3020-a.3.c.(i) provides that a hearing on disciplinary charges filed against an employee "shall be public or private at the discretion of the employee." Regulations of the Commissioner of Education provide:

Public hearing shall be open to members of the public and to representatives of the news media, except that the hearing officer may, in his or her discretion, exclude any persons other than parties, witnesses, and their attorneys from all or any portion of the hearing where such exclusion is warranted for the protection of the privacy or reputation of any person under the age of 18 years.

8 NYCRR § 82-1.10(b).

You explained that the teacher has refused to agree to a closed hearing and attached to your letter a printout of an e-mail message dated May 5, 2006, from Joel M. Douglas, hearing officer, denying the District's motion to close portions of the hearing when students or parents testify. You indicated further that the District is attempting to obtain a State court order directing the hearing officer to close the proceedings to the public when information from education records is presented and filed a formal complaint with this Office on behalf of the District regarding the matter.

FERPA provides that no funds administered by the Secretary of Education shall be made available to an educational agency or institution that has a policy or practice of permitting the release of education records or providing access to any personally identifiable information in education records, without the prior written consent of a parent except as authorized by law. See 20 U.S.C. § 1232g(b)(1) and (b)(2). (All rights under FERPA, including the right to consent to the disclosure of education records, transfer to an "eligible student," i.e., a student who is 18 years of age or attends a postsecondary institution regardless of age. 34 CFR §§ 99.3, 99.5.) Under § 99.30 of the regulations, a parent or eligible student must provide a signed and dated written consent before an educational agency or institution "discloses" education records, except under conditions set forth in § 99.31. "Disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means." 34 CFR § 99.3. An educational agency or institution is responsible for FERPA violations committed by teachers and other school officials who disclose personally identifiable information from a student's education records in violation of FERPA requirements.

The term "education records" is defined in FERPA as those records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 34 CFR § 99.3. "Personally identifiable information" includes, but is not limited to:

- (a) The student's name;
- (b) The name of the student's parent or other family member;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number or student number;
- (e) A list of personal characteristics that would make the student's identity easily traceable; or
- (f) Other information that would make the student's identity easily traceable.

34 CFR § 99.3. An educational agency or institution may disclose education records, or information from education records, without complying with the written consent requirements in § 99.30 if all "personally identifiable information" has been removed.

Section 99.31 contains various exceptions to the written consent requirement including disclosure of personally identifiable information from education records to teachers and other school officials whom the agency or institution has determined to have "legitimate educational interests"; to officials of another school where the student seeks or intends to enroll; in connection with student financial assistance; in connection with a health or safety emergency; to

an accrediting organization to carry out accrediting functions, etc. There is no exception to the written consent requirement for disclosure of information from education records in a teacher (or student) disciplinary proceeding that is open to the public.

One of the exceptions in § 99.31(a) permits an educational agency or institution to disclose “directory information” without complying with the written consent requirements provided that the parent (or eligible student, as defined in § 99.3) has been given notice of the types of personally identifiable information that the agency or institution as designated as directory information and an opportunity to opt-out of the disclosure. 34 CFR §§ 99.31(a)(11), 99.37. “Directory information” is defined as information contained in an education record that would not generally be considered harmful or an invasion of privacy if disclosed and includes the student’s name; address; telephone listing, email address, date and place of birth, major field of study; dates of attendance; grade level; enrollment status; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended by the student. 34 CFR § 99.3. “Directory information” does not include a student’s social security or student identification number; grades and other evaluations of classroom performance; health and medical information; special education status; and other information in education records that would be considered harmful or an invasion of privacy if disclosed.

FERPA also permits an educational agency or institution to disclose personally identifiable information from education records to comply with a “judicial order or lawfully issued subpoena.” 34 CFR § 99.31(a)(9)(i). Before compliance, the agency or institution must make a reasonable effort to notify the parent (or eligible student) of the order or subpoena so that the parent (or eligible student) may seek protective action, with certain exceptions not relevant here. 34 CFR § 99.31(a)(9)(ii). You indicated that a subpoena has not been issued in the case at issue here.

Under this authority, both the District and the teacher are prohibited by FERPA from disclosing information about a student’s grades and other non-directory information from education records in a public hearing conducted under New York Education Law § 3020-a unless all personally identifiable information has first been removed (including information that would make the student’s identity easily traceable), or a parent has provided written consent in accordance with § 99.30 of the FERPA regulations. Note that a parent cannot be forced to waive his or her FERPA rights and consent to the disclosure of personally identifiable information from education records as a condition of receiving educational benefits from the District.

Finally, New York Education Law § 3020-a and 8 NYCRR 82-1.10 appear to conflict with FERPA to the extent that they authorize an employee of the District or a hearing officer to compel the disclosure of personally identifiable information from education records in a hearing open to the public and the parent (or eligible student) refuses to provide written consent. The District may not comply with State laws that require or authorize other parties to require the disclosure of education records in violation of FERPA requirements and continue to receive funds administered by the Secretary of Education. See our August 13, 2003, letter to the Superintendent of Public Instruction, Michigan Department of Education, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/miopen.html>. This Office will promptly

notify the State Commissioner of Education of the apparent conflict between State law and FERPA as set forth in this letter and seek voluntary compliance as required under § 99.67 of the regulations.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Richard P. Mills, Commissioner of Education, State of New York