

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.

March 17, 1999

Complaint No. XXXX
Family Educational Rights
and Privacy Act

Mr. Jock Wheeler, M.D.
Provost
Eastern Virginia Medical School
P. O. Box 1980
Norfolk, Virginia 23501-1980

Dear Dr. Wheeler:

This is to advise you of the finding in the complaint filed with this Office by [name (Student)]. The Student alleged that the Eastern Virginia Medical School (School) violated his rights under the Family Educational Rights and Privacy Act (FERPA) when it denied him access to a complete copy of an audio tape recording of a meeting concerning him. By letter dated July 22, 1998, this Office advised you of the allegation and by letter dated August 20, 1998, Mr. Sidney R. Steinberg, attorney, responded on behalf of the School.

As set forth in our July letter, the Student alleged that by letter dated December 24, 1997, he requested access to "the tape recordings of the March 23, 1993 Student Progress Committee meeting that interviewed [him] and then discussed [him] after [he] left the meeting." He specifically requested to "review the entire record in its original form: not tampered with, not edited, not abridged, specifically including all the discussions that took place while [he] was not present." Mr. A. James Johnston, an attorney for the School, responded to his request in a January 14, 1998, letter. Mr. Johnston stated that he "would suggest to you that any such request should be made pursuant to the applicable discovery procedures."

Mr. Steinberg responded to the complaint by asserting that the Student's allegation was untimely because [the Student] had sought access to the tape recording dating back to March 1993. Mr. Steinberg also asserted that the audio tape of the meeting is a "sole possession record" under FERPA because it was "made for the sole purpose of assisting the record keeper [secretary to the Student Progress Committee] in preparing a record of the meeting." In this regard he likens the recordings to "a person's handwritten notes" and he states that recordings were kept in the possession of Dr. [Robert] McCombs and his staff" and at no time have any of the recordings been made a part of any student's academic record."

Finally, Mr. Steinberg asserts that the Student's complaint "must be rejected on the grounds that

FERPA's regulations do not supersede the Federal or Commonwealth of Virginia Rules of Civil procedure." In this regard, he states that "[the Student] has had on-going litigation against the School since 1993" and that the Student has requested a copy of the tape recording at issue within the normal course of the litigation process." Mr. Steinberg states that the School has "objected to this particular request, again within the course of litigation." Mr. Steinberg asserts that the Student "should not be permitted to circumvent the litigation process when he has chosen this route ... Once [the Student] has begun litigation, the relevance and discoverability of documents is the exclusive province of the courts."

FERPA requires that postsecondary institutions provide students the opportunity to inspect and review their education records within 45 days after receipt of a request. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10(b). 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); 34 CFR § 99.3. This term is broadly defined to include virtually all records which are directly related to a student and maintained by an educational agency or institution, or a party acting for such agency or institution. Thus, the location or manner in which a record is maintained, such as whether or not it is placed in a particular file, does not affect its status as an education record. The purpose for which a record is created does not affect its status as an education record. In this case, the tape-recording of a meeting where a particular student is discussed among school officials is the student's education record so long as the recording is maintained. This is not altered by the fact that the record may have been created for the sole purpose of assisting the record keeper.

As Mr. Steinberg notes in his letter, FERPA exempts from the definition of education records those records which are kept in the sole possession of the maker of the records and are not accessible or revealed to any other person except a temporary substitute for the maker of the records are exempted from the definition of education records. 20 U.S.C. § 1232g(B)(i); 34 CFR § 99.3 "Education records" (b)(1). Once the contents or information recorded in sole possession records is disclosed to any party other than a temporary substitute for the maker of the records, those records become education records subject to FERPA.

FERPA's sole possession exception is strictly construed by this Office to mean "memory-jogger" type information that a school official may use as a reference tool to record his or her thoughts or observations. Such records are generally kept by the school official unbeknownst to other individuals. The content of a recording or a transcript of a meeting is not a sole possession record because it is known to all who were in attendance at the meeting. Thus, the School's claim that the tape recording is exempted from FERPA's definition of "education records" as a sole possession record is unfounded.

With regard to Mr. Steinberg's claim that the Student "should not be permitted to circumvent the litigation process when he has chosen [that] route," FERPA affords students certain rights with respect to their education records, whether or not they also seek access to such records through

other means, such as in connection with litigation. Further, while several courts have found that individuals may bring civil action for deprivation of rights under 42 U.S.C. §1983 for violation of FERPA, this does not amount to direct enforcement, including imposition of FERPA penalties. That is, a court could not terminate Federal financial assistance to an institution, even where it had determined that the institution had violated FERPA, because the statute itself requires the Secretary to find that "there has been a failure to comply with FERPA and compliance cannot be secured by voluntary means." Therefore, the Department retains the affirmative responsibility for taking appropriate actions to enforce FERPA, including by voluntary settlement or otherwise, where it appears that the educational institution may have a policy or practice of denying or abridging FERPA rights. Accordingly, notwithstanding any activity the Student has pursued to seek access to the tape-recording in the process of litigation, this Office is obligated to consider the Student's allegation that his rights under FERPA have been denied by the School.

With respect to Mr. Steinberg's assertion that the Student's complaint is not timely, this Office investigates those timely complaints containing specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred. A complaint is timely if it is submitted to this Office within 180 days of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation. The FERPA regulations provide that this Office may extend the time limit for filing a complaint under FERPA if the complainant shows that he or she was prevented by circumstances beyond the complainant's control from submitting the matter within the time limit or for other reasons considered sufficient by the Office. In the Student's case, this complaint is not based on an assertion that the School denied him access to the tape recording in 1993. Such a complaint would not have been presented to this Office in a timely manner. However, the Student made a December 1997 request for access to the tape recordings and the School denied that request. As such, his allegation that the School denied a December 1997 request for access to his education records is timely. The fact that the Student was aware that the School had refused his request for access to complete copies of the tape recordings in 1993 does not alter the fact that the School again denied a request for access to those tape recordings in 1998.

In sum, the facts relevant to this complaint are that, in December 1997, the Student requested access to the tape-recording, which is an education record of his, and in January 1998, his request was denied. While there are certain provisions in FERPA which would permit an educational agency or institution to deny a student access to education records under certain circumstances, such provisions do not apply to this request of the Student's. Therefore, since the School failed to comply with the Student's request for access to the tape-recording within 45 days, this Office finds that the School violated FERPA as alleged. The Student will be advised of this finding by copy of this letter.

Before this Office can close the investigation of this complaint, we need assurance that the School has afforded the Student access to those parts of the tape-recording that contain information directly related to him. We also need assurance that all appropriate school officials have been advised of FERPA's definition of education records and its requirement that students be afforded access to their education records within 45 days of receipt of the request.

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Thank you for your continued cooperation with respect to the investigation of this complaint.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Student

Mr. Sidney R. Steinberg