

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.

August 29, 1996

Mr. Charles Abourezk
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Complaint No. XXXX
Family Educational Rights
and Privacy Act

Dear Mr. Abourezk:

This is in response to your July 22, 1996, letter in which you raised four arguments against applying the Family Educational Rights and Privacy Act (FERPA) to tribal schools on Indian reservations, specifically the Little Wound School. In particular, you argue that the Indian Self-Determination and Education Assistance Act (the Act) prohibits the application of FERPA to the Little Wound School because FERPA will impermissibly interfere with the school's, and presumably the tribe's, right to self-governance. Second, you suggest that a line of cases providing that Indian rights to self-governance shall not be limited absent clear congressional intent applies to the Little Wound School. Third, you claim that FERPA is analogous to the Privacy Act and the Freedom of Information Act (FOIA), and because these statutes do not apply to Indian tribes, FERPA is also inapplicable to tribal schools. Finally, you submit that the "spirit" of § 450j(a)(1) of the Act exempts the Little Wound School from FERPA requirements.

Addressing your first two arguments together, you correctly point out that the Supreme Court has held that statutes written in terms applying to all persons include members of Indian tribes as well. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); see also, *United States v. Funmaker*, 10 F.3d 1327 (7th Cir. 1993); *Equal Opportunity Commission v. Fond du Lac Heavy Equipment and Construction*, 986 F.2d 246 (8th Cir. 1993). The exception to this general rule, as you suggest, is that if the application of a law affects rights "essential to self-governance of intramural matters, the law specifically must evince Congressional intent to interfere with those rights." *United States v. Funmaker*, 10 F.3d at 1330; *Smart v. State Farm Insurance Co.*, 868 F.2d 929, 932-34 (7th Cir. 1989); see also, *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1989). Thus, if the application of a federal law governing the privacy of education records of students is "essential to Indian self-governance," then FERPA will not apply to Little Wound School.

Courts have concluded, however, that the Indian self-governance exception is quite narrow. In *Donovan*, for example, the Ninth Circuit restricted the self-government exception to matters to

such “purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations.” *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d at 1116. The Supreme Court has also upheld such matters as “hunting rights, taxation of non-Indians doing business on reservations, and the creation and enforcement of substantive law governing social relations” as areas traditionally left to tribal self-government. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978).

In contrast, the protection of a student’s privacy in his or her education records is not a “purely intramural matter” of Indian self-governance. FERPA applies to any educational institution or agency that receives federal funds, and FERPA’s legislative history does not contain an exception for Indian tribes. *See* 20 U.S.C. § 1232g. Because the Little Wound School receives formula grant funds from the Department, it is subject to FERPA.

In your letter, you cite two cases for the proposition that FERPA impermissibly interferes with the school’s self-governance. *See Equal Employment Opportunity Commission v. Fond du Lac Heavy Equipment and Construction*, 986 F.2d 246 (8th Cir. 1993) and *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989). In *EEOC*, the issue presented was the applicability of the Age Discrimination in Employment Act (ADEA) to a charge of age discrimination. The Eighth Circuit held that, because the matter concerned a tribal employer and a member of the tribe only, the matter was sufficiently internal as to deny intervention by the Federal government. *EEOC*, 986 F.2d at 249. Because the ADEA is a statute of general applicability and FERPA applies only when a school *receives* federal funds, we believe the holding in this case does not apply to the issue before us.

In *Nero*, the court considered a tribe’s decision to refuse membership to descendants of slaves once owned by the Cherokee Indian Nation. As noted above, tribal membership has been, and continues to be, a matter that is essential to tribal self-governance and, therefore, beyond the reach of the Federal government. *Nero*, 892 F.2d at 1462. None of the cited case law or legislative history is persuasive of the argument that protecting the privacy of student records at an Indian school is beyond the reach of the federal government.

Turning to your third point, we disagree that the Privacy Act and the FOIA are analogous to FERPA. The Privacy Act and FOIA apply only to records maintained by the Federal government. FERPA applies to any school that accepts federal funds from the U.S. Department of Education. *See* 20 U.S.C. § 1232g(a)(4). As noted above, and in our previous letter to you, Little Wound School falls into this category.

Finally, you argue that the receipt of federal funds by the Little Wound School is not subject to federal contracting or cooperative agreement laws under 25 U.S.C. § 450j(a)(1). This statute, however, does not appear to be applicable in this instance. Section 450j(a)(1) applies to self-determination contracts or agreements entered into by tribal organizations with non-governmental parties. In this case, Little Wound School has accepted federal funds from a federal agency; as such, continued receipt of similar funding is conditional upon compliance with FERPA.

In sum, we believe that FERPA applies to any Indian school that receives and accepts federal

funds. Consequently, the Family Policy Compliance Office will proceed with its investigation of the Little Wound School. Therefore, please respond to the referenced complaint within three weeks of your receipt of this letter.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office