

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.

July 29, 2002

Ms. Deborah B. Baum
Shaw Pittman LLP
2300 N Street, NW
Washington, D.C. 20037

Dear Ms. Baum:

This is in response to your letter of June 19, 2002, and your email of June 20, 2002, regarding the Family Educational Rights and Privacy Act (FERPA). This letter also serves to respond to the issues raised in our meeting with you and Ms. Jane Genster, Vice President and General Counsel, Georgetown University (University), on June 20, 2002. You asked for guidance regarding a possible conflict between an Order issued on March 29, 2001, by the District of Columbia Board of Zoning Adjustment (BZA) and FERPA. This Office administers FERPA and is responsible for investigating complaints and providing technical assistance under the statute and its implementing regulations. 20 U.S.C. § 1232g; 34 CFR Part 99.

You believe that certain provisions of the Order require the University to report certain information about students to outside agencies in violation of FERPA. According to Petitioner's Memorandum in Support of Its Motion for Stay, which you provided on the University's behalf. Condition 7 of the Order provides that the University must report to housing providers and local regulatory agencies evidence of violations of District of Columbia sanitation or housing regulations involving off-campus students. The Order also requires the University to monitor enforcement of reported violations to determine whether inspections have occurred, and fines have been issued and paid, and keep detailed records of reported complaints and responses.

Condition 14 of the Order requires the University registrar to collect information regarding the license plate numbers of motor vehicles kept by University students and to direct all students to register their vehicles with the local department of motor vehicles (DMV) or obtain reciprocity stickers. The Order requires the University to "consult with" DMV to determine whether student registration has been completed. The University understands this provision to mean that it must disclose to DMV, at a minimum, license plate numbers and student names that have been collected by the registrar. The University has argued before the District of Columbia Court of Appeals that these conditions require it to violate FERPA.

Specifically, your questions under FERPA can be summarized as follows:

1. Is information regarding alleged off-campus violations of local housing or sanitation regulations that the University creates and/or maintains by individuals outside its authorized law enforcement unit considered "education records" protected by FERPA?
2. Are license plate numbers and/or other motor vehicle information collected by the University's register pursuant to the BZA's Order protected "education records" under FERPA?
3. What is the purpose of 34 CFR § 99.61? Does it authorize the Department to grant waivers from FERPA, or exercise discretion not to enforce it, when the Secretary of Education (the "Secretary") determines that there is conflict with State law?

General Overview of FERPA

FERPA protects eligible students'¹ privacy interests in "education records," which 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)(i) and (ii). See also 34 CFR § 99.3 "Education records."

In general, an educational agency or institution may not disclose education records, or personally identifiable information from education records, unless the student has provided a signed and dated written consent in accordance with 34 CFR § 99.30, or the disclosure meets one of several exceptions to the written consent requirement set forth in § 99.31 of the regulations. Excluded from the definition of "education records" are records of the law enforcement unit of an educational agency or institution, but only under the conditions described in § 99.8 of the FERPA regulations.

One of the exceptions to FERPA's general prior consent rule permits the nonconsensual disclosure of information derived from education records that has been appropriately designated as "directory information" by the educational agency or institution. 20 U.S.C. § 1232g(b)(1); 34 CFR §99.31(a)(1). FERPA defines directory information as information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. 20 U.S.C. § 1232g(a)(5)(A); 34 CFR § 99.3 "Directory information."

More specifically, FERPA provides that a school may disclose directory information if it has given public notice of the types of information which it has designated as "directory information," the student's right to restrict the disclosure of such information, and the period of time within which a student has to notify the school in writing that he or she does not want any

¹ "Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary institution at any age. See 34 CFR § 99.3 "Eligible student." The rights under FERPA belong to the parents of students under the age of 18 at the elementary/secondary level and transfer to the student when he or she becomes an "eligible student."

or all of those types of information designated as "directory information." 20 U.S.C. § 1232g(a)(5)(B); 34 CFR § 99.37(a).

With respect to what information can be considered "directory information," FERPA states:

For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A). In administering FERPA, the Department recognizes that there are other similar types of information that an educational agency or institution may wish to designate and disclose as directory information. The regulations then specifically list those items set forth as "directory information" in the statute. The most recently amended regulations (published in the *Federal Register* on July 6, 2000) state that electronic mail address, grade level, and student status (part-time, full-time, graduate, undergraduate) can also be specified as directory information.

This Office has ruled on various occasions, in response to specific inquiries from school officials or in connection with the investigation of complaints of alleged violations of FERPA, whether a particular type of information can appropriately be considered directory information. In so doing, this Office fully considers the relationship of the potential new type of directory information to those types of information clearly specified by statute. For instance, a photograph or an email address is very similar to those types of information listed in the statute. They identify the student or provide a means to contact the student, without disclosing to the individual receiving the directory information any additional data that the student would generally expect to be private or that he or she would perceive as harmful if others had access to it. In this regard, this Office has not made a determination that "license plate numbers" may be considered, as a matter of law, as a "directory information" item. Further, we believe that disclosure of a student's license plate number goes beyond the scope of the "directory-type" information this provision is intended to cover. That is, the use of the directory information is limited to identifying students and their successes and/or participation in school sponsored activities, not for compliance with vehicle registration laws.

Responses to Specific Questions Raised

Is information regarding alleged off-campus violations of local housing or sanitation regulations that the University creates and/or maintains by individuals outside its authorized law enforcement unit considered "education records" protected by FERPA?

Records on a student regarding off-campus violations of local housing or sanitation regulations maintained by school officials outside the University's law enforcement unit are protected as "education records" under FERPA because the records are "directly related" to students and maintained by the institution and do not fall under the law enforcement unit exemption to

"education records." See 20 U.S.C. § 1232g(a)(4)(i) and (ii) and 34 CFR § 99.3 "Education records."

Condition 7 of the Order requires the University to disclose to the BZA evidence of violations of local sanitation or housing regulations involving off-campus students, as well as information from detailed compliance records the University is required to maintain. As noted above, this information would constitute "education records" if the information were maintained by an official, such as the registrar, and may not be disclosed with the prior written consent of the student. Additionally, information that is collected and maintained as records of student disciplinary actions or proceedings conducted by the University for the same conduct (i.e., sanitation or housing code violations), may not be disclosed without student consent. United States of America v. Miami University; Ohio State University, et al., 2002 ED App. 0213P (6th Cir).

Are license plate numbers and/or other motor vehicle information collected by the University's registrar pursuant to BZA's Order protected "education records" under FERPA?

Condition 14 of the order appears to require the University to disclose to the local DMV license plate numbers and student names that have been collected by the registrar. License plate numbers and other motor vehicle information collected by the University's registrar are protected as "education records" under FERPA because the records are "directly related" to a student and maintained by the institution.

You note that the BZA's position is that license plate and other motor vehicle information that might be required to be reported to the DMV would constitute "directory information." However, this is not the case under FERPA. As noted previously, we believe that the designation and disclosure of a student's license plate number goes beyond the scope of the "directory-type" information this provision is intended to cover.

What is the purpose of 34 CFR § 99.61? Does it authorize the Department to grant waivers from FERPA, or to exercise its discretion not to enforce it when the Secretary of Education (Secretary) determines that there is a conflict between those requirements and state law?

Section 99.61 of the FERPA regulations states the following:

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the [Family Policy Compliance Office] within 45 days, giving the text and citation of the conflicting law.

This notification requirement is intended to provide an avenue for identifying potential conflicts and attempt to find ways to resolve the conflict so that educational agencies and institutions can remain in compliance with FERPA and not jeopardize losing Federal educational funding. In some instances, this Office has reviewed a State law reported by an educational agency or institution to find that a conflict did not exist and advised the agency or institution of that finding. In other instances, this Office has worked with State legislators and administrators to revise State statutes to ensure that they do not require actions by educational agencies and

institutions that prevent them from complying with FERPA. This provision does not give the Department authority to grant waivers or otherwise decline to enforce FERPA.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to the issue you have raised. Please let us know if this Office can be of further assistance to you.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Ms. Jane Genster
Vice President and General Counsel
Georgetown University