

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 8, 2005

Dr. Judith D. Fillion
Director
Division of Program Support
New Hampshire Department of Education
101 Pleasant Street
Concord, New Hampshire 03301

Dear Dr. Fillion:

This is in response to your letter concerning the applicability of the Family Educational Rights and Privacy Act (FERPA) to investigations conducted by the New Hampshire Department of Education (NHDOE) and in follow-up to conversations that Dann Brittenham of this Office has had with Michael Kelleher of your Division. This Office administers FER.PA, which addresses issues that relate to students' education records.

You state that NHDOE is conducting a formal investigation of educator misconduct. To conduct the investigation, you indicate NHDOE needs the names, telephone numbers, and other records and documents of students who were the alleged victims. In response, the superintendent of the school district (District) from whom you requested this information has informed NHDOE that the District's attorney stated the release of the student information would violate FERPA.

In addition, you provided the following information from the New Hampshire Code of Administrative Rules:

1. Ed 511.05 Investigations subsection (e) states: When an investigation occurs, an investigator designated by the board shall contact persons and examine such records and other documents as are reasonably necessary to make a recommendation as to whether further board action should be taken on the allegations in question.
2. Ed 502.1 Confidentiality of Educator Certification Records subsection (b) states: The provisions of this section shall not require the release of information related to: (1) an Informal or formal investigation. Any and all information received by the Investigator is confidential.

FERPA is a Federal law that gives parents or eligible students the right to have some control over the disclosure of information from their education records. Specifically, FERPA provides that a school generally may not disclose personally identifiable information from a student's education records to a third party unless the parent or eligible student has provided prior written consent. 34 CFR § 99.30. The term "education records" is defined as those records that contain

information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 "Education records." Full rights under FERPA belong to either parent of the student. 34 CFR § 99.4. The rights transfer to the student at age 18, or when he or she begins attending a postsecondary institution. 34 CFR §§ 99.3 "Eligible student," 99.4, and 99.5(a).

There is an exception to FERPA's prohibition on nonconsensual disclosure of education records that permits disclosure of students' education records in some circumstances. Specifically, FERPA permits disclosures by an educational agency or institution in compliance with a judicial order or lawfully issued subpoena. Such disclosures are permitted only if the educational agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with:

1. A Federal grand jury subpoena and the court has ordered that the existence or the content of the subpoena or the information furnished in response to the subpoena not be disclosed; or
2. Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

34 CFR § 99.31(a)(9).

Another FERPA exception permits an educational agency or institution to disclose education records to "authorized representatives" of

- (1) The Comptroller General of the United States;
- (2) The Attorney General of the United States;
- (3) The Secretary [of Education]; or
- (4) State and local educational authorities,

34 CFR § 99.31(a)(3), provided the disclosure is in connection with an audit or evaluation of Federal or State supported education program, or for the enforcement of or compliance with Federal legal requirements that relate to those programs. 34 CFR § 99.35(a). Information that is collected under this provision must:

- (1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and
- (2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

34 CFR § 99.35(b).

The phrase "State and local educational authorities" is not defined in FERPA or elsewhere in Federal law or regulations. However, this Office has generally interpreted the term to mean an

agency or other party with educational expertise and experience that is responsible for and authorized under State or local law to regulate, plan, coordinate, advise, supervise or evaluate elementary, secondary, or postsecondary education programs, services, agencies, or institutions in the State. (Note that "State or local educational authorities" need not exercise the "direction and control" that characterizes the relationship between an "educational agency" and an "educational institution" under 34 CFR §99.1(a)(2).).

Based on the information you have provided, this Office concludes that FERPA would permit disclosure of the education records that NHDOE seeks only if:

1. The District obtains prior written consent from parents or eligible students;
2. NHDOE complies with the requirements of § 99.31(a)(9) of the FERPA regulations concerning judicial orders or lawfully issued subpoenas; or
3. NHDOE needs the records under §§ 99.31(a)(3) and 99.35 to conduct an investigation based on Title IX of the Education Amendments of 1972; or some other federal legal requirement relating to Federal or State supported education programs.

I trust that the above information is helpful in explaining FERPA as it relates to your inquiry. If this Office can provide further assistance please do not hesitate to contact us.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office