

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](mailto:FERPA@ed.gov).

April 11, 2005

Ms. Melody L. McCoy  
Native American Rights Fund  
1506 Broadway  
Boulder, Colorado 80302-6296

Dear Ms. McCoy:

This responds to your June 9, 2003, letter to Victoria Vasques, Director of the Office of Indian Education (OIE) in the U.S. Department of Education (Department), in which you asked for an opinion regarding the release of public school student records to tribal governments under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Your letter was referred to me for response because the Family Policy Compliance Office (Office) administers FERPA and provides technical assistance to ensure compliance with the statute and regulations found at 34 CFR Part 99.

Your letter states that your organization represents the Tribal Education Departments (TEDs) of the Rosebud Sioux Tribe, the Fort Peck Tribes, the Three Affiliated Tribes of the Fort Berthold Indian Reservation, the Jicarilla Apache Tribe, the Native Village of Kiana, and Nulato Village. The attached material indicates that since 1987 the Native American Rights Fund (NARF) has provided legal assistance helping tribes to establish tribal education departments (TEDs) and enact and implement a comprehensive tribal education code to improve the quality of education and educational opportunities for Indian students.

As explained in your letter, tribal governments, particularly TEDs, need access to the attendance records, grades, and test scores of Indian students "to track the educational needs and progress of their students and to guide tribal undertakings to improve education." Since the vast majority of tribal students attend State public schools, "the public school records are essential to tribal efforts to monitor and advance Indian education." Most school districts provide student records to the tribes as requested, but at least one school district, Winner School District #59-2 in South Dakota, has refused to disclose the information to tribal governments without parental or student consent. As a result, the tribes have determined that "FERPA stands as a major obstacle to tribal access to public school records and other information on tribal students."

In particular, you understand that FERPA "generally allows *federal, state, and local* education agencies, authorities, and officials access to records and other personally identifiable information kept by, among other institutions, the state public schools, without the advance consent of

parents or students” citing 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.31(a). You suggest, however, that it is “unclear whether Congress intended *Indian tribes* to be included among these governmental entities for whom advance parental or student consent is not required to access these records.” (Emphasis in original.) In any case, your letter concludes that “[r]equiring advance parental or student consent as a condition to tribal access to the records does not allow regular and reasonable access by tribes to the needed information. It also places sovereign tribal nations in a lesser position than the state and local governments for whom advance consent is not required.”

You suggested further that these “impediments to improving education for tribal students caused by FERPA have been recognized by tribes for some time.” The Rosebud Sioux Tribe, through NARF, first brought this matter to the attention of David Beaulieu of OIE in January 1999 (via email), and then again in August 2001, when NARF contacted Lorraine Edmo in OIE about the matter.

The Rosebud Sioux Tribe’s “UPDATE on the need for Amendments to [FERPA] regarding student records and tribal governments,” which was prepared for the National Indian Education Association’s Legislative Impact Week in March 1999, noted that over 80 percent, or 3,500 of the Tribe’s elementary and secondary school students are served by several public school districts located on or near the Tribe’s reservation. The UPDATE explained the problem this way:

The Tribe’s Education Department prepares an annual State of Reservation Education Report. For the Report, the Tribe requests from the school districts copies of the records kept regarding matters such as the attendance, achievement, and educational attainment levels of tribal students. The Report is used to track tribal students’ progress and to guide the Tribe’s education improvement efforts.

In general, the schools have complied with the Tribe’s requests for student records. However, at least one school district has recently asserted that [FERPA] is an obstacle to providing the Tribe with student education records or personally identifiable information about the students unless parent or student consent is obtained in advance.

....

In October 1998, the Rosebud Sioux Tribe submitted testimony on this matter to the National Advisory Council on Indian Education. The Tribe also brought the matter to the attention of the National Indian Education Association (NIEA) and the national Congress of American Indians (NCA), and asked those organizations to support its efforts to clarify FERPA on this point. By Resolutions #98-07 and #MB-98-0004, respectively, the general memberships of both NIEA and NCAI pledged their support.

In January 1999, the Rosebud Sioux Tribe brought this matter to the attention of the [Department] and asked it to consider requesting Congress to clarify FERPA to allow public schools to release tribal student records and information without advance parent or student consent to Tribes. The Department of Education is currently reviewing and

considering this request.

Regardless of the response of the Department of Education, the Rosebud Sioux Tribe will continue to pursue this matter until tribes are treated fairly as sovereign nations with respect to the school records of tribal students. The Tribe considers these records to be essential to its efforts to monitor and improve Indian education.

It is not clear from Paul E. Jensen's August 18, 1998, letter on behalf of Winner School District #59-2 exactly what information the tribe requested or what information the district refused to provide: Mr. Jensen stated:

Under both applicable state and federal laws, much of the information which you have requested is simply not available for public dissemination. Various privacy enactments prevent the disclosure of a substantial amount of data, and for that reason the Winner School District cannot comply with your request for information.

Please understand that the District makes every attempt to cooperate with all units of local government, whether it be city, county, or tribal entities. We will also cooperate with your office in providing the information compiled for our regular annual survey of students in our District who live on reservation lands. Any other regularly disseminated statistics of the district will also be available to you, as it would be to any citizen who requests it. But to go beyond that is simply not within the purview of this non-reservation, state-chartered public school district, and therefore the District will be unable to provide the information which you have requested.

Mr. Jensen's letter does not mention FERPA specifically by name.

Subsequent to Mr. Jensen's letter, testimony of the Rosebud Sioux Tribe in support of amending FERPA before the National Advisory Council on Indian Education, in October 1998, indicated that "several of the over 90 other tribal education departments in this country have had similar responses from public schools when seeking records and information about tribal students." More recently, on September 27, 2004, you discussed this issue further with members of my staff, along with Ms. Vasques and other OIE personnel, and indicated that while many school districts currently provide information to TEDs as requested, some districts remain a problem. You also asked for the Department's support for appropriate statutory amendments to FERPA should we determine that these disclosures are not permitted under current law without prior written consent.

As explained below, we have conducted a detailed review and analysis of applicable legal requirements and found no legal authority on which to conclude that educational agencies and institutions may disclose education records to TEDs without the prior written consent of the students' parents.

FERPA protects the privacy interests of parents in their children's education records. It applies to any "educational agency or institution" that receives funds under a program administered by the U.S. Department of Education. 34 CFR § 99.1. This includes virtually all public elementary

and secondary school districts in the United States. Under FERPA, parents have the right to inspect and review the student’s records and to seek to have them amended if they are inaccurate, misleading, or in violation of the student’s rights of privacy. 34 CFR Part 99, Subparts B and C. (When a student becomes an “eligible student,” that is, one who is 18 years of age or attends a postsecondary institution, all FERPA rights transfer from the parents to the student. 34 CFR §§ 99.1, 99.5.)

In addition to parents’ rights to inspect and review and to seek to amend their children’s education records, FERPA also provides that an educational agency or institution may not have a policy or practice of disclosing education records, or personally identifiable information from education records, without the prior written consent of the parent or eligible student, except as provided by law. 20 U.S.C. § 1232g(b)(1) and (2). Specific requirements for written consent are set forth in 34 CFR § 99.30, and the exceptions follow in § 99.31.

“Education records” are defined broadly 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 (“Education records”). (There are five exclusions from the definition not relevant to this discussion.) The attendance records, grades, and test scores of tribal students requested by TEDs clearly fall within the definition of “education records” that are protected under FERPA.

One of the exceptions to the prior written consent requirement in FERPA allows an educational agency or institution to disclose education records to “other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.” 34 CFR § 99.31(a)(1)(emphasis added). For example, under this exception a school may disclose education records, without parental consent, to officials of the local educational agency (LEA) or school district that “directs and controls” the school provided that district officials have a “legitimate educational interest” in the information. See 34 CFR § 99.1(a)(1) for description of “educational agency.” It does not allow a school or school district to disclose education records to officials of a different agency or organization, such as a tribal education department, that does not govern the schools attended by the students whose records are disclosed. While the Secretary of Education may treat a tribal government as a “local educational agency” for purposes of awarding grants under 20 U.S.C. § 7422, there is no support in the Indian Education provisions of the No Child Left Behind Act for concluding that “grantee” status also confers upon tribal educational authorities full rights, privileges and obligations as “local educational agencies.”

Likewise, an educational agency or institution may also disclose education records without consent to “officials of another school, school system, or institution of postsecondary education” where the student seeks or intends to enroll. See 34 CFR § 99.31(a)(2). However, tribal education departments that do not receive Federal education funds and that do not have students in attendance fail to meet the definition of an “educational agency or institution” and, therefore, cannot be the recipient of education records under this exception. See 20 U.S.C. § 1232g(a)(3).

Section 99.31(a)(3)(iv) of the FERPA regulations allows disclosure of education records without consent to “authorized representatives of ... State and local educational authorities” for purposes

of an audit or evaluation of Federal or State supported education programs, or the enforcement of Federal legal requirements that relate to those programs. (See also § 99.35, which limits the redisclosure of education records under this exception and requires destruction of information as specified.) However, we are unable to conclude that TEDs qualify as State educational agencies or other State or local educational authorities, especially given that their requests for records are not in connection with an audit or evaluation of a Federal or State supported education program or to enforce Federal requirements related to those programs. Further, since TEDs are not conducting studies for or on behalf of a State or local educational agency, the exception in § 99.31(a)(6) of the FERPA regulations does not apply.

We recognize the importance of these initiatives and look forward to working with NARF and with tribal authorities to in seeking a possible solution to assist in achieving these goals.

Sincerely,

/s/

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

cc: Victoria Vasques, Director  
Office of Indian Education