

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.

April 11, 2005

Kurt A. Steinhaus, Ed.D.
Deputy Secretary of Education
New Mexico Public Education Department
300 Don Gaspar
Santa Fe, NM 87501-2786

Dear Dr. Steinhaus:

This responds to your letters of July 1 and November 2, 2004, in which you asked for guidance regarding the release of public school records to the Division of Dine Education of the Navajo Nation under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. 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 July 1 letter included a letter dated January 23, 2004, from Rebecca Izzo-Manymules of the Office of Educational Research and Statistics, Division of Dine Education (DDE) to Betty Kee, Director of Data Collection and Information Systems, New Mexico Department of Education (NMDOE), a copy of which I had received previously from Arlene Strumor, Deputy General Counsel for NMDOE. Ms. Manymules explained that her office has been working for some time with NMDOE to collect and report data on Indian students for purposes of educational research, including research to meet the reporting requirements of the No Child Left Behind Act, and that the partnership between DDE and NMDOE "is only a benefit for students on the Navajo Nation." (The Resolution of the Education Committee of the Navajo Nation Council, ECAP-25-03, included with Ms. Manymules' letter explains that the purpose of the Office of Educational Research and Statistics is to provide "quality statistical analysis on the status of education" and that the data will allow DDE "to conduct statistical data analysis of the academic performance of students on the Navajo Nation.")

Ms. Manymules' letter indicates that in 2000 DDE "received a census of five school districts with a high population of Native American students totaling 14,055 students" and since then has asked NMDOE for additional and updated data, "including school and student academic achievement and demographic data." DDE, which is now asking for data for the previous three school years (2000-2001 through 2002-2003), explained that school and student level data are needed with "variables that link to the classroom and student, such as Special Education, Gifted and Talented, Limited English Proficiency, Free and Reduced Lunch (Social Economic Status), Ethnicity, Primary Language, etc." According to DDE, data collected from NMDOE "will be

secured in the Navajo Education Information System, a database housed within [DDE]. An overall data analyses will be conducted to arrive at a valid statistical and methodological research outcome for the Navajo Nation.”

Ms. Manymules also described meetings with NMDOE, in which the parties discussed a “data confidentiality agreement” that would serve to secure student-identifying information.

According to her letter, DDE has entered into such agreements with the Arizona Department of Education and Utah State Office of Education and wants to conclude a similar agreement with NMDOE because the Navajo Nation expands into all three States. Ms. Manymules included a copy of the fully executed Arizona and Utah agreements, along with a legal opinion from the Navajo Nation’s Office of Legislative Counsel to the Chairperson of the Education Committee regarding whether that Committee could require State public schools to submit student data.

The Data Confidentiality Agreement between the Arizona Department of Education (ADE) and DDE (dated February 13, 2003) provides that DDE may use the “confidential information” provided under the agreement solely for “research to advance the knowledge of Dine education” and will provide ADE with a copy of the completed research study. Neither the “Description of Confidential Information” (paragraph two) nor any other provision in the agreement provided to this Office indicates exactly what information ADE has agreed to provide to DDE. A similar agreement was signed by the Utah State Superintendent of Public Instruction on August 28, 2003.

The May 29, 2003, opinion from the Navajo Nation Council’s Office of Legislative Counsel states that formula grants under Title VII, Part A (Indian Education) of the Federal No Child Left Behind Act that require local educational agencies (LEAs) to periodically assess the progress of Indian students and provide the results to the community served by the LEA would be consistent with providing student achievement data to the Navajo Education Information System (NEIS). The opinion states further that regulations promulgated under the Johnson-O’Malley Act (JOM), 25 U.S.C. § 452 et seq., address the availability of records concerning students served under contracts between the Navajo Nation and eligible public schools that provide educational services to Navajo students. According to legal counsel, “[n]one of the JOM regulations can be fairly interpreted to prohibit the release of this information to the Navajo Nation for purposes of the NEIS.” Finally, the opinion asserts that DDE “certainly qualifies as an eligible recipient of education records” under either the FERPA exception to the prior written consent rule for “other school officials with legitimate educational interests” (34 CFR § 99.31(a)(1)) or to “organizations conducting studies for, or on behalf of, educational agencies or institutions” for specified purposes (34 CFR § 99.31(a)(6)).

More generally, your July 1, 2004, letter on behalf of NMPED shared “the unequivocal State policy as articulated by both the New Mexico Legislature and Governor Richardson with respect to strong and collaborative government-to-government relationships between the State of New Mexico and tribal governments.” You also identified the State’s 2003 Indian Education Act, which emphasizes the State’s “clear and unequivocal policy expectation that [NMPED] partner with tribes to increase tribal involvement and control over schools and the education of students located in tribal communities.” Your follow-up letter of November 2, 2004, notes further that the “proposed agreement is a critical step toward implementation of the Indian Education Act

and is a matter of the highest priority for [NMPED]. The statutorily-created Indian Education Advisory Council continues to emphasize the importance of this agreement and expresses frustration at its delay.” You asked that we respond prior to the start of the State’s legislative session on January 18, 2005, so that NMPED will be in a position to respond to legislative inquiries and possible legislative action.

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 DDE or any other “tribal education department” 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 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 detailed student academic achievement and demographic data requested by DDE 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, as noted in the May 2003 opinion from the Navajo Nation’s legal counsel, 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, a tribal authority, such as DDE, that does not receive Federal education funds and that does not have students in attendance fails 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.) Indeed, this is the basis on which local school districts generally provide education records, without consent, to NMDOE and other State educational agencies under FERPA. However, we are unable to conclude that DDE qualifies as a State educational agency or other State or local educational authority, especially given that DDE’s 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 DDE is 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 the State and with tribal authorities 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
Arlene F. Strumor, Deputy General Counsel, NM Public Education Department