

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.

October 26, 1990

[Letter to Parent]

Dear [Parent]:

This is in response to your letter of September 21, 1990, regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) to the confidentiality of student information concerning HIV/AIDS. This Office administers the implementing regulations for FERPA, a copy of which is enclosed.

FERPA is a Federal law which affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. When a student reaches the age of 18 or attends an institution of postsecondary education, all the rights afforded by FERPA transfer to the student.

Specifically, you asked the following: "Does a public school student with HIV/AIDS have the right to have his medical condition not released to classroom teachers, physical education instructors, secretaries who provide medical treatment to students, or other staff in the school building? Does the answer vary depending on whether the student's medical condition has been recorded in a "student record" under FERPA?" As explained below, records indicating the presence of HIV/AIDS are education records in this case and are, therefore, subject to the requirements of FERPA. Further, although these records are subject to FERPA and the parent or eligible student thus has some control over the disclosure of information from the records, the information may be disclosed without consent under certain specified conditions.

As a threshold matter, the question is whether medical records compiled by educational agencies and institutions are "education records" under FERPA. FERPA defines "education records" as those records containing information directly related to the student that are maintained by an educational agency or institution. 20 U.S.C. 1232g(a)(4)(A). However, "education records" do not include:

records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of

treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. 1232g(a)(4)(B)(iv). Therefore, at an institution of postsecondary education, a student's medical record is excepted from the definition of "education records" only if it is not disclosed to anyone other than to individuals providing treatment. See also 34 CFR 99.3 "Education records" (a). In non-postsecondary educational agencies or institutions, education records of students under 18 years old would always include medical records relating to that student which are maintained by the educational agency or institution or by a party acting for the agency or institution, regardless of whether they relate to treatment. Therefore, these records would be subject to FERPA.

FERPA generally requires consent for disclosure of information from an education record under section 99.30 of the regulations. Section 99.31 lists conditions under which disclosures may be made without consent. Two of those exceptions would apply to the circumstances which you present. Following is a discussion of the relevant exceptions.

One of the conditions which would be applicable to the disclosure of HIV/AIDS information from an education record is presented under section 99.31(a)(1). That section states that information from the student's education records may be disclosed without prior consent "to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interest." In order to disclose under this section, a school's student records policy must contain, under section 99.6(a)(4), the following:

[a] statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information under section 99.31(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest.

The enclosed model policy for use on elementary and secondary school levels contains sample language on pages 4 and 5 that meet this requirement.

Therefore, if an educational agency or institution has specified in its student records policy the criteria for school officials and for legitimate educational interests, and the criteria for "school officials" and "legitimate educational interest" is broad enough to encompass access of the student's HIV/AIDS information to those individuals, then the school may disclose the information to the parties you listed in your inquiry. An educational agency or institution may but is not required to disclose personally identifiable information from education records under FERPA. Although it is advisable that a student records policy include the above specification, disclosure of information pertaining to HIV/AIDS to school officials would also be permissible under the health or safety emergency provision discussed below.

The second exception relevant to the issue is found under section 99.31(a)(10). This section states: "An institution may disclose . . . information from an education record . . . without consent . . . if the disclosure . . . is in connection with a health or safety emergency." The

exception applies when it is "necessary to protect the health or safety of the student or other individuals." 34 CFR 99.36(a). Although educational agencies and institutions may disclose personally identifiable information from an education record without prior written consent under the health and safety emergency exception, the agency or institution making such a disclosure must also fulfill the recordation requirements contained in 34 CFR 99.32 to comply with FERPA.

As reflected in the preamble to the revised FERPA regulations, the initial determination of whether a disclosure is necessary to protect public health is appropriately made by an educational agency or institution. The preamble states, in connection with a comment regarding FERPA's health and safety exception, that "if the institution determined that the circumstances of a situation were such as to constitute a health or safety emergency . . . then the disclosure could be made under the section of the regulations that provides for disclosure in those emergencies." 53 Fed. Reg. 11955 (April 11, 1988). Of course, the Department reserves the right ultimately to determine whether, as a matter of Federal law, the disclosure comes within the exception to FERPA's usual requirement of prior consent.

I trust that the above adequately explains the scope and limitations of FERPA as it pertains to your concern. If you have any further questions, please do not hesitate to contact me again.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosures