

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

Ms. Jean Welch Hill
Attorney
Utah State Office of Education
P.O. Box 144200
Salt Lake City, Utah 84114-4200

Dear Ms. Hill:

This responds to your letter dated July 27, 2004, in which you asked for guidance on the disclosure of information to the Navajo Nation under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. This Office administers FERPA and provides technical assistance to ensure compliance with the statute and regulations codified at 34 CFR Part 99.

Your letter states that the Navajo Nation (Nation) has asked the Utah State Office of Education (USOE) for personally identifiable information regarding Native American students attending Utah public schools. According to your letter, the Nation intends to use this information in order to develop recommendations for schools and the Nation to improve instruction and/or assessment of Native American students.

The Nation asserts that it can receive the data as an "educational agency or institution with a legitimate educational interest" under 34 CFR § 99.31(a)(1). USOE is uncertain whether the Nation's "Department of Education" qualifies as an educational agency or institution under the FERPA definitions, citing 34 CFR § 99.1(a)(1) and (2). In that regard, you explained that the Nation receives funds from the U.S. Secretary of Education and provides educational services to students attending tribal schools. It does not, however, "control, direct or perform service functions for public schools in the area." You asked us whether the Nation meets the definition of an "educational agency or institution" so that USOE can provide personally identifiable student records to the Nation without parental consent under § 99.31(a)(1), and if any other exception to the written consent rule in FERPA applies. You also asked whether USOE may provide data on all native American students or only on members of the Nation.

Your letter also notes that USOE and the Nation are anxious to resolve the issues and that other States with significant Native American populations may have the same questions. You added that USOE is willing to provide the information so long as it complies with FERPA because "Native American student success is a critical issue in Utah and other Western states and tribal analysis of student data could be a crucial component of that success."

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 or USOE may disclose education records to the Nation’s Department of Education 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 Indian students requested by tribal education departments (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, a tribal education department 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 USOE and other State educational authorities under FERPA. However, we are unable to conclude that the Nation’s Department of Education qualifies as State educational agency or other State or local educational authority, especially given that its request for records is 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 the Nation 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