

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).

January 25, 2011

Mr. Mark D. Henss  
Office of University Counsel  
University of Illinois  
Public Affairs Center, Room 578  
One University Plaza, MS PAC 563  
Springfield, Illinois 62307-5407

Dear Mr. Henss:

This is in response to your letter dated May 24, 2010, in which you seek written guidance on the requirements of the Family Educational Rights and Privacy Act (FERPA) as it relates to audit requests that the University of Illinois (University) is receiving from the Office of the Illinois Auditor General. Specifically, the University has received these requests from KPMG LLP, the accounting firm that the Illinois Auditor General has selected and appointed to act as its Special Assistant Auditor with regard to an audit of the University. This Office enforces FERPA, 20 U.S.C. § 1232g, and provides technical assistance to ensure compliance with the statute and regulations, which are codified at 34 CFR Part 99.

You explain that the University would like to comply with KPMG's requests for education records in order to assist them in discharging their auditing responsibilities and to be in compliance with the provisions of the Illinois State Auditing Act, but does not wish to produce education records to KPMG that would result in a violation(s) of FERPA. You provided the following background:

The Board of Trustees of the University of Illinois . . . is a creature of Illinois statutory law. The University was established by the state legislature in 1867 as a "body corporate and politic" pursuant to the terms of the University of Illinois Act (110 ILCS 305/1 et seq).

The Illinois State Auditing Act (30 ILCS 5/1 et seq) describes the role of the Illinois Auditor General in the State of Illinois, provides guidance regarding the auditing of public funds by the Office of the Illinois Auditor General and implements Article VIII, Section 3 of the Constitution of the State of Illinois. . . . Section 5/3-1 of this Act gives the Illinois Auditor General "jurisdiction over all State agencies to make post audits and investigations authorized by or under this Act or the Constitution." Section 5/1-7 of this Act defines a state agency, for purposes of this Act, as encompassing all "universities" and "bodies politic and corporate of the State."

As an educational institution that receives funds under programs administered by the DOE, the University of Illinois is accordingly subject to the jurisdiction and provisions of FERPA regarding privacy of student educational records. As an Illinois state agency (specifically identified as such in the Illinois State Auditing Act), the University of Illinois is accordingly subject to the jurisdiction and provisions of the Illinois State Auditing Act regarding post audits and investigations authorized by the Illinois Constitution or the Illinois State Auditing Act. Herein lies our dilemma (i.e. the University is subject to the provisions of two laws that are, at times, in conflict with each other as to their impact upon the University of Illinois).

As noted above, the Illinois Auditor General has selected KPMG to act as its Special Assistant Auditor with regard to an audit of the University. Section 5/3-12 of the Illinois Auditing Act specifically provides that at the request of the Auditor General (in this case, KPMG, the Special Assistant Auditor), “each State agency shall without delay, make available to the Auditor General . . . any record requested . . . which is related to or within the scope of any audit or investigation under this Act.”

The information requested of the University by KPMG includes student education records. For example, KPMG requests that the University provide it with information/documentation in order to confirm the University’s compliance with the Illinois College Student Immunization Act (110 ILCS 20), and information/documentation in order to confirm the University’s compliance with the federal Higher Education Act of 1965.

FERPA provides generally that an educational agency or institution may not disclose education records, or personally identifiable information from education records, without the prior written consent of a parent or eligible student (i.e., a student who has reached 18 years of age or attends a postsecondary institution). 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30. One of the several exceptions to this requirement permits disclosure without consent of unblocked directory information. See 34 CFR §§ 99.3 (“Directory information”) and 99.37. However, the information that the University would disclose to KPMG is not limited to directory information. 34 CFR § 99.3 (“Directory information”).

Another exception to the prior written consent requirement in FERPA allows an educational agency or institution to disclose education records to authorized representatives of “State and local educational authorities . . . in connection with an audit or evaluation of Federal or State supported education programs . . .” 34 CFR §§ 99.31(a)(3)(iv) and 99.35(a); 20 U.S.C. § 1232g(b)(3) and (b)(5). Section (b)(5) of the statute, which was added in 1979, refers to disclosure to “State and local education officials” for purposes of auditing or evaluating publicly funded education programs. In enacting this provision, Congress stated that the amendment

would correct an anomaly which presently exists in FERPA [interpreting section (b)(3), which refers to “State educational authorities.”] The Department of HEW is now interpreting that legislation as precluding State auditors from requesting records on students in order to conduct State audits of local and State-supported programs. The Department has recognized that this situation hampers States in carrying out necessary audits and evaluations and has recommended that the Committee adopt this amendment.

H.R. Rep. No. 338, 96th Cong., 1st Sess. at 10 (1979), reprinted in 1979 U.S. Code Cong. & Admin. News 819, 824. The plain meaning of State educational authority under 20 U.S.C. § 1232g(b)(3) or (b)(5) is not defined and is in fact ambiguous. That is, the phrase “State and local educational authorities” is not defined in FERPA. As such, 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.

However, the legislative history convinces us to consider the Illinois Auditor General as a State educational authority. Therefore, in addition to the above outlined definition that this office has interpreted the term “State educational authority” to mean, we believe that it also applies to parties that are responsible under State or local law for auditing elementary, secondary, or postsecondary education programs, services, agencies, or institutions in the State. Furthermore, we conclude that due to the fact that the Illinois Auditor General has “jurisdiction over all State agencies to make post audits and investigations authorized by or under this Act or the Constitution” and that “State agencies” encompass all “universities” and “bodies politic and corporate of the State” the University can release education records to authorized representatives of the Illinois Auditor General, a State educational authority, to the extent that the Illinois law authorizes the Illinois Auditor General to conduct the audits in question.

In sum, we believe that this disclosure falls within the limits of §§ 99.31(a)(3)(iv) and 99.35 of the FERPA regulations as outlined above. Note further that disclosures to KPMG under this exception must be protected in a manner that does not permit personal identification of individuals by anyone except the officials listed in § 99.31(a)(3) and must be destroyed when no longer needed for the purposes for which it is disclosed. 34 CFR § 99.35(b). The University must also record the disclosures in accordance with § 99.32 of the FERPA regulations.

I trust that this responds to your inquiry and appreciate the opportunity to assist you in this matter.

Sincerely,

/s/

Ellen Campbell  
Acting Director  
Family Policy Compliance Office