



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

November 6, 2015

Mr. Brian A. Caufield
Director of Labor Relations
University Shared Services Enterprise
P.O. Box 456
Corvallis, Oregon 97339

Dear Mr. Caufield:

This is in response to your letter, dated May 4, 2015, in which you ask about a potential conflict between the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the Oregon Public Employee Collective Bargaining Act (PECBA), a State law that addresses labor practices in Oregon. You state that your office represents the University of Oregon (“University” or “the UO”) and that, pursuant to 34 CFR § 99.61, you are notifying the Family Policy Compliance Office (this Office) of the apparent conflict between FERPA and PECBA. You explain that the University is a respondent in an unfair labor practice complaint brought by the Service Employees International Union Local 503, OPEU (Union), which is pending before the Oregon Employment Relations Board with a hearing date scheduled for November 12, 2015. We note that, by email dated September 29, 2015, the University withdrew its request for technical assistance it had requested in the May 4th letter pertaining to another unfair labor practice filed by an employee to which it was a respondent. Accordingly, we are not addressing that matter.

Specifically, the University is being asked to disclose personally identifiable information (PII) from students’ education records to the Union. This office administers FERPA and is responsible for providing technical assistance to ensure that educational agencies and institutions comply with the statute and regulations codified at 34 CFR Part 99. As explained more fully below, FERPA does not permit the University to non-consensually disclose PII from students’ education records to the Union unless doing so is necessary to comply with any federally guaranteed due process rights of the public school employees, or unless the University receives a lawfully issued subpoena or judicial order and must disclose the information in order to comply with the subpoena or judicial order and otherwise has complied with the requirements in FERPA for making a non-consensual disclosure pursuant to such a subpoena or judicial order.

Issue

In this case, the Union requested copies of documents relied on by the University to support the University’s finding of a violation of its policy prohibiting sexual harassment, which resulted in the administration of discipline against a Union-represented employee. The UO provided a redacted version of its investigation report under Title IX of the Education Amendments of

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1972 (Title IX), because the underlying sexual harassment complaint was filed by a UO student (complainant). The Union followed with a second request for an un-redacted version of the investigation report and the name of the complainant. Citing FERPA, the UO refused to provide the un-redacted investigation report and the name of the complainant. The UO stated to this office that, while the UO did not specifically cite this to the Union, the UO was also concerned that disclosure of the student's name would violate Title IX and other Department guidance.

You asked whether the University would violate FERPA by providing an un-redacted Title IX investigation report or otherwise confirming for the Union the name of the complainant in that case. You further contend the following:

The UO wishes to note that although it did not provide the Union with personally-identifiable information from education records, the UO did provide sufficient information to both the Union and the employees in order to allow the Union a reasonable opportunity to represent their members (the UO's employees) in allegations against them, thereby satisfying due process rights under federal law and applicable University grievance procedures. The information disclosed was information obtained from in-person interviews of relevant student witnesses, rather than the records that contained their personally-identifiable information. In other words, it is not as if the employees had no idea what the allegations were or who filed the complaints; to have proceeded otherwise would have clearly violated the employee's due process rights and violated the UO's obligations under Title IX, the Violence Against Women Act, and applicable University grievance procedures, all of which require that the UO provide both the respondent and complainant an opportunity to be heard.

The PECBA (ORS 243.650 - 243.782), which is administered by the Oregon Employment Relations Board, establishes a collective bargaining process for Oregon's public employers and unions representing public employees. In your letter, you explain that the PECBA "makes it an unfair labor practice for a public employer to refuse to bargain collectively with the exclusive representative." You state that, in this situation, the University is the "public employer" and the Union is an "exclusive representative." You cite *Washington County School District No. 48 v. Beaverton Education Assn. and Paul Nelson*, 5 PECBR 4398, 4405 (1981) in which, according to your letter, the Oregon Employment Relations Board held that a "public employer's refusal to provide information to the exclusive representative that is of probable or potential relevance to a grievance or contract administration is a refusal to bargain collectively in violation of OR. REV. STAT. § 243.672(1)(e)." While we have not thoroughly reviewed the PECBA, to the extent that the law is interpreted to require the non-consensual disclosure of PII from a student's education records to the Union, a conflict would exist between the PECBA and FERPA, unless the disclosure is necessary to comply with any federally guaranteed due process rights of the public school employees or the University receives a lawfully issued subpoena or judicial order and must disclose the information in order to comply with the subpoena or order.

Applicable FERPA Provisions

Postsecondary institutions subject to FERPA may not have a policy or practice of permitting the disclosure of "education records, or personally identifiable information contained therein,"

without the prior written consent of eligible students or meeting an applicable exception to the requirement of consent. 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30(a). An “eligible student” is one who is at least 18 years of age or attends a postsecondary institution. *See* 34 CFR § 99.3. Under FERPA, “education records” means those records that are:

- (a) Directly related to a student; and
- (b) Maintained by an educational agency or institution or by a party acting for the agency or institution.

See 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 “Education records.” We believe that complaints and investigative reports that result from the complaints that are maintained by an educational institution when the student is an alleged victim of harassment and files a complaint with that educational institution are “directly related” to the student complainant because the records document and investigate that student’s allegations of harassment. *See* 20 U.S.C. § 1232g(a)(4)(i) and (ii) and 34 CFR § 99.3 “Education records.” There are six exclusions in the FERPA regulations to the definition of “education records,” none of which appear to apply here. Accordingly, harassment complaints and investigative records resulting from such complaints that are maintained when a student complains of harassment under Title IX are protected as “education records” under FERPA because the records are “directly related” to the student complainant and maintained by the educational institution. *See* 20 U.S.C. § 1232g(a)(4)(i) and (ii) and 34 CFR § 99.3 “Education records.”

The term “personally identifiable information” is defined in the regulations as including, but not limited to:

- (a) The student’s name;
- (b) The name of the student’s parent or other family members;
- (c) The address of the student or student’s family;
- (d) A personal identifier, such as the student’s social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

See 34 CFR § 99.3 “Personally Identifiable Information.”

“Disclosure” means “to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by an means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.” *See* 34 CFR § 99.3.

As previously noted, FERPA provides that PII from students' education records may be disclosed by an educational agency or institution, such as the University, to third parties only with the prior written consent of the eligible student, unless the disclosure meets one of the exceptions to FERPA's general consent requirement. 20 U.S.C. § 1232g(b)(1) and (d). *See also* 34 CFR § 99.30.

One of the exceptions to the prior written consent requirement in FERPA allows "school officials, including teachers, within the agency or institution" to obtain access to education records provided the educational agency or institution has determined that they have "legitimate educational interests" in the information. 20 U.S.C. § 1232g(b)(1)(A); 34 CFR § 99.31(a)(1). Although "school official" is not defined in the statute or regulations, this office has interpreted the term to include a teacher; school principal; president; chancellor; board member; trustee; registrar; counselor; admissions officer; attorney; accountant; human resources professional; information systems specialist; and support or clerical personnel. A school official typically has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

Section 99.7(a)(3)(iii) of the FERPA regulations requires an educational agency or institution to include in its annual notification of rights under FERPA a statement indicating whether it has a policy of disclosing personally identifiable information under § 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. A school must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. If the school does not use physical or technological access controls, it must ensure that its administrative policy for controlling access to education records is effect and that it remains in compliance with the legitimate educational interest requirement in FERPA. *See* § 99.31(a)(1)(ii).

Unions are independent, private legal entities that typically represent a specific teacher's interest rather than perform a task for the educational agency or institution. Because a union's interest is usually different from those of an educational agency or institution, we do not believe union personnel could be considered "school officials" with "legitimate educational interests" under FERPA.

Another provision in FERPA that permits disclosure without consent is a disclosure that is necessary to comply with a lawfully issued subpoena or judicial order. 20 U.S.C. § 1232g(b)(2)(B). In general, a postsecondary institution must make a reasonable effort to notify the eligible student of the subpoena or judicial order before complying with it in order to allow the eligible student to seek protective action, unless certain exceptions apply. *See* 20 U.S.C. § § 1232g(b)(1)(J) , (b)(2)(B), and (j); 34 CFR § 99.31(a)(9) for the requirements for complying with a lawfully issued subpoena or judicial order, as well as the exceptions for the types of subpoenas or judicial orders about which school officials are not required to notify the eligible student. Accordingly, if the Oregon Employment Relations Board has subpoena authority under State law, it could issue a subpoena for the education records and the University could comply with the subpoena by making the disclosure, provided that the University had made a reasonable effort to notify the student complainant and provided the student with sufficient time to seek protective action before complying.

While FERPA does not discuss the due process rights of school employees or students under the United States Constitution, we have indicated that FERPA does not override federally protected due process rights of persons accused of sexual harassment. See “Revised Sexual Harassment Guidance” (January 2001) at p. 22 (available at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>).

With regard to your reference to “directory information” under FERPA, you state that the University refused to provide the Union the student’s name, because doing so would have been disclosing personally identifiable information about a student that is not designated as directory information under the University’s annual notification or student records policy. Please note that even if the name of the student had been properly designated as “directory information,” FERPA would not permit the disclosure. That is because this office has consistently advised that, under FERPA, a school may not disclose the names, addresses, and other “directory information” items that are linked to non-directory information. For example, a school may not disclose “directory information” on all students who were of a certain race or ethnicity or, such as in the case before us, the name of a specific student who is a complainant in a Title IX harassment complaint.

FERPA and Title IX

Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. In 2001, the Department’s Office for Civil Rights (OCR) issued its *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001 Guidance). Subsequently, OCR issued a Dear Colleague Letter on Sexual Violence (2011 DCL) elaborating on this guidance.

With regard to due process rights, the 2001 Guidance stated the following:

A public school’s employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. Furthermore, the Family Educational Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment. Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.

Conclusion

Under FERPA, at the postsecondary level, disclosures of PII from education records must either be made with the student’s prior written consent or must meet one of the exceptions to FERPA’s

general consent requirement. In the case before us, FERPA would only permit the University to disclose to the Union PII from the student's education records, absent the prior written consent of the student complainant, if the disclosure is necessary to comply with any federally guaranteed due process rights or unless the University receives a lawfully issued subpoena or judicial order. In the event of a subpoena, the University would have to make a reasonable effort to notify the student complainant involved and provide the student with sufficient time to seek protective action before complying.

With regard to the Title IX investigation report, FERPA would not permit the University to disclose the un-redacted Title IX investigation report or otherwise confirm for the Union the name of the complainant in that case without prior written consent of the complainant or unless the University receives a lawfully issued subpoena or court order and met the conditions described above. However, if federal due process requirements disclosure of PII from a student's education records, FERPA would not prevent that.

We trust this adequately explains the scope and limitations of FERPA as it relates to your inquiry.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dale King", with a stylized flourish at the end.

Dale King
Director
Family Policy Compliance Office