

August 21, 2000

Mr. David J. Strom, In-house Counsel  
Ms. Stephanie S. Baxter, Senior Associate Counsel  
American Federation of Teachers  
555 New Jersey Avenue, N.W.  
Washington, DC 20001-2079

Dear Mr. Strom and Ms. Baxter:

This is in response to your August 4, 2000, letter, addressed to Deputy Secretary Frank Holleman, in which you asked that the Department interpret the Family Educational Rights and Privacy Act (FERPA) in such a way that universities may disclose to a union representing student graduate assistants who teach undergraduate classes personally identifiable information from the education records of such individuals. I have been asked to respond to your letter to the Deputy Secretary because, as you know, this Office administers FERPA. This also serves to respond to your July 14th letter to this Office, and as a follow-up to our July 19th meeting, on this issue.

You explained in your letter that the University of Oregon (University) and the Graduate Teaching Fellows Federation (GTFF), a union that represents graduate student teaching fellows at the University, have signed an agreement under which the University would disclose certain information regarding graduate teaching fellows to the GTFF. This information includes: name, social security number, department, terms of employment, changes in employment status or rate of pay, home addresses, bargaining unit status, terms of appointment, and major. The agreement provides that addresses disclosed by the University will only be used by GTFF for union business and that social security numbers will only be used for payroll deduction and insurance administration. The agreement further states that "The University will assume no liability for the unauthorized disclosure of information to parties outside the GTFF."

By letter dated April 3, 2000, Melinda W. Grier, general counsel of the University, advised you that based on a September 19, 1999, letter to the University of California from this Office, the University could no longer disclose information from education records of graduate teaching fellows to the GTFF absent prior written consent. In relevant part, we advised in that letter that the records of teaching assistants are education records subject to the provisions of FERPA. We also explained in that letter that when an educational agency or institution chooses to comply with a State law that is in conflict with FERPA, it puts its continued eligibility for Federal education funds in jeopardy. That is, FERPA provides that the Department of Education may not make funds available to any educational agency or institution that has a policy or practice of denying students their rights under FERPA. You stated in your letter to this Office that you disagree with "this construction of the statute as it leaves education institutions in the untenable situation of choosing between complying with FERPA and conflicting state and federal law."

You stated that without information about graduate teaching fellows, the GTFF cannot meet its obligations under State and Federal law, and such individuals will be "deprived of important rights," such as health enrollment information to eligible non-participants and continuation of benefit notices required under COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. 99-272, Apr. 7, 1986, 100 Stat. 82) to teaching fellows who are separated from employment. Additionally, the GTFF would not be able to seek fees to which it is entitled. Finally, you stated that this issue is of concern because such situations exist regarding student graduate teaching assistants and fellows across the country.

You suggested in your letter that this Office interpret FERPA so that the records of graduate teaching fellows/assistants are employment, and not education, records under FERPA. You state that such individuals "are employed not because they are students, but, instead, because the

institution has decided to carry out [its] undergraduate teaching programs using a significant number of graduate teaching fellows rather than professors." You also argued that "the vast majority of public employee relations boards . . . have ruled that graduate student employees are 'employees' entitled to organize and bargain collectively," and, as such, their records should not be subject to FERPA. You alternatively suggested in your letter that this Office expand "directory information" to include: graduate employees teaching status, schedule, rate of pay, bargaining unit status and other pertinent employment information. You suggested that this information could not be considered "harmful or an invasion of privacy if disclosed."

FERPA protects privacy interests of parents in their children's "education records," and generally prohibits the disclosure of education records without the consent of the parent. The term "education records" is broadly defined as all records, files, documents and other materials which:

contain information directly related to a student; and are maintained by the educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 232g(a)(4)(A); 34 CFR § 99.3 "Education records." When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an "eligible student" under FERPA and all of the rights afforded by FERPA transfer from the parents to the student.

FERPA provides limited exemptions from the definition of "education records." FERPA states:

(B) The term "education records" does not include —

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose. . . .

20 U.S.C § 1232g(a)(4)(B)(iii); 34 CFR § 99.3 "Education records" (b)(3) (emphasis added). The FERPA regulations clarify this provision by explaining that: "records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition." 34 CFR § 99.3 "Education records"(b)(3)(ii) (emphasis added).

Thus, FERPA provides a very narrow exemption for records related to an individual's employment from the protections provided by FERPA. This exemption applies to those records related to the employment of individuals who are employed without regard to their status as students. For instance, if a secretary in the president's office takes a course at any given time, her employment records do not become education records because the secretary is not employed as a result of her status as a student. The regulations make clear that if an individual is employed at a school as a result of his or her status as a student, those records **are** education records under FERPA. While you did contend that graduate fellows/assistants are employed out of necessity for the schools at which they work, you did not contend that graduate fellows would be employed if they were not also enrolled as graduate students in a program at such schools.

You further asked that this Office interpret the records of graduate fellows/assistants as "employment records" rather than as "education records" because some public employee relations boards have ruled that graduate student employees are "employees" entitled to organize and bargain collectively. However, whether graduate student fellows/assistants have the right to organize and bargain collectively as employees does not affect whether records regarding such individuals are education records under FERPA. Further, the fact that certain records may be related to an individual's employment does not prevent such records from also being education

records under FERPA. Rather, as discussed above, records regarding an individual's employment at a school **are education records** if the individual's employment is contingent on the fact that he or she is also a student at that school. As stated above, it appears that this is the case with respect to graduate student teaching fellows/assistants.

With regard to your question about directory information, FERPA generally provides that an educational agency or institution may only disclose a student's education records to a third party if the parent or eligible student has given appropriate written consent. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A); 34 CFR § 99.30. FERPA does permit the nonconsensual disclosure of education records in certain limited circumstances that are clearly specified by statute, such as when the information has been appropriately designated as "directory information." 20 U.S.C. § 1232g(b)(1); 34 CFR § 99.31(a)(11). FERPA provides that a school may disclose directory information if it has given public notice of the types of information which it has designated as "directory information," the student's right to restrict the disclosure of such information, and the period of time within which a student has to notify the school in writing that he or she does not want any or all of those types of information designated as "directory information." 20 U.S.C. § 1232g(a)(5)(B); 34 CFR § 99.37(a).

With respect to what information can be considered "directory information," FERPA states:

For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A).

In administering FERPA, the Department recognizes that there are other similar types of information that an educational agency or institution may wish to designate and disclose as directory information. In this regard, the FERPA regulations further define directory information as information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. 34 CFR § 99.3 "Directory information." The regulations then specifically list those items set forth as "directory information" in the statute. The recently amended regulations (published in the Federal Register on July 6, 2000) also state that electronic mail address, grade level, and student status (part-time, full-time, graduate, undergraduate) can be specified as directory information.

This Office has made determinations on various occasions, in response to specific inquiries from school officials or in connection with the investigation of complaints of alleged violations of FERPA, as to whether a particular type of information can appropriately be considered directory information. In so doing, this Office fully considers the relationship of the potential new type of directory information to those types of information clearly specified by statute. For instance, a photograph or an e-mail address are very similar to those types of information listed in the statute. They identify the student or provide a means to contact the student, without disclosing to the individual receiving the directory information any additional data that the student would generally expect to be private or that he or she would perceive as harmful if others had access to it.

Much of the information you have specified cannot be designated and disclosed as directory information because it is not similar to those types of information clearly specified by the statute and because it would be an invasion of privacy if disclosed without consent. Specifically, we find that rate of pay and bargaining unit status cannot be designated and disclosed by educational agencies and institutions as directory information.

Additionally, we note that a social security number, or other identification number, is generally linked to significant amounts of other information about an individual. An individual's social security, or other identification, number is a private identification number, the disclosure of which is generally expected to be controlled by the individual. Therefore, the designation and disclosure of a student's social security, or other identification, number as "directory information" is not permitted under FERPA.

However, we agree with your assertion that a graduate fellow's/assistant's status as a graduate fellow/assistant and his/her teaching assignment may be designated as directory information, should an educational agency or institution so choose. This information is similar to those types of information that are specified by the statute under the definition of directory information and are of a nature of being common knowledge to those who are in the individual's class or who pass by the class. We note that if a school publishes and/or posts the names of teaching fellows/assistants with course selection or other registration information, it should be designating these two items as directory information.

With regard to your concern that FERPA's requirement that educational agencies and institutions comply with FERPA even if that means choosing to not comply with conflicting State law, any other interpretation would render FERPA meaningless in the context of any State law that permitted disclosure of education records outside the scope of FERPA's provisions. Further, with regard to your claim that schools are forced to choose between FERPA and conflicting Federal statutes, we are not convinced that an irreconcilable conflict exists. Generally, in such cases, we begin with the presumption that Congress does not intend two statutes to conflict. Thus, when determining which of two Federal laws controls in an apparent conflict, it is especially important to try to avoid reading them as being in conflict, which Congress presumably does not intend.

The purpose of FERPA is to protect the privacy interests of eligible students in education records. These privacy interests should not be viewed as barriers to be minimized or overcome, but as important public safeguards to be protected and strengthened. Exceptions to the rule of prior written consent under FERPA should be construed narrowly to achieve its statutory purpose — protecting the privacy interests of students. From the circumstances you have presented, a plausible method for sharing personally identifiable information from education records with the union is to obtain the consent of the graduate student fellow/assistant before personally identifiable information is disclosed to the GTFF. Alternatively, the University could provide information to the students on behalf of the GTFF and the graduate student fellows could then submit the required information to the GTFF. Finally, based on the advice we give herein, the GTFF will be able to learn who are graduate teaching fellows through the directory information exception.

As we discussed in our meeting, another option is to seek a legislative amendment to FERPA that would specifically permit the nonconsensual disclosure of information from education records to graduate student teaching fellows/assistants unions. Should you choose to take this step, this Office would, of course, offer any assistance in drafting appropriate language.

Finally, as a matter of note, the agreement between the University and GTFF states: "The University will assume no liability for the unauthorized disclosure of information to parties outside the GTFF." Even if the University could lawfully disclose the information sought by GTFF without consent, this provision in the agreement is not in compliance with FERPA's redisclosure provisions. FERPA provides that a school may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not redisclose the information without the prior consent of the parent or eligible student, unless the redisclosure is on behalf of the educational agency or institution and meets the requirements of § 99.31 of the regulations. 20 U.S.C. § 1232(g) (b)(1) and (b)(4)(A); 34 CFR § 99.33. 34 CFR § 99.33(a)(1) and (b). Further, if this Office determines that a third party has improperly redisclosed information from education records, the educational agency or institution may not allow that third

party access to personally identifiable information from education records for at least five years. 34 CFR § 99.33(e). The redisclosure provisions do not, however, apply to disclosures of directory information.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to the issue you have raised. Please let us know if this Office can be of further assistance to you.

Sincerely,

LeRoy S. Rooker  
Director  
Family Policy Compliance Office