

June 22, 1998

Ms. Linda C.T. Simlick
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Attorneys at Law
601 University Avenue, Suite 265
Sacramento, California 95825-6706

Dear Ms. Simlick:

This is in response to your November 25, 1997, letter to this Office and in confirmation of oral advice given to you by a member of my staff on November 21, 1997. You state that your office represents school districts throughout Northern California and you ask whether the Family Educational Rights and Privacy Act (FERPA) would require a school district to obtain a court order confirming that a subpoena has been "lawfully issued." You state that it was your understanding that such action would be required, but that "the question has been raised that if the subpoena is issued in compliance with California law . . . isn't the subpoena then legally sufficient to be defined as 'lawfully issued', for the purposes of FERPA?" This Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions.

FERPA is a Federal law that 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 records. When a student turns 18 years of age or attends an institution of postsecondary education, the student becomes an "eligible student" and all FERPA rights transfer to the student. FERPA broadly defines the term "education records" as those records that contain information that is directly related to a student and that are maintained by an educational agency or institution or a party acting for the agency or institution.

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. section 1232g(b)(1) and (b)(2)(A); 34 CFR section 99.30. However, FERPA permits the nonconsensual disclosure of education records in certain limited circumstances, such as when the disclosure is made in compliance with a lawfully issued subpoena or court order if the educational agency or institution makes a "reasonable effort to notify" the parent or eligible student of the order or subpoena in advance of compliance. 34 CFR section 99.31(a)(9)(ii).

While FERPA does not specifically define what constitutes a "lawfully issued subpoena", this Office has consistently advised that school districts, in consultation with their counsel, are best able to determine whether a subpoena has been lawfully issued because what would be considered a "lawfully issued subpoena" varies from State to State. However, we note that if a subpoena is issued in compliance with State law, it would be "lawfully issued."

In addition, we note that FERPA's requirement that school districts make a reasonable effort to notify parents or eligible students when education records are disclosed pursuant to a subpoena or court order allows the parent or eligible student to seek protective action from the court, such as limiting the scope of the subpoena. Prior attempts to notify are not required when the disclosure is in compliance with a Federal grand jury subpoena or a law enforcement subpoena if a court has concluded, for good cause shown, that the information furnished in response to such subpoena or court order should not be disclosed. 20 U.S.C. section 1232g(b)(1)(J); 34 CFR ' 99.31(9)(ii).

Section 99.32 of the FERPA regulations generally requires that an educational agency or institution maintain a record of all requests for access to and disclosures from education records;

however, we have determined that such recordation would not be required when the disclosure was made in compliance with a judicial order or subpoena as long as the school successfully notified the parent or eligible student of the order or subpoena in advance of compliance. Further, the recordation requirements at 34 CFR section 99.32 do not apply when disclosure of education records is made in pursuant to a Federal grand jury or law enforcement subpoena if a court concludes that the information furnished in response to the subpoena should not be disclosed to the parent or eligible student.

Additionally, the redisclosure provisions at 34 CFR section 99.33 do not apply to records that have been disclosed pursuant to a court order or lawfully issued subpoena. 34 CFR section 99.33(c). Once an institution determines that the subpoena or judicial order is valid and makes a reasonable attempt to provide advance notice in sufficient time to allow the student to take appropriate action, the institution is not responsible for taking any further action to protect the records against redisclosure.

While a lawfully issued subpoena or court order may compel disclosure of information, FERPA does not require an educational institution to disclose information from a student's education record to anyone other than to the parent of a student to whom the records relate or to the eligible student to whom the records relate. Rather, FERPA permits disclosure of education records without prior written consent in certain limited situations, such as when the records are the subject of a subpoena or court order.

Finally, we have enclosed a copy of the November 21, 1996 final regulations that amended FERPA. The regulations removed section 99.6--the requirement for a student records policy--and revised the annual notification requirements under section 99.7. As a result, school districts must annually notify parents of their FERPA rights, but are no longer required to maintain a student records policy. We are also enclosing a model notification for your review.

I trust that the above information is responsive to your inquiry. Should you have any further questions on FERPA, please feel free to contact this Office again.

Sincerely,
LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure