

August 23, 1999

Dr. Thomas Henry
Executive Director
Wyoming Community College Commission
2020 Carey Avenue, 8th Floor
Cheyenne, Wyoming 82002

Dear Dr. Henry:

This responds to your request for review of the data sharing arrangement between the Wyoming Community College Commission (WCCC) and the seven Wyoming community colleges under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. This Office is responsible for investigating complaints and violations of the law and for providing technical assistance to educational agencies and institutions to ensure compliance with FERPA and its implementing regulations found at 34 CFR Part 99.

Summary Response: As explained below, this Office has determined that Wyoming community colleges may disclose personally identifiable, non-directory information to WCCC's Management Information System (MIS) on a nonconsensual basis to the extent that WCCC is a State educational authority engaged in the audit or evaluation of Federal and State supported education programs. Please note, however, that issues concerning the disclosure or redisclosure of information to the Wyoming Department of Employment under FERPA and the Workforce Investment Act of 1998 and other Federal laws are still under review. We will advise you promptly as soon as we have made a determination on these additional issues.

Mr. Tex Boggs, President of Western Wyoming Community College, first asked this Office to review WCCC's request for data from education records in a letter dated March 9, 1998. Mr. Boggs indicated that the Council of Presidents, which represents the seven community colleges in the State, was concerned about the release of personally identifiable information from education records without the student's prior written consent. Mr. Boggs indicated further that you had circulated among the college presidents Wyoming Attorney General Opinion No. 98-004, which concluded that FERPA did not prevent WCCC from obtaining access to the community college system databases. Your March 2, 1998, letter requested "full and unrestricted data transfer from these repositories" to WCCC.

This Office responded by letter dated June 1, 1998, that it did not have sufficient information to determine whether the release of data by the community colleges to WCCC would comply with the FERPA conditions for nonconsensual disclosure to authorized representatives of State educational authorities or to organizations conducting studies for educational agencies and institutions. As noted in that letter, we were advised only that WCCC wanted to archive the data indefinitely to ensure its availability for future studies.

Immediately thereafter, Ms. Linda Vosika, WCCC Chair, advised this Office by letter dated June 4, 1998, that WCCC would shortly provide for review a formal document that would address the FERPA concerns addressed in our June 1 letter. Ms. Vosika also explained that WCCC is the Statewide coordinating body for the State college system and that it could not meet its core mission without access to unit record data from the colleges. Senior Assistant Attorney General Rowena L. Heckert next advised by letter dated July 17, 1998, that she had reviewed our June 1 letter, the concerns of the colleges, and the most recent draft of WCCC's comprehensive MIS Manual, which addressed those concerns, and requested our evaluation and advice concerning the use of the MIS Manual for the stated purposes.

Ms. Vosika followed-up with a letter and documentation dated July 20, 1998, including a copy of the Wyoming statute that creates WCCC and defines its powers and duties. According to Ms. Vosika's letter, these statutory provisions demonstrate that WCCC is a legitimate State educational authority and that its powers and duties include the improvement of instruction within the meaning of these FERPA exceptions to the prior written consent rule for the disclosure of information from education records. Ms. Vosika also included Working Draft 3 of the WCCC MIS Manual dated July 17, 1998, which was offered to address our concerns that WCCC had not identified a sufficiently specific use for the information by WCCC and that the information would be maintained indefinitely.

Representatives from this Office met with Mr. Steve Butler, WCCC Senior Policy Analyst, on May 13, 1999, to discuss nonconsensual disclosure of information from education records under WCCC's MIS Handbook. At that meeting Mr. Butler explained in more detail the purposes and procedures related to the disclosures from education records sought by WCCC, and we in turn explained to Mr. Butler the requirements of FERPA with respect to disclosures of education records to State educational authorities, in particular the limitations on such disclosures, which are discussed in more detail below.

Your follow-up letter (undated) noted that "[c]hanges suggested at [the May 13] meeting have been implemented" and included a copy of the MIS Handbook (Working Draft 5) for our review, together with the WCCC "Personally Identifiable Data Request Form." Working Draft 5 is dated "July 17, 1998" at the bottom of the title page and "5/18/99" in the upper left corner. Since you indicated that changes discussed at the May 13 meeting have been implemented, we assume that 5/18/99 is the correct date for this document. In addition to review of the MIS Handbook and the overall data sharing arrangement between WCCC and the community colleges, your letter asked this Office to review WCCC's proposed study of student retention and attrition, also as discussed at our May 13 meeting. You included for our information a copy of Wyoming Program Performance Measurement Through Unemployment Insurance Wage Record Follow-Up, A Report to the Workforce Development Division dated March 1999 (WDD Report), and The Status of Statewide Student Transition Data Systems: A Survey of SHEEO Agencies, dated May 1999.

Thereafter, this Office received a letter from Mr. Boggs dated May 24, 1999, in which he states his belief that a Memorandum of Understanding (MOU) between the Wyoming Department of Employment and the various community colleges fulfills FERPA requirements for the nonconsensual release of personally identifiable information from education records. In particular, Mr. Boggs explained that disclosure by the colleges to the Department of Employment is permissible as an organization conducting studies for or on behalf of educational institutions to improve instruction under 34 CFR § 99.31(a)(6), and because the Department of Employment study constitutes the evaluation of a State-supported education program under 34 CFR § 99.31(a)(3)(iii). Mr. Boggs also noted that 80 or 90 percent of the time, the release of personally identifiable information from education records is not necessary to evaluate State-supported programs because data can be extracted from institutional databases in aggregate or non-personally identifiable form. One of the few exceptions to using aggregated data for program evaluation, according to Mr. Boggs, occurs when it is necessary to conduct follow-up studies on students, as proposed under the MOU between the Wyoming community colleges and the State Department of Employment.

Applicable FERPA Provisions

FERPA applies to educational agencies and institutions that receive Federal funds under any program administered by the Secretary of Education, including the seven community colleges required to submit student unit record data to WCCC under the MIS Handbook. See 34 CFR § 99.1. The purpose of FERPA is to protect the privacy interests of parents in their children's education records. FERPA affords parents the right to inspect and review and to seek amendment of those records in certain circumstances, and the right to consent to the release of

personally identifiable information from education records except as specified by statute. See 20 U.S.C. § 1232g(a) and (b); 34 CFR Part 99, Subparts B, C, and D. Once a student becomes 18 years of age or attends a postsecondary institution, the student becomes "eligible" and FERPA rights accorded to parents transfer to the student. 20 U.S.C. § 1232g(d); 34 CFR § 99.5.

The term "education records" is broadly defined under FERPA as:

[T]hose records, files, documents, and other materials which -
(i) contain information directly related to a student; and
(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A), 34 CFR § 99.3 ("Education records.")

As noted above, an educational agency or institution subject to FERPA may not have a policy or practice of permitting the release of personally identifiable information from education records *without obtaining the prior written consent of the parent or eligible student except in several statutorily specified circumstances.* 20 U.S.C. § 1232g(b)(1) and 34 CFR § 99.30, § 99.31.

Further, the agency or institution is required to maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student. 34 CFR § 99.32(a)(1). This includes a record of disclosures to WCCC under the requirements of the MIS Handbook. The record must include for each request the parties who have requested or received information from the record, and the legitimate interests the parties had in requesting or obtaining the information. 34 CFR § 99.32(a)(3).

FERPA also provides that the agency or institution may disclose personally identifiable, non-directory information from an education record *only on the condition that the party to whom the information is disclosed will not redisclose the information to any other party without the prior consent of the parent or eligible student, and the recipients of the information may use the information only for the purposes for which the disclosure was made.* 34 CFR § 99.33(a). FERPA was amended in 1994 to require that in those instances where this Office determines that a third party, such as WCCC, improperly redisclosed personally identifiable, non-directory information from education records in violation of this provision, the agency or institution may not allow that third party access to personally identifiable information from education records for at least five years. 20 U.S.C. § 1232g(b)(4)(B); 34 CFR § 99.33(e).

The purpose of FERPA is to protect a parent's or eligible student's privacy interests in records maintained by educational agencies and institutions. These privacy interests should not be viewed as barriers to be minimized and overcome but important public safeguards to be protected. As such, the preferred method of constructing and operating databases and data exchange systems with personally identifiable information from education records is to obtain the appropriate written consent before information is released or disclosed to the database or system. Under FERPA written consent must:

1. specify the records that may be disclosed;
2. state the purpose of the disclosure; and
3. identify the party or class of parties to whom the disclosure may be made.

34 CFR § 99.30. This Office is available to review any consent form to be used by an agency or institution. The administrative burdens on the agency or institution may actually be reduced by obtaining prior written consent to disclose information because the recordkeeping requirements in § 99.32 do not apply to disclosures made with prior written consent. 34 CFR § 99.32(d)(3).

It should be noted that the prior written consent rule under FERPA applies whether the release of information from education records will be used to make administrative decisions about an individual student or the student's family, or whether the information will eventually be compiled and used in a statistical format that is no longer personally identifiable to the student or family. Any time an agency or institution discloses personally identifiable information from education records, a parent or eligible student must provide prior written consent unless the disclosure is specifically allowed under one of the FERPA exceptions. FERPA regulations provide that "personally identifiable information" includes, but is not limited to a "personal identifier, such as the student social security number or student number." 34 CFR § 99.3 ("Personally identifiable information").

Disclosures under WCCC MIS Handbook

The WCCC MIS Handbook requires community colleges to submit personally identifiable, unit record data on students, including the student's college code; social security number; student identification number; first and last name; date of birth; gender; ethnicity; residency status; original enrollment status; high school code; high school graduation year; transfer college or university; transfer grade point average (GPA); start and current term; credit hours attempted and earned; term and cumulative GPA; program and major; highest previous degree; various test scores; and financial aid status. The Handbook suggests on page 5 that unit record rather than aggregate data is required from the colleges in order to track individual students over time and across institutions and activities, and because "aggregate data systems lack the flexibility to examine relationships among variables and to re-aggregate data should reporting needs change" (quoting the National Postsecondary Education Cooperative).

Disclosure of Directory Information

One of the exceptions to FERPA's prior written consent rule permits the release of information that the agency or institution has designated "directory information." See 20 U.S.C. § 1232g(b)(1) and 34 CFR § 99.31(a)(11). "Directory information" is defined as information contained in an education record that "would not generally be considered harmful or an invasion of privacy if disclosed" and includes 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.

20 U.S.C. § 1232g(a)(5)(A); 34 CFR § 99.3 ("Directory information"). In order to disclose "directory information" without prior written consent, the agency or institution is required to provide public notice to parents and eligible students in attendance of the types of personally identifiable information that has been designated and the parent's or eligible student's right to refuse to agree to the designation of certain information about the student as "directory information." ¹ 34 CFR § 99.37(a). The nonconsensual disclosure of directory information is not subject to the recordkeeping and redisclosure provisions discussed above.

Much of the data required from community colleges under the WCCC MIS Handbook cannot be designated and disclosed or redisclosed as "directory information" under FERPA. As this Office has consistently advised, *any* number used to identify a student, including the student's social security number, is considered "personally identifiable information" that may not be disclosed on a nonconsensual basis as designated "directory information," even where the individual's name is not released with the number. Similarly, grades and test scores, credit hours attempted and earned, ethnicity, and financial aid status is the type of information that may not be designated as "directory information" under FERPA.

In some instances, data sharing systems may operate solely on the basis of directory information, such as a new program for tracking transfer students established by the National Student Loan Clearinghouse, which we discuss below in connection with WCCC's Retention Study. As noted below, State or local educational authorities may establish a data system of personally identifiable, *non-directory* information from education records so long as the information is obtained and maintained in accordance with applicable FERPA requirements.

Disclosure to State and Local Educational Authorities or Organizations Conducting Studies for Educational Agencies and Institutions

As you know, one of the exceptions to the prior written consent rule under FERPA permits disclosure to "authorized representatives of . . . State and local educational authorities" when the disclosure is "in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs." 20 U.S.C. §§ 1232g(b)(1)(C)(i)(III), (b)(3), (b)(5); 34 CFR §§ 99.31(a)(3)(iii) and 99.35(a). Authorities that receive information under this provision must 1) protect the information in a manner that does not permit personal identification of individuals by anyone else; and 2) destroy the information when it is no longer needed for the purposes for which non-consensual release was authorized. 20 U.S.C. § 1232g(b)(3); 34 CFR § 99.35(b).

The phrase "State or local educational authorities" is not defined in FERPA or elsewhere under Federal law or regulation.² This Office has interpreted the phrase to include any entity or person that is responsible under State or local authority for the administration of educational programs and functions, including the supervision, direction, coordination or control of educational activities at the postsecondary, secondary, or elementary level. Based on information provided by WCCC setting forth its statutory powers and duties, we find that WCCC is a "State educational authority" under FERPA.

In particular, WCCC is responsible for overall administration of the program of State support for the community college system; promulgating and adopting rules that will ensure the coordinated operation and maintenance of the State's community college system, including basic audit requirements; reviewing, approving, disapproving, and terminating academic and vocational-technical programs; and establishing an effective management information system for the community college system. Wyoming Community College Code, 21-18-202. Powers and duties of the commission (1997). Under these provisions, nonconsensual disclosure of personally identifiable information from the community colleges to WCCC is permissible under 34 CFR § 99.31(a)(3)(iii) to the extent that the disclosure is part of the audit or evaluation of Federal or State supported education programs and the requirements in § 99.35 of the regulations regarding redisclosure and destruction of data have been met.

The WCCC MIS Handbook at page 6 states that the data collected from the community colleges will be used to "[p]rovide accurate management information to evaluate state supported community college programs and improve instruction." Certain items listed under "Special Studies" and "Strategic Plan Objectives" support this conclusion. Accordingly, Wyoming community colleges may disclose personally identifiable information from education records to the WCCC MIS, without prior written consent, so that WCCC may carry out its responsibilities for evaluating educational programs.

However, the Handbook also suggests that information disclosed to the WCCC system will be redisclosed in ways that may not meet the FERPA requirement for disclosure to State educational authorities as part of the audit or evaluation of Federal or State supported education programs.

Similarly, the Wyoming Report to the Workforce Development Division and accompanying Memorandum of Understanding indicate that WCCC will release personally identifiable information to the Wyoming Department of Employment, or have the community colleges release that information directly to the Department of Employment (as suggested in Mr. Boggs' letter of May 24, 1999), for purposes that may not comply with FERPA requirements for disclosure of

information to State and local educational authorities. As previously noted, these specific issues will be address by separate letter.

FERPA also permits nonconsensual disclosure of information to "organizations conducting studies for, or on behalf of, educational agencies or institutions to . . . develop or administer predictive tests, administer student aid programs, or improve instruction." 34 CFR § 99.31(a)(6); see 20 U.S.C. § 1232g(b)(1)(F). Only representatives of the research organization may have access to personally identifiable information, and the information must be destroyed when no longer needed for the purposes for which the study was conducted. Id.

Based on the information provided, this Office has determined that Wyoming community colleges may disclose personally identifiable, non-directory information from education records *to the WCCC MIS* for purposes of auditing and evaluating education programs, provided that information will be destroyed when it is no longer needed for audit or evaluation purposes. We are still reviewing issues concerning the redisclosure of information by WCCC to the State Department of Employment and other agencies, or the direct disclosure of information to those agencies by the community colleges, and will advise you promptly once we have made a determination.

As noted previously, FERPA provides that where information from education records is disclosed to authorized representatives of State or local educational authorities or officials, or to organizations conducting studies to improve instruction, the information must be destroyed when it is no longer needed for the purposes for which it was collected. See 34 CFR §§ 99.31(a)(6)(ii)(B) and 99.35(b). The WCCC MIS Handbook provides that data from community colleges will be retained for ten years, but we have been unable to locate in the materials that you provided any explanation why it is necessary to retain the data for that period of time. This was one of the items discussed at our May 13 meeting with Mr. Butler, and we ask that you provide us with this information so that we may resolve part of your inquiry.

WCCC Retention Study

Your most recent letter also indicates that WCCC intends to request personally identifiable information from education records in order to "study the retention/attrition rates of students in the Wyoming Community College System." As set forth in your letter, the "end purposes of the study are to identify policy and practice strategies that are effective in reducing attrition, prepare a comparative report on those policies and practices, and through institutional adoption of the most effective practices, reduce student attrition throughout the Wyoming College System." You also explained that this study requires obtaining information regarding students who have transferred to other institutions and that for this purpose WCCC plans to use the National Student Loan Clearinghouse to verify the enrollment status of former Wyoming College System students.

We find that the nonconsensual release of personally identifiable information from community colleges to WCCC for purposes of the retention study is permissible as a disclosure to a State educational authority in connection with the evaluation of a State supported education program, 34 CFR § 99.31(a)(3)(iii), or to an organization conducting studies for an institution to improve instruction, 34 CFR § 99.31(6)(i)(C). As summarized in your letter, WCCC will redisclose only directory information to the National Student Loan Clearinghouse in order to determine whether students have transferred to other institutions as part of this study. (Procedures need to be implemented to ensure that WCCC does not submit directory information for students who have blocked the release of this data in accordance with 34 CFR § 99.37.) This Office has also independently determined that the Clearinghouse is able to provide this information to WCCC through the release of directory information only. In these circumstances, the retention study as outlined in your follow-up letter appears to conform to the requirements of FERPA.

This Office appreciates the opportunity to comment on the applicability of FERPA to the WCCC data sharing program. We will advise you as soon as possible of our determinations in regard to the issues concerning redisclosure of information by WCCC, or direct disclosure of information by

the Wyoming community colleges to the Wyoming Department of Employment and other agencies.

Sincerely,

Mr. LeRoy S. Rooker

Director

Family Policy Compliance Office

cc:

Honorable Barbara Cubin

Ms. Rowena L. Heckert

Senior Assistant Attorney General (Wyoming)

Mr. Tex Boggs

Western Wyoming Community College