

September 27, 2002

Ms. Diane Walker
Director
Judiciary Programs
Kennesaw State University
1000 Chastain Road MB # 0506
Kennesaw, Georgia 30144-5591

Dear Ms. Walker:

This is in response to your email of September 26, 2002, in which Kennesaw State University (University) seeks clarification on certain provisions of the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99. You ask whether certain education records can be disclosed pursuant to a State open records request. Specifically, you state that you have received a media request under the Georgia open records act for disciplinary records relating to incidents that occurred in student housing. You state that the campus law enforcement unit has incident reports, which are open to the public, and that any information relating to disciplinary proceedings, such as sanctions, could be compared to the law enforcement unit records and, thus, reveal the identity of individual students.

FERPA protects eligible students'¹ privacy interests in "education records," which are defined as "those 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)(i) and (ii). See also 34 CFR § 99.3 "Education records." Excluded from the definition of "education records" are records of the law enforcement unit of an educational agency or institution, but only under the conditions described in § 99.8 of the FERPA regulations. Records on a student regarding violations of housing or other regulations maintained by school officials outside of the University's law enforcement unit are protected as "education records" under FERPA because the records are "directly related" to students and maintained by the institution and do not fall under the law enforcement unit exemption to "education records." See 20 U.S.C. § 1232g(a)(4)(i) and (ii) and 34 CFR § 99.3 "Education records."

¹ "Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary institution at any age. See 34 CFR § 99.3 "Eligible student." The rights under FERPA belong to the parents of students under the age of 18 at the elementary/secondary level and transfer to the student when he or she becomes an "eligible student."

FERPA prohibits a recipient of U.S. Department of Education funds from having a policy or practice of nonconsensually disclosing personally identifiable information derived from education records, except in certain statutorily specified circumstances. 20 U.S.C. § 1232g(b); 34 CFR § 99.31. While there are specific statutory exceptions to the prohibition that personally identifiable information from education records may not be released without consent, the FERPA statute does not include a *general* exception for the public disclosure of student disciplinary records. Accordingly, these records may not be disclosed without the prior written consent of the student or students about whom the records relate. 20 U.S.C. § 1232g(b)(1) and (d). See also 34 CFR § 99.30.

In 1998, Congress amended FERPA to, in relevant part, provide the following:

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18, United States Code), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime of offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding--

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

Pub. L. No. 105-244, § 951, 105th Cong., 2nd Sess. (October 7, 1998).

Under this amendment, postsecondary institutions may – but are not required by FERPA to – disclose the final results of a disciplinary proceeding in which the institution determines that the student perpetrator committed a crime of violence or non-forcible sex offense. On July 6, 2000, the Department published in the *Federal Register* regulations implementing this change to FERPA. See specifically § 99.31(a)(14) and § 99.39. Enclosed is a copy of those regulations. You did not indicate whether the University believes that the violations constitute offenses that would, if proven, constitute a crime of violence. If the University believes that the offense would rise to the level of a crime of violence, then FERPA would not prohibit the disclosure of the final results of the disciplinary proceeding. (See the definition of “final results” under § 99.39.)

With regard to the disclosure of a disciplinary record (assuming that the request is *not* within the purview of the amendments to FERPA involving crimes of violence), the school may not disclose the information, even in redacted form, if the information could be traced to the individual student. "Personally identifiable information" includes, but is not limited to, the following information:

- (a) the student's name;
- (b) the name of the student's parent or other family member;
- (c) the address of the student or the student's family;
- (d) a personal identifier, such as the student's social security number or student number;
- (e) a list of personal characteristics that would make the student's identity **easily traceable**; or
- (f) other information that would make the student's identity **easily traceable**.

34 CFR § 99.3, "Personally identifiable information" (emphasis added).

FERPA does not specifically define the term "easily traceable" and whether or not the release of information might be considered easily traceable must be analyzed on a case-by-case basis. If a school reasonably believes that release of information would make the student's identity "easily traceable," then the school should not disclose the information to the requesting party. Where a request asks for a specific student's disciplinary records, then it is reasonable to conclude that the student's identity would be obvious to the requester. However, if the institution of postsecondary education receives a general request for disciplinary records, as long as personally identifiable information (including information that is easily traceable to a student) is redacted, such a release would not be prohibited by FERPA.

Your e-mail indicated that the editor of the school newspaper indicated that a decision of the Georgia Supreme Court supported his position. We are aware that in 1993, the Supreme Court of Georgia concluded that records of disciplinary proceedings of the University of Georgia were "not the type" of records FERPA was "intended to protect." *Red & Black Publishing Company v. Board of Regents*, 427 S.E. 2d 257, 261 (Ga. 1993). We believe that decision is inapposite for several reasons.

On its face, the records sought in that case pertained to organizations, not individual students.² Moreover, the United States Supreme Court recently decided the case of *Gonzaga University v. Doe*, No. 01-679 (June 20, 2002). There, the disclosure at issue pertained to allegations of "sexual misconduct." While the Court ultimately held that FERPA's nondisclosure provisions create no rights enforceable under 42 U.S.C. § 1983, there was no dispute that records regarding student misconduct are subject to FERPA. Since disciplinary records pertain to student misconduct, the United States Supreme Court has, in effect, overturned the decision in *Red & Black*. Further, as noted above, *Red & Black*, which was decided in 1993, was overtaken by Congressional action in 1998 through the enactment of section 951 of Pub.L. No. 105-244. Finally, we note that on June 27, 2002, the United States Court of Appeals for the Sixth Circuit unanimously

² Specifically, the requested records were those of the "Organization Court," which "hears and adjudicates cases involving alleged University rule and regulation violation on the part of fraternities and sororities." 427 S.E. 2d at 260.

affirmed a lower court’s ruling that university disciplinary records are “education records” under FERPA and that disclosing such records without students’ consent constitutes a violation of FERPA. United States of America v. Miami University; Ohio State University, et al., 294 F.3d 797 (6th Cir. 2002). Although we realize that Georgia is not in the Sixth Circuit, this decision is consistent with the Supreme Court’s decision in Gonzaga and would be highly persuasive to the Federal courts in Georgia.

I trust that this explains the scope and limitations of FERPA as it pertains to your inquiry. Should you have any additional questions, please do not hesitate to contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure