

August 13, 2003

Mr. Thomas D. Watkins
Superintendent of Public Instruction
Michigan Department of Education
608 W. Allegan
Lansing, Michigan 48933

Dear Mr. Watkins:

This is to notify you of an apparent conflict between Michigan law and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the resulting violation of FERPA by local school boards in the State. This Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations found at 34 CFR Part 99.

Section 99.61 of the regulations provides that an educational agency or institution that determines that it cannot comply with FERPA due to a conflict with State or local law shall notify this Office within 45 days and include the text and citation of the conflicting law. Mr. Douglas L. Dinning, counsel for the Roseville Community School District Board of Education (Board), notified this Office of the apparent conflict by letter dated February 5, 2003. Mr. Dinning explained that the Board conducted a student expulsion hearing and, in accordance with State law, published minutes of the meeting that identified the student by name, the charge against the student, and the Board's disposition of the matter. The letter suggested that the disclosure of information about the student violated FERPA because the student's parents did not consent. Mr. Dinning indicated that the Board's practice is consistent with the 1982 decision of the Michigan Court of Appeals in Palladium Publishing Co. v. River Valley School District, 321 NW2d 705, 115 Mich. App. 490, which held that a Board's duty to act through its minutes, together with certain provisions of the Michigan Open Meetings Act, MCLA 15.261 et seq., mandate that the minutes identify the disciplined student by name, rather than by student number. The court noted that there were no reported Michigan cases on point and cited a previous opinion by the Michigan Attorney General, 1980 OAG 5362, which reached the same conclusion based on the same legal principles.

Under FERPA, an educational agency or institution may not have policy or practice of permitting the release of education records, or personally identifiable information from education records, without the parent's written consent. 20 U.S.C. § 1232g(b)(1); 34 CFR § 99.30. FERPA applies to any "educational agency or institution" to which funds have been made available under any program administered by the Secretary if the

“educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.” 34 CFR § 99.1. The term “education records” is defined as records, files, documents, and other materials that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for the agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 “Education records.” Based on these provisions, and assuming that public school districts in Michigan receive funds from the U.S. Department of Education (Department), the minutes of a local school board meeting that contain the name of a student and the results of a disciplinary proceeding constitute an “education record” under FERPA.

FERPA provides for several exceptions to the prior written consent rule, including an exception for information that has been designated as “directory information” in accordance with regulatory requirements. 34 CFR §§ 99.3 (“Directory information”) and 99.37. “Directory information” includes a student’s name and other information that would not generally be considered harmful or an invasion of privacy if disclosed. A parent must be given notice and an opportunity to opt out of disclosures of directory information. 34 CFR § 99.37. Importantly, personally identifiable information about disciplinary action taken against a student may not be disclosed as directory information under FERPA because it would be considered a harmful or an invasion of privacy if disclosed.

FERPA allows *postsecondary* educational agencies and institutions to disclose information about certain disciplinary proceedings without prior consent in limited circumstances specified at 34 CFR §§ 99.31(a)(13) and (14). Information about K-12 disciplinary actions may be disclosed without consent only if all personally identifiable information about a student has been removed, including information that would make the student’s identity “easily traceable.” 34 CFR § 99.3 “Personally identifiable information.” FERPA does not specifically define “easily traceable,” and situations regarding disclosures of information that could be considered easily traceable must be analyzed on a case-by-case basis. In making this kind of determination, we generally consider whether a reasonable person in the educational community or a requestor who does not have specific knowledge about the student would be able to identify the student to whom the records relate without substantial, additional effort.

Based on the Michigan law Mr. Dinning cites, it appears that Michigan does not allow school boards to release minutes of disciplinary proceedings without personally identifying the student. As noted above, there are no exceptions to the prior consent rule in FERPA that permit local school boards to disclose the results of a disciplinary proceeding that identifies a student by name, student number, or by inclusion of other personally identifiable information about a student. As such, local Michigan school boards are in violation of FERPA to the extent that they have a policy or practice of

releasing or otherwise making public minutes that contain the name of a student, a student's number, or other personally identifiable information about a student who is referenced in a disciplinary proceeding, without the written consent of the student's parent.

In general, an actual conflict of laws arises if it is impossible for a party to comply with both federal and state law, or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law. Taubman Realty Group Ltd. Partnership v. Norman Mineta , 198 F.Supp 2d 744, 761 (E.D. Va. 2002), *citing* English v. General Electric , 496 U.S. 72 (1990). Based upon our review of Mr. Dinning's letter and applicable law, we have determined that the Michigan Open Meetings Act, as interpreted and applied to the release of the minutes of local school board proceedings, conflicts with FERPA in that it is impossible for a Michigan educational agency or institution to comply with both laws in situations involving student disciplinary proceedings.

As noted most recently in United States v. Miami University, Ohio State University, 294 F.3d 797 (6th Cir. 2002), Congress provided in FERPA that "no funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records" except as provided in FERPA. The court explained that legislation, like FERPA, enacted pursuant to the Constitutional spending power (art. I, § 8, cl. 1) "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 294 F.3d at 808, *citing* Pennhurst State School and Hospital, 451 U.S. 1, 17 (1981) (holding that Congress may fix the terms on which it disburses Federal money to the states, and likening the relationship to a contract where the receipt of Federal monies is conditioned upon a state's compliance with Federal laws). That is, "Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states." 294 F.3d at 808, *citing* Wheeler v. Barrera, 417 U.S. 402, 427 (1974), *modified on another ground*, 422 U.S. 1004 (1975). "Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent." 294 F.3d at 809.

As discussed above, local Michigan school boards violate FERPA to the extent that they have a policy or practice of releasing or otherwise making public board meeting minutes of a disciplinary proceeding that contain the name of a student, a student number, or other personally identifiable information, without the prior written consent of the student's parent. Assuming for purposes of this determination that *all* local school boards follow the Michigan Attorney General's 1980 opinion in this matter, the resulting systemwide FERPA violation would also constitute a breach of the assurances in the consolidated application submitted by your agency to receive Federal funds. Accordingly, the State

must ensure that all local school boards in Michigan comply with FERPA regarding the release of personally identifiable student information in board minutes so that the State may continue receiving Federal education funds.

In achieving compliance with FERPA, there are a number of enforcement options available to the Department, including withholding further payments, issuing a cease and desist order, and recovering funds. See enclosed copy of 34 CFR § 99.67 and 20 U.S.C. § 1234c. The court of appeals in Miami University, supra, also concluded that the United States has the inherent power to sue to enforce conditions imposed under FERPA on the recipients of Federal grants. Miami University, 294 F.3d at 808.

However, this Office is committed to working with your office and with local school boards to achieve voluntary compliance with FERPA. As part of that effort, please report to me within 30 days of the date of this letter on the steps your agency has taken, or will take, to ensure that local school boards in Michigan comply with FERPA requirements as described in this letter, or provide a statement explaining why you believe this action is unwarranted. The address of this Office is as follows:

Family Policy Compliance Office
Office of Innovation and Improvement
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-5901

We look forward to working with you to resolve this issue as expeditiously as possible. Should you have any questions about the assurance of compliance this Office is seeking, please do not hesitate to contact me directly, or Ellen Campbell of my staff, at the address noted above. Additionally, the telephone number of this Office is (202) 260-3887.

Sincerely,
/s/
LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Mr. Douglas L. Dinning, Esq.

Enclosure