

September 17, 1999

Mr. Edward M. Opton, Jr.
University Counsel
The Regents of the University of California
Office of General Counsel
1111 Franklin Street, 8th Floor
Oakland, California 94607-5200

Dear Mr. Opton:

This is in response to your March 15, 1999, letter to this Office requesting our guidance on the University of California's (University) response under the Family Educational Rights and Privacy Act (FERPA) to a subpoena duces tecum that may be issued for certain students' education records. Specifically, the California Public Employment Relations Board (PERB) has served (or will serve) a subpoena duces tecum for "directory information" about the University's teaching assistants. You ask for our advice on the following:

1. Whether the University would violate FERPA by complying with a subpoena that may be issued by the PERB.
2. Whether there is any other provision contained in FERPA that would allow the University to lawfully provide education records to PERB.
3. Whether FERPA allows notice of a court order or subpoena to be made by publication in campus newspapers or on campus bulletin boards, or would individual letters be required.
4. What is the purpose of § 99.61 of the FERPA regulations?

This Office administers FERPA is responsible for providing technical assistance to educational agencies and institutions regarding issues related to education records. As you are aware, FERPA is a Federal law that affords parents and eligible students the right to have access to education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. See 20 U.S.C. § 1232g and 34 CFR Part 99. 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. As explained more fully below, records of teaching assistants are education records under FERPA and may not be disclosed without written consent of the student or unless the disclosure meets one of the exceptions to the prior consent rule under FERPA. Each of your questions is addressed below.

Can the University lawfully comply with a subpoena that may be issued by the PERB?

In your March 15, 1999, letter you state that the PERB may issue a subpoena duces tecum to the University for "the names, departments where employed, and home addresses for several thousand students who are employed in various campus positions, chiefly as teaching assistants". You specifically ask if the University can provide this information under a subpoena for those students who have exercised their right to opt out of the disclosure of "directory information." The PERB wants the information "because it is planning representation elections this Spring at most of the University's nine campuses to determine whether the student employees wish to be exclusively represented by a labor union in their employment relationship with the University."

You indicated in your letter that you are concerned that "compliance with the subpoena duces tecum may violate FERPA." It appears you believe that if the PERB issues the University a subpoena duces tecum, it would not be valid or considered "lawfully issued" because, in your opinion, the PERB may not have the authority under its enabling statute to issue a subpoena for

the teaching assistant's education records. The enabling statute, according to your letter, states that the PERB shall have the authority:

To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of, any employer's or employee organization's records, books, or paper confidential under statute.
Cal. Gov't Code § 3563 (g).

In your letter, you also state that it "does not appear that FERPA conflicts with state or local law under the facts that I have described—instead, the conflict is between FERPA and a directive (and potentially a subpoena duces tecum) issued by a state agency."

As you aware, Ms. Margo A. Feinberg, counsel to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, also sent a letter to this Office regarding the potential subpoena duces tecum. In her letter, dated March 19, 1999, she makes the following statements:

The UAW has filed representation petitions to represent academic student employees in such titles as Teaching Assistants, Readers and Tutors at the University of California campuses. . . . PERB has held several lengthy hearings as to the status of these positions and has determined that they are employees as defined by the Higher Education Employment Relations Act (HEERA) (California Government Code Section 3560, et seq.), and as such have a right to representation.

It is our position first and foremost that any interpretation of HEERA rests with PERB and in certain circumstances the California courts. Therefore, it is not for the Department of Education to evaluate whether PERB's subpoena is legitimate.

We, however, share PERB's view that it has legitimate subpoena power.

As you are aware, 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 specifically includes in the term, *those 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.* 34 CFR § 99.3 (b)(3)(ii). You indicated in your letter that teaching assistants are students in attendance at the University and one cannot be a teaching assistant unless one is a student. Therefore, it is our determination that records maintained by the University regarding teaching assistants are "education records" under FERPA.

This Office is not addressing the question of whether the records of readers and tutors are subject to FERPA because sufficient facts were not presented in either your letter or Ms. Feinberg's letter to enable us to determine whether the readers and tutors are students in attendance at the University. However, to the extent a University employs readers and tutors and their employment is contingent upon their being students in attendance at the University, then the same conclusion as teaching assistants would apply and their records would be considered "education records."

With regard to the disclosure of education records, FERPA generally provides that an educational agency or institution may only disclose a student's education record to a third party if the eligible student has given appropriate written consent. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A); 34 CFR § 99.30. However, FERPA does permit 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. CFR § 99.31(a)(9). A student's decision to be excluded from the disclosure of "directory information" has no bearing on the institution's compliance with a lawfully issued subpoena or court order. That is, an institution may disclose personally identifiable information from education records in compliance with a lawfully issued subpoena or court order regardless whether a student has opted out of the disclosure of directory information (see below).

While FERPA does not specifically define what constitutes a "lawfully issued subpoena," this Office has consistently advised that institutions, 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. In short, we have concluded previously that if a subpoena is issued in compliance with State law, it is "lawfully issued."

Please note that 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 eligible student to whom the records relate. Rather, *FERPA* permits the 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. In addition, unless the subpoena is a Federal grand jury subpoena or other subpoena issued for a law enforcement purpose, and the subpoena contains a provision that the eligible student must not be informed of the existence of the subpoena, the institution must make a reasonable effort to notify the eligible student in advance of compliance with the subpoena. This permits the eligible student to seek protective action from the court, such as limiting the scope of the subpoena.

Is there any other provision contained in FERPA that would allow the University to lawfully provide education records to PERB?

Absent prior written consent, no. As mentioned above, records containing information on teaching assistants are education records under FERPA. FERPA does provide that written consent is not needed if the disclosure concerns information the educational agency or institution has designated as "directory information," under the conditions described in 34 CFR § 99.37. See 34 CFR § 99.31(a)(11). The definition lists items that would not generally be considered harmful or an invasion of privacy if disclosed which includes, but is not limited to: a 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 previous educational agency or institution attended. 34 CFR § 99.3 ("Directory information"). Should a school disclose the names and addresses of its teaching assistants under FERPA's directory information exception, the school would also be disclosing, at the same time, the fact that those students are teaching assistants. Under FERPA, the fact that a student is a teaching assistant is not directory information.

Ms. Feinberg states in her letter, however, that the "University has previously released the names and addresses of teaching assistants in identical proceedings." She lists situations or mechanisms in which she states the names of the teaching assistants, tutors, or readers have previously been disclosed or made public. They include printing the names in the course catalog, posting them to the web page of the University, in the tutorial center, in the departments, on the office doors and mailboxes. She also states that the "individuals when voting in the election release their name as part of the process and obviously assume the University will have to release information to verify if they are currently employees in the bargaining unit." In addition she states: "The University already provides the names and addresses of these academic student employees to other state agencies that cover employment issues, such as the Franchise Tax Board and the Workers' Compensation Appeals Board, as well as to the health insurance providers."

Although Ms. Feinberg states that the University has previously released the names and address of teaching assistants, the nature and circumstances in the situations she describes differ from the disclosure of information to a specific third party, the PERB. Our advice does not relate to the publishing of a teaching assistant's name and address on-campus, action that an individual who is acting as a teaching assistant knows is inevitable as part of his or her teaching curriculum. However, in general, it is our understanding that in circumstances such as those described by Ms. Feinberg, an educational institution would ordinarily have obtained the student's permission to make his or her name and designation as a teaching assistant available to certain students and staff as part of the actual employment application process for teaching assistants.

Also, Ms. Feinberg states that "the University already provides the names and addresses of these academic student employees to other state agencies that cover employment issues, such as the Franchise Tax Board and the Workers' Compensation Appeals Board, as well as to the health insurance providers." We do not have enough information to consider how FERPA applies to these disclosures. For example, we would need to know whether at any point in the employment application process the individual signed a consent form for the release of his or her education records.

As noted previously, records containing a student's name, address, and status as a teaching assistant are considered "education records" because of the teaching assistants' status as students. As such, under the circumstances provided and assuming the absence of any other exception, such as a lawfully issued subpoena, the University would be required to obtain the consent of the teaching assistants prior to disclosing such information to the PERB. No other provisions in FERPA are applicable to the particular circumstances you have presented. However, it appears from a subsequent communication that the University has taken action to overcome the problem of withholding the teaching assistants addresses for those who opted out. We are pleased that it appears you have resolved the issue. Although you did not elaborate on how the situation was resolved, we offer you the following two suggestions as possible solutions or actions the University may want to consider taking in the event it finds itself in a similar situation in the future.

1. The University could add a consent portion to the teaching assistant's application giving the teaching assistants the option of having their names and addresses released to the PERB for the purpose of elections.

OR

2. The University could volunteer to mail or deliver the literature that PERB presumably would like to have provided to the students via their mailing addresses. This would avoid any disclosures of education records to a third party.

Is notice of a court order or subpoena by publication in campus newspapers and on campus bulletin boards sufficient or are individual letters required?

This Office has consistently interpreted FERPA to require that students be notified in advance of the compliance with a court order or subpoena by individual notice. Notice on campus bulletin boards or in campus newspapers would not be adequate to meet this requirement. In contrast, the requirement in § 99.7 of the FERPA regulations that institutions must annually notify students of their FERPA rights may be provided by individual notice, publication in campus newspapers or on campus bulletin boards.

What is the purpose of § 99.61?

In your letter you ask whether the purpose of § 99.61 is to allow this Office to grant exceptions in appropriate cases to the restrictions that the FERPA places on the release of education records. If so, you then ask whether the University may be granted such an exception.

The purpose of § 99.61 is to require an educational agency or institution that determines that it cannot comply with FERPA, due to a conflict with a State law, to notify this Office regarding such conflict. Once notified, this Office reviews the law and any pertinent interpretations made by the State and provides guidance to the agency or institution regarding its applicability to FERPA. The Department has no authority to grant an exception or waiver to any of the provisions in FERPA. In sum, compliance with portions of a State law that conflict with FERPA may jeopardize an educational agency or institution's continued eligibility to receive Federal education funds. FERPA provides that the Department may not make funds available to any educational agency or institution that has a policy of denying parents or students their rights under FERPA. Thus, to the

extent that a conflict does exist between a State law and FERPA, and the agency or institution has a practice or policy of violating FERPA in order to comply with a State law, the agency or institution would be in jeopardy of losing Department of Education funds.

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