

July 11, 2005

Ms. Deborah T. Wilkins  
General Counsel  
Western Kentucky University  
1 Big Red Way  
Bowling Green, Kentucky 42101-3576

Dear Ms. Wilkins:

This responds to your November 8, 2004, request for guidance regarding the disclosure of education records by Western Kentucky University (WKU) to the Kentucky Council on Postsecondary Education (CPE) in accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. You noted that WKU supported a similar request submitted to this Office by Eastern Kentucky University (EKU) in a letter dated February 22, 2002. This Office administers FERPA and is responsible for providing technical assistance to ensure compliance with the statute and regulations, which are codified at 34 CFR Part 99.

Your letter asks for guidance on the following two issues:

- 1) Whether disclosure of the requested information to CPE (as outlined below), without student consent violates FERPA; and
- 2) Assuming that the disclosure to CPE does not violate FERPA, whether further or subsequent disclosure of personally identifiable information to third parties or entities without student consent would be prohibited under FERPA.

You explained that CPE has asked state universities to produce “student-specific final grade information,” including each student’s Social Security number (SSN); first and last name; year of birth; state of origin; number of transfer hours; full or part-time status; whether the student is a first-time transfer; the transfer institution; total number of credit hours; high school identifier; date of high school graduation; declared major; home county and/or address including zip code; courses in current enrollment; audited courses; gender; race/ethnicity; and classification level (freshman, sophomore, junior, or senior). You indicated that CPE does not intend to obtain student consent for the release and cannot identify a specific date when the use of the data will be complete and the data will be destroyed.

As explained more fully below, it is our opinion that these disclosures are permissible under the assumptions and conditions described in this letter.

FERPA applies to an educational agency or institution that receives funds under any program administered by the Secretary of Education. See 34 CFR § 99.1(a). We assume for purposes of this discussion that WKU (like ECU) is an educational agency or institution subject directly to FERPA requirements. Eligible students (i.e., those who have reached 18 years of age or attend a postsecondary institution) have a right under FERPA to inspect and review the student’s education records and to seek to have them amended in certain circumstances. 34 CFR Part 99, Subparts B and C. In addition, an eligible student must generally provide a signed and dated written consent in accordance with § 99.30 of the FERPA regulations before an educational agency or institution discloses education records, or personally identifiable information from education records. Exceptions to this requirement are set forth in § 99.31 of the regulations.

One of the exceptions to FERPA’s prior written consent requirement allows an educational agency or institution to disclose education records to “authorized representatives” of

- (1) The Comptroller General of the United States;
- (2) The Attorney General of the United States;
- (3) The Secretary [of Education]; or
- (4) State and local educational authorities,

34 CFR § 99.31(a)(3), provided the disclosure is in connection with an audit or evaluation of Federal or State supported education program, or for the enforcement of or compliance with Federal legal requirements that relate to those programs. 34 CFR § 99.35(a). Information that is collected under this provision must:

- (1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and
- (2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

34 CFR § 99.35(b).

The phrase “State and local educational authorities” is not defined in FERPA or elsewhere in Federal law or regulations. However, this Office has generally interpreted the term to mean an agency or other party with educational expertise and experience that is responsible for and authorized under State or local law to regulate, plan, coordinate, advise, supervise or evaluate elementary, secondary, or postsecondary education programs, services, agencies, or institutions in the State. (Note that “State or local educational authorities” need not exercise the “direction and control” that characterizes the relationship between an “educational agency” and an “educational institution” under 34 CFR § 99.1(a)(2).)

CPE is a 16 member public agency composed of the Commissioner of Education, a faculty member, a student member, and 13 citizen members. KRS § 164.011. Among its various duties, CPE is required to develop, plan, implement, and revise the strategic postsecondary agenda (with

the advice and counsel of the Strategic Committee on Postsecondary Education); review, revise, and approve the missions of the State’s universities and the Kentucky Community and Technical College System; and ensure that all postsecondary institutions in the state provide cooperatively for an integrated system of postsecondary education by promoting transferability of credits and easy access of information among institutions. KRS § 164.020(1), (2), (4) and (5). CPE leads and provides staff support for the biennial budget process and advises the Governor on recommendations to the General Assembly on appropriations for postsecondary institutions and devises policies for allocation of funds among these institutions. KRS § 164.020(9) and (10).

CPE constitutes the State’s representative agency in all matters of postsecondary education that are not otherwise delegated to one or more postsecondary institutions. KRS § 164.020(21). CPE determines tuition and approves the minimum qualifications for admission to the State postsecondary educational system. KRS § 164.020(8). It defines and approves the offerings of all public postsecondary education degree, certificate or diploma programs; eliminates or makes changes in existing programs; approves the teacher education programs in public institutions; and recommends to the Governor the establishment of new institutions within the State. KRS § 164.020(14), (15), (17) and (20). CPE maintains a uniform financial reporting procedure used by all state postsecondary institutions and procedures for the approval of a designated receiver to maintain student records of specified public institutions that cease to operate. KRS § 164.020(22) and (25). The executive officer of each institution may be required to submit reports to CPE as needed for the effective performance of CPE’s duties. KRS § 164.020(12).

CPE is directed to develop a system of public accountability related to the postsecondary strategic agenda by evaluating the performance and effectiveness of the State’s postsecondary system. KRS § 164.020(3). In that vein, CPE is required to engage in analyses and research to determine the overall needs of postsecondary and adult education in the State and develop and implement a system of accountability for postsecondary institutions that measures educational quality and outcomes; student progress in the postsecondary system; research and service activities; use of resources; other performance or outcomes that support achievement of the strategic agenda, including involvement in quality enhancement of elementary and secondary education; and other indicators as deemed appropriate by CPE. KRS §§ 164.020(6) and 164.095(3). The postsecondary education accountability process requires CPE to “collect information, maintain a comprehensive database, and publish reports on the condition of the postsecondary education system that include but are not limited to student enrollments, utilization of facilities, and the finances of the institutions.” KRS § 164.095(4). Each year, CPE must submit to the Governor and the Legislative Research Commission an “annual accountability report” providing information on the implementation of performance standards and the achievement of performance goals during the prior year. KRS § 164.095(4).

You also provided a memorandum from CPE President Thomas D. Layzell dated September 9, 2004, regarding collection of final grades. Mr. Layzell’s memo states that CPE “currently [collects] final grades for all first-time freshmen for purposes of the high school feedback report” and was ready to move forward, starting with the 2004 fall semester, with collecting final grades as part of the “comprehensive database.” The memo explains further:

Increasingly, we are asked to address factors that contribute to or detract from student success. State leaders want to know what factors contribute to a successful transition from high school to college. Student-specific final grade information is necessary for us to evaluate the relationship of performance in remedial education courses to performance in credit bearing courses, retention, and ultimately to graduation. Final grades also will help determine predictors of success for two-year transfer students. More broadly, final grades will help determine what courses and what performance (grades) in what types of courses (math, writing, general education core, technical courses), for what types of students (minority, first time college goers, adult learners, full/part time) predict success (retention, graduation rate, time to degree, level of learning, transition to the workplace). These questions require student level performance data, more specifically grades, that show the level of success.

In addition, Katherine M. Coleman, then University Counsel for ECU, indicated in her February 22, 2002, letter to this Office that CPE would begin requiring institutions to submit “End of Term Credit Reports” that would include students’ SSNs and final grade data. At that time, a representative of CPE had indicated to ECU that the data would be used as follows:

[to] ... avoid making increasing numbers of specialized grade requests for special cohorts of students. Already we know we currently need or will require grade reports for:

- High school feedback report
- Monitoring the Mandatory Placement Policy
- Validating CATS scores as a predictor of college performance
- Providing the KCTCS [Kentucky Community and Technical College System] feedback report
- Evaluating the KEES [Kentucky Educational Excellence] scholarship program.

With this one data report we can handle these and other coming analysis from here. The alternative would be recurring requests for data in various forms from you.

Our focus will be on statewide issues related to student success: P-12 factors that predict student success in college, success of remedial programs in enabling students to succeed in college, links between adult education programs and college success, links between college performance and employment 1 and 5 years out, links between student performance and civic engagement, alumni satisfaction, employer satisfaction, etc.

Based on our review of statutory authority, we conclude that CPE qualifies as a “State or local educational authority” under §99.31(a)(3)(iv) of the FERPA regulations because it is an agency with educational expertise and experience that is responsible for and authorized under State law to regulate, plan, coordinate, advise, supervise and evaluate postsecondary education programs, services, agencies, and institutions in the State. We conclude further that WKU (and ECU) may

provide CPE with the information requested, without prior written consent, under § 99.35(a) of the FERPA regulations because of CPE's stated purposes, as described in the Layzell memo and Ms. Coleman's letter, of using the information in connection with CPE's evaluation of Federal and State funded education programs.

The Layzell memo noted CPE's commitment to protection and security of the data, as required by Federal and State law, and attached a draft "Data Access Policy" (Attachment A) and a separate "formal document describing the purpose for the data collection and analysis, and detailing [CPE's] commitment to conforming to the federal privacy statute" (Attachment B). We note that many of the security and confidentiality requirements in these policies comply with FERPA requirements, as asserted in section 3 of the Data Access Policy. However, as explained in more detail below, some of CPE's plans for using and redisclosing information in the comprehensive database would fail to comply with the requirements of § 99.35(b) of the regulations (and we are aware of no other exception to the written consent requirement in FERPA that would apply to the disclosure of education records to CPE as requested). Therefore, since WKU is the responsible party for compliance with FERPA, it should not disclose personally identifiable information from education records to CPE without assurances that CPE will not redisclose information in personally identifiable form except in accordance with FERPA requirements.

Under § 99.35 of the FERPA regulations, CPE may not redisclose information from education records it has received from WKU (or any other educational agency or institution), in personally identifiable form, to State health, labor, employment or other non-educational agencies, as suggested in section 3, paragraph 2 of the Data Access Policy, and in material quoted from Ms. Coleman's letter (i.e., "links between college performance and employment 1 and 5 years out, links between student performance and civic engagement, ... employer satisfaction, etc."). As explained in our February 18, 2004, letter to the California Department of Education (available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/ca21804.html>):

Earlier this year, the Department issued guidance regarding whether FERPA permits a State or local educational authority, such as an SEA [State educational agency], to authorize or designate another State agency as its "authorized representative" in order to conduct data matching with the other entity. This memorandum was issued to all Chief State School Officers on January 30, 2003, by former Deputy Secretary William D. Hansen and is available on this Office's website ([www.ed.gov/offices/OII/fpco](http://www.ed.gov/offices/OII/fpco)). The Deputy Secretary's memorandum .... grew out of concern that unlimited discretion to appoint or designate an "authorized representative" for data matching purposes essentially vitiates the specific conditions for nonconsensual disclosure under §§ 99.31(a)(3) and 99.35 and, more generally, FERPA's prohibition on disclosure without written consent. The memo explains that multiple references to "officials" in the statutory text for this exception reflect congressional concern that the "authorized representatives" of a State educational authority (or other official listed in § 99.31(a)(3)) must be under the *direct control* of that authority, which means an employee, appointed official, or "contractor."

In regard to CPE’s use of contractors to perform CPE functions, as noted in section 5.C.6 of the Data Access Policy, the letter explained further:

"Contractor" in this sense means outsourcing or using third-parties to provide services that the State educational authority would otherwise provide for itself, in circumstances where internal disclosure would be appropriate under § 99.35 if the State educational authority were providing the service itself, and where the parties have entered into an agreement that establishes the State educational authority's direct control over the contractor with respect to the service provided by the contractor. Any contractor that obtains access to personally identifiable information from education records in these circumstances is bound by the same restrictions on redisclosure and destruction of information that apply to the State educational authority itself under § 99.35, and the State educational authority is responsible for ensuring that its contractor does not redisclose or allow any other party to have access to any personally identifiable information from education records.

We note also that KRS § 164.283(7) provides that “[a]ll student academic records shall be made available upon request to a public or private junior college from which the individual student was graduated or to a public or private secondary school from which the individual student was graduated.” In that vein, KRS § 164.020(5) directs CPE to “[promote] transferability of credits and easy access of information among institutions” in the State. CPE may permit staff of a postsecondary institution to have access to data from education records that it disclosed to the comprehensive database, as indicated in section 5.C.7.a. of the Data Access Policy. However, § 99.35(b) of the FERPA regulations does not permit CPE to redisclose personally identifiable information from education records to a school previously attended by a student, for example in order to report on a student’s subsequent progress, unless that school qualifies as a “State or local educational authority” that is auditing or evaluating Federal or State supported education programs. Accordingly, WKU may not disclose information from education records to CPE with the understanding that CPE will redisclose information, in personally identifiable form, to other educational institutions.

Finally, CPE’s Data Access policy provides in section D.1 for release of personally identifiable data in five levels of access, including Level 2, which –

allows researchers, education groups, and other parties who express legitimate educational interests to read all records and fields in the database to further the understanding of educational practices, methods, or theory that would be expected through acceptable research practice. Level 2 access will be granted only after approval of a data request form. The CPE will notify institutions when a level 2 data request has been approved for a third party.

Section D.2. provides further that –

Researchers, education groups, and other parties who express legitimate education interests in using personally identifiable data shall submit a Data Request Form that explains what data are requested, and how the data are to be stored, used, maintained, disseminated, and ultimately destroyed.

There is no exception to the prior written consent requirement in FERPA that allows a State educational authority, such as CPE, to redisclose information from education records, in personally identifiable form, to outside researchers, whether or not they demonstrate “legitimate education interests.” Educational agencies and institutions themselves may disclose education records, without prior written consent, to organizations conducting studies for them or on their behalf, for the improvement of instruction and other purposes set forth in § 99.31(a)(6) of the regulations. However, this exception does not apply to a State educational authority that has received information from education records under § 99.31(a)(3) and is subject to the specific limitations on redisclosure of information set forth in § 99.35, as described above. The Department recognizes, of course, the importance of research-based decision making and has outlined a method for removing personally identifiable information from education records, including information that would make a student’s identity “easily traceable,” so that it may be disclosed for education research purposes. See our November 18, 2004, letter to the Tennessee Department of Education on the use of “anonymous” data from education records available at [www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville\\_tn2004.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html).

Finally, please note that WKU is required to comply with the recordkeeping requirements in § 99.32(a) of the regulations with respect to its disclosure of information to CPE. In lieu of recording every single disclosure, this Office has advised that an educational agency or institution may maintain with each student’s records a notice of the annual or other schedule under which personally identifiable information is disclosed to CPE for the purposes specified.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to your inquiry.

Sincerely,

/s/

LeRoy S. Rooker

Director

Family Policy Compliance Office

cc: Joanne K. Glasser, President, Eastern Kentucky University  
Cheryl Harris, University Counsel, Eastern Kentucky University  
Dennis Taulbee, General Counsel, Kentucky Council on Postsecondary Education