

February 16, 1999

Dr. Leslie Cochran
President
Youngstown University
One University Plaza
Youngstown, Ohio 44555-0001

Complaint No. []
Family Educational Rights
and Privacy Act

Dear Dr. Cochran:

This is to advise you of the finding in the complaint filed with this Office by Mr. []. Mr. [] alleged that Youngstown University (University) violated his rights under the Family Educational Rights and Privacy Act (FERPA) when it disclosed his education records in compliance with a subpoena which he believes was issued without giving him sufficient notice. This Office advised you of the allegation by letter October 20, 1998, and by letter dated December 22, 1998, Ms. Sandra L. Denman, General Counsel, responded on behalf of the University.

Specifically, Mr. [] alleged that the University wrote him on June 3, 1998, to advise him of the subpoena for his education records and then released the records nine days later on June 12. He stated that the letter was received at his post office on June 8. Mr. [] was out of town on June 8 and did not return until June 16. Nonetheless, he argues that had he been in town on the 8th, he still would not have had sufficient time to move for an order to quash the subpoena in the four days that remained prior to the disclosure of his records. He also alleged that the subpoena was not lawfully issued because it was "served by US Mail without a Certificate of Mailing."

In her response, Ms. Denman explained that the subpoena was lawfully issued and properly served. In this regard, she states that the subpoena was issued in accordance with Federal Rule of Civil Procedure (Fed. R. Civ. P.) 45 in that Ms. [], the attorney issuing the subpoena, represented the defendant in a civil action pending in a Florida federal court and issued the subpoena out of the federal district court having jurisdiction over the University. She further explains that the subpoena was not served by regular mail and thus a "Certificate of Mailing" was not required. She stated that the subpoena was personally served by a process server, who completed the Affidavit of Service certifying that the subpoena had been served.

Ms. Denman explained that the University was served with the subpoena on June 2, 1998, which requested any and all records that the University maintained on Mr. [], including but not limited to his transcript by June 9, 1998. Because the University was required by FERPA to make a reasonable attempt to notify Mr. [] of the subpoena and to allow him sufficient time to object, the University advised Ms. [], on June 3, that "the documents would not be produced on the date required by the subpoena." Instead, the University advised that provided "Mr. [] made no objection . . . the documents would be mailed on June 12th." She states that a letter was sent to Mr. [] on June 3 notifying him of the subpoena and that "at the end of the day on June 12th, the University had received no objection from Mr. [], his attorney, or any other counsel of record . . .," so the University mailed the records.

Ms. Denman provided this Office with a copy of the June 3 letter to Mr. [] from Ms. Laurie L. Miraglia, Legal Assistant. That letter states the following:

We intend to comply with this subpoena on June 12, 1998 by providing the records requested, to the extent they exist and may be disclosed, to the individual identified in the subpoena. If you wish to object to the release of your records by the University, you or your attorney must file a motion to that effect in the court from which the subpoena was issued. Please send a copy of any such motion to this Office.

FERPA generally requires that prior written consent be provided by an eligible student⁽¹⁾ before education records are disclosed to a third party. 20 U.S.C. § 1232g(b). 34 CFR § 99.30. There are, however, exceptions to the general prohibition on nonconsensual disclosures. One of the exceptions permits the nonconsensual disclosure of education records when the disclosure is made in compliance with a lawfully issued subpoena or court order if the educational agency or institution makes a **reasonable attempt to notify** the parent or eligible student of the order or subpoena in advance of compliance. 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9). This notification is intended to give the parent or eligible student sufficient time to move for an order to quash the subpoena.

From the information that the University has submitted to us, we see no evidence to suggest that the subpoena for Mr. []'s education records was illegally served, as Mr. [] alleges. Mr. [] claims that:

. . . the first clue to the fact that the "Subpoena Duces Tecum was flawed" should have been improper service. The document was served by US Mail without a Certificate of Mailing attached according to the [University]. This is no in accordance with Federal Rules of Civil Procedure and constitutes an invalid service. [Emphasis provided.]

The University explained, however, that the subpoena was personally served by a process server and provided an Affidavit of Service reflecting this. Personal service is a proper means of service.

The University explained, however, that the subpoena was personally served by a process server and provided an Affidavit of Service reflecting this. Personal service is a proper means of service under Fed. R. Civ. P. 45.

Turning to Mr. []'s allegation that he was not provided sufficient time to move to quash the subpoena, given the totality of the circumstances in this case, we do not find that the University violated FERPA. Mr. [] asserts that "the normal time to respond to a discovery demand is 30 days." However, under Fed. R. Civ. P. 45, a subpoena duces tecum sets forth a time for compliance (which can be far less than 30 days) for the person who is or the entity that is commanded to produce documents. Further, under Fed. R. Civ. P. 45, there is a maximum of fourteen days after service of the subpoena for the recipient of the subpoena to serve written objections to the subpoena.

FERPA does not define what constitutes sufficient time to allow a parent or eligible student to move to quash a subpoena and this Office has not issued a per se rule on what is a sufficient amount of time in this context. Whether or not a school makes a reasonable attempt to notify a parent or eligible student in advance of compliance with a subpoena is considered on a case-by-case basis. A reasonable attempt to notify can be a letter via the U.S. mail.

Because we consider each complaint on a case-by-case basis, we look at the totality of the circumstances to determine if the time period provided to the eligible student or parent was reasonable. Factors that we will consider include: (a) the time period that an educational agency or institution was given to comply with the subpoena from the date the subpoena was served; (b) whether this time period for compliance was reasonable, considering the urgency of the issuer's need for the subpoenaed documents and the educational agency's obligation under FERPA to attempt to notify the parent or eligible student;⁽²⁾ (c) whether the educational agency has made a

good faith effort under FERPA in its attempt to notify the eligible student or parent of the subpoena in advance of compliance with it⁽³⁾; (d) when and how the educational agency attempted to notify the eligible student or parent of the subpoena duces tecum and whether the parent or eligible student was given sufficient time to move for an order to quash the subpoena.

In this case, we note that the University received the subpoena duces tecum in Ohio at 4:00 p.m. on Tuesday, June 2, 1998, and that the subpoena commanded that the University produce documents in Florida within 7 days, that is, by 10:00 a.m. on Tuesday, June 9, 1998. In consideration of the second factor, from the evidence presented to us, the University determined that the time period that the party issuing the subpoena gave to the University to produce Mr. []'s education records was too limited. As noted above, the University was given less than seven calendar days both to try to notify Mr. [] (a Florida resident) of the subpoena for his education records and to comply with the subpoena. The University has not presented any evidence to this Office showing why compliance with the subpoena in the seven day time period was necessary. In looking at the efforts made by the University to object to that time period for compliance, we note that the University requested from the party issuing the subpoena an additional three business days to comply with the subpoena. On June 3, 1998, the University promptly contacted by fax and regular mail the attorney who had issued the subpoena. The University noted that it had received the subpoena and that it had to make a reasonable effort under FERPA to notify Mr. [] of the subpoena. The University stated that if Mr. [] did not object to the subpoena, then the University would comply with it on Friday, June 12, 1998. Therefore, on June 3, 1998, the University had nine days both to try to notify Mr. [] and to comply with the subpoena. Although the University could have requested even more time before complying with the subpoena, the University did secure some additional time for compliance.

The evidence shows that the University made a good faith effort to comply with FERPA . On June 3, 1998, the University promptly notified Mr. [] by US mail that it had been served with a subpoena for his education records. The letter informed Mr. [] of the University's intention to comply with the subpoena on June 12, 1998. Additionally, it informed Mr. [] that he could move to quash the subpoena in the court that had issued it.

Finally, turning to the fourth factor, the purpose for which the University was required by FERPA, before complying with the subpoena, to attempt to notify Mr. [] is so that, in the event that the notification occurred, Mr. [] would have had sufficient time to move to quash the subpoena. A reasonable attempt to notify Mr. [] was made by the University when on June 3 it mailed Mr. [] the letter of notification.

In this case, on Wednesday, June 3, 1998--the day after the University had been served with the subpoena--the University promptly attempted to notify Mr. [] of the subpoena duces tecum by regular mail and informed Mr. [] that the University would comply with the subpoena on Friday, June 12, 1998. Assuming that the U.S. Mail would take two or three days, the University reasonably could have expected Mr. [] to receive the notification by Friday, June 5 or Saturday June 6, 1998. Thus, the University reasonably could have expected that, if Mr. [] had received the University's notification letter, he would have had six or seven days in which to file an out-of-state motion to quash the subpoena and to notify the University that he had done so. Significantly, Mr. [] did not contact the University during this timeframe. Given these factors, we find this amount of time to be sufficient.

In this regard, Mr. [] indicates that the University's letter did not arrive until approximately 2:00 p.m. on June 8, 1998. Furthermore, because Mr. [] was on travel until Tuesday, June 16, 1998, his mail was held at the local post office. There is no evidence that the University knew that Mr. [] was on travel when it mailed the June 3 letter of notification, and the University is not responsible for Mr. []'s not receiving his mail between June 8 and June 16. Furthermore, the University cannot be held responsible for the fact that the US mail did not deliver the letter to his address until June 8, thus leaving him four days to move to quash the subpoena should he have been in town.

Weighing all of the above factors, this Office finds that the University did not violate FERPA as Mr. [] has alleged.

Although we do not find that the University violated FERPA in this instance, we encourage educational agencies and institutions to strive to provide a sound and sensible time period to allow a parent or eligible student to take action to quash a subpoena, particularly where a subpoena duces tecum has been issued by a court from a state other than the one in which the parent or eligible student resides. Further, while regular mail is a normal means of notification, we also encourage educational agencies and institutions in an effort to notify students before compliance with a subpoena, to consider using certified mail, telephone, or facsimile as appropriate supplemental means of notification.

Finally, we note that the FERPA regulations were amended in November 1996. The final regulations, a copy of which is enclosed, removed § 99.6--the requirement for a student records policy--and revised the annual notification requirements under § 99.7. This means that while schools must annually notify students currently in attendance of their FERPA rights, they are no longer required to maintain a student records policy. Some of the information required to be in the policy will now appear in the notification. In an effort to assist you with ensuring that the University's notification is in compliance with FERPA, we are enclosing a model notification which meets the new requirements of § 99.7. Additionally, we are closing this complaint and will so notify Mr. [] by copy of this letter. Thank you for your cooperation with regard to this investigation.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

cc:

Mr. []
Ms. []

Footnotes:

1. When a student reaches the age of 18 or attends an institution of postsecondary education, that student is deemed "eligible" and all rights afforded by FERPA transfer from the parents to the student. 20 U.S.C. section 1232g(d); CFR 99.3 "Eligible student."

2. If we conclude that the time period for compliance was insufficient, then we will look at the efforts made by an educational agency to object to or to move to quash the subpoena in order to allow for a sufficient time to notify the eligible student or parent.

3. If an educational agency learns that an eligible student or parent has moved to quash a subpoena duces tecum, the educational agency would not show good faith if it then produced the subpoenaed records without being ordered to do so.

