



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INNOVATION AND IMPROVEMENT

Ms. Elvira Strehle-Henson
Associate University Counsel
University of Colorado at Boulder
203 Regent Administrative Center, 13 UCB
Boulder, Colorado 80309-0013

FEB 11 2005

Dear Ms. Strehle-Henson:

This is to respond to your November 22, 2004 letter on behalf of the University of Colorado at Boulder (University), stating that you believe there may be a conflict between Colorado law and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. 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 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. You stated that Colorado Criminal Code § 18-8-115 requires the University to report suspected crimes to law enforcement authorities. In addition, § 18-05-104.5 states that it is a crime to use a forged academic record to seek employment, admission to an institution of higher education, or financial assistance. You further stated that the University has a reasonable belief that a currently enrolled law student (the Student) deliberately provided falsified versions of her academic transcript to prospective employers and the School of Law's career services office. Based on these considerations, the dean of the School of Law notified the University's campus police of this "apparent crime," in compliance with § 18-8-115, "Duty to report a crime." You also stated that the student in question voluntarily provided copies of her original unaltered transcript, as well as the altered version, to the campus police when requested to present herself for an interview in this matter.

FERPA generally requires that an educational agency or institution obtain written consent before disclosing education records or personally identifiable information from education records. 34 CFR 99.30 and 99.3. FERPA defines "education records" 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)(A); 34 CFR 99.3. Accordingly, FERPA applies to the disclosure of tangible records and of information derived from tangible records. FERPA does not

protect the confidentiality of information in general, and, therefore, does not apply to the disclosure of information derived from a source other than education records, even if education records exist which contain that information. As a general rule, information that is obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA. Cf. Kline v. Department of Health & Human Services, 927 F.2d 522 (10th Cir. 1991)(Privacy Act); Thomas v. Department of Energy, 719 F.2d 342 (10th Cir. 1983)(Privacy Act); Savarese v. Harris, 620 F.2d 298 (5th Cir. 1980)(Privacy Act), cert. denied, 449 U.S. 1078 (1982).

However, this general rule does not necessarily apply where the individual who discloses information about a student based on personal knowledge or observation had an official role in making a determination that generated a protected education record. Cf. Bartel v. Federal Aviation Administration, 725 F. 2d 1403, 1407-1411 (D.C. Cir. 1984)(Privacy Act); Kassel v. Veterans' Administration, 709 F.Supp. 1194, 1201 (D.N.H. 1989). For example, under FERPA a teacher may not disclose a grade that the teacher issued to a student merely because the teacher has personal knowledge of the grade. Similarly, under FERPA a principal who took official action to suspend a student may not disclose that information absent consent or some other exception permitting disclosure.

FERPA excludes from the definition of education records those records that are law enforcement unit records. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 CFR § 99.3 “Education records” (b)(2). Law enforcement unit records are defined as:

those records, files, documents, and other materials that are --

- (i) Created by a law enforcement unit;
- (ii) Created for a law enforcement purpose; and
- (iii) Maintained by the law enforcement unit.

34 CFR § 99.8(b)(1).

In your letter you stated that the dean of the School of Law notified the campus police of the Student’s alleged forgery, but you did not state whether he obtained this information from an education record. As stated previously, the general rule is that information obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA. If this rule applies, based on the explanation provided above, then the disclosure would not violate FERPA.


In addition, § 99.31(a)(1) of the FERPA regulations provides that an educational institution may permit a teacher or other school official to obtain access to a student’s education records without the written consent required under § 99.30 if the institution has determined that the individual has a legitimate educational interest in the information. If the institution has a policy of disclosing information to school officials without consent

under this exception, it must also notify Students each year of the criteria it uses to determine who constitutes a school official and what constitutes a legitimate educational interest. 34 CFR § 99.7(a)(3)(iii). Thus, FERPA would permit the University to disclose information from the Student's education records to the campus police if the University complies with these requirements. However, education records and personally identifiable information in education records which are maintained by the law enforcement unit do not lose their status as education records and remain subject to FERPA, including the disclosure provisions of §99.30, while in the possession of the law enforcement unit. 34 CFR § 99.8(c).

Furthermore, FERPA's redisclosure provisions apply to education records disclosed to third parties by educational agencies and institutions. 34 CFR § 99.33. Specifically, a school may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not redisclose the information without the prior consent of the student, unless the redisclosure is on behalf of the educational agency or institution and meets the requirements of § 99.31 of the regulations. 34 CFR § 99.33(a)(1) and (b). Accordingly, FERPA generally would not permit a law enforcement unit that maintains an education record to redisclose it to a law enforcement authority outside the institution, unless the Student provided prior written consent. In addition, § 99.31(a)(9) of the FERPA regulations permits disclosure of education records without prior written consent in response to a judicial order or lawfully issued subpoena. A school first must determine that the subpoena or judicial order is valid and make a reasonable attempt to provide advance notice in sufficient time to allow a student to seek protective action.

Thank you for contacting this Office regarding your inquiry. I trust this information is helpful.

Sincerely,


for LeRoy S. Rooker
Director
Family Policy Compliance Office