UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INNOVATION AND IMPROVEMENT

Christine Helwick, Esq.
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MAR 3 2005

Dear Ms. Helwick:

This responds to the issues raised in your letter of September 1, 2004, and in our September 10, 2004, teleconference that included representatives of the University of California (UC) and the California Community Colleges (CCC), about the disclosure of education records to the California Postsecondary Education Commission (CPEC) in accordance with 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 ensure compliance with the statute and regulations codified at 34 CFR Part 99.

Your letters indicate that each year the California State University (CSU) and UC provide CPEC with "raw enrollment and other data, with all personally identifiable information removed." CSU and UC previously utilized a Memorandum of Understanding to provide CPEC with students' social security numbers (SSNs) "in those instances where a specific research function has been identified, that would have fit within the FERPA research exception" citing 20 U.S.C. § 1232g(b)(1)(F). You indicated that CPEC is no longer willing to abide by that specific research limitation and now seeks access to personally identifiable information (i.e., SSNs) for all students in order to conduct a variety of undisclosed analyses and potential research in the future.

CSU and UC have questioned whether the proposed disclosures to CPEC would violate FERPA. Your September 1 letter included a copy of an informal opinion to CPEC by the California Attorney General dated August 19, 2004, which concludes that FERPA does not authorize the CSU, UC, and CCC systems to refuse to provide the requested information. On September 10 you also sent us a copy of pertinent sections of the California Education Code that establish and describe CPEC, along with a 2003 report from the Legislative Analyst's Office on CPEC's functions.

During the September 10 teleconference we indicated that while we disagreed with certain aspects of the Attorney General's August 19 letter, it appears that FERPA may allow CSU, UC, and CCC to release the information to CPEC, as requested, without the prior written consent of eligible students. Since that time we have also spoken with and received correspondence from Murray J. Haberman, Executive Director of CPEC, about these matters. In both of these conversations, we discussed briefly our August 23, 1999, letter to the Wyoming Community College Commission (WCCC), which addressed similar issues. 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 U.S. Secretary of Education. 34 CFR § 99.1. Parents and 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 educational agency or institution subject to FERPA may not have a policy or practice of disclosing education records, or personally identifiable information from education records, unless a parent or eligible student has provided a signed and dated written consent in accordance with § 99.30 of the regulations. Your inquiry concerns the disclosure or redisclosure of personally identifiable information from education records without prior written consent, which is governed by regulations codified in 34 CFR §§ 99.31(a), 99.32, 99.33 and 99.35 and depends in part on whether or not CSU, UC, and CCC are considered "educational agencies or institutions" under FERPA.

An "educational agency" is described in the regulations as an entity that is authorized to "direct and control" a public elementary, secondary, or postsecondary "educational institution," which in turn is described as one that "provides educational services or instruction, or both, to students." See 34 CFR § 99.1(a)(1) and (a)(2). One of the exceptions to the prior written consent requirement in FERPA allows an educational agency or institution to disclose education records without prior written consent to "other school officials, including teachers, within the agency or institution" with legitimate educational interests. 34 CFR § 99.31(a)(1). For example, this is the basis on which school boards and superintendents of local educational agencies[1] obtain access to education records maintained by public elementary and secondary schools within their jurisdiction without parental consent. (It should be noted that this exception generally does not permit teachers and school officials from one institution to obtain access to the records of a student enrolled at another school within the same "educational agency" because they do not have "legitimate educational interests" in the information.)

FERPA also allows an educational agency or institution to disclose personally identifiable information from education records without consent to "authorized representatives of ... State and local educational authorities" when the disclosure is "in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs." See 34 CFR §§ 99.31(a)(3)(iv) and 99.35(a). Our 1999 letter to WCCC explains (at page six) that unlike "State

[1] "Local educational agency" is defined in the Education Department General Administrative Regulations (EDGAR) as a public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in a political subdivision of a State, or any other any public institution or agency that has administrative control or direction of a public elementary of secondary school. 34 CFR § 77.1.

educational agency,"[2] the phrase "State or local educational authorities" is not defined in FERPA or elsewhere under Federal law or regulation. In previous guidance this Office has interpreted the phrase broadly to include any entity or person that is responsible under State or local authority for planning, coordinating, supervising, evaluating, or providing advice regarding educational programs, services and activities at the elementary, secondary, or postsecondary levels. (Note that a "State or local educational authority" need not exercise the "direction and control" that characterizes the relationship between an "educational agency" and an "educational institution," discussed above.) We concluded in our 1999 letter that WCCC met this standard.

FERPA regulations provide further that an educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student. 34 CFR § 99.32(a). The agency or institution must maintain this record of requests for access and actual disclosures with the education records of the student for as long as the records themselves are maintained. The recordkeeping requirement does not apply if the request was from or the disclosure was to a school official under § 99.31(a)(1). However, this requirement *does* apply if the request was from or the disclosure was to an authorized representative of a State or local educational authority under § 99.31(a)(3). (Other exceptions to this requirement not relevant to this discussion are set forth in § 99.32(d).)

FERPA also generally prohibits a party that receives information from education records without consent, including a teacher or other school official, from redisclosing that information, in personally identifiable form, to any other party. See 34 CFR § 99.33(a). However, the regulations create an exception in § 99.33(b), which permits an educational agency or institution to disclose personally identifiable information from education records with the understanding that the party receiving the information, such as a superintendent or school board that governs a school district, may make further disclosures *on behalf of* the agency or institution provided that the redisclosure meets one of the exceptions in § 99.31(a) and the agency or institution complies with the recordkeeping requirements in § 99.32(b). Section 99.33(b) applies to teachers and other school officials who obtain access to education records under § 99.31(a)(1). It does not apply to State and local educational authorities that receive education records under § 99.31(a)(3) because of the restrictions on redisclosure that apply under § 99.35.

Under State law, CPEC is a statewide coordinating and planning board responsible for coordinating public, independent, and private postsecondary education in the State and for providing independent policy analyses and recommendations on postsecondary education issues to the Legislature and Governor. CA Education Code § 66900(a). CPEC's policy recommendations are a primary consideration in developing State policy and funding for postsecondary education. CA Education Code § 66900(c)(1). State law directs CPEC to "develop and maintain a data collection system capable of documenting the performance of postsecondary education institutions in meeting the post high school education and training needs of California's diverse population." CA Education Code §§ 66900(c)(2) and 66903(m). CPEC's statutory mission, as set forth in § 66010.6(a), includes: 1) analysis and

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[2] EDGAR defines a "State educational agency" as the State Board of Education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a state.

recommendations related to long-range planning for public postsecondary education; 2) analysis of state policy and programs involving independent and private postsecondary educational sectors; 3) analysis and recommendations related to program and policy review; 4) resource analysis; and 5) maintenance and publication of pertinent public information relating to all aspects of postsecondary education.

Based on our review of this statutory authority, we conclude that CPEC qualifies as a "State or local educational authority" under §99.31(a)(3) of the FERPA regulations and that its essential functions include evaluation of State or Federally funded education programs in accordance with § 99.35. Accordingly, FERPA does not prevent an educational agency or institution from disclosing or redisclosing personally identifiable information from education records, including students' social security numbers, to CPEC, without prior written consent, for the purposes described in § 66903 of the State Education Code.

Although we have not attempted to make a final determination regarding the legal status of CSU, UC, and CCC under FERPA, it is our understanding from our discussions that each of these entities exercises the requisite degree of "direction and control" and therefore considers itself an "educational agency " or a single "educational institution" with respect to its individual campus institutions or community college districts. If this is in fact the situation, then these campus institutions and community college districts may send their respective system officials education records, without prior written consent, under § 99.31(a)(1) provided they have been determined to have a "legitimate educational interest" in the records. Those system officials, in turn, may redisclose personally identifiable information from those records, without prior written consent, under the conditions set forth in § 99.33(b) to CPEC as a "State or local educational authority" for the audit or evaluation purposes set forth in the State Education Code, as noted above.

We do not address whether systems officials of CSU, UC, and CCC could redisclose information received from their constituent campus institutions and community college districts directly to CPEC under § 99.33(b) if they were not considered "educational agencies" or "educational institutions" under FERPA. However, in those circumstances, the individual campus institutions and community college districts that make up these systems could disclose personally identifiable information from the education records directly to CPEC under §§ 99.31(a)(3) and 99.35.

This guidance is further based on our understanding that CPEC does not intend to redisclose any information from education records submitted by CSU, UC, and CCC in personally identifiable form, which would include information that would make a student's identity "easily traceable." See 34 CFR § 99.3 ("Personally identifiable information"). For example, this would preclude CPEC from redisclosing information in personally identifiable form to "sectors of higher education" and "educational segments" identified in § 66903(m)(1)(D) and (E) of the Education Code. (FERPA does permit CPEC to return data to the agency or institution that provided it to the system but not to any other educational agency or institution.) We ask that you contact us

again for further guidance should CPEC desire to redisclose information from education records in personally identifiable form.

I trust that this responds to your questions and appreciate the opportunity to be of service.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Murray J. Haberman, California Postsecondary Education Committion
Maria Shanle, The University of California
Ralph Black, California Community Colleges