

Ms. Susanne K. Reed  
Assistant General Counsel  
Room 111-E, Education Building  
410 Fiscal Drive  
Santa Rosa, California 95403

JUN 5 1990

Dear Ms. Reed:

By letter dated February 26, 1990, we provided an interim response to your request for an opinion on a potential conflict between the Family Educational Rights and Privacy Act (FERPA) and California State Law. We informed you that we were referring the matter to our Office of General Counsel for review. This letter provides the determination of this Office based on the results of that review.

California has enacted two amendments to the California Education Code (Code) that provide for disclosure of personally identifiable information from an education record to a third party without prior written consent. Section 49076 of the Code was amended to provide that education records shall be disclosed to various law enforcement officials for specific purposes, and Section 49079 of the Code was amended to provide that teachers must be notified of students who have participated in certain criminal behavior. As discussed more fully below, with respect to Section 49076 of the Code, we believe that a conflict does exist and that you should advise the appropriate State officials that the education records required to be disclosed should be disclosed only pursuant to a lawfully issued subpoena. With respect to Section 49079 of the Code, we believe that the required disclosure can be made under the exception to prior written consent that allows disclosure to teachers within the school who have a legitimate educational interest in the records, provided that all other applicable requirements under FERPA are met.

FERPA generally provides that an educational agency or institution must obtain written consent prior to disclosing education records, or personally identifiable information from education records. FERPA requires that prior written consent for disclosure of education records be obtained from a student's parents, or from a student after he or she has reached the age of 18 or is attending an institution of postsecondary education. 20 U.S.C. §1232g(b) and (d), see also 34 CFR §99.30 and §99.4.

SECTION 49076

Section 49076 of the Code states that:

Access to those particular records relevant to the legitimate educational interests of the requester shall be permitted to the following:...

- (7) Any district attorney who is participating in or conducting a truancy mediation program...or participating in the presentation of evidence in a truancy petition...
- (8) A prosecuting agency for consideration against a parent or guardian for failure to comply with Compulsory Education Law...
- (9) Any probation officer or district attorney for the purposes of conducting a criminal investigation or an investigation in regards to declaring a person a ward of the court or involving a violation of a condition of probation.

Therefore, the amendments to the Code require educational agencies and institutions to provide access to information by district attorneys, prosecuting agencies and probation officers under certain circumstances without prior written consent.

FERPA does provide that an educational agency or institution may disclose education records, or personally identifiable information from such records, without prior written consent under certain limited exceptions. None of these exceptions, however, cover the required disclosures to district attorneys, prosecuting agencies and probation officers in the amended California State law. Accordingly, a conflict does exist between FERPA and Section 49076 of the Code.

FERPA establishes requirements with which a recipient must comply if it desires to continue receiving certain Federal funds; it does not preempt conflicting State laws. Thus, FERPA does not prohibit educational agencies and institutions from complying with the State law at issue here. However, if educational agencies and institutions in California comply with this State law by disclosing education records, or personally identifiable information from such records, without obtaining prior written consent, it appears they would be in violation of FERPA and thereby jeopardize their continued eligibility to receive Federal funds.

We note that one possible solution to preserve the efficacy of ~~both the~~ the California statute and FERPA in this situation could be

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for the educational agencies and institutions in California to request of the authority seeking the student information that lawfully issued subpoenas be obtained, and accompany any requests for information from education records made pursuant to the State law at issue here. Educational agencies and institutions could then properly disclose the requested information under one of the enumerated exceptions to FERPA's prior written consent requirement. 20 U.S.C. §1232g(b)(2)(B) and 34 CFR §99.31(a)(9).

SECTION 49079

Section 49079 of the Code states that:

A school district shall inform the teacher of every student who has caused, or who has attempted to cause, serious bodily injury or injury...to another person. The district shall provide the information to the teacher based on any written records that the district maintains or receives from a law enforcement agency regarding a student...

As for section 49076, this new provision in the Code requires disclosure of information from an education record without prior written consent. However, in this instance FERPA provides an exception to prior written consent that may be applicable. Specifically, FERPA provides that education records, or personally identifiable information from such records, may be disclosed without prior written consent to:

other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests.

20 U.S.C. §1232g(b)(1)(A). See also 34 CFR §99.31(a)(1). It is noted that FERPA's implementing regulations provide that, among other things, an educational agency or institution's FERPA policy must contain:

A statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information [to other school officials with a legitimate educational interest], and, if so, a specification of the criteria for determining which parties are school officials and what the educational agency or institution considers to be a legitimate educational interest.

34 CFR §99.6(a)(4). Therefore, assuming that educational agencies and institutions in California conform their FERPA ~~policies~~ appropriately to the requirement cited above, no

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conflict exists between FERPA and Section 49079. Accordingly, no conflict would exist and educational agencies and institutions in California could provide the required information to teachers without prior written consent.

We recommend that you call the determinations of this Office, as discussed above, to the attention of the appropriate State authorities. If you have any further questions, you may direct them to Connie Moore of my staff. Our telephone number is 202/401-2057.

Sincerely,

LeRoy S. Rooker  
Director  
Family Policy and  
Regulations Office