



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

February 9, 2015

Ms. Loren W. Soukup
Associate General Counsel
School and College Legal Services
of California
5350 Skylane Boulevard
Santa Rosa, California 95043

Dear Ms. Soukup:

The Department's Office for Civil Rights (OCR) has asked that we provide you with technical assistance with regard to your concerns about the Family Educational Rights and Privacy Act (FERPA), which this office, the Family Policy Compliance Office (FPCO) administers. 20 U.S.C. § 1232g; 34 CFR Part 99. We understand that your concern has to do with the language from OCR's April 4, 2011, Dear Colleague Letter (DCL) on sexual violence regarding what information may be disclosed in the notice of the outcome of a discriminatory harassment complaint, and whether the language in the DCL is consistent with the requirements of FERPA. Specifically, OCR informed us that you expressed concerns regarding language in a proposed draft resolution agreement in an OCR racial harassment complaint involving the Del Norte County Unified School District (District).

The proposed draft resolution agreement requires the District to revise its discrimination complaint procedures in several areas, including notice of the outcome of the complaint. Section (4)(b)(iv)(3) in the proposed draft agreement states that notice of the outcome includes "the consequences imposed on any individual found to have engaged in discrimination that relate directly to the subject of the complaint, such as requiring the individual found to have engaged in discrimination to stay away from the complainant, prohibiting the individual from attending school for a period of time, or transferring the individual to other classes or another school." On December 23, 2014, you informed OCR that you could not advise the District to agree to this provision. OCR forwarded to us a June 19, 2013, letter from FPCO to a parent that you sent to OCR on December 19, 2014, which you believe represents our position that the provision in the proposed draft resolution agreement relating to the notice of outcome violates FERPA. You also indicated that the DCL "is not law" and that you did not have anything from FPCO agreeing with the DCL principles. We appreciate your concerns for the privacy of students' education records and the proper application of FERPA. However, as explained more fully below, FERPA does permit this type of information to be disclosed in compliance with OCR compliance resolution agreements.

As you know, FERPA is a federal law that protects the privacy of students' education records. The term "education records" means those records that are: (1) directly related to a student, and (2) maintained by an educational agency or institution or by a party acting for the

agency or institution. *See* 34 CFR § 99.3 (definition of “education records”). FERPA affords parents and eligible students (a student who has reached 18 years old or attending a postsecondary institution at any age) the right to have access to their education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. An educational agency or institution is prohibited from disclosing personally identifiable information (PII) from students’ education records, without consent, unless the disclosure meets an exception to FERPA’s general consent requirement. *See* 34 CFR §§ 99.30 and 99.31.

Please note that, as stated in the January 2001 OCR guidance, which you can find on OCR’s website, entitled “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” the Department has long viewed FERPA as permitting a school to disclose to the parent of a harassed student (or to the harassed student if 18 or older or in attendance at a post-secondary institution) information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student. The 2001 OCR guidance explained that one example of this would be “an order that the harasser stay away from the harassed student.” OCR’s April 4, 2011, guidance, which FPCO worked with OCR in drafting, expounded on this in the context of discriminatory harassment and indicated that sanctions that would directly relate to the student include “an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.” The April 4, 2011, OCR guidance also warned that disclosure of other information in the student’s education record, including information about sanctions that do not directly relate to the harassed student, may result in a violation of FERPA.

The Department also has repeatedly noted in OCR guidance that in 1994 Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA “shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program.” 20 U.S.C. § 1221(d). As a later enacted and more specific statute, this amendment to GEPA reflects congressional intent that, if there is a conflict between the laws, FERPA should not be construed to affect the applicability of these civil rights laws, such as Title VI. The 2011 DCL noted this action by Congress in footnote 32 on page 13. Although the 2011 DCL was focused on discrimination on the basis of sex in education programs or activities as prohibited by Title IX, the foregoing GEPA provision applies to all discrimination covered by the laws OCR enforces. The Department interprets the 1994 amendment to GEPA to mean that FERPA continues to apply in the context of Title VI enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title VI, such that enforcement of FERPA would interfere with the primary purpose of Title VI to eliminate discrimination based on race in schools, the requirements of Title VI override any conflicting FERPA provisions.

The Department originally noted this position in the January 2001 OCR guidance, which stated:

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department’s position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of

harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment. [Footnote 3: Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception to consent in FERPA, such as crimes of violence or certain sex offenses in postsecondary institutions.]

With regard to the June 19, 2013, FPCO letter you referenced, please note that this letter does not relate to enforcement of civil rights laws or a civil rights complaint filed by a student who was subject to discriminatory harassment. While the parent wrote that the student was “assaulted in the locker room,” the parent did not mention discriminatory harassment in the brief complaint. Rather, the parent misapplied the FERPA exception to the general requirement of consent that permits a *postsecondary* institution to disclose to a victim of a crime of violence the final results of certain disciplinary proceedings.

Accordingly, please be assured that we do not interpret FERPA as prohibiting the District from complying with the notice of outcome provisions in OCR’s resolution agreement in this case or in any other case involving discriminatory harassment. We hope that this is responsive to your concerns and you may write to us directly if you have any further questions or you may call me at (202) 401-3887. Our email address is FERPA@ed.gov or you may write to us at the following address:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Sincerely,

/s/

Dale King
Director
Family Policy Compliance Office

cc: OCR