



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

November 22, 2013

Ms. Dawna McIntyre
Associate Counsel
Office of the General Counsel
University of Massachusetts
225 Franklin Street
Boston, Massachusetts 02110

Dear Ms. McIntyre:

This is to respond to your May 23, 2013, inquiry in which you requested guidance as to how an educational institution can meet its obligations under the Family Educational Rights and Privacy Act (FERPA) without a written agreement when it discloses education records to a State longitudinal data system. In particular, your question was in the context of a Maryland law that requires your institution, the University of Massachusetts (University), and other online institutions that provide distance learning to Maryland students and that are required to register under § 11–202.2 of the Annotated Code of Maryland to send personally identifiable information (PII) from education records to the Maryland Longitudinal Data System (MLDS).

Please note this office administers FERPA and provides technical assistance to ensure compliance with FERPA and its implementing regulations (20 U.S.C. § 1232g and 34 CFR § 99 respectively). This office typically does not interpret state law, though sometimes we must do so to administer FERPA, *e.g.*, to determine whether a State law conflicts with FERPA. In this matter, this office takes no position on what Maryland law requires, the legality of the relevant Maryland laws, or what if any duty is imposed by the laws on educational institutions, such as the University.

This office has discussed your inquiry with Counsel to the Maryland Higher Education Commission (Commission), who also works as an Assistant Attorney General in the State of Maryland's Office of the Attorney General (Office of the Attorney General), and relies on her representations concerning the requirements of Maryland State law. Consequently, based upon the information that both of you have provided to us, this office provides guidance on what the University must do in order to meet its obligations under FERPA before disclosing personally identifiable information (PII) from students' education records to the MLDS.

As indicated above, this office contacted the Counsel to the Commission in order to obtain information about the Maryland laws and practices regarding disclosure requirements for the MLDS. In letters and phone conversations, the Counsel to the Commission explained the following:

“[T]he Commission has a role with respect to higher education that is similar to the Maryland State Department of Education's role with respect to K-12 education. Its role is broader in that the Commission must approve all institutions – for-profit, non-profit,

private, public, in-state and out-of-state – that operate in the State with the exception of those institutions authorized by the Maryland General Assembly or those religious institution that are exempt from the certificate of approval process. Education Article (ED) §§ 11-202, 11-202.1. The Commission reviews all programs offered in Maryland, ED §§ 11-206, 11-206.1, and as of July 1, 2012, it must register every 100% online institution that has Maryland students. ED § 11-202.2.”

Counsel to the Commission also explained that Maryland statute and regulations provide the authority for the Commission to collect data, including individual student record information, for the purposes of (i) planning, (ii) evaluation of education programs, and (iii) instructional improvement from institutions that must be registered or authorized to operate in Maryland. Moreover, as of July 1, 2012, Maryland has a statute that requires online institutions that provide distance learning to Maryland students and that are required to register under § 11–202.2 of the Annotated Code of Maryland to submit education records (and specifically student–level enrollment data, degree data, and financial aid data) to the Maryland Longitudinal Data System Center (Center), the entity in charge of operating the MLDS. ED § 24-707(c). The Commission further explained that the Center is an authorized representative of the Commission under Maryland law. ED § 24-703(e). The Center uses the MLDS and the education records it has compiled “to improve the State’s education system and guide decisionmaking by State and local governments, educational agencies, institutions, teachers and other educational professionals.” ED § 24-703(f)(4).

In response to your inquiry it is important to note that postsecondary institutions subject to FERPA cannot have a policy or practice of permitting the disclosure of education records or PII contained therein without the written consent of eligible students or an applicable exception to the requirement of consent. 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30(a). One of the exceptions to the requirement of consent is the audit and evaluation exception. Authorized representatives of State educational authorities “may have access to education records 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 that relate to those programs.” 34 CFR § 99.35(a)(1).

To ensure that the University meets its obligations under FERPA, the University must determine that under FERPA the Commission properly has designated the Center as its authorized representative through a written agreement before disclosing education records to the Center. Furthermore, the University must determine that the disclosure is in connection with an audit or evaluation of a Federal- or State -supported education program, or to enforce or to comply with Federal legal requirements that relate to those education programs.

In order for an entity to be designated as an authorized representative, a State educational authority must designate the entity as such in a written agreement. 34 CFR § 99.35(a)(3)(i). The Commission is a State educational authority under FERPA. This office has traditionally interpreted the term State educational authority to include State postsecondary commissions such as the Commission. Therefore, the Commission has the ability to designate the Center as an authorized representative. However, a statute stating that the Center is an authorized representative is insufficient. The FERPA regulations require that a State educational authority designate its authorized representative through a written agreement. 34 CFR § 99.35(a)(3)(i). This regulatory requirement on what these written agreements must contain went into effect on January 3, 2012, except for those situations in which there was already a written agreement in

place on January 3, 2012, in which case the written agreement only would need to be revised to reflect the new regulatory requirements when the written agreement with the authorized representative was renewed or amended.

The FERPA regulations require that the written agreement between the Commission and the Center contain several provisions. Section 99.35(a)(3) specifically requires that the following provisions be included in written agreements under the audit or evaluation exception:

1. Designate the individual or entity as an authorized representative.
2. Specify the PII from education records to be disclosed.
3. Specify that the purpose for which the PII from education records is being disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs.
4. Describe the activity with sufficient specificity to make clear that it falls within the audit or evaluation exception.
Require the authorized representative to destroy the PII from education records when the information is no longer needed for the purpose specified.
5. Specify the time period in which the PII must be destroyed.
6. Establish policies and procedures, consistent with FERPA and other Federal and State confidentiality and privacy provisions, to protect PII from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of PII from education records to only authorized representatives with legitimate interests in an audit, evaluation, or enforcement or compliance activity.

This office has provided detailed guidance on the written agreement requirements related to the audit and evaluation exception which can be found here:

http://www2.ed.gov/policy/gen/guid/fpco/pdf/reasonablemtd_agreement.pdf

If the Commission has properly designated the Center as an authorized representative of the Commission, the University may disclose the requested student records to the Center under the audit and evaluation exception as long as the Center's receipt of the records is in connection with an audit or evaluation of a Federal- or State-supported education program, or to enforce or to comply with Federal legal requirements that relate those education programs. As specified in the FERPA regulations, 34 CFR § 99.3, the education program to be audited or evaluated must be principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution. The written agreement between the Center and the Commission must meet the requirements of 34 CFR § 99.35(a)(3) as discussed above.

No provision in FERPA requires the University to have a written agreement with the Center before disclosing the education records. Additionally, the University is not required to have a written agreement with its own State educational authority. Under the audit and evaluation exception to FERPA, a written agreement is required only between an authorized representative (other than an employee) and the State or local educational authority (or Federal agency headed by an official listed in 34 CFR § 99.31(a)(3)) that is designating the authorized representative,

on its behalf, to conduct an audit or evaluation of a Federal- or State-supported education program or to enforce or to comply with Federal legal requirements that relate those education programs. 34 CFR § 99.35(a)(3)(i). As such, the University may meet its obligations under FERPA in this situation without having a written agreement with any of the relevant parties. However, before disclosing education records to the Center, the University must determine that the Center and Commission have a written agreement that properly designates the Center as an authorized representative of the Commission. The University must, either through the established written agreement or other means, also determine that its disclosure to the Center is in connection with an audit or evaluation of a Federal- or State-supported education program, or to enforce or to comply with Federal legal requirements that relate to those programs.

I trust this information is responsive to your inquiry. Please do not hesitate to contact this office if you require further assistance in this regard.

Sincerely,

/s/

Dale King
Director
Family Policy Compliance Office

cc: Catherine Shultz
Assistant Attorney General
Maryland Higher Education Commission