



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

November 1, 2016

Dear Colleague:

On December 10, 2015, President Obama signed into law the *Every Student Succeeds Act (ESSA)*, Pub. L. 114-95, which reauthorized the *Elementary and Secondary Education Act of 1965 (ESEA)*. As part of the ESSA, Congress amended the “Armed Forces Recruiter Access to Students and Student Recruiting Information” provisions of the ESEA and directed the Department of Education (Department), in consultation with the Department of Defense (DoD), to notify school leaders, school administrators, and other educators about these requirements. The purpose of this Dear Colleague Letter is to provide you with that notice.

The *No Child Left Behind Act of 2001*, enacted in 2002, first added provisions concerning military recruiters to the ESEA, as § 9528 (now § 8528). Congress also added similar provisions to § 503 of Title 10, U.S. Code, in the *Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*, and in subsequent amendments to § 503. Both of these laws require local educational agencies (LEAs) receiving assistance under the ESEA to provide military recruiters, upon request, access to specific information on a secondary school student, unless the parent of the student or the student opts out of the disclosure of this information, in which case the information may not be released without the parent or student’s prior written consent. Due to the recent amendments made by the ESSA to § 8528 of the ESEA, a request to the LEA to opt out of the disclosure of the specific information must be in writing and only a parent of a secondary school student may submit such a written request until the secondary school student has reached 18 years of age, when the right to submit such a written request and to provide prior written consent transfers from the parent to the secondary school student. (Section 8528 of the ESEA also requires that this same information be provided to institutions of higher education (IHEs) upon request, unless the parent of the secondary school student, or the secondary school student if the student has reached 18 years of age, requests in writing to opt out of the disclosure of this information, in which case the information may not be released without the parent’s or the student’s prior written consent.)

Specifically, under the ESEA, as amended by the ESSA, military recruiters (and IHEs) are entitled, upon request, to receive the name, address, and telephone listing of secondary school students served by that LEA, unless the parent of such student (or a secondary school student who has reached 18 years of age) has submitted a written request to the LEA to opt out of such a disclosure. As a matter of DoD policy, military recruiters routinely request this information only on juniors and seniors in high school. Additionally, each LEA receiving assistance under the ESEA must provide military recruiters the same access to secondary school students as is provided generally to IHEs or to prospective employers of those students.

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-4500
www.ed.gov

The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering national educational excellence and ensuring equal access.

Please note that, while the requirements under the provisions addressing military recruiters in both the ESEA and the DoD law (10 U.S.C. § 503(c)) apply only to LEAs receiving assistance under the ESEA, the DoD law, unlike the ESEA, defines an LEA as including a “private secondary school.” Thus, the DoD law also applies to a private secondary school that receives funds under the ESEA. However, a private school that maintains a religious objection to service in the Armed Forces, if the objection is verifiable through the corporate or other organizational documents or materials of that school, is not required to comply with the DoD law. Moreover, a private secondary school whose students receive equitable services under one or more of a number of ESEA programs—e.g., Title I, Part A; Title II, Part A; Title III, Part A—is not thereby a secondary school that “receives” funds under the ESEA; the school’s students receive those services from a public agency that receives ESEA funds. As a result, unless such a secondary school also receives a direct grant or subgrant under the ESEA, it is not subject to the military recruiter requirements of either § 8528 of the ESEA or 10 U.S.C. § 503.

The Department’s Family Policy Compliance Office (FPCO) administers the provisions in the ESEA concerning military recruiters and provided guidance, in conjunction with DoD, on the prior provisions in the ESEA concerning military recruiters on October 9, 2002. You may access the 2002 guidance on FPCO’s website here:

<http://www2.ed.gov/policy/gen/guid/fpco/hottopics/ht10-09-02.html>. In 2003, the Department and the DoD issued follow-up guidance, which can be accessed at the following link: <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ht070203.pdf>.

To summarize, under § 8528 of the ESEA, each LEA that receives funds under the ESEA is required to:

- Comply with a request by a military recruiter or an IHE for access to the name, address, and telephone listing of each secondary school student served by the LEA, unless the parent of such student (or the student if he or she has attained 18 years of age) has submitted a written request to the LEA to opt out of the disclosure of such information, in which case the information may not be released without the parent’s (or the student’s) prior written consent;
- Notify parents of the students served by the LEA, or the student (if he or she has attained 18 years of age), of the opportunity to submit a written request to opt out of the disclosure of the student’s name, address, and telephone listing, unless prior written consent has been provided; and
- Provide military recruiters the same access to secondary school students as is provided generally to IHEs or to prospective employers of those students.

In the ESSA amendments to § 8528 of the ESEA, Congress made three changes. First, under the opt-out process, Congress removed the provision that allowed a secondary school student to request that his or her information not be disclosed without his or her parent’s prior written consent. This provision now provides that a parent (or a student who has reached 18 years of age) may submit a written request to the LEA that the information not be disclosed without the parent’s (or the student’s) prior written consent. This change removed the right of a secondary school student under the age of 18 years to request that his or her information not be disclosed without his or her parent’s prior written consent, required that a request to opt out of such a

disclosure be in writing, and transferred the right to submit a written request to opt out of such a disclosure, as well as to provide prior written consent, from a parent to a secondary school student when the student reaches 18 years of age. Second, Congress clarified that each LEA must notify the parents of the students served by the LEA (or the students, if they have reached 18 years of age) of the option to make a request to opt out of the disclosure. Third, Congress clarified that LEAs may not use an “opt-in” process or any other process other than the opt-out process described in the law as a means to withhold access to a student’s name, address, and telephone listing from a military recruiter or an IHE.

LEAs and their constituent schools are required to comply with these ESEA requirements regardless of their “directory information” policy under the *Family Educational Rights and Privacy Act (FERPA)*. 20 U.S.C. § 1232g; 34 CFR Part 99. 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 20 U.S.C. § 1232g(a)(4)(A) and the definition of “education records” in 34 CFR § 99.3. FERPA affords parents and eligible students the right to access their education records, seek to have their education records amended, and exercise some control over the disclosure of the personally identifiable information (PII) from their education records. (An “eligible student” is a student who has reached 18 years of age or is attending an IHE at any age.) Under FERPA, an educational agency or institution is prohibited from disclosing PII from a student’s education records, without the prior written consent of the parent or eligible student, unless the disclosure meets an exception to FERPA’s general consent requirement. See 34 CFR §§ 99.30 and 99.31.

One exception to FERPA’s general consent requirement permits the nonconsensual disclosure of PII from education records that has been appropriately designated as “directory information” by the educational agency or institution. 34 CFR § 99.31(a)(11). FERPA defines “directory information” as information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. 34 CFR § 99.3. Directory information includes information such as the student’s name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance (i.e., the period of time during which the student attends or attended an educational agency or institution and not daily attendance records); participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

FERPA provides that an educational agency or institution may disclose directory information if it has given public notice of: (1) the types of information that it has designated as “directory information”; (2) a parent’s or eligible student’s right to restrict the disclosure of such information; and (3) the period of time within which a parent or eligible student has to notify the educational agency or institution in writing that he or she does not want any or all of those types of information designated as directory information. 34 CFR § 99.37(a). Additionally, an educational agency or institution may implement a limited directory information policy. Under a limited directory information policy, an educational agency or institution may choose to limit the

disclosure of directory information to specific parties, for specific purposes, or both. 34 CFR § 99.37(d).

In our 2002 guidance, we explained that a single notice that combines the FERPA directory information notification and the ESEA military recruiter/IHE notification is sufficient, as long as the parents and eligible students are adequately informed of their rights to opt out of these disclosures. Please note that an LEA may have separate notices if it prefers. If an LEA does not disclose directory information under FERPA, then it must still provide military recruiters and IHEs, upon request, access to secondary school students' names, addresses, and telephone listings, and must notify parents (or students who have reached 18 years of age) that they may submit a written request to opt out of this disclosure. In other words, an LEA that does not disclose directory information must nonetheless provide a notice that it discloses information to military recruiters and IHEs.

If an LEA combines its FERPA directory information notification and the military recruiter/IHE notification, and a parent opts out of providing access to the student's name, address, or telephone listing to third parties, then that parental opt-out also applies to requests from military recruiters or IHEs for access to the student's name, address, or telephone listing. For example, if the opt-out states that the student's telephone number may not be disclosed to the public, then the LEA may not disclose the student's telephone number to military recruiters or IHEs.

Even if an LEA has not designated one or more of the three items – name, address, and telephone listing – as “directory information” under FERPA, it still must provide all three items to military recruiters and IHEs, upon request, unless the parent or student over 18 years of age has submitted a written request to the LEA to opt out of such a disclosure. Also, in that case, the LEA would have to send a separate notice to parents or students over 18 years of age about any of the three items that the LEA has not designated as “directory information,” notifying them of their right to submit a written request to opt out of the disclosure of the information to military recruiters and IHEs. An easier method, of course, would be for the LEA to designate all three items – name, address, and telephone listing – as “directory information.”

We appreciate your attention to this matter and invite you to contact us if you have any questions concerning this issue. You may do so by emailing FPCO at FERPA@ed.gov or by calling 202-260-3887.

Sincerely,

/s/

Dale King
Director
Family Policy Compliance Office