



Tuesday
January 17, 1995

Part III

**Department of
Education**

**34 CFR Part 99
Family Educational Rights and Privacy;
Final Rule**

DEPARTMENT OF EDUCATION

34 CFR Part 99

RIN 1880-AA57

Family Educational Rights and Privacy

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations implementing the Family Educational Rights and Privacy Act (FERPA), which is section 438 of the General Education Provisions Act. These amendments are needed to implement a provision of the Higher Education Amendments of 1992, which modified the conditions under which records of an institution's law enforcement unit are excluded from the definition of "education records." As amended, FERPA excludes from the definition of "education records," and thereby from the restrictions and rights of access under FERPA, records that are maintained by a law enforcement unit of an educational agency or institution that were created by that unit for the purpose of law enforcement.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ellen Campbell, Family Policy Compliance Office, Office of Management, U.S. Department of Education, 600 Independence Avenue, S.W., Washington, D.C. 20202-4605. Telephone (202) 260-3887. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Postsecondary institutions that have questions relative to any of the requirements in the Higher Education Act regarding disclosure of information about campus safety policies and procedures and campus crime statistics should contact Paula M. Husselmann or Kimberly L. Goto at (202) 708-7888.

SUPPLEMENTARY INFORMATION: On August 11 and December 14, 1993, the Secretary published two notices of proposed rulemaking (NPRMs) for 34 CFR part 99 in the **Federal Register** (58 FR 42836-42837 and 58 FR 65298-65300, respectively). The second NPRM did not

change the proposed regulations but merely asked for additional public comment based on the response to the first NPRM.

The proposed regulations define for the first time both "law enforcement unit" and "disciplinary action or proceeding." In contrast to law enforcement unit records, the Department has been legally constrained to treat the records of a disciplinary action or proceeding as "education records" under FERPA (20 U.S.C. 1232g), that is, protected against non-consensual disclosure except in statutorily specified circumstances and subject to inspection and review by parents and eligible students. The Secretary proposed the definition of "disciplinary action or proceeding" to help institutions distinguish disciplinary records from law enforcement unit records, which are excluded by statute from the definition of "education records" in the circumstances specified.

Many of the public comments received on the first NPRM challenged the Department's position on this issue and expressed the view that records of institutional disciplinary proceedings taken against students accused of criminal and other non-academic misconduct should not be considered "education records" under FERPA and should be available to the public even without the parent's or student's consent. This issue, which has been the subject of recent media attention, took precedence over the issue of law enforcement unit records in the comment process. The Secretary sought additional public comment on the issue because it raised important and sensitive concerns about campus crime as well as students' need for privacy and access to records in the educational process.

The Secretary remains legally constrained to conclude that records of an institution's disciplinary action or proceeding are "education records" under FERPA, not law enforcement unit records, and that excluding these records from the definition of "education records" can be accomplished only through a statutory amendment of FERPA by Congress. In support of this view, Congress enacted in 1990 a new statutory provision permitting non-consensual disclosure of only the *results* of disciplinary proceedings conducted by postsecondary institutions; the disclosure is limited to the alleged *victim of a crime of violence* as defined in the United States Code and not to the public generally. However, the Secretary also recognizes that the issue of full

public access to disciplinary hearing records concerning criminal and other non-academic misconduct is an important part of the ongoing debate concerning safety on college campuses and believes that, given the competing interests involved, these issues need to be aired and argued in the legislative arena. Therefore, the Secretary has notified Congress of the need to address this issue and has offered to work with Congress in drafting an appropriate FERPA amendment that identifies and balances these interests at various education levels.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRMs to comment, approximately 150 parties submitted comments on the proposed regulations. An analysis of the comments and changes in the regulations since publication of the NPRMs follows. Substantive issues are discussed under the section of the regulations to which they pertain.

Section 99.3 What definitions apply to these regulations? Definition of "Disciplinary action or proceeding."

Comments: A majority of commenters approved of the Secretary's effort to effectively clarify the distinction between disciplinary records and law enforcement unit records. Those commenters stated that to allow the release of student disciplinary records to the public without consent would compromise what they believe to be the fundamental educational mission of the campus judicial process. Several commenters also stated that if FERPA were amended to allow such disclosures, institutions would have to amend their disciplinary procedures to incorporate greater due process protections. These commenters, mostly officials at postsecondary institutions, argued that campus judicial systems have been effective in responding to violations of institutional policy because of the privacy protections afforded to students by FERPA.

A substantial minority, however, disagreed and stated that disciplinary records relating to criminal and other non-academic conduct should not be treated as "education records." They argued that postsecondary institutions have used FERPA to evade efforts by the public to gain access to information about crime on campuses. These commenters questioned the statement in the NPRMs that the Department has always considered records relating to an institution's internal proceedings that deal with violations of its own rules and standards of student conduct as

"education records" under FERPA. The commenters believe that the Department's position in this matter represents an effort to circumvent the recent State court ruling, *Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257, 261 (Ga. 1993), which considered records of a disciplinary action against a student fraternity outside the definition of "education records" and, thus, outside the privacy protections of FERPA. Several commenters also requested that the proposed definition of "disciplinary action or proceeding" be changed to include only violations of academically-related rules and that disciplinary action taken against a student for criminal acts be excluded.

Discussion: The Secretary has carefully analyzed the statutory and regulatory authority to address these concerns. Based on the broad definition of "education records," which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are "education records" subject to FERPA. It is noted that *Red & Black Publishing Co. v. Board of Regents* concerned records of a student "organization court," which disciplined a student *organization* (fraternity) for a rules violation, and did not concern disciplinary action against an individual student. More recently, another State court ruled that FERPA prevented a university from releasing to the media personally identifiable information from student disciplinary records without consent. *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport*, Case No. 393,332, First Judicial District Court, Caddo Parish, LA, (March 4, 1994). Although the Secretary is equally concerned with the problem of crime on campus, it is clear that only Congress has the authority to change the statutory provisions of FERPA to permit disclosure of disciplinary records without prior consent.

Nevertheless, because crime on our Nation's college campuses has escalated since 1974 when FERPA was enacted, the Secretary has notified Congress of the need to address this important issue. The Congress may find that public access to disciplinary records concerning criminal and other non-academic misconduct is an appropriate response to the problem of maintaining safe college campuses, and the Secretary has offered to work with Congress in

writing an appropriate amendment to FERPA.

The Secretary received very few comments from State and local educational officials on how the proposed definition of "disciplinary action or proceeding" might affect elementary and secondary schools. Issues regarding the privacy of minor students and their families on the elementary and secondary level may require different treatment than those of postsecondary students. At this time, FERPA is consistent with those State laws that protect information regarding juvenile offenders.

Change: None.

Comments: Even among those commenters who approved of the proposed definition of "disciplinary action or proceeding," several postsecondary officials noted that it is important that institutions be able to tell victims the outcome of a disciplinary proceeding regarding their assailant.

Discussion: Section 99.31(a)(13) of the FERPA regulations, which implements 20 U.S.C. 1232g(b)(6) of the statute, permits postsecondary institutions to disclose to an alleged victim of a crime of violence, as defined in the United States Code, the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator. As noted earlier, this specific statutory exception to the prior written consent rule, enacted in 1990 as part of the Student Right-to-Know and Campus Security Act, demonstrates Congress' view that disciplinary records are education records under FERPA. Additionally, 34 CFR 668.47(a)(12)(vi) (Student Assistance General Provisions) provides that in cases of an alleged sex offense both the accuser and the accused *shall be* informed of the outcome of any institutional disciplinary proceeding at the postsecondary level. On the elementary and secondary level, Congress has made no changes to FERPA that would allow a school official to disclose information relating to a disciplinary action without the prior consent of that student's parents, to an alleged victim or the alleged victim's parents. The Secretary has no authority to change these statutory provisions to provide for disclosure of information from disciplinary records other than in the circumstances identified.

Change: None.

Comments: Some commenters noted that conduct that would constitute a criminal violation should not be kept confidential as part of a campus disciplinary proceeding and that disciplinary hearings should be open to the public. In contrast, a number of

school officials stated that to allow disciplinary hearings to be open to the public would substitute those processes for criminal proceedings, which would negate a long-standing separation of an on-campus disciplinary system from the criminal justice system.

Discussion: FERPA does not prevent an institution from opening disciplinary proceedings to the public. Rather, FERPA prevents the non-consensual disclosure of education records or personally identifiable information from "education records," unless the disclosure meets one or more of the statutory conditions for non-consensual disclosure. Schools routinely restrict access to disciplinary proceedings to those school officials with a "legitimate educational interest," which is the first condition for non-consensual disclosure under section (b)(1) of the statute, because information from "education records" is frequently disclosed in a disciplinary hearing.

As discussed above, the Secretary has advised and offered to work with Congress toward an appropriate solution to the concern about campus safety issues in relation to FERPA.

Change: None.

Comments: Several commenters expressed concern that, as parents, they would want to know how many sexual assaults had been reported at the schools to which their children had applied or at which their children were attending. These commenters believed that disciplinary records related to criminal conduct should not be considered "education records."

Discussion: Parents and students at the postsecondary level may currently obtain information about the type and the amount of crime on college campuses under 34 CFR 668.47(a)(6) (Student Assistance General Provisions), which implements the Student Right-to-Know and Campus Security Act. These provisions require postsecondary institutions to report annually statistics concerning the occurrence on campus of certain crimes, including sexual assaults, that have been reported to local police agencies and to any official of the institution who has significant responsibility for student and campus activities. The Secretary is enforcing these requirements fully and believes that they will make students—and their parents—aware of the nature and the amount of crime on any college campus they may attend or which they are considering attending.

Change: None.

Comments: One commenter noted that the definition of "disciplinary action or proceeding" does not specifically state that disciplinary

records are education records, thus leaving open to interpretation whether they are "education records" subject to FERPA. Another commenter suggested that the definition be changed to include all appeals of the initial adjudication or imposition of sanctions.

Discussion: Under FERPA, the statutory definition of "education records" is all inclusive, covering "those records, files, documents, and other materials, which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A). The only types of records specifically identified in FERPA are those that are specifically excluded from the definition of "education records," such as law enforcement unit records. 20 U.S.C. 1232g(a)(4)(B). FERPA does not list, identify, or single out any particular type of materials or documents as "education records." Consequently, the regulations explain that records of a law enforcement unit do not include or mean disciplinary records. That is, they are not excluded from the definition of "education records" under FERPA.

Change: None.

Section 99.8 What provisions apply to records of a law enforcement unit?

Definition of "law enforcement unit".

Comments: One commenter, a State assistant attorney general, interpreted the proposed rules to mean that if a school principal or dean maintained a record on a student in a discipline file it would be an "education record" protected by FERPA, but that the same record maintained by the institution's law enforcement unit would not be protected by FERPA and could be disclosed to an outside party directly from the campus law enforcement unit. A school official also commented that, under the proposed definition, it is not clear whether using law enforcement unit records during a disciplinary proceeding would render the records "disciplinary records" and thus "education records" subject to FERPA. A commenter from a State educational agency asked for clarification on whether a record of a law enforcement unit can lose its status and become an "education record."

Discussion: FERPA was amended by Congress to exempt from the definition of "education records" those records that are created by a law enforcement unit for a law enforcement purpose and maintained by that law enforcement unit, thus allowing educational agencies and institutions to disclose these records publicly without obtaining prior

written consent. If a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a dean, principal, or other school official for use in a disciplinary proceeding, that copy is an "education record" subject to FERPA if it is maintained by the dean, principal, or other school official and not the law enforcement unit. The original document created and maintained by the law enforcement unit is not an "education record" and does not become an "education record" merely because it was shared with another component of the institution.

Change: None.

Comments: A few commenters said that the proposed definition of "law enforcement unit" was too broad and could encompass offices or components within an institution that may maintain information directly related to students but that are responsible for the institution's compliance with Federal civil rights laws, financial aid regulations, hiring requirements, etc., which should not be considered law enforcement activities under FERPA. It was also suggested that the definition be limited to enforcement of "criminal" laws.

Discussion: The proposed definition is intended to cover that part of the institution which is responsible for providing and maintaining a safe and orderly school environment by monitoring and dealing with the conduct of *individuals*, not the institution itself. After considering these comments, the Secretary agrees that the definition is potentially too broad and may encompass functions of the institution, such as an office of legal counsel, that should not be included. However, the Secretary believes that adding "criminal" to the definition might unnecessarily restrict or confuse school officials as to their responsibilities for ensuring school safety.

Changes: The Secretary has revised the definition of "law enforcement unit" by adding a new provision to clarify that it pertains to those individuals or parts of the institution responsible for maintaining the safety and security of school surroundings and for enforcing laws against individuals and organizations within the school community and not those responsible for the institution's own compliance with various laws.

Comments: Several commenters associated with postsecondary institutions stated that they did not believe, for various reasons, that their campus security departments were "law enforcement units" under FERPA and

requested clarification on the status of the records of what they considered a "non-law enforcement" campus security department. Some commenters also noted that a majority of colleges and universities do not employ "campus police officers" who possess police authority or perform official police functions. Instead, many institutions employ non-commissioned "campus security officers" whose main function is to keep the peace and enforce institutional policies. Another commenter noted that the definition of "law enforcement unit" was potentially confusing because student conduct code offenses are considered violations of the "law" and that an office that is responsible for student conduct might be considered a "law enforcement unit" under the definition.

Discussion: The Secretary has taken into consideration these comments and has revised the regulations to clarify that the term "law enforcement unit" under FERPA includes "a unit of commissioned police officers or non-commissioned security guards." That is, security departments such as those described by the commenters would be considered "law enforcement units" if they are officially authorized or designated by the institutions to carry out the functions listed in the regulatory definition, regardless of whether the individuals of that unit are commissioned police officers. The second part of the definition of law enforcement unit makes it clear that a security department retains its status as a "law enforcement unit" even if it also has responsibility for enforcing the institution's code of student conduct.

Change: The definition has been revised to state that it applies to units consisting of commissioned police officers as well as non-commissioned security guards.

Comments: One commenter, an official at a major university, stated that the law enforcement unit at that institution generates both "crime reports," which it considers public documents, and "incident reports," which are treated as education records and referred to the student affairs office for disciplinary purposes. The official further stated that he believes that the functions of the law enforcement unit and the functions of the student affairs office charged with administering the student discipline system are intertwined at his institution as they are at other institutions.

Discussion: If an institution has a security unit or individual with a dual role or function of enforcing institutional rules of conduct related to safety and security and referring

potential or alleged violations of law to government authorities, that unit or individual would be considered a "law enforcement unit" under FERPA. Under the new amendment, records of that unit that were created and maintained for a law enforcement purpose are considered records of a law enforcement unit and, therefore, excluded from the definition of "education records" under FERPA.

The Secretary has revised the proposed regulations to clarify that where a law enforcement unit also performs non-law enforcement functions, the records created and maintained by that unit are considered law enforcement unit records, even where those records were created for dual purposes (e.g. for both law enforcement and disciplinary purposes). Only records that were created and maintained by the unit *exclusively* for a non-law enforcement purpose will not be considered records of a law enforcement unit. For example, if a campus security unit initiates an investigation into an incident on campus relating to a possible violation of law or the student conduct code, the record created and maintained by the unit in connection with this investigation is a law enforcement unit record, whether or not it is ever referred to the local police authorities. If, however, the same unit or individual responsible for law enforcement investigates an incident for the purposes of internal disciplinary actions and creates a record *exclusively* for the purpose of a possible disciplinary action against the student, that record would not be considered a record of a law enforcement unit and would be an "education record" subject to FERPA. It should be stressed that the Secretary expects such occasions to be very rare, especially with incidents involving criminal conduct by students at postsecondary institutions.

Postsecondary institution officials should note also that when they decide to refer a matter to a disciplinary committee rather than to the institution's own law enforcement unit or directly to governmental law enforcement authorities, the institution is not relieved of its responsibilities for complying with the reporting requirements of the Student Right-to-Know and Campus Security Act, as codified in 34 CFR 668.47(a)(6) (Student Assistance General Provisions).

Changes: The definition has been clarified by the insertion of the word "exclusively" to indicate records created and maintained exclusively for internal disciplinary purposes are not law enforcement unit records and are,

therefore, not excluded from the definition of "education records."

Comments: One commenter suggested that the regulations be changed to allow institutions that may not have a law enforcement unit to publicly disclose records that relate to a criminal act but which are not necessarily related to a disciplinary action.

Another commenter expressed concern that, because most public elementary and secondary schools do not have a "law enforcement unit," an individual administrator could be considered a "law enforcement unit" under the proposed definition. The commenter believed this dual role of school administrator and law enforcement official could pose a potential problem for abuse because of his or her access to both education records and law enforcement unit records. He stated that, in such a circumstance, a school official could "essentially confer or remove parents' rights of access to records, or maintain or eliminate confidentiality with respect to certain records by choosing to characterize documents as education records or records of a law enforcement unit."

Discussion: The Secretary has carefully considered whether provisions should be included in the regulations to address these concerns. The definition of "law enforcement unit" has been clarified by adding the term "officially" to describe an office, department, or individual who is authorized or designated by the agency or institution to perform law enforcement unit functions. Additionally, a subsection has been added to the definition to further describe a "law enforcement unit" as an *entity or individual* whose function is to maintain the safety and security of the institution.

The inclusion of the term "individual" is intended to permit small educational agencies and institutions to designate a single individual responsible for "law enforcement" and related safety and security functions. The records created and maintained by that individual for a law enforcement purpose may be disclosed, without prior consent of the parent or eligible student to whom the records relate, and the parent or eligible student would have no right to inspect and review the records under FERPA. The Secretary believes that the benefits gained by safer school surroundings outweigh any potential problems for abuse of the privacy or access rights under FERPA that might occur by including "individual" in the definition.

However, the Secretary does not have the authority to change the regulations

to allow institutions that do not have a law enforcement unit to publicly disclose records that relate to a criminal act. Such a change would have to be made by Congress.

Change: The Secretary has revised the definition of "law enforcement unit" to include only entities or individuals officially authorized or designated by an agency or institution to enforce local or State law, or to refer to appropriate authorities a matter for enforcement of these laws, or to maintain the physical security and safety of the agency or institution.

Comments: A couple of commenters from State departments of education noted that the definition of law enforcement unit should be clarified to include a city police officer hired by a local educational agency or through special arrangements with local law enforcement authorities.

Discussion: The Secretary believes that the definition of "law enforcement unit" which includes the term "individual," as discussed in the previous comment, will allow schools to designate a single individual responsible for "law enforcement" and related safety and security functions. However, educational agencies and institutions should also be aware of the requirement under § 99.6 of the FERPA regulations to adopt a policy regarding how the agency or institution meets the requirements of FERPA. In that policy, educational agencies and institutions are required to include a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. If agencies and institutions have a policy of disclosing information from education records to officials of their own law enforcement unit, the officials of that unit must be designated under the school's FERPA policy as school officials with a legitimate educational interest. The Department can provide further guidance on the formulation of such a policy.

The Secretary encourages educational agencies and institutions that do not have a separate law enforcement unit to develop working relationships with local police authorities. However, FERPA currently prohibits schools from disclosing information from education records to local police authorities absent the prior written consent of parents or a lawfully issued subpoena or court order.

Changes: None.

Comment: One commenter expressed concern that the proposed regulations do not permit officials of an institution's law enforcement unit to disclose

information that the unit had obtained from a student's education records to local police or prosecutors. He believes that the regulations, as proposed, would impede the institution's ability to investigate students suspected of falsified time sheets, transcript forgery, computer fraud, and similar crimes that may be demonstrated by documents considered "education records" under FERPA.

Discussion: An institution may disclose education records to an outside law enforcement agency without consent to comply with a judicial order or lawfully issued subpoena. The Secretary does not have the statutory or regulatory authority to permit the non-consensual disclosure of education records to outside law enforcement authorities in other circumstances. Any changes to this provision would have to be made by Congress.

Changes: None.

Comment: The same commenter proposed that § 99.8(c)(1) be changed by replacing "contacting its law enforcement unit, orally or in writing" with "disclosing education records or information from education records to its law enforcement unit."

Discussion: This provision was included in order to clarify that the Secretary would not consider an institution "contacting" its own law enforcement officials regarding suspected criminal activity to involve necessarily the disclosure of information from an education record, which the institution would not be permitted to do under FERPA unless those individuals had been designated in the school's FERPA policy as "school officials" with legitimate educational interest in accordance with 34 CFR 99.6.

Additionally, as referenced in the previous comment, FERPA does not permit any party, including the institution's own law enforcement unit, that has received information from education records to redisclose that information without the prior consent of the parent or eligible student or in accordance with one of the exceptions listed under 34 CFR 99.31, which includes disclosure in compliance with a judicial order or lawfully issued subpoena.

Changes: None.

Comments: A commenter from a large metropolitan school district agreed that exempting law enforcement unit records from the definition of "education records" promotes cooperation between local police agencies and local educational agencies in their efforts to reduce violence on school campuses. He further stated, however, that to regard disciplinary records as "education

records," which cannot be disclosed to the school district's own law enforcement unit, obstructs a law enforcement unit official's ability to maintain a safe school environment. In contrast, a commenter from a State educational agency, who agreed with the Secretary's proposed regulatory definition of "law enforcement unit," stated that the proposed change would allow schools to disclose to the public records created and maintained by school law enforcement units. He further noted, without explanation, that the change would assist public schools in working with local law enforcement authorities and other agencies to provide the best education for students in a safe environment conducive to learning.

Discussion: With regard to the first commenter's concern that FERPA prevents the disclosure of information from disciplinary records to the school district's designated law enforcement unit, as discussed in the previous comment section, FERPA does not prevent such a disclosure if the officials of the law enforcement unit have been designated as "school officials" with a legitimate educational interest under the district's student records policy, as required by 34 CFR 99.6. However, FERPA does prohibit an educational agency or institution from disclosing information from education records, including information from disciplinary records, to an outside, governmental law enforcement authority, except in certain circumstances such as in response to a judicial order or lawfully issued subpoena, provided notice requirements of § 99.31(a)(9) have been met. As previously noted, the Secretary does not have the statutory or regulatory authority to permit the non-consensual disclosure of information from education records, such as disciplinary records, to third parties, including governmental law enforcement authorities.

Changes: None.

Comments: A few commenters noted that students who are victims of crime should have a right to know about the progress of the investigation of their cases. In contrast, several commenters suggested that information regarding active criminal investigations be protected from disclosure until the investigations have been closed or adjudicated.

Discussion: The Secretary has considered these comments but believes that because agencies and institutions are *permitted, not required*, by FERPA to publicly disclose information from law enforcement unit records, schools should develop their own policies with

regard to if and when they will disclose the information.

Changes: None.

Paperwork Reduction Act of 1980

These proposed regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Assessment of Educational Impact

In the NPRMs, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the NPRMs and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Family educational rights, Privacy, Parents, Reporting and recordkeeping requirements, Students.

Dated: January 10, 1995

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number does not apply.)

The Secretary amends Part 99 of Title 34 of the Code of Federal Regulations as follows:

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for part 99 continues to read as follows: Authority: 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.3 is amended by republishing the introductory text of paragraph (b) and revising paragraph (b)(2) in the definition of "Education records" and by adding a new definition of "Disciplinary action or proceeding" in alphabetical order to read as follows:

§ 99.3 What definitions apply to these regulations?

* * * * *

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

* * * * *

Education records * * *

(b) The term does not include:

* * * * *

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

* * * * *

3. A new § 99.8 is added to subpart A to read as follows:

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit; (ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose,

such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

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