



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

October 7, 2014

Ms. Theresa Marcel Schwartz  
Associate General Counsel  
Kansas Board of Regents  
1000 SW Jackson, Suite 520  
Topeka, Kansas 66612-1212

Dear Ms. Schwartz:

This is in follow-up to our telephone call on June 2, 2014, concerning the applicability of the Family Educational Rights and Privacy Act (FERPA) to the re-disclosure of personally identifiable information (PII) from students' education records by State educational authorities under the audit or evaluation exception to FERPA's general consent requirement. Specifically, you ask whether the Kansas Board of Regents (KBOR), a State educational agency, that has entered into a written agreement with a third party contractor under FERPA's audit and evaluation exception must also enter into agreements with any and all other third parties that are subcontractors for the same project and who will have access to PII from students' education records. As explained more fully below, we believe that KBOR may satisfy the requirements of FERPA by either including in the original contract or written agreement with the primary authorized representative that redisclosures may be made to subcontractors or entering into a separate contract or written agreement with any subcontractors, as long as certain conditions are met. The general applicability of FERPA to KBOR and the specific requirements for entering into agreements with these contractors and subcontractors are discussed below.

### *Applicability of FERPA to Disclosing Educational Agencies or Institutions*

An educational agency or institution subject to FERPA is prohibited from disclosing PII from students' education records, without prior, written parental consent, unless the disclosure meets an exception to FERPA's general consent requirement. *See* 34 CFR §§ 99.30 and 99.31. 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* § 99.3 "Education records." *See* also the definition of "Personally identifiable information" in § 99.3. By "educational agency or institution" in FERPA, we generally mean a school district, public elementary or secondary school, or college or university. When a student becomes an "eligible student," the FERPA rights accorded to, and the consent required of, parents transfer from the parents to students. § 99.5(a)(1). Thus, at the postsecondary level, an "eligible student" must provide prior, written consent before PII from his or her education records is disclosed, unless an exception in FERPA applies. (An "eligible student" is a student who has reached 18 years of age or who is attending a postsecondary institution at any age. *See* § 99.3 "Eligible student.") Educational agencies and institutions may non-consensually disclose PII from education records for audit, evaluation, or enforcement purposes under §§ 99.31(a)(3) and 99.35 only to authorized representatives of the officials or agencies listed in § 99.31(a)(3). Typically, postsecondary institutions disclose PII from students' education records to State

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educational authorities, such as a State postsecondary commission, under this exception to FERPA’s general consent requirement.

*Applicability of FERPA to KBOR*

You explained that KBOR is a State educational agency that plays a governing and management role with regard to postsecondary educational institutions within Kansas. Based on our conversation about KBOR’s authority and responsibilities as a State postsecondary commission, we assume for the purpose of this letter that KBOR qualifies as a “State or local educational authority” under § 99.31(a)(3) of the FERPA regulations and that its essential functions include evaluation of State- or Federally-funded education programs in accordance with § 99.35.

The term “State and local educational authority” is not explicitly defined in FERPA. However, the term is important in the context of FERPA’s audit or evaluation exception in §§ 99.31(a)(3) and 99.35 (discussed more fully below) because State and local educational authorities are permitted to access, without consent, PII from education records. We generally have interpreted the term “State and local educational authority” to refer to a State educational agency (such as a State department of education), a local school district, a State postsecondary commission, or any other entity that is responsible for and authorized under local, State, or Federal law to supervise, plan, coordinate, advise, audit, or evaluate elementary, secondary, or postsecondary Federal- or State-supported education programs and services in the State. The Department generally considers a State postsecondary commission to be a State educational authority because such commissions are typically responsible for, and authorized under, State law to supervise, plan, coordinate, advise, audit, or evaluate Federal- or State-supported postsecondary education programs and services in the State.

A State educational authority, such as the KBOR, may “re-disclose” PII from students’ education records that it has received from constituent institutions if the re-disclosure meet the conditions described in § 99.33. That is, generally the re-disclosure:

- (1) must be on behalf of the educational institution that provided the personally identifiable information;
- (2) must meet the requirements of § 99.31 (exceptions to the FERPA’s general consent requirement); and
- (3) the State educational authority (or the educational institution that provided the personally identifiable information) has complied with FERPA’s recordation requirements in § 99.32(b)(2).

Accordingly, a State educational authority generally may not non-consensually re-disclose PII from students’ education records that it has received from constituent educational institutions unless the re-disclosure meets these conditions.

*Re-disclosures under the Audit or Evaluation Exception*

One of the exceptions to FERPA's general consent requirement permits educational agencies and institutions to disclose PII, without consent, to “authorized representatives” of State and local educational authorities, the Secretary, the Attorney General of the United States, and the Comptroller General of the United States, as may be necessary in connection with the audit, evaluation, or the enforcement of Federal legal requirements related to Federal- or State-supported education programs. As previously explained, postsecondary institutions often disclose PII from students’ education records to State postsecondary commissions under §§ 99.31(a)(3)(iv) and 99.35 of the FERPA regulations, which permit disclosure without written consent to “authorized representatives of ... State and local educational authorities” provided the disclosure is in connection with:

- An audit or evaluation of Federal- or State-supported education programs; or
- Enforcement of, or compliance with, Federal legal requirements relating to such programs.

In 2008, the Department amended the FERPA regulations (73 FR 74806 (Dec. 9, 2008)) to apply the same conditions on a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) that apply to other third party recipients of PII from education records with regard to re-disclosure. Those conditions, as found in § 99.33 and explained above, generally only permit a State educational authority to re-disclose PII from education records if the re-disclosure is on behalf of the educational agency or institution that provided the PII, meets a condition for disclosure listed in § 99.31, and the re-disclosure is recorded as required in § 99.32(b)(2).

For example, this change would allow a State educational agency (SEA) to use the exception in § 99.31(a)(2) to transfer a student’s education records to a student’s new school district on behalf of the former district. Similarly, a State postsecondary commission would be able to re-disclose PII from education records received under § 99.35 to an accrediting agency under § 99.31(a)(7). The 2008 regulatory changes also clarified that an official listed in § 99.31(a)(3) may re-disclose PII from education records to another official listed in § 99.31(a)(3), such as the Secretary of Education, for audit, evaluation, or compliance and enforcement purposes under § 99.35.

In 2011, the Department made four additional modifications to the FERPA regulations that relate to FERPA’s audit or evaluation provision (76 FR 75604 (Dec. 2, 2011)):

1. Definition of “Authorized Representative”

In 2011, we amended § 99.3 to add a definition for the term “authorized representative.” The FERPA regulations now define an authorized representative to mean any entity or individual designated by a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) to conduct—with respect to Federal- or State-supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs.

## 2. Definition of “Education Program”

We also amended § 99.3 to add a definition for the term “education program.” “Education program” is an important term under the audit or evaluation exception because PII from education records can only be disclosed to audit or evaluate a Federal- or State-supported “education program,” or to enforce or to comply with Federal legal requirements related to an education program. As specified in the FERPA regulations (§ 99.3 “Education program”), an education program means any program that is 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.

## 3. Responsibility to Use Reasonable Methods

The Department also amended § 99.35 to add a new requirement (§ 99.35(a)(2)) providing that the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) is the entity responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or individual designated as its authorized representative –

- (i) Uses personally identifiable information only to carry out an audit or evaluation of Federal- or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements related to these programs;
- (ii) Protects the personally identifiable information from further disclosures or other uses, except as authorized in paragraph (b)(1) of this section; and
- (iii) Destroys the personally identifiable information in accordance with the requirements of paragraphs (b) and (c) of this section.

*See* § 99.35(a)(2).

## 4. Written Agreement Requirement

We also amended § 99.35 to require written agreements between a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and its authorized representative, other than an employee (*see* § 99.35(a)(3)). The requirement for a written agreement and what must be included in the written agreement are provided in § 99.35 of the regulations:

(3) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) must use a written agreement to designate any authorized representative, other than an employee. The written agreement must—

- (i) Designate the individual or entity as an authorized representative;
- (ii) Specify—
  - (A) The personally identifiable information from education records to be disclosed;
  - (B) That the purpose for which the personally identifiable information from education records is 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; and

- (C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of § 99.31(a)(3), including a description of how the personally identifiable information from education records will be used;
- (iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;
- (iv) Specify the time period in which the information must be destroyed; and
- (v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

These requirements help protect the confidentiality of student information. They also help ensure increased accountability on the part of authorized representatives with access to PII from education records.

#### *Applicability of FERPA's Written Agreement Requirement to Subcontractors or other Additional Third Parties*

The FERPA regulations do not, at this time, specifically address whether a State educational authority, such as KBOR, that has entered into a written agreement with a third party contractor to act as KBOR's authorized representative must also enter into agreements with any and all other third parties with which that contractor subsequently contracts in order to conduct the same audit or evaluation and who will have access to PII from students' education records.

However, the FERPA regulations clearly indicate that the state educational authorities are responsible for the use of reasonable methods and written agreements to protect personally identifiable information from education records from further disclosure and unauthorized use. This includes limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs, as well as to ensure its destruction when the personally identifiable information is no longer needed for the authorized use. Accordingly, in order to satisfy the abovementioned reasonable methods and written agreement requirements of § 99.35(a)(2) and (3), KBOR has two options: (1) include in the original written agreement with the primary authorized representative a specification of the reasonable methods and written agreement requirements of § 99.35(a)(2) and (3) that must be satisfied before the contractor may make any re-disclosure of PII from education records to subcontractors and designate these subcontractors in the original contract or written agreement as additional authorized representatives of the state educational authority; or (2) enter into a separate written agreement with any subcontractors that comply with the abovementioned reasonable methods and written agreement requirements of § 99.35(a)(2) and (3).

If KBOR chooses option (1), the written agreement between KBOR and the primary authorized representative must also designate subcontractors as authorized representatives of KBOR under FERPA in order to allow the subcontractors to obtain PII from education records. These additional subcontractors have to be designated in the written agreement, and they must be subject to all of the same requirements discussed above for authorized representatives. Moreover, KBOR must take reasonable methods to ensure to the greatest extent practicable that all of its authorized representatives are in compliance with and will comply with FERPA relative to the PII.

I trust this is responsive to your inquiry and adequately explains the applicability of FERPA to State educational authorities and their responsibilities under FERPA's audit or evaluation exception.

Sincerely,

/s/

Dale King  
Director  
Family Policy Compliance Office

Enclosure