

**CALIFORNIA COMMUNITY COLLEGES  
CHANCELLOR'S OFFICE**

1102 Q STREET  
SACRAMENTO, CA 95814-6511  
(916) 445-8752  
HTTP://WWW.CCCCO.EDU



September 7, 2004

TO: Superintendents and Presidents  
Chief Student Services Officers  
Admissions and Records Officers  
Community College Attorneys

FROM: Steve Bruckman  
Interim General Counsel

SUBJECT: Advisory on the Disclosure of Student Discipline Records.  
**Legal Advisory 04-03**

As districts are well aware, the federal Family Educational Rights and Privacy Act (FERPA) establishes strict conditions on district policies or practices of disclosing student education records.<sup>1</sup> FERPA provisions apply to educational institutions that receive federal funds that are administered through the federal Department of Education. Virtually every community college district receives such funds, so FERPA affects all districts.

The California Education Code also addresses student records. The provisions presently appear at sections 76200 et seq., and they have been in effect since 1975, shortly after FERPA took effect on November 19, 1974. (Education Code sections that predated FERPA had also protected student records.) It is clear that sections 76200 et seq. are intended to support the federal requirements. In fact, section 76200 specifically declares the Legislature's intention that state provisions be interpreted so as to ensure the continuation of federal funding. That is, it is the Legislature's intent that FERPA prevail over conflicting state provisions.

Although the state provisions have remained largely unchanged over the years, federal law has evolved and has been the subject of judicial and administrative interpretation. Accordingly, the potential for conflict between federal and state provisions exists. The System Office is reviewing the option of developing proposals to amend the state statutes to ensure greater consistency with the federal requirements even as those federal requirements evolve. In the meantime, we wanted to address two specific areas of potential conflict.

---

<sup>1</sup> FERPA (20 U.S.C. § 1232g) and its implementing regulations (34 CFR part 99) are detailed and fairly complex. This advisory does not purport to provide a comprehensive review of all potential issues related to student disciplinary records.

Student Disciplinary Records Generally Are Not Public Records.

The ability of institutions of higher education to release student disciplinary records as public records was addressed by the U.S. Court of Appeals for the Sixth Circuit in *U.S. v. Miami University* (6th Cir. 2002) 294 F.3d 797. In that case, the Miami University student newspaper requested student disciplinary records under the state's public records laws. The *Chronicle of Higher Education* also requested disciplinary records from Miami University and from Ohio State University under the same public records laws. The United States Department of Education filed a complaint against the two Ohio universities to prevent them from producing student discipline records that included personally identifiable information. The Department of Education asserted that such records were education records subject to the nondisclosure requirements of FERPA.

The United States Court of Appeals for the Sixth Circuit agreed with the Department of Education. In affirming the lower court's decision, the Court of Appeals stated:

"Specifically, the district court concluded that university disciplinary records were 'educational records' as that term is defined in the Family Education Rights and Privacy Act ('FERPA'), 20 U.S.C. § 1232g, and that releasing such records and the personally identifiable information contained therein constitutes a violation of the FERPA." (*U.S. v. Miami University, supra*, 294 F.3d 797 at pp. 802-803.)

In 2003, a California appellate decision addressed an Education Code section that conflicts with federal law in the area of student discipline records. (*Rim of the World Unified School District v. Superior Court* (2002) 104 Cal.App.4th 1393, mod. on den. of reh. January 30, 2003, review den. April 23, 2003.) Education Code section 48918 applies to the disciplinary records of K-12 pupils. Subsection (k) provides in pertinent part, "Records of expulsions shall be a nonprivileged, disclosable public record." Section 48918 does not apply to community college districts, but, as noted below, the decision informs the enforcement of a section that does apply to community college districts.

The *Rim of the World* court acknowledged that both the Education Code and FERPA provide general protection against disclosure of student records. It also verified that the *U.S. v. Miami University* decision confirmed that student disciplinary records are records protected by FERPA. The Court found that a federal court enforcing FERPA could enjoin the release of the requested expulsion records even as a court interpreting California law could order their release:

"Here, federal law prohibits educational institutions from receiving federal funds unless they safeguard education records in the manner prescribed by FERPA. At the same time, California law mandates that student expulsion records be publicly disclosed on demand. This is a genuine, undeniable conflict between state and federal law." (*Id.*, at p. 1399.)

The Court also found section 48918 to be an "obstacle to accomplishing Congress's purposes and objectives in enacting FERPA." (*Ibid.*)

The Court concluded that:

"FERPA preempts section 48918, in that section 48918 requires the public disclosure of student expulsion records while FERPA conditions the receipt of federal funds on protecting students and their parents from disclosure of this very type of record." (*Ibid.*)

In a January 30, 2003, modification of its earlier opinion, the Court rejected a request that the expulsion records be disclosed after redaction of student names and other identifiable information. The Court found that FERPA protected,

"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. . . ." (*Ibid.*)

The Court found that:

"Even if the student's name and other identifying information were redacted from an expulsion record, it would still contain 'information directly related to a student,' such as the specific reasons for the expulsion and other details." (*Ibid.*)

The Court found no support under FERPA for releasing such information. The California Supreme Court declined to review the appellate court's decision

Education Code section 72122 applies to community college districts. It allows for closed session meetings of a community college district board of trustees to consider the discipline of students. (This closed session authorization augments the bases for closed session meetings specified in the Brown Act.) Section 72122 provides in part:

"Whether the matter is considered at a closed session or at a public meeting, the final action of the governing board of the community college district shall be taken at a public meeting and the result of that action shall be a public record of the community college district." (Emphasis added.)

The language of section 72122 is not identical to the language of section 48918 that was considered in *Rim of the World*. In fact, unlike section 48918, section 72122 does not even appear in the community college student discipline sections. (See community college disciplinary sections at Ed. Code, §§ 66300 et seq., 76030 et seq.) A board may be able to harmonize FERPA and section 72122 through a general announcement to the effect that a student has been disciplined and the closed session vote taken with respect to the discipline. Beyond that, to the extent that section 72122 suggests that student disciplinary records are public records, we believe that FERPA preempts state law and prohibits disclosure.

In some instances, FERPA permits the final results of disciplinary proceedings to be released. This disclosure exception applies if:

"The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and . . . With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies." (34 CFR § 99.31(a)(14)(i)(A), (B).)

Please note, however, that disclosure applies only to the described type of student conduct.

Student Discipline Records Generally Cannot be Released to Parents of Minor Students Unless the Student Consents or is a Dependent for Tax Purposes.

By letter of January 16, 2004, LeRoy S. Rooker, the Director of the Family Policy Compliance Office (FPCO) of the U.S. Department of Education responded to an inquiry from the Grossmont-Cuyamaca Community College District regarding Education Code section 76031. The FPCO administers FERPA and interprets its requirements.

The District notified the FPCO that section 76031 provides in pertinent part:

"Whenever a minor is suspended from a community college, the parent or guardian shall be notified in writing by the president or the president's designee."

The District verified that it enrolls minors and that disciplinary action involving those minors sometimes occurred.

Mr. Rooker confirmed that some factual circumstances would allow a district to comply with section 76031 and still comply with FERPA, but that other circumstances would create a conflict between the provisions. Under FERPA, personally identifiable information from student education records could generally not be released without the consent of the parents of minors, or without the consent of "eligible students." He further explained that:

"When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an 'eligible student,' and all of the rights afforded by FERPA transfer from the parents to the student."

Accordingly, once students enroll in community colleges, they are the "beneficiaries" of the protections described in FERPA and their records generally cannot be released unless they consent to the release. However, if the minor student is a dependent for federal income tax purposes, FERPA permits disclosure of the minor's education records to the parent.

The problem with section 76031 is that it does not distinguish between minors who are dependents for federal income tax purposes, and those who are not dependents. Districts need to determine which minor students are dependents for federal income tax purposes so that they will know when they can comply with section 76031 in releasing student disciplinary information to the parent. FERPA permits notice to the parents of dependent minors, but does not permit notice

to the parents of nondependent minors. If the student is not a dependent for federal income tax purposes, the parent's right of access passes to the student and the release of disciplinary information concerning the student should not be shared with the parent without the student's consent.

Another type of allowable disclosure under FERPA concerns the type of student conduct as opposed to the recipient of the disclosed information. As discussed above, FERPA regulations allow a district to disclose the final results of disciplinary proceedings if:

"The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and . . . . With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies." (34 CFR § 99.31(a)(14)(i)(A), (B).)

To the extent that section 76031 would require disclosures regardless of the type of conduct at issue, it would conflict with FERPA.

Based on the potential conflicts between section 76031 and FERPA, districts will need to assess the factual circumstances of each instance of the discipline of a minor in terms of notifying the parent or guardian.

Although Mr. Rooker's response addressed the potential disclosure problems with section 76031, it did not address section 76032 that also requires special consideration when a minor is involved. Section 76032 permits a district to authorize its instructors to remove students for two class periods. If the student is a minor, the parent or guardian of the minor must be asked to attend a conference regarding the removal. As with section 76031, section 76032 does not differentiate between minors who are dependents for federal income tax purposes and those who are not dependents, nor does it address the type of student conduct. It appears that the problems related to section 76031 would similarly apply to disclosing the removal of minor students under section 76032, and districts should assess the factual circumstances under this section as well.

#### Recommendation.

We recommend that districts review their policies and practices concerning actions taken under Education Code sections 72122, 76031, and 76032 to ensure that those actions conform to the requirements of FERPA. Because section 76200 states the Legislature's intent that potential conflicts between California law and FERPA be resolved so as to insure the continuation of federal education funds to community colleges, we believe that districts may properly make this interpretation without running afoul of California disclosure laws.

SB:RB:VAR:sj

cc: Linda Michalowski, Vice Chancellor for Student Services