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To: Board of Governors

From: Steve Bruckman
Executive Vice Chancellor of Operations and General Counsel

Re: Release of Personally Identifiable Information from
Education Records to Foundations
Legal Opinion 11-05

Issue

Board member Geoffrey Baum has asked whether a college or district foundation can access student records, such as addresses, so that the students can be solicited for donations.

Conclusion

Yes, but the access is permissible only if specific requirements of state and federal laws are satisfied. Furthermore, the requirements may differ depending on whether the records are those of a current student or a former student.

Analysis

Federal and state laws impose requirements on educational agencies aimed at protecting the privacy rights of students. The Family Educational Rights and Privacy Act (FERPA; 20 U.S.C. § 1232g; 34 C.F.R. part 99)¹ is a federal law that protects student privacy by prohibiting educational agencies and institutions from having a practice or policy of disclosing personally identifiable information in student education records unless a parent or eligible student provides prior written consent or a statutory exception applies. Student education records are those records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. (34 C.F.R. § 99.3, "education records.") Certain records are excluded from the definition of "education records" even though the records are directly related to a student and maintained by the educational agency. As those records are not "education records" within the meaning of FERPA, the student's consent is not required to

¹ The Secretary of Education has recently proposed to amend the regulations implementing FERPA. (No. 68, 76 Fed.Reg. 19726 (April 8, 2011).) However, those amendments, if adopted would not have any effect on the analysis or conclusions reached in this memorandum.

disclose the records to a third party. Among those records excluded are those records “created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual’s attendance as a student.” (34 C.F.R. § 99.3 “education records” subd. (b)(5).) While FERPA is more well-known, in many cases the obligations imposed by state law are more stringent than those imposed by federal laws.

As explained above, in all cases, students can affirmatively consent to the release of education records. However, in practice, this rarely happens. Furthermore, it should be noted that release of information by an educational institution is discretionary. The law set forth in this memorandum does not at any time require the release of student information. The institution can refuse to release information if it is determined to be in the best interests of the student or institution. (Ed. Code § 76240, subd. (c).)

Under certain circumstances personally identifiable information can be released to a third party without the student’s consent if the disclosure is information the educational agency or institution has designated “directory information.” (34 C.F.R. § 99.31, subd. (a)(11), Ed. Code § 76240, subd. (a)(1).) Directory information is that information that is contained in the education records that “would not generally be considered harmful or an invasion of privacy if disclosed.” (34 C.F.R. § 99.3, “directory information” subd. (a).) Directory information can include information such as the student’s name, address, telephone number, and email address.

However, before an educational agency can release directory information without consent, federal law requires that the agency must have provided public notice to students in attendance at the agency or institution of the following:

- The types of personally identifiable information that it has designated as directory information.
- The student’s right to refuse to let the agency designate the information as directory information (also referred to as the student’s right to “opt out” of designating the information directory information).
- The period of time in which the student has to refuse to the designation of the information as directory information.

(34 C.F.R. § 99.37, subd. (a)(1)-(3).)

Under FERPA the agency may designate the information as directory and provide it to third parties unless the student submitted a valid request to opt out of the disclosure of directory information while the student was in attendance at the educational agency. If the student opts out, the agency must honor a former student’s previous refusal to allow the information to be designated as directory even though the student is no longer in attendance at the educational agency. (34 C.F.R. § 99.37, subd. (b).) State law goes further by requiring educational agencies

to provide former students notice of the types of information it has designated as directory and an opportunity to opt out of this designation. (Ed. Code § 76240, subd. (c).) State law does not specify the manner in which former students must be notified. Specifically, state law imposes the following additional requirements:

- The community college must have adopted a policy identifying those categories of directory information that may be released. (Ed. Code, § 76240, subd. (a)(1).)
- Directory information may be released only in accordance with that policy. (Ed. Code, § 76240, subd. (c).)
- Public notice must be given at least annually of the categories of information that the district plans to release and of the recipients. (Ed. Code, § 76240, subd. (c).) State law does not specify what constitutes adequate public notice.

Therefore, in order to maximize its ability to provide information to foundations or alumni associations for fundraising purposes, community college districts should take the following steps:

1. Adopt a policy specifically designating “directory information” and publish it in the college catalogue.
2. Annually provide public notice of the categories of directory information and specifically identify to whom it will be released. (This can be achieved using a district or college web site.) If the intent is to release the information to foundations, it should be stated in the policy.
3. The annual notice must explain the student’s right to refuse to permit the release of directory information (opting out), including the time in which a student must indicate such refusal.
4. Establish a system to maintain this information because the opt out remains in effect even after the student leaves the institution.

If you have any questions, please feel free to contact me.

SB/MG/fr