

March 8, 2005

W. Joseph Hatley, Esq.
Lathrop & Gage
Building 82, Suite 1000
10851 Mastin Boulevard
Overland Park, Kansas 62210-1669

Dear Mr. Hatley:

This responds to your letter of October 27, 2004, in which you asked for guidance regarding the disclosure of information by your client, Unified School District No. 229, Johnson County, Kansas (District), under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. This Office administers FERPA and is responsible for providing technical assistance to ensure compliance with the statute and regulations codified at 34 CFR Part 99.

You asked whether the District could notify parents that a registered juvenile sex offender has enrolled in their children's high school. According to your letter, information about registered sex offenders, including juvenile offenders, is deemed an "open record" under Kansas law and may be posted on any Internet site sponsored by a sheriff's department or the Kansas Bureau of Investigation (KBI). You indicated that KBI maintains a website devoted to publishing the names, addresses, pictures and other pertinent information concerning registrants. Since the student appears as a registered sex offender on the KBI website, you suggested that this information is not part of the student's "education records" and therefore not subject to FERPA. You also suggested that since a student's school falls within the definition of "directory information," the District could disclose the student's presence at a particular school in conjunction with public information not found in the student's education records (i.e., the fact that the student is a registered sex offender).

Under FERPA an educational agency or institution may not have a policy or practice of disclosing education records, or personally identifiable information from education records, without the prior written consent of the parents of students who are or who have been in attendance. 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30. (Once a student reaches 18 years of age or attends a postsecondary institution, written consent must be obtained from the student. See 34 CFR §§ 99.3 "Eligible student" and 99.5.) "Education records" are defined as information that is 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. 34 CFR § 99.3 ("Education records").

There is no exclusion from the definition of "education records" for information that is available from another source, even if the information is publicly available. While your letter does not provide sufficient detail for us to determine whether the District, in fact, maintains information about the student's status as a registered sex offender, this information would be considered an

“education record” under FERPA if it is maintained by the District, even if it was obtained from the public, KBI website.

You noted correctly that a student’s enrollment at a particular school may be designated and disclosed without prior written consent as “directory information,” subject to the notice and opt-out procedures in § 99.37, because it is information that generally would not be considered “harmful or an invasion of privacy” if disclosed. See 34 CFR § 99.3 (“Directory information”). However, in disclosing directory information under FERPA, an agency or institution must be careful not to link it to information that may not be disclosed as directory information. The fact that information may be available on a public website is not dispositive of whether it is the type of information that would be harmful or an invasion of privacy if disclosed. For example, we would consider a parent’s real estate taxes and property values to be information that would be “harmful or an invasion of privacy” if disclosed by an educational agency or institution, even though this information is generally available from public websites maintained by most jurisdictions. We likewise view an individual’s status as a registered sex offender as the type of information that would generally be considered harmful or an invasion of privacy if disclosed.

As you know, there are several exceptions to the prior written consent requirement in FERPA that are codified in § 99.31 of the regulations. In October 2000, Congress added a new exception in § 1601 of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106-386), known as the Campus Sex Crimes Prevention Act (CSCPA), which provides:

Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, concerning registered sex offenders who are required to register under such section.

20 U.S.C. § 1232g(b)(7)(A). The Secretary notified educational institutions that disclosure of this information is permitted under FERPA, without consent, in a letter dated October 24, 2002, that is posted on our website at <http://www.ed.gov/policy/gen/guid/fpco/hottopics/ht10-24-02.html>. As explained in this letter and more fully below, the CSCPA amendment to FERPA applies to both postsecondary and elementary and secondary institutions.

The minimum national standards for sex offender registration and community notification programs are contained in the Federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, codified at 42 U.S.C. § 14071. Under the Wetterling Act, States must establish programs that require a sexually violent predator (and anyone convicted of specified criminal offenses against minors) to register their name and address with the appropriate authority where the offender lives, works, or is enrolled as a student. States are also required to release relevant information necessary to protect the public concerning persons required to register, excluding the identity of any victim. This community notification provision is commonly known as the “Megan’s Law” amendment to the Wetterling Act. See 20 U.S.C. § 14071(e).

CSCPA supplemented the general standards for sex offender registration and community notification programs with provisions specifically designed for higher education campus

communities. 20 U.S.C. § 14071(j). These include a requirement that States obtain information about a registered offender's enrollment or employment at an institution of higher education and make this information available promptly to a campus police department or other appropriate law enforcement agency having jurisdiction where the institution is located. (The Attorney General's Final Guidelines implementing this provision were issued on October 25, 2002, at 67 Fed. Reg. 65598.) CSCPA also amended the Higher Education Act of 1965 by requiring institutions of higher education to advise the campus community where it can obtain information about registered sex offenders provided by the State pursuant to the Wetterling Act, such as the campus law enforcement office, a local law enforcement agency, or a computer network address. 20 U.S.C. § 1092(f)(1)(I); 34 CFR § 668.46(b)(12).

While the FERPA amendment was made in the context of CSCPA's enhancements to registration and notification requirements applicable to the higher education community, the Department has determined that all educational institutions are covered by the FERPA amendment, including elementary and secondary schools, and not just postsecondary institutions. The registration and community notification requirements apply in the State where an offender lives, works, or is a student, defined as "a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade, or professional institution, or institution of higher education." See 42 U.S.C. § 14071(a)(3)(G). Because the sex offender registration and community notification requirements apply broadly to students enrolled in "any public or private educational institution," the Department likewise interprets the FERPA amendment to apply to all educational agencies and institutions subject to FERPA.

The Attorney General's Guidelines implementing the original and amended Wetterling Act standards for community notification programs, as noted above, govern the release of information about registered sex offenders by educational institutions. The Final Guidelines implementing CSCPA amendments explain that the general community notification requirement, 42 U.S.C. § 14072(e)(2), applies to registered sex offenders enrolled or employed at institutions of higher education, just as it applies to all other registered sex offenders. Subsection (e)(2) requires that relevant information be released concerning registrants as necessary to protect the public. See 67 Fed. Reg. at 65598. Final Guidelines for the community notification requirements explain that "there is no requirement under the [Wetterling] Act that registration information be treated as private or confidential to any greater extent than the State may wish" and that States "retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes and to specify standards and procedures for making these determinations." See 64 Fed. Reg. 572, 581-82 (Jan. 5, 1999).

As summarized in our October 2002 letter, nothing in FERPA prevents educational institutions from disclosing information concerning registered sex offenders provided under the Wetterling Act, including information made available under the CSCPA amendment to that Act and information otherwise made available under State sex offender registration and community notification programs. Further, the Department of Education will not take enforcement action against any school district that has a policy or practice of releasing information that a State (or

any agency authorized by a State) provides to the district under the Wetterling Act on a registered sex offender enrolled in an educational institution of that district.

I trust that this responds to your inquiry and thank you for the opportunity to be of assistance.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office