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APR 8 2011

Dear Ms. Hitch:

This is in response to your August 26, 2010, letter in which you inquire about the Family Educational Rights and Privacy Act (FERPA) as it relates to the records of "prospective" students. This Office is responsible for administration of FERPA, which protects the privacy interests of parents and eligible students in students' education records. See 20 U.S.C. §1232g and 34 CFR part 99. Under that authority we investigate, process, and review complaints and violations and provide technical assistance to ensure compliance with all FERPA requirements.

In your letter, you ask for confirmation of whether: 1) college applications submitted by prospective students who do not enroll at the institution are "education records" under FERPA; 2) FERPA prevents the disclosure of these applications that are not considered education records; 3) unadmitted applicants have no right of access to the applications under FERPA, and; 4) state law would govern the confidentiality of that information.

Postsecondary institutions subject to FERPA may not have a policy or practice of permitting the disclosure of "education records, or personally identifiable information contained therein" without the written consent of eligible students. 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30(a). (An "eligible student" is one who is at least 18 years of age or attends a postsecondary institution. See 34 CFR § 99.3.) Under FERPA, "education records" means those records that are:

(a) Directly related to a student; and

(b) Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 CFR § 99.3 "Education records."

"Disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means." See 34 CFR § 99.3.

It is also important to understand the definition of "student" in this context of your questions. In the statute, the term "student"

> includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

20 U.S.C. § 1232g(a)(6). The FERPA regulations define the term "student" in this manner:

> "Student," except as otherwise specifically provided in this part, means any individual who is or has been *in attendance* at an educational agency or institution and regarding whom the agency or institution maintains education records."

34 CFR § 99.3 ("Student"). Emphasis added.

Neither the statute nor the regulations offer guidance which would provide further clarification as to when a student would be considered "in attendance" for the purposes of FERPA. Historically, the Department has left it to each institution to determine when a student is considered to be "in attendance" at that particular institution. However, such a determination should be justified by some reasonable basis of fact, and the Department reserves the right ultimately to conclude whether, as a matter of Federal law, the facts on which the determination is based are relevant and reasonable and that such determination is applied consistently. Generally, a student should be considered "in attendance" no later than the first day of class.

Accordingly, applications of individuals who are not attending an educational agency or institution are generally not "education records" because the individuals are not "students" at the educational agency or institution. However, please note that an institution that receives information (such as a transcript) on an applicant from a high school or from another postsecondary institution is required to protect that information and may not redisclose the information except in accordance with § 99.33 of the FERPA regulations.

Moreover, you are correct that, with respect to FERPA, an unadmitted applicant has no right to access his or her application materials maintained by the prospective college. In that regard, State law would govern the confidentiality of that information.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to your concerns.

Sincerely,

Ellen Campbell
Acting Director
Family Policy Compliance Office