

NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to [FERPA@ed.gov](mailto:FERPA@ed.gov).

April 15, 2008

The Honorable Raymund A. Paredes  
Commissioner  
Texas Higher Education Coordinating Board  
P.O. Box 12788  
Austin, Texas 78711

The Honorable Robert Scott  
Commissioner  
Texas Education Agency  
1701 N. Congress Avenue  
Austin, Texas 78701

Dear Commissioner Paredes and Commissioner Scott:

We have reviewed your October 22, 2007, letter to Secretary Spellings describing the new education research centers (ERCs) established recently under State law through "interagency cooperation contracts" among the Texas Education Agency (TEA), the Texas Higher Education Coordinating Board (THECB), and three institutions of higher education (IHEs) in the State of Texas. You asked for the Department's guidance on any improvements that can be made with regard to the operation of the ERCs, including how you might better comply with the requirements of the Family Educational Rights and Privacy Act (FERPA).

In general, the TEA and the THECB appear to have developed a model approach for the conduct of independent educational research in accordance with FERPA requirements. It also appears that ERC data will prove more valuable to researchers than what is available under current practices because longitudinal student information can be made available to the ERCs without having to address confidentiality issues associated with small data cells. As such, we anticipate that the ERC approach will become the preferred method for conducting longitudinal educational research with State education data.

According to the TEA-THECB interagency cooperation contract that you provided to us for review, the TEA discloses personally identifiable, K-12 education records to the THECB, which is responsible for day-to-day operations and oversight of the ERCs, including compliance with confidentiality requirements. The THECB creates a P-16 longitudinal database by merging its own postsecondary education records with TEA data; removes certain direct identifiers (i.e., name, social security number or SSN, and date of birth); assigns a unique identifier not based on

SSNs to facilitate longitudinal studies; does not disclose to the ERC (or any other party) the linking key that connects the non-personal identifier to student information subject to FERPA and prohibits using the linking key for any other purpose; and then releases the information in student level or microdata format to the ERCs pursuant to three interagency cooperation contracts with IHEs in the State. The THECB does not mask or otherwise address any small data cells before releasing the new database to the ERCs.

Following is our summary of the basic features of the ERC contracts:

- The stated purpose of the ERC contracts is to conduct research for the benefit of education in Texas. ERCs are required to conduct specified research projects for the TEA and the THECB. ERCs also conduct their own, independent research and allow other researchers to use ERC research, data, and facilities according to an allocation formula approved by the TEA and the THECB. ERCs are also required to respond to public information requests following rate schedules established by the State Attorney General.
- The TEA and the THECB exercise “direct, joint supervision” of the ERCs through a Joint Advisory Board (JAB) that must approve each research request before an ERC researcher accesses the confidential student-level data that the THECB makes available to the ERCs. Research produced with ERC data must contain a disclaimer that the conclusions do not necessarily reflect the opinion or official position of the TEA, the THECB, or the State of Texas.
- The JAB reviews the ERC’s management plans regarding allocation of capacity to researchers, compliance with security requirements, annual internal audit certification, annual budget, and fundraising for ERC support.
- The THECB is responsible for ERC data security and FERPA compliance. The TEA and the THECB must approve all physical locations at which researchers access confidential student data. Agency officials advised us that the TEA and the THECB agreed to allow each of the ERCs to maintain student-level data at its own site under the oversight and supervision of the THECB, which is permitted under the ERC contracts. The TEA-THECB written contract provides that student-level data may not be copied, removed from the site, or provided to a researcher at a location other than an ERC. To our knowledge, this provision has not been modified and remains in effect. However, ERC contracts suggest in section V.D.4. that student-level data may be provided to a researcher at “a public institution of higher education located in Texas that is an acknowledged consortium member of the Research Center.”
- An initial appropriation of State funds (about \$1 million each) was used to establish the ERCs and fund specified research projects. Thereafter, each sponsoring IHE must financially support and staff its ERC through gifts, grants, and fees. Sponsoring IHEs must also fund staffing and necessary equipment at the TEA and the THECB for preparation and maintenance of data for the ERCs and reimburse them for JAB expenses.

- The TEA-THECB contract period is 9/1/06 through 8/31/12. ERCs are created for a minimum term of five years, currently 7/1/07 through 8/31/12. The TEA and the THECB may terminate ERC contracts for failure to meet FERPA and other legal requirements and breach of security and other contract terms, subject to certain administrative remedies. The TEA, the THECB, and the IHEs have agreed further in their written contracts that they will comply with any directive received from the Department.

Under § 99.30 of the FERPA regulations, a parent (or eligible student) must provide written consent before personally identifiable information from education records is disclosed unless the disclosure falls under one of the exceptions, which are set forth in § 99.31(a). “Personally identifiable information” is defined in § 99.3 to include a list of personal characteristics or “[o]ther information that would make the student’s identity easily traceable.” As noted in your letter, the THECB removes certain direct identifiers before releasing information to the ERCs but does not suppress or mask small data cells (which it describes as “confidential information”) and, therefore, does not meet the standards for release of anonymous or de-identified information under our November 18, 2004, guidance to the Tennessee Department of Education. See [www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville\\_tn2004.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html).) As such, the THECB’s disclosures to ERCs must fall under an exception in § 99.31(a) if parental consent has not been provided.

Upon review of the information you provided, we have concluded that the THECB’s disclosures to ERCs may fall under §§ 99.31(a) (3) and 99.35, which permit disclosure of personally identifiable information from education records without consent to “authorized representatives” of State and local educational authorities (and certain Federal officials) in connection with the audit or evaluation of Federal or State supported education programs. (Section 99.31(a) (6), which was identified in your letter as the applicable FERPA exception, does not apply to State educational authorities under current regulations. However, proposed regulations issued on March 24, 2008 would apply this exception to State educational authorities.) The Deputy Secretary issued guidance on January 30, 2003, explaining that an “authorized representative” of the officials listed in this FERPA exception “must be under the direct control of that authority, e.g., an employee or a contractor of the authority.” (The full text of the memorandum is available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>.)

The TEA and the THECB have identified certain contract provisions that demonstrate their direct control over the ERCs. In particular, ERCs may not access confidential student-level data independent of the direct oversight and supervision of the THECB and the TEA; the JAB must approve all research using confidential student-level data; all student-level data must be maintained on a secure server under the oversight of the THECB; student-level data may not be copied or otherwise removed from a secure server at the ERC for research purposes; ERCs must review all datasets created by researchers to ensure that confidential information is not removed from ERC premises. The JAB may require an ERC to remedy a security deficit, and the TEA and the THECB may jointly terminate an ERC for failure to comply with contract terms and applicable federal and State laws, including State security requirements applicable to all IHEs in Texas. ERC compliance is monitored and enforced through an annual audit conducted by the IHE’s independent auditor; an annual data security audit conducted by the Texas Department of Information Resources; and random audits by the TEA, the THECB, and the Texas State

Auditor. According to your staff, IHEs in Texas are also subject to THECB funding and supervision on a variety of other issues and, therefore, have strong incentives to ensure that they comply with all ERC contract requirements.

The ERC contract provisions and compliance mechanisms, as described above, appear to provide the TEA and the THECB with the means to exercise “direct control” over the IHEs as their “authorized representatives” under § 99.31(a)(3) of the FERPA regulations. TEA and THECB officials explained that even though the State IHEs will maintain ERC data at their own sites, they are subject to all JAB project approval, security, audit, regulatory supervision, contract termination, and other oversight provisions that ensure compliance with contract requirements and applicable federal and State laws.

As noted above, the ERC contracts allow researchers to access student-level data at not only at the THECB or an ERC but also at “consortium” institutions in Texas. (Counsel for the TEA advised us that this provision refers to institutions identified in section II of the ERC contracts, which lists the initial research projects to be conducted at each ERC.) Under current agreements, it appears that these “consortium” institutions are not subject to the various oversight provisions described above, including the annual audit requirements, that allow the TEA and the THECB to disclose confidential ERC data without parental consent to its “authorized representatives” under § 99.31(a)(3). In recent telephone discussions about this matter initiated by TEA and THECB staff, we advised that consortium institutions could access ERC data at their own locations as long as the TEA and the THECB can establish and maintain direct control over these institutions, as described above. The TEA and THECB staff advised us that they are developing contracts with the consortium institutions that would address this requirement.

Further in that regard, you indicated in your letter that in negotiating the ERC contracts you agreed to ask the Department whether you can “allow secure access to FERPA-protected information at institutions of higher education outside the State of Texas.” You explained that “[w]e have thus far declined to do so, both because of security concerns and to preserve the direct regulatory oversight of [the] THECB at each location at which student information is made available.” We understand your question to be whether the THECB may transfer, or allow an ERC to transfer, a copy of confidential ERC data to an institution outside the State of Texas instead of requiring that institution to access the data from one of the ERCs established in the State (as required under the TEA-THECB and ERC contracts). As we discussed in follow-up conversations with agency officials, the TEA and the THECB may allow the release of FERPA-protected information from ERCs to an institution, wherever it is located, as its “authorized representative” under § 99.31(a)(3) of the regulations as long as it can establish and maintain direct control over that institution, as discussed in the Deputy Secretary’s guidance.

You also explained in your letter that research results and publications “may not disclose individual student information and must mask any data cell or subgroup small enough to allow identification of an individual student, in accordance with procedures adopted by the JAB.” Each IHE must also “adopt procedures to review any dataset created by a researcher to ensure that student-identifiable or other confidential information is not removed from the center premises by a researcher.” TEA-THECB contract paragraph IV.B.3.b. You noted that JAB rules define “small numbers” in accordance with the current TEA policy of excluding data cells with

populations under 5. An educational agency or institution (or State educational authority) may release education records without parental consent under FERPA if it has first removed all personally identifiable information, which includes small data cells and other information that would make a student’s identity easily traceable. (We note that proposed regulations issued on March 24, 2008, would amend the definition of “personally identifiable information” and establish standards for the de-identification of education records in § 99.31(b).) It is the responsibility of any party that releases or allows the release of statistical information from education records to determine which methods it will use to ensure that it does not release personally identifiable information.

Finally, we would like to emphasize that this guidance is based on our review of the written contracts that you provided for our review with your letter and our follow-up conversations with your staff about how those contracts have been modified in practice, as noted above. The written agreements between the TEA and the THECB, as well as the written ERC contracts, should be amended to incorporate all significant changes to contract requirements, including those described in this letter regarding the location of ERC data and disclosure of confidential information to consortium institutions in the State. You may also wish to modify your use of the term “anonymous” with respect to confidential information released to ERCs, as described above. Please note also that under § 99.35 of the FERPA regulations, information that is disclosed to authorized representatives of State educational authorities under § 99.31(a)(3) must be destroyed when no longer needed for the audit, evaluation, or compliance and enforcement purposes for which it was collected. You may wish to consider this requirement in ERC contract amendments and extensions.

Thank you for providing us with the opportunity to review and comment on your approach to conducting independent educational research with longitudinal student data in Texas.

Sincerely,

/s/

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

