



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

December 5, 2017

Mr. David Corry  
General Counsel  
Office of Legal Affairs  
Liberty University  
1971 University Boulevard  
Green Hall, Suite 2730  
Lynchburg, Virginia 24515

Dear Mr. Corry:

This is in response to your November 13, 2015, letter regarding the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g and 34 CFR Part 99. Specifically, you seek “clarification on the extent to which” FERPA requires Liberty University (University) to provide individuals allegedly involved in fraud rings with the opportunity to inspect and review investigation reports prepared by the University related to suspected financial aid fraud. You explain that “these reports contain evidence that support the University’s suspicion that a student is committing financial aid fraud.” You also explain that the University sends these reports to the U.S. Department of Education’s (Department’s) Office of Inspector General (OIG) for further investigation pursuant to 34 CFR § 668.16(g). You express concern that if individuals who are suspected of fraud are permitted by FERPA to inspect and review these reports, they “will likely learn the investigative techniques for how [the University] detects financial aid fraud and adjust their *modus operandi*.” We appreciate your bringing this matter to our attention, and we apologize for the amount of time it has taken us to respond to your inquiry.

You explain that the University investigated suspected financial aid fraud allegedly perpetrated by one or more individuals. This alleged fraud was accomplished through fraud rings. Fraud rings often involve a single individual, a ring leader, enrolling in courses at an educational institution under his or her own name and on behalf of, and with the consent of, other individuals, i.e., ring associates. To avoid detection and obtain financial aid disbursements, ring leaders frequently complete coursework for not only themselves but also their ring associates.

As the University’s counsel, you argue that FERPA is largely inapplicable to these alleged fraudsters. More specifically, you claim that ring associates cannot be considered “students” under 34 CFR § 99.3 because they are not and have never been in attendance at the University and thus are not afforded FERPA rights. You also assert that FERPA does not permit ring leaders and ring associates the right to inspect and review one another’s records because only the individual named in an education record is afforded inspection and review rights. Further, you explain:

The more challenging question arises when ring leaders assert their rights to inspect and review their own education records. Ring leaders sometimes complete coursework in their own names in addition to the work they complete in the names of ring associates. If they do complete coursework in their own names, ring leaders would be able to argue that they are “students” and are thus entitled to inspect and review their education records, which presumably would include the fraud investigation report created by [University]. I believe the Department [ ] would have the discretion to interpret the regulation’s definition of “student” to mean “any individual who is or has been in attendance *in good faith*.” [Emphasis supplied.]

Subject to some limitations (the majority of which are not relevant to this analysis), educational agencies and institutions subject to FERPA may not have a policy of denying, or effectively preventing, parents of students who are or who have been in attendance the right to inspect and review their education records. 20 U.S.C. 1232g(a)(1)(A); 34 CFR § 99.10(a). The rights of parents transfer to “eligible students,” which are students who are 18 years of age or older or attend an institution of postsecondary education at any age. 20 U.S.C. 1232g(d); 34 CFR §§ 99.3 (Eligible student) and 99.5(a)(1). One such limitation that may be relevant is that if education records contain information on more than one student, the parent or eligible student only has the right to inspect and review, or to be informed about, only the specific information about his or her child, or himself or herself, respectively. 34 CFR § 99.12(a).

Under the FERPA regulations, “education records” are defined, with some limited exceptions, as “those records that are:

- (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. Here, it is undisputed that the University’s fraud investigation reports directly relate to individuals allegedly involved in financial aid fraud and the University maintains such records.

Whether such individuals are students, however, is a far more complex matter. The FERPA regulations define the term “student” as “any individual who is or has been *in attendance* at an educational agency or institution.” 34 CFR § 99.3. (Emphasis added.) Attendance includes, but is not limited to, “[a]ttendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom.” *Id.* Neither the statute nor its implementing regulations offer further guidance on what constitutes attendance and whether such attendance must be in good faith. Historically, the Department has left it to the discretion of each educational agency or institution to make determinations about attendance, requiring that any such determination be justified by some reasonable basis of fact and consistently applied. For example, some educational agencies and institutions consider individuals to be students in attendance once they attend orientation or start attending classes.

Therefore, subject to certain conditions set forth below, the University may adopt an attendance standard that requires an individual to attend the University “*in good faith*” in order to be considered a student. The Department may, however, choose to evaluate whether, as a matter of Federal law, the facts used by the University in its application of such standard are relevant and reasonable and whether the University’s standard for determining when a student is in attendance has been applied consistently. For example, if the Department receives a timely FERPA complaint that sets forth specific allegations of fact giving reasonable cause to believe that the University improperly determined that an alleged student was not in attendance and that the University’s failure to treat the individual as a student resulted in a violation of the student’s rights under FERPA, then the Department would investigate the complaint to determine if the University’s determination that the student was not in attendance was unreasonable or was not based on the relevant facts.

Another option that the University may wish to consider going forward (either supplemental to, or in place of, the aforementioned approach) is to task the University’s law enforcement unit with investigating suspected financial aid fraud, as students do not have the right under FERPA to inspect and review law enforcement unit records. Among the limited exceptions from the definition of “education records” – and thus from the applicability of FERPA – are records of a law enforcement unit of an educational agency or institution. 34 CFR § 99.3 (Education records). Under the FERPA regulations, a “law enforcement unit” is defined in part as any unit “officially authorized or designated by an [educational] agency or institution to enforce any . . . Federal law, or refer to appropriate authorities a matter for enforcement of any . . . Federal law against any individual or organization other than the agency or institution itself.” 34 CFR § 99.8(a)(1)(i). Records of a law enforcement unit are defined to mean “those records, files, documents, and other materials that are: (i) created by a law enforcement unit; (ii) created for a law enforcement purpose; and (iii) maintained by the law enforcement unit.” 34 CFR § 99.8(b)(1). In the January 17, 1995 preamble to the final rule (Preamble) defining “law enforcement unit,” the Department stated as follows:

The proposed definition [of “law enforcement unit”] is intended to cover that part of the institution which is responsible for providing and maintaining a safe and orderly school environment by monitoring and dealing with the conduct of *individuals*, not the institution itself . . . The Secretary has revised the definition of “law enforcement unit” by adding a new provision to clarify that it pertains to those individuals or parts of the institution responsible for maintaining the safety and security of school surroundings and for enforcing laws against individuals and organizations within the school community and not those responsible for the institution’s own compliance with various laws.

60 F.R. 3464, 3466 (Jan. 17, 1995) (Emphasis in original).

We believe that an investigation of student violations of the financial aid requirements of the Higher Education Act of 1965, as amended (HEA), or its implementing regulations, could fall within this definition of “law enforcement unit,” as such investigations constitute an enforcement of Federal law. In addition, we believe that an educational agency or institution could structure its law enforcement unit to monitor financial aid fraud, focusing solely on student conduct, rather than monitoring the educational agency’s or institution’s overall “compliance with . . . financial aid regulations.” 60 F.R. 3464, 3466 (Jan. 17, 1995). As such, to the extent that an educational agency or institution properly structures its law enforcement unit to investigate student financial

aid fraud under the HEA and satisfies the remaining conditions set forth under 34 CFR § 99.8 (note that the law enforcement unit officers also would need to satisfy the conditions of 34 CFR § 99.31(a)(1) in order to access student financial aid records as school officials with legitimate educational interests), then any records created and maintained by the law enforcement unit for such a law enforcement purpose would not be covered by FERPA.

It should be noted, however, that while applying this law enforcement unit exception to the definition of education records would prevent a student from being able to inspect and review his or her law enforcement unit records under FERPA, the student may nevertheless be able to seek access to these records under State open records laws, as records in possession of law enforcement units may be required to be publicly available under such laws. In your case, we assume (and the University should confirm with independent legal counsel) that, because the University is a private institution, it is not subject to the Virginia Freedom of Information Act (FOIA) and the University's law enforcement unit's records are not subject to FOIA disclosure requirements. Additionally, please note that if the University's law enforcement unit discloses a law enforcement unit record about a student, for example, investigative materials related to the student, to any other component of the University, for example, the financial aid office, the copy of any such law enforcement unit record shared with and maintained by said latter component becomes an "education record" and a student would have the right to inspect and review it under FERPA. As we stated in the 1995 Preamble discussion:

If a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a dean, principal, or other school official for use in a disciplinary proceeding, that copy is an "education record" subject to FERPA if it is maintained by the dean, principal, or other school official and not the law enforcement unit. The original document created and maintained by the law enforcement unit is not an "education record" and does not become an 'education record' merely because it was shared with another component of the institution.

60 F.R. 3464, 3466 (Jan. 17, 1995).

We trust that this is responsive to your inquiry. Should you require additional guidance, please do not hesitate to contact us again at the following address:

Office of the Chief Privacy Officer  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202-8520

Sincerely,



Michael B. Hawes  
Director of Student Privacy Policy  
Office of the Chief Privacy Officer  
U.S. Department of Education