

21 FAB 32

117 LRP 46530

**Letter to Anonymous
Family Policy Compliance Office**

N/A

August 1, 2017

Judge / Administrative Officer

**Michael B. Hawes, Director of Student Privacy
Policy**

Ruling

FPCO found that a requirement for a district to notify a complainant about certain stages of suspension and expulsions, as required by OCR, was permissible, and not a violation of FERPA.

Meaning

Notifying a complainant or alleged victim in a student discipline matter of the type of discipline handed down to another student is likely not a violation of FERPA, so long as the discipline directly relates to the harassed student. Here, the district was concerned that revealing the status of a complaint would be in violation of FERPA; however, a district may disclose information to the complainant or alleged victim about the sanction imposed upon the student who engaged in harassment when the sanction directly relates to the harassed student.

Case Summary

FPCO found that an OCR resolution agreement that required a district to notify a complainant about certain stages of the suspension/expulsion process was not a violation of FERPA. A district resolved an OCR complaint by agreeing to revise its policy on student suspensions and expulsions. The district was concerned that the requirement to notify a complainant of the outcome of a student's discipline hearing would violate FERPA and asked for guidance from FPCO. Referring to OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 117 LRP 41391 (OCR 2001), FPCO noted that the

ED has long viewed FERPA as permitting a school to disclose to the parent of the harassed student information about the sanction imposed upon the student who engaged in harassment when the sanction directly relates to the harassed student. The district could satisfy the requirement by sending the complainant a generalized letter stating that a decision has been made regarding expulsion, whether the decision has been appealed, and if so, subsequently that the appeal was fully addressed, FPCO explained. FPCO clarified that the changes that OCR required the district to make to its policy only apply to suspensions that result from complaints filed by students pursuant to the nondiscrimination laws that OCR enforces.

Full Text

Dear []:

This is in response to your email inquiry concerning the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99. Specifically, you asked about the applicability of FERPA to revisions that the Office for Civil Rights (OCR) at the U.S. Department of Education (Department) has required your client, [] (District), to make to its Policy on Student Suspensions/Expulsions. You originally contacted our office by email dated December 30, 2015, and we apologize for the delay in responding to your concerns. In follow-up to a request from us on May 5, 2017, you provided additional information that helped to clarify your original concerns. You explained that your office has been working with the OCR Region VIII office in [] pursuant to a Resolution Agreement to revise the District's Policy on Student Suspensions/Expulsions, among other things. Of particular concern to you is the requirement to notify the complainant about certain stages of the suspensions/expulsions and appeal process in an investigation.

Specifically, by letter dated November 3, 2015, OCR stated that the District's policy should include "timeframes for when the appealing party will be

notified in writing of the appeal determination, at the same time that the Complainant who brought forth the underlying complaint will be notified of major stages of the expulsion and appeal process." See page 4 of letter from [], [] to [].) OCR also similarly noted that the District's policy did not include a discussion of "when the appealing party will be notified in writing of the appeal determination, at the same time that the Complainant who brought forth the underlying complaint will be notified of major stages of the expulsion and appeal process." *Id.* at page 6. OCR also noted, in response to your concerns raised with them regarding FERPA, the following:

Regarding the Complainant, the District stated that including language that notifies a complainant of the outcome of a student's discipline hearing would violate FERPA. While we are sensitive to FERPA concerns, at the same time, for obvious safety reasons, a Complainant cannot be kept in the dark as to what has happened to a complaint he or she filed. An appropriate middle ground would be the District sending the Complainant a generalized letter stating that decision has been made regarding expulsion, whether the decision has been appealed, and if so, subsequently that the appeal was fully addressed. Providing such responses need not jeopardize confidentiality of records or student information. Please revise [the policy] to reflect this, and include timeframes for notifying the Complainant.

Id.

You state that you believe this directive would violate FERPA as it would disclose confidential information about a student and the type of discipline the student received. You asked for written guidance as to whether notifying a complainant or alleged victim in a student discipline matter of the type of discipline handed down to another student, and whether that student exercised his/her right to an appeal, may or may not violate FERPA. We appreciate your concerns for the privacy of students' education records. However, as explained more fully below, the changes to the District's policy that OCR requires can be made in certain circumstances and this

type of information can be disclosed in compliance with the specific laws that OCR enforces.

As you know, FERPA is a federal law that protects the privacy of students' education records. The term "education records" means, with certain exceptions, 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. See 20 U.S.C. § 1232g(a)(4)(A) and 34 CFR § 99.3 "Education records." FERPA affords parents and eligible students (students who have reached 18 years of age or are attending an institution of postsecondary education at any age) the right, with very limited exceptions, to have access to the student's education records, the right to seek to have the education records amended, and the right to have some control over the disclosure of the education records and of personally identifiable information (PII) contained therein. Under FERPA, an educational agency or institution is prohibited from having a policy or practice of disclosing PII from students' education records, without prior, written consent, unless the disclosure meets an exception to FERPA's general consent requirement. See 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j); 34 CFR §§ 99.30 and 99.31. Enclosed is a copy of the FERPA regulations. You may also access a copy of the FERPA regulations on our website at: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/

As stated in OCR's January 2001 "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX" (2001 Guidance), the Department has long interpreted FERPA as not conflicting with the requirement in Title IX that a school notify the harassed student of the outcome of the investigation, i.e., whether or not harassment was found to have occurred because this information directly relates to the harassed student. While the Department has viewed there being a potential conflict between FERPA and Title IX regarding the disclosure of the sanctions imposed upon a student to the parent of a harassed student (or to the harassed

student if 18 or older or in attendance at a post-secondary institution), the Department also has long viewed FERPA as permitting a school to disclose to the parent of the harassed student (or to the harassed student if 18 or older or in attendance at a post-secondary institution) information about the sanction imposed upon the student who was found to have engaged in harassment when the sanction directly relates to the harassed student. The 2001 Guidance explained that one example of this would be "an order that the harasser stay away from the harassed student." (See footnote 3, page vii.)

OCR's April 4, 2011, *Dear Colleague Letter* on sexual violence (2011 DCL), which we worked with OCR in drafting, indicated that sanctions that would directly relate to the harassed student include "an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall." (See page 13.) The 2011 DCL also warned that disclosure of other information in the student's education records, including information about sanctions that do not directly relate to the harassed student, may result in a violation of FERPA. You may find this guidance on the OCR website. Here are links to the OCR documents referenced above as well as a related OCR Q&A document on Title IX and sexual violence:

<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>,

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>,
and

<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

While the Department has not found a direct conflict between FERPA and Title IX in the circumstances set forth above, the Department has repeatedly noted in these OCR guidance documents that Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, through the Improving America's Schools Act, Pub. L. 103-382, title II, Section 211 (1994), to state that nothing in GEPA "shall be construed to affect the applicability of title VI of the Civil Rights Act of

1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any program." 20 U.S.C. § 1221(d). As a later enacted and more specific statute, this amendment to GEPA reflects congressional intent that, if there is a direct conflict between the laws, FERPA should not be construed to affect the applicability of these civil rights laws, such as Title V, Title VI, and Title IX. The 2011 DCL noted this action by Congress in footnote 32 on page 13. Although the 2011 DCL was focused on discrimination on the basis of sex in education programs or activities as prohibited by Title IX, the forgoing GEPA provision applies to all discrimination covered by the laws OCR enforces. The Department interprets the 1994 amendment to GEPA to mean that FERPA continues to apply in the context of Title V, Title VI, and Title IX, but if there is a direct conflict between the requirements of FERPA and the requirements of these laws, such that enforcement of FERPA would interfere with the primary purpose of these laws to eliminate discrimination on prohibited bases in programs or activities that receive federal financial assistance from the Department, the requirements of these laws would override any conflicting FERPA provisions.

Accordingly, please be assured that we do not interpret FERPA as prohibiting the District from complying with the determination made by the OCR Region VIII office in Denver. However, the changes that OCR requires the District make to its policy only apply to suspensions that result from complaints filed by students pursuant to the nondiscrimination laws that OCR enforces.

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

Statutes Cited

20 USC 1232(g)
20 USC 1232(g)(a)(4)(A)
20 USC 1232(g)(b)(1)
20 USC 1232(g)(b)(2)
20 USC 1232(g)(b)(3)
20 USC 1232(g)(b)(5)
20 USC 1232(g)(b)(6)
20 USC 1232(g)(b)(1)(h)
20 USC 1232(g)(b)(1)(i)
20 USC 1232(g)(b)(1)(j)
20 USC 1221(d)