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Opinion No. 03-139

Effect of 2003 Public Acts 105 on Access to Confidential Student Records Maintained by Institutions of Higher Education

QUESTIONS

1. Does 2003 Public Acts, ch. 105 (the 2003 Act) open each of the types of records no longer defined as confidential to public inspection and copying, or merely permit an institution of postsecondary education to publicly disclose these records at its discretion?

2. Does the 2003 Act open each type of record that continues to be defined as confidential, except in limited circumstances, to inspection and copying by the parties permitted, or merely permit an institution of postsecondary education to disclose to the specified parties those records at their discretion?

3. Does the 2003 Act provide for access to the specified student records created at any time or only to records created on or after the effective date of August 10, 2003?

4. If the 2003 Act provides access to records created prior to August 10, 2003, does Tenn. Code Ann. § 10-7-503(b) limit access to records created prior to the effective dates of the various amendments to the federal Family Educational Rights and Privacy Act (FERPA) on which the 2003 Act is based? For example, the language of Section 1 of the 2003 Act is based on a FERPA provision that permits disclosure of certain educational records created on or after October 7, 1998. Specifically, does this mean that the 2003 Act provides for access to student records of this type created on or after October 7, 1998?

OPINIONS

1. and 2. The 2003 Act does not make the student records public and open for inspection. The records are still confidential. The 2003 Act grants a higher education institution discretionary authority to disclose some otherwise confidential student information and establishes the conditions of disclosure.

3. The 2003 Act governs all of the specified student records, regardless of the date when the records were created.

4. In instances of conflict between FERPA and the Tennessee Public Records Act, the federal law controls. In the example you have given, the 2003 Act provision should be read as if it contained the FERPA date restrictions.

ANALYSIS

To answer your questions, we look at (1) the Tennessee Public Records Act (PRA), Tenn. Code Ann. §§ 10-7-501, *et seq.*, 2003 Tenn. Public Acts, ch. 105 (the "2003 Act"), and the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

Chapter 105, 2003 Tennessee Public Acts, amends Tenn. Code Ann. § 10-7-504, a section of the PRA that makes student records confidential and not open for public inspection and copying. The 2003 Act modifies Tenn. Code Ann. § 10-7-504(a)(4) by adding five new subsections. It does not, however, otherwise amend this statutory provision. Student records are still confidential and subject to disclosure only in the specific instances set out in the 2003 Act and in Tenn. Code Ann. § 10-7-504(a)(4). You say in your letter that the exceptions to nondisclosure created under the 2003 Act were modeled on the federal Family Education Rights and Privacy Act, which also deals with the confidentiality of, access to and disclosure of student records. 20 U.S.C. § 1232g.

A. Tennessee Public Records Act and Student Records

1. The PRA Before Amendment by the 2003 Act

The Tennessee Public Records Act declares all state records open. Tenn. Code Ann. § 10-7-503. Thus student records[1] maintained at a public education institution would be public records, were it not for an exception made for these records. The exception's general rule is that student records, including information in student records relating to academic performance, financial status of a student or the student's parent or guardian, medical or psychological treatment or testing, are not available to unauthorized personnel of the institution or to the public or any agency. An educational institution may not disclose this information without parental consent, if the student is a minor, or

[1] Under FERPA, "education records" are defined as follows:

> [T]he term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--
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> (i) contain information directly related to a student; and
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> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A)

without student consent, if the student is eighteen or older.[2] Tenn. Code Ann. § 10-7-504(a)(4).[3] The PRA, however, also carves out exceptions to the exception, thus allowing disclosure in some instances. Tenn. Code Ann. § 10-7-504(a)(4). The secondary level of exceptions allow disclosure, without consent, of student records to the following entities and individuals or in the following instances:

(a) To agencies authorized by the educational institution to conduct specific research.
(b) To entities otherwise authorized by the governing board of the institution.
(c) If permitted otherwise by law or regulation pursuant to that law.
(d) In consequence of due legal process.
(e) In cases when the safety of persons or property is involved.
(f) To the educational institution's governing board, the department of education, and the Tennessee higher education commission to fulfill their lawful functions. (The documents remain confidential.).
(g) Statistical information not identified with a particular student.
(h) Information relating to an individual student's name, age, address, dates of attendance, grade levels completed, class placement and academic degrees awarded (called directory information under FERPA).[4]

2. The PRA After Amendment by 2003 Tennessee Public Acts, ch. 105

The 2003 Act adds disclosure exceptions to the confidentiality established in Tenn. Code Ann. § 10-7-504(a)(4). Of the five new subsections added by the 2003 Act, four[5] begin with the following language:

> Nothing in this section shall be construed to prohibit an institution of post-secondary education from disclosing . . . .

Thus, under the 2003 Act, higher education institutions may disclose student information, without obtaining student or parental consent, but are not required to do so. The institutions' discretionary authority is limited to disclosure of specific student information to certain people, only in the manner allowed by the 2003 Act and Tenn. Code Ann. § 10-7-504(a)(4). The exceptions to nondisclosure of student records added by the 2003 Act are the following:

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[2] FERPA requires written consent before an institution discloses personally identifiable information from student's education record. 34 C.F.R. § 99.30.

[3] "The records of students in public educational institutions shall be treated as confidential."

[4] Under FERPA regulations, the higher education institution must give the student the opportunity to have the directory information remain confidential. 34 C.F.R. § 99.31(a)(11).

[5] The fifth, subsection (E), is definitional.

> (a) Permitting disclosure to the victim of the final results of any disciplinary proceeding held to review allegations of any crime of violence or nonforcible sex offense.
> (b) Permitting disclosure of the final results of any disciplinary proceeding on the same types of allegations if the institution determines that the charged student has violated institution rules or policies with respect to such crime or offense.
> (c) Permitting disclosure required by Tenn. Code Ann. § 40-39-106 (sex offenders registry).
> (d) Permitting disclosure to a parent of information regarding the student's violation of law or policy governing the use or possession of alcohol or a controlled substance, if the student is under twenty-one and the institution determines that the student has violated disciplinary rules.

None of the new 2003 Act exceptions is restricted by date.

B. Differences Between FERPA and the PRA

FERPA prohibits federal funding of programs at educational institutions that have a policy or practice of releasing education records to unauthorized persons. *Gonzaga University v. Doe*, 536 U.S. 273, 276 (2002). Boiled down, FERPA is about the who, what, why, how and when of access to and disclosure of education records. If an educational institution receives funds under a United States Department of Education program, the educational institution must conform to FERPA's requirements. FERPA's basic rule is that before an educational institution may disclose personally identifiable information from a student's educational record, the institution must obtain written consent from the parent or eligible (over 18) student. FERPA does not, *per se*, make student records confidential nor does it prohibit disclosure of the records. If, however, an institution does not comply with the access and disclosure requirements of FERPA, it jeopardizes its federal funding. *See* 20 U.S.C. § 1232g(f).

The opinion request states that the 2003 Act was modeled on FERPA and cites the example of Section 1 of the 2003 Act. This section's counterpart in FERPA regulations allows disclosure only for certain records created after October 7, 1998.

Section 1 of the 2003 Act includes the subparagraph that follows:

> (C) Nothing in this section shall be construed to prohibit an institution of post-secondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in § 18 U.S.C. 16), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that

> the student committed a violation of the institution's rules or policies with respect to such crime or offense.[6]
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> The FERPA counterpart reads as follows:
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> (i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that--
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> (A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and
> (B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.
> (ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.
> (iii) **This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.** (Emphasis added.)

34 C.F.R. § 99.31(a)(14).

C. Date Limitations

When neither FERPA nor the 2003 Act have date limitations, the applicability of confidentiality, access and disclosure requirements would be to all records that fall within the definition of educational or student records, including records created before the effective dates of the acts. *See* 34 C.F.R. § 99.3 (definition of "student.").[7] When the 2003 Act contains no date limitation and FERPA does, covering the same documents and information, a conflict arises between the Tennessee Act and FERPA.

FERPA will control over state law to the extent that state law conflicts with the federal act. Tennessee is bound by federal law under the Supremacy Clause of the United States Constitution, art. VI, cl. 2. State law is displaced by federal law under the Supremacy Clause where (1) Congress expressly preempts state law; (2) congressional intent to preempt is inferred from the existence of

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[6] Section 1 of the 2003 Act also describes what "final results" may be disclosed:

> (D) For the purpose of this section, the final results of any disciplinary proceeding:
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> (i) Shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and
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> (ii) May include the name of any other student, such as a victim or witness, only with the written consent of that other student.

[7] Under FERPA, a "student" means any individual who attends or **has attended** an educational institution or agency and regarding whom the agency or institution maintains education records, unless specifically provided elsewhere under the act or in the regulations. 20 U.S.C. § 1232g(a)(6); 34 C.F.R. § 99.3. (Emphasis added).

a pervasive federal regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of congressional objectives. *Hodges v. Delta Airlines, Inc*., 4 F.3d 350, 352 (5th Cir. 1993), rev'd and rem'd on other grounds, 44 F.3d 334 (1995) (en banc hearing). Thus, under these principles, the FERPA date limitations would control, and the 2003 Act should be read as if it were date restricted in the same manner as in FERPA regulations.[8]

In sum, the 2003 Act does not make previously confidential student information public record. It does give an institution of higher learning the discretion to disclose confidential student record information in certain carefully described circumstances. The 2003 Act's exceptions apply to records created before August 10, 2003, unless further limited by a FERPA provision. Where the 2003 Act and FERPA conflict, FERPA controls.

This opinion contains only basic information and should not be used to determine whether an institution may disclose a particular student record. Because FERPA is both comprehensive and complex, and because FERPA and the PRA cover the same subject, *i.e.*, student records, a higher education institution must carefully analyze any proposed disclosure of student record information to determine whether it meets PRA and FERPA requirements.

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[8] The dates FERPA has been amended do not bear on the issue of what student information may be disclosed.