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Letter to University of North Alabama re: Disability Office Records

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November 2, 2004

Mr. David Cope
Assistant Professor
Mathematics Department
University of North Alabama
Florence, AL 35632-0001

Dear Professor Cope:

This responds to your memorandum dated June 18, 2004, in which you asked for guidance regarding the applicability of the Family Educational Rights & Privacy Act (FERPA), 20 U.S.C. § 1232g, to records maintained by the Office of Developmental Services (ODS) at the University of North Alabama (University). This Office administers FERPA and provides technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations codified at 34 CFR Part 99.

You explained that students submit records prepared by a medical or clinical professional to ODS for the purpose of documenting a claim of a disability under Federal law and a request for appropriate accommodations. You have occasion to examine these records as a professor from whom disability accommodations are requested. University policy requires that you communicate any concerns you may have about the adequacy of

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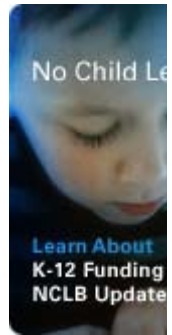
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the documentation or the accommodations authorized by ODS to specified administrators in your chain of authority. The University recently announced a policy that prevents a faculty member from sharing information from these records with anyone other than ODS and the student, citing the Americans with Disabilities Act, the Health Insurance Portability & Accountability Act (HIPAA), and FERPA. You expressed concern that this policy has the effect of preventing a faculty member from seeking modifications of accommodations authorized by ODS and asked us to respond to the following questions:

1. Do the student's medical or clinical records maintained by ODS qualify as "education records" or "treatment records" under FERPA?

"Education records" are defined as records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. See 34 CFR § 99.3 ("Education records"). The term does not include records on a student who is at least 18 years of age, or who attends a postsecondary institution, that are:

- (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;
- (ii) Made, maintained, or used only in connection with treatment of the student; and
- (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, 'treatment' does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution.

34 CFR § 99.3 ("Education records" (b)(4)).

These are sometimes referred to as "treatment" records.

A student's medical or clinical records maintained by ODS qualify as "education records" because they contain information that is directly related to a student and are maintained by the University. There is no exclusion from the definition of "education records" under FERPA for "health" or "medical" records except for "treatment" records that meet the requirements described above.

In order to qualify as treatment records, the record or information may not be made, maintained, or used for any purpose other than treatment by the professionals identified above. The regulations clearly identify medical functions as the focus of "treatment" and exclude educational and other non-medical activities from this concept. As such, we conclude that "treatment" does not include determining appropriate accommodations for a disability and, therefore, these records are not considered "treatment" records excluded from the definition of "education records" under FERPA.

2. Are a student's medical or clinical records maintained by ODS exempt from the HIPAA Privacy Rule?

Yes. The HIPAA Privacy Regulations specifically exclude from the definition of "protected health information" individually identifiable health information contained in "education records" covered by FERPA, as well as "treatment" records excluded from the definition of "education records" under FERPA. See 45 CFR § 164.501 ("Protected health information").

3. Does FERPA permit a faculty member from whom accommodations have been requested by a student to inspect the student's medical or clinical records maintained by ODS pursuant to the annual FERPA notification published by the

University?

A postsecondary educational agency or institution may not have a policy or practice of disclosing personally identifiable information from education records without the prior written consent of an eligible student except as specified except as specified by law. See 34 CFR §§ 99.30 and 99.31. One of the exceptions allows disclosure to "other school officials, including teachers...whom the agency or institution has determined to have legitimate educational interests." 34 CFR § 99.31(a)(1). An institution that discloses information without consent under this provision must provide in its annual FERPA notification a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. 34 CFR § 99.7.

The information you provided indicates that the University has adopted the model notification provided by this Office for postsecondary institutions. That notification states that:

A school official is a person employed by the University in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the University has contracted (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks. A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

Under this notification, the University could determine that a faculty member from whom accommodations have been requested by a

student has a "legitimate educational interest" in inspecting the student's medical or clinical records maintained by ODS. However, FERPA does not require a postsecondary agency or institution to make education records available to anyone other than an eligible student. Therefore, nothing in FERPA would prevent the University from adopting a policy that a faculty member may not have access to these records.

4. Does FERPA permit a faculty member to redisclose a student's medical or clinical records to administrators in the chain of authority who are entitled by University policy to modify the accommodations that were authorized by ODS in response to information contained in the records?

The University's policy on disclosure of education records without consent to teachers and other school officials with legitimate educational interests (quoted above) could permit a faculty member to redisclose the records to other administrators as described in your question. However, as explained above, the University is not required under FERPA to authorize these redisclosures.

I trust that this responds to your questions and appreciate the opportunity to provide assistance.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

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