

12/22/07

Ms. Margaret Spellings
Family Policy Compliance Office
U.S. Department of Education

Dear Mr. Rooker:

We are writing to ask for your guidance as to any improvements our state can make in the operation of recently-established education research centers ("ERCs"). We believe these centers offer an important opportunity to perform education research within the limits of confidentiality established under the Family Education Rights and Privacy Act and its regulations (collectively "FERPA").

The Texas Legislature authorized the creation of up to three ERCs by statute in 2006¹. The centers are jointly created by our two state education agencies (SEA), The Texas Education Agency ("TEA") and the Texas Higher Education Coordinating Board ("THECB")². Those two agencies collect and maintain substantial amounts of student-level data subject to FERPA from public schools and institutions of higher education in the state. ERCs are required to be located at either one of the two SEAs, or at a public institution of higher education within the state. The two agencies are required to exercise "direct, joint supervision" of the activities of the ERCs under a memorandum of understanding. The statute requires rules "establishing procedures to ensure that confidential student information is not duplicated or removed from a center in an unauthorized manner".

TEA and THECB have entered into an "interagency cooperation contract"³ to implement the ERC statute. The contract authorizes TEA to share certain FERPA-protected data with THECB for the purposes of research at the three ERCs. THECB is responsible for day-to-day operations to maintain the data, for confidentiality, and for immediate oversight of the ERCs. The contract explicitly recognizes the primacy of FERPA in the use of student-level information for research. Pursuant to that contract, either party may submit a question regarding the operation of the Research Centers and student data to the U.S. Department of Education for resolution. In order to provide information that may be helpful in resolving any such question, TEA and the THECB agreed to submit the contract and other security requirements as well as a copy of the enabling legislation to you.

¹ Section 1.005, Texas Education Code.

² For simplicity, this letter will refer to the SEAs (TEA and THECB). Each is headed by a commissioner (of education and higher education, respectively). The commissioner of education is appointed by the Governor and is effectively synonymous with the TEA pursuant to Section 7.002, Texas Education Code. The commissioner of higher education reports to a nine-member board appointed by the Governor and established under Chapter 61, Texas Education Code.

³ All of the documents referenced in this letter are attached for your reference. The rules submitted are those currently proposed for adoption by TEA, which contain minor technical modifications to those previously adopted by THECB. The THECB rules are expected to be amended to be identical in January 2008.

TEA and THECB have jointly authorized three ERCs through sponsoring institutions of higher education (“IHE”)⁴. ERCs operate under rules jointly adopted by the two SEAs, procedures adopted by a joint advisory panel appointed and chaired by the commissioners of education and higher education, and the terms of their contracts with the two agencies. Below is a summary of the FERPA-related requirements in those documents:

- The sponsoring IHE is required to comply with all applicable laws or rules, including any subsequent amendments thereto [Contract IV(B)(3)(b)].
- The sponsoring IHE is required to cooperate with any state audits and must through its internal auditor annually certify that the ERC is in full compliance with all applicable laws, including FERPA [Contract IV(B)(3)(c)].
- The sponsoring IHE must undergo an annual security audit performed by the state Department of Information Resources, or a contractor approved by that agency [Contract IV(B)(3)(c)].
- ERC status is subject to revocation for failure to comply with the terms of the agreement creating the ERC, rules of the two agencies or policies adopted by the joint advisory committee [Contract IV(B)(3)(j), Rule 1.18(e)].
- A joint advisory board (“JAB”) appointed and chaired by the two commissioners of education is created to provide oversight of research involving FERPA-protected student information. The JAB may not include employees of or individuals conducting research at an ERC. The JAB must approve and oversee any research using FERPA-protected data [Contract IV(C)(3), Rules 1.18(d)(3)]⁵.
- Student data contributed by the two SEAs must be de-identified prior to becoming available to an ERC by removing personally identifiable information (e.g., name, social security number, and date of birth) and being assigned a Personal Identification Number (“PID”) that is a unique identifier to facilitate longitudinal studies, but is not a scrambled social security number. The linking key between the PID and social security number is retained only at the two SEAs and may not be shared with any other entity or used for any other purpose [Contract IV(D)].
- THECB is required to maintain security of confidential data and may not provide access to such data at a location other than a research center [Contract IV(D), Rule 1.18(f)].
- All research results or 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

⁴ In each of the ERCs, the sponsoring institution is acting as the lead for a consortium of public institutions of higher education within Texas

⁵ Initial research projects at the ERCs were approved as part of the contract between them and TEA/THECB pending the establishment of the JAB.

the JAB⁶. THECB may match and add additional information collected by researchers, but may not return the data to a researcher following that match [Contract IV(D)(6) and (7), Rule 1.18(a)(3)].

- The sponsoring IHE must provide for an independent review of each research product, publication, dataset or use of FERPA-protected information to ensure compliance with all confidentiality requirements [Contract IV(B)(3)(b)].
- Additional provisions in the contract and rules deal with funding and the fulfillment of Public Information Requests by the ERCs.

The ERCs are designed to operate under the provisions of Title 34 of the Code of Federal Regulations, Section 99.31(a)(6) as performing research conducted under the direct oversight and supervision of the two SEAs. We want to stress that the only confidential data available to the ERCs is the ability to conduct research with data that includes small data cells; otherwise, the data is completely de-identified and could be released to the public under our current understanding of your guidance as to FERPA compliance⁷. All research is required to be approved and overseen by the JAB acting on behalf of the two SEAs and is subject to rigorous security procedures at the ERCs. The ERCs may not release or disclose confidential information as part of a project. Access to confidential student information is limited to the physical location of an ERC under the regulatory jurisdiction of the THECB.

Our agencies are excited about this opportunity to facilitate important research while still maintaining the confidentiality students and parents are entitled to expect. We also strongly believe that the ERC approach is more secure than the current practice of allowing researchers access to student-level information by scrambling identification numbers and removing small data cells, thereby allowing a copy of de-identified student records to leave the control of the educational institution. We would appreciate any guidance you might wish to provide our agencies on how to better comply with the requirements of FERPA.

Finally, in negotiating the ERC contracts, we were asked to allow secure access to FERPA-protected information at institutions of higher education outside of the State of Texas. We 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. However, we agreed to specifically pose that question as part of this submission.

We appreciate your consideration of this letter. Should you have any questions, please feel free to contact David Anderson, TEA General Counsel (512-463-9720) or William Franz, THECB General Counsel (512-427-6143).

⁶ The rules define "small numbers" in accordance with the current TEA policy of excluding data cells with populations under 5. See Section 1.18

⁷ TEA has pending with your office a request for guidance as to an obligation, if any, to consider "longitudinal small numbers" in determining what data cells may be confidential.

Sincerely,

Raymund A. Paredes
Commissioner of Higher Education

Robert Scott
Acting Commissioner of Education

Cc: Morgan Brown, Office of Innovation and Improvement
David Dunn, Chief of Staff
LeRoy Rooker, Family Policy and Compliance Office