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January 9, 2014

### MEMORANDUM

TO: Dan Sharphorn

FROM: Barbara M. Holthaus *Barbara M. Holthaus*

SUBJECT: Authority of The Board of Regents of the University of Texas and The University of Texas System Administration to Access Education Records Maintained by a System Institution under the Family Educational Rights and Privacy Act

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### QUESTION PRESENTED

Does the Family Educational Rights and Privacy Act, ("FERPA"), 20 U.S.C. § 1232g, allow component institutions of The University of Texas System to provide personally identifiable information from education records of students to The Board of Regents of The University of Texas System ("Board of Regents" or "Board"), as well as the officers and staff of The University of Texas System Administration ("System Administration") without consent from those students?

### SHORT ANSWER

Yes. The Board of Regents, as well as the officers and staff of System Administration, are authorized by Texas law to provide oversight and coordination of the activities of the System Institutions within The University of Texas System. Two separate provisions of FERPA, the "evaluation and audit" exception in 34 CFR §§ 99.31(a) and 99.35, as well as the "school official exception", 34 CFR § 99.7, authorize a post-secondary institution to provide education records subject to FERPA to a legally authorized body as needed by the body to fulfill its legal oversight responsibilities as to that institution.

## DISCUSSION

### **Oversight Authority of the Board of Regents And System Administration Over System Institutions**

The Board of Regents is authorized by § 65.31 of the Texas Education Code to “govern, operate, support, and maintain each of the component institutions that are now or may hereafter be included in a part of The University of Texas System.” This includes the authority to prescribe for each of the component institutions courses and programs leading to such degrees as are customarily offered in outstanding American universities, and to award all such degrees and to promulgate and enforce such other rules and regulations for the operation, control, and management of the university system and the component institutions thereof as the board may deem either necessary or desirable.

*Id.*

Subsection (g) of section 65.31 authorizes the Board by rule to delegate a power or duty of the board to a committee, officer, employee, or other agent of the Board. Texas Education Code § 65.16, creates System Administration as the entity to which the Board delegates these powers and duties:

- (a) The board shall establish a central administration of the university system to provide oversight and coordination of the activities of the system and each component institution within the system.
- (b) The board shall appoint a chief executive officer and such other executive officers of the system central administration as the board considers appropriate. The board shall determine each officer’s term of appointment, salary, and duties.
- (c) Subject to the power and authority of the board, the chief executive officer is responsible for the general management of the university system within the policies of the board and for making recommendations to the board concerning the organization of the university system and the appointment of the chief administrative officer for each component institution within the system.

Accordingly, the Board and System Administration are authorized to take any reasonable action required to exercise these powers and duties that is not otherwise prohibited by an applicable law. This necessarily includes access to any record, including an education record, they require to supervise, plan, coordinate, advise on, audit or evaluate the provision of services and programs by System Institutions.

## FERPA

FERPA is a federal law that protects the privacy of student education records. The law applies to all schools, including post-secondary institutions that receive funds under an applicable program of the U.S. Department of Education (the Department).

Generally, post-secondary institutions must have written permission from the student in order to release any information from a student's education record. However, FERPA provides specific exceptions that allow an institution subject to FERPA to disclose those records, without consent.<sup>1</sup>

At the outset, it should be noted that access to an institution's education records by System Administration and/or the Board has always been, and continues to be crucial to the ability of System institutions to fulfill their obligations as institutions of public education created by Texas law. Both the Board and System Administration, since their inception, have routinely accessed education records from all of the fifteen component institutions.

For example, System academic institutions must meet certain state law reporting obligations with regard to the Texas Higher Education Coordinating Board by providing personally identifiable information from education records to the Executive Vice Chancellor for Academic Affairs at System Administration, who, in turn, provides the information to the Coordinating Board on behalf of the institutions. Institutions also comply with data requests to provide education records to the University Administration's Office of Strategic Initiatives. In addition, System institutions provide education records to the Office of General Counsel at System Administration to allow that office to represent the institution in administrative matters, law suits and briefing of Public Information requests.<sup>2</sup>

No changes have occurred in the Education Code or FERPA that create a barrier to this continued access. In addition, as described above, the Board has the authority to set and approve the policies under which System Institutions operate, including their FERPA policies.

### **The Audit and Evaluation Exception**

One FERPA exception that allows the Board and System Administration to access a System Institution's education records is the "audit or evaluation exception" in 34 CFR §§ 99.31(a) and 99.35, which authorizes disclosures to a state or local educational authority in connection with an audit or evaluation of Federal or State supported education programs.<sup>3</sup> The Department has clarified in guidance issued in connection

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<sup>1</sup> It should be noted that FERPA does not *require* an institution to provide education records under an applicable exception. However, if an exception available under FERPA permits an institution to provide access to education records to a body otherwise authorized to access them, nothing in FERPA or other law would permit the institution to rely upon FERPA as a basis to deny the oversight body access to those records need to exercise its authority.

<sup>2</sup> FERPA would permit this information to be shared without student consent under another exception that permits the outsourcing of services that involve access to education records, but only if the System Institution has a FERPA compliant agreement in place with System Administration.

<sup>3</sup> 34 CFR §99.31(a)(3)(iv) permits an institution to make a non-consensual disclosure from an education record to a state educational authority as permitted by 34 CFR § 99.35. 34 CFR § 99.35(a)(1) states that "authorized representatives of the officials or agencies headed by officials listed in §99.31(a)(3) may have

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with recent amendments to the FERPA regulations that a State Educational Authority is any "entity that is responsible for and authorized under local, state or federal law to supervise, plan, coordinate, advise, audit or evaluate elementary, secondary, or postsecondary Federal- or State-supported education programs and services in the State." *Family Educational Rights and Privacy, Final Regulations*, 76 Fed. Reg., 75607 (December 2, 2011) (amending 34 C.F.R. Part 99)("Guidance").

As set forth above, the duties imposed upon the Board of Regents and System Administration by the Texas Education Code bring both entities squarely within the definition of a State Educational Authority with which the University can share education records for oversight and evaluation purposes.<sup>4</sup> Accordingly, under 34 CFR §§ 99.31(a) and 99.35, the Board and System Administration may continue, as they always have, to access any System Institution's education records reasonably required to allow them to supervise, plan, coordinate, advise, audit or evaluate the provision of services and programs by the institution.

In turn, as State Educational Authorities that access education records from FERPA compliant institutions, both the Board and System Administration are required by 34 CFR § 99.35 to have policies and procedures in place to maintain the confidentiality of education records they obtain pursuant to the evaluation and audit exception. They also must enter into FERPA compliant agreements with any third parties to whom they in turn outsource such education records for services related to supervision, planning, coordination, advising, auditing or evaluation of the services and programs of the institutions that they oversee. See Guidance at 75614.

### **The University Official Exception**

34 CFR 99.31(a)(1) allows individuals to access student education records without student consent if the institution has designated that individual as a "university official" with a "legitimate educational interest" in those records. Institutions must issue an annual notification of FERPA rights that specifies the criteria used to determine who constitutes a school official and what constitutes a legitimate educational interest. 34 CFR § 99.7(a)(3)(iii).

Although the term "school official" is not defined in the FERPA statute or regulations, the

access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with federal legal requirements that relate to those programs."

<sup>4</sup> See *FPCO Letter to Dr. Thomas Henry Executive Director, Wyoming Community College Commission Western Kentucky University*, August 23, 1999, where the FPCO found the Wyoming Community College Commission to be a state educational authority that could access records from the seven community colleges as it was "responsible for overall administration of the program of State support for the community college system; promulgating and adopting rules that will ensure the coordinated operation and maintenance of the State's community college system, including basic audit requirements; reviewing, approving, disapproving, and terminating academic and vocational- technical programs; and establishing an effective management information system for the community college system."

Department has broadly construed the term to include a professor; president; chancellor; board member; trustee; registrar; counselor; admissions officer; attorney; accountant; human resources professional; information systems specialist; and support or clerical personnel. *FPCO Letter to Louis J. Saccocio General Counsel, The University of Rhode Island, May 21, 2013.* While the term "legitimate educational interest" is similarly not defined in the FERPA statute or regulations, the Department has generally viewed a school official as having a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility. *Id.*

As recognized by the FPCO in the Saccocio letter, *supra*, designation of a board that constitute a separate state agency, such as the Rhode Island Board of Governors for Higher Education, permits an institution subject to that board to share education records with an employee of the board. *Id.* Similarly, by designating the Board of Regents or person employed by System Administration as university officials, FERPA permits a System Institution to provide access to its education records to them under the school (or in the case of higher education, the "university official") exception.

The model FERPA policy promulgated by the UT System Office of General Counsel includes System officials and the Regents as "university officials" when their duties required them to access education records. Under the model policy, any institutional or UT System official can access a System Institutions' education records to permit the institution and/or the System to meet their educational duties under Texas and federal law.<sup>5</sup>

## CONCLUSION

Two separate provisions of FERPA, the "evaluation and audit" exception in 34 CFR §§ 99.31(a) and 99.35, as well as the "school official exception", 34 CFR § 99.7, authorize a post-secondary institution to provide education records subject to FERPA to a legally authorized body as needed by the body so it can fulfill its legal oversight responsibilities as to that institution.

As noted above, FERPA does not generally require an institution to provide education records under an applicable exception. However, the very purpose of these exceptions is to allow University Institutions to provide access to education records that the Board and/or System Administration have determined to be necessary to allow the Board and System Administration to carry out its obligations to ensure that the institution is compliant with the regulations and policies promulgated by the Board. Given the Board's mandate to provide oversight of the operations of the University and to delegate oversight duties to System Administration, as well as the availability of these exceptions that clearly permit the Board and System Administration to access System Institution's education records to oversee and assist the University in carrying out its legislatively imposed missions, the

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<sup>5</sup> The University official exception is also used by The Texas A & M University System to permit its board and system officials to access Texas A&M component institutions to enable that system and its institutions to perform their state law educational duties.

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Board and System Administration can clearly access education records as needed from System Institutions.

To ensure FERPA compliance and reduce the potential risk of improper exposure of education records or personally identifiable information obtained from such records, System must consistently enforce policies and procedures that ensure that personally identifiable information is accessed only when de-identified or aggregated information will not suffice to permit the Board or System Administration to perform a specific, educationally related duty. These policies and procedures should include a process to determine that the requestor articulates a legitimate and official purpose for accessing the records, that the records are used only for that purpose, and that they are securely and confidentially maintained only for the period of time in which the records are required for the articulated and approved purpose.

I hope this information is helpful to you. If you have questions or comments about this or any other matter, please do not hesitate to contact me. My direct line is 512 499 4617.