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MEMORANDUM

Date: August 4, 2008

To: Minnesota State Colleges and Universities Chief Student Affairs Officers
and Data Practices Compliance Officials

From: Gail M. Olson, General Counsel
Kris Kaplan, Deputy General Counsel

**Subject: New State Law On Privacy of Student Discipline Records
Effective August 1, 2008**

As you may know, the 2008 Minnesota Legislature amended Minn. Stat. § 13.32 to clarify that colleges and universities subject to the Minnesota Government Data Practices Act (MGDPA) are permitted to disclose student discipline records as authorized by the federal Family Educational Rights and Privacy Act (FERPA).

Attached hereto is a "Frequently Asked Questions" guide on common issues that may arise in implementing these detailed FERPA provisions. Please share this document with other administrators and personnel who have student records responsibilities. The document will also be posted for future reference on the Office of General Counsel Web site: www.ogc.mnscu.edu.

Contact Kris Kaplan at 651 296-3905 or Kristine.kaplan@so.mnscu.edu if you have questions about this or other data privacy issues.

Att.

**Minnesota State Colleges and Universities
Office of General Counsel**

**Privacy of Student Discipline Records
FAQ's for Minnesota State Colleges and Universities on
Implementing the 2008 Amendments to
the Minnesota Government Data Practices Act
August 2008**

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Introduction

These Frequently Asked Questions (FAQs) are provided to give clarification on issues related to the disclosure of student disciplinary records under the federal Family Educational Rights and Privacy Act (FERPA) and the Minnesota Government Data Practices Act (MGDPA).

Because the law and regulations strictly proscribe the circumstances under which these disclosures are permitted, it is important that administrators carefully follow the guidelines below in developing college and university procedures. Violations of student privacy may result in institutional or individual liability. The Office of General Counsel or the Attorney General's Office is available for consultation.

Background

Student disciplinary proceedings and results are generally classified by federal and state law as "private" information and may not be released to third parties without the student's written consent. Thus, under most circumstances no disciplinary information may be disclosed publicly without the student's prior, written consent or some law that specifically authorizes the disclosure, including the fact that a named student has been charged and is the subject of disciplinary proceedings.

For some time, FERPA has permitted limited disclosures pertaining to certain types of disciplinary proceedings without student consent. The 2008 Minnesota Legislature has amended the Minnesota Government Data Practices Act to clarify that colleges and universities may now disclose information about student discipline pertaining to *crimes of violence* and *nonforcible sex offenses*, as permitted by FERPA. The following information may assist colleges and universities in developing procedures to implement these new disclosure provisions.

1. What kind of disciplinary disclosures are permitted?

In general, this law permits (but does not require) colleges and universities to disclose without student consent specified information pertaining to disciplinary proceedings on students who are accused of violations of its conduct code that are defined by FERPA as *crimes of violence* or *nonforcible sex offenses*. Certain information may be made

available to the public, and additional information may be made available to an alleged victim pursuant to rights under other federal law.

You may read the applicable text of the laws following the FAQs.

2. What specific disciplinary information may colleges and universities disclose to the PUBLIC?

If a campus honor court, or council, committee, commission, or other entity authorized to resolve disciplinary matters within the college or university has made a *final* determination (i.e., the student has no further internal appeal rights) that a student has committed a *crime of violence* or *nonforcible sex offense* the following limited information may be made public, pursuant to school policy:

- Name of student;
- The *violation committed*; and
- Any *sanction imposed* by the institution against the student.

a. What does the term *crime of violence* mean in this context?

Crime of violence means that a student was found to have committed or attempted to commit an act that would, if proven, constitute any of the following offenses: arson; assault offenses; burglary; criminal homicide – negligent or non-negligent manslaughter, or murder; destruction/damage/vandalism of property; kidnapping/abduction; robbery; or forcible sex offenses. The FERPA Regulations at 34 CFR Part 99, Appendix A (see text following FAQs) and state law may need to be consulted for further clarification of the conduct included.

No criminal charge or proceeding need have been initiated; the criminal laws are only relevant in defining the conduct.

b. What is a *nonforcible sex offense* for this purpose?

A *nonforcible sex offense* means acts that, if proven, would constitute statutory rape or incest. See Appendix A, below.

As with *crimes of violence*, no criminal proceeding is required for this definition to apply.

c. What does the term *violation committed* mean?

Violation committed means the college or university's rules or code sections that were violated and any essential findings supporting the institution's conclusions that the violation was committed.

d. How is the term *sanction imposed* defined?

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

e. When is a disciplinary decision considered to be *final*?

The FERPA regulations specify that *final* means the college or university's decision at the end of its internal procedure. Thus, a decision is final once the student has exhausted his or her appeal rights within the college or university, regardless of any further opportunity a student may have to request an evidentiary hearing at the Office of Administrative Hearings under Chapter 14, or other legal or administrative venues.

3. If the conditions above are met, may a college or university disclose all the findings related to the disciplinary proceeding?

No. The exception only permits the specified information to be released about established conduct that constituted a *crime of violence* or *nonforcible sex offense*. If the student was additionally charged with misconduct outside of those categories, for example, academic dishonesty, information relating to that charge remains private.

Moreover, private information on other students involved in the proceeding, including, but not limited to their identities as witnesses or complainants, must be protected from disclosure.

4. What may be disclosed if a student charged with a *crime of violence* is not found to have violated the college or university's code of conduct?

If no violation defined as a *crime of violence* or *nonforcible sex offense* was established, no information on the proceeding becomes public.

5. What different access is permitted to alleged VICTIMS about discipline pertaining to *crimes of violence* or *nonforcible sex offenses*?

The alleged victim of a *crime of violence* or *nonforcible sex offense* may obtain the final results of a disciplinary proceeding concerning these offense(s) *regardless of whether a violation of the school's policies was found to have been committed*.

6. May the college or university limit the alleged victim from redisclosing disciplinary information?

If the disciplinary information is about an alleged sex offense that is required to be provided to the victim under the Sexual Assault Victims' Bill of Rights (Clery Act)¹, (*see* System Procedure 1B.3.1., Part 6. B. 6), the alleged victim may not be required to execute a non-disclosure agreement or otherwise restricted by the college or university as to redisclosure.

Other victims that are permitted to have information about disciplinary matters should be informed that FERPA does not permit them to redisclose the information.

¹ Under the federal Clery Act, if the alleged misconduct concerns a "sex offense", i.e., rape, acquaintance rape or other forcible or non-forcible sex offenses, both the accuser and the accused shall be informed of the outcome of the campus disciplinary proceeding and the victim may not be required to sign a pledge of confidentiality in order to be advised of this information. *See* Sect. D, of Regulations following FAQs.

7. What rights do parents have?

Unless the college or university has a published policy of allowing parents of students who are dependents for tax purposes access to private data on their children, parents generally have no special access to discipline information. Parents may have access to discipline information if it is public, under the conditions described above; as authorized by their child's written consent; or as otherwise permitted by law, such as may be required for a health or safety emergency.

8. Does the student's age matter in determining data disclosure rights?

No. All students at a college or university have the same rights to control their data regardless of age.

9. If a sanction includes a "no-contact" order, may the college or university notify the individual(s) the student is to stay away from about the order?

Yes – this is permitted regardless of the type of conduct involved and stage of the proceeding. Otherwise, enforcement would not realistically be possible. Unless the information is public, however, the disclosure should be limited to the fact of the no-contact order and how to report suspected violations. Additionally, unless the information is public or the disclosure is to the victim of a sex offense, as described above, the individuals should be informed that FERPA does not permit redisclosure.

10. Is there any information that is public while a student disciplinary hearing is pending?

In general, a college or university may not publicly disclose *any* information about a pending student disciplinary proceeding if it could reasonably identify an individual student.² This would preclude even making statements that confirm that a disciplinary proceeding is in progress against a named student.

11. How should campuses respond to media inquiries about a student discipline matter?

Campus personnel should be strongly encouraged to direct all media inquiries to the communications office or designee to ensure compliance with these guidelines. The wording and context of an inquiry should always be considered in determining the appropriate response to an inquiry about student discipline. Consultation with the Office of General Counsel or Attorney General's Office is encouraged, especially if the matter is one that is already the subject of public comment and speculation.

If asked about a situation, rather than responding with "no comment," a spokesperson may offer an explanation that student disciplinary matters, if they are being pursued, are required by state and federal law to be confidential in nature, and that a college or university would be subject to sanctions if it operated under policies or procedures that were inconsistent with law. A college or university could describe its conduct procedure and make general statements to the effect that the college/university is "pursuing appropriate action against individuals it believes to be responsible" for an incident at

² In contrast, for employees, the existence and status of a complaint or charge against an employee is always public. Minn. Stat. § 13.43, Subd. 2 (a) (4).

issue, as long as that information cannot reasonably be used to identify individual student(s).

11. If a student has already disclosed the fact that he/she is the subject of a disciplinary proceeding, shouldn't the administration be able to confirm or correct the record?

While it may seem illogical or even unfair, the institution must continue to protect private educational data regardless of what the student does. The student may choose to make public statements about his/her private information, but such statements should not be confused with consent for disclosures by the college or university. Unless otherwise authorized, college and university personnel may not publicly disclose any disciplinary information without the student's prior written consent – even to simply confirm what the student has decided to make public.

12. If an athletic coach has disciplined a student athlete for violating team rules, do the same disclosure rules apply?

Generally, no. The *crime of violence/nonforcible sex offense* exceptions are not applicable unless the sanction was based on a final decision under the student conduct process. Thus, no information is public about such actions without the student's prior, written consent.

13. What can or should a college or university say about a student's criminal charges?

Questions from the public about any criminal proceedings should simply be referred to the appropriate law enforcement or prosecutor's office. The college or university should be clear that the institution's disciplinary procedure is separate and different from the criminal process; it is not a legal hearing and serves a different purpose. The outcome of a criminal hearing will not generally determine an institution's disciplinary proceeding, and *vice versa*, as the standard of proof and rules are different.

14. What information may a college or university provide to law enforcement personnel about student disciplinary matters?

In general, law enforcement may have access to private data only if they have a valid written consent from the student or some other legal authority such as a valid judicial order or as permitted for a health or safety emergency. In certain limited circumstances, an institution may release "law enforcement" data that is held by an institution's "law enforcement unit" without the student's consent, for appropriate purposes, but legal advice is strongly advised.

15. May a college or university share disciplinary information with other schools?

At the time a student seeks or indicates an intent to enroll or transfer to another school, any records about the student may be forwarded to the new institution, including disciplinary records, without the student's consent *provided that* the originating school includes notice of this practice in its FERPA policy. MnSCU colleges and universities should routinely forward discipline records if a student currently under suspension for

disciplinary reasons indicates an intent to transfer to another system school as System Procedure 3.4.1. Part 6 permits the denial of admission under such circumstances.

Proposed amendments in the FERPA regulations would broaden the ability of a college or university to disclose student records without consent at any time and not just at the time of transfer. When the amendments are finalized, the Office of General Counsel will provide further guidance on this and other changes.

FERPA Law and Regulations on Disclosure of Student Discipline

The text of the applicable FERPA provisions is as follows:

A. General Nonconsensual Disclosure Provisions:

“An educational agency or institution may disclose personally identifiable information from an education record of a student without . . . consent . . . if 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 –

“(A) The student is an alleged perpetrator of a crime of violence or nonforcible 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.” 34 C.F.R. § 99.31(a)(14).

B. “§ 99.39. What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?”

“As used in this part:

“*Alleged perpetrator of a crime of violence* is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in Appendix A to this part:

“Arson

“Assault offenses

“Burglary

“Criminal homicide – manslaughter by negligence

“Criminal homicide – murder and nonnegligent manslaughter

“Destruction/damage/vandalism of property

“Kidnapping/abduction

“Robbery

“Forcible sex offenses.

“Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

“Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

“Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

“Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution’s conclusion that the violation was committed.” 34 C.F.R. § 99.39.

C. Appendix A to Part 99 – Crimes of Violence Definitions

“Arson

“Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

“Assault Offenses

“An unlawful attack by one person upon another.

“Note: By definition there can be no ‘attempted’ assaults, only ‘completed’ assaults.

“(a) *Aggravated Assault*. An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

“(b) *Simple Assault*. An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

“(c) *Intimidation*. To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

“Note: This offense includes stalking.

“Burglary

“The unlawful entry into a building or other structure with the intent to commit a

felony or a theft.

“Criminal Homicide – Manslaughter by Negligence

“The killing of another person through gross negligence.

“Criminal Homicide – Murder and Nonnegligent Manslaughter

“The willful (nonnegligent) killing of one human being by another.

“Destruction/Damage/Vandalism of Property

“To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

“Kidnapping/Abduction

“The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

“Note: Kidnapping/Abduction includes hostage taking.

“Robbery

“The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

“Note: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.

“Sex Offenses, Forcible

“Any sexual act directed against another person, forcibly or against that person’s will, or both; or not forcibly or against the person’s will where the victim is incapable of giving consent.

“(a) *Forcible Rape (Except ‘Statutory Rape’)*. The carnal knowledge of a person, forcibly or against that person’s will, or both; or not forcibly or against the person’s will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

“(b) *Forcible Sodomy*. Oral or anal sexual intercourse with another person, forcibly or against that person’s will, or both; or not forcibly or against the person’s will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

“(c) *Sexual Assault With An Object*. To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person’s will, or both; or not forcibly or against the person’s will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

“Note: An ‘object’ or ‘instrument’ is anything used by the offender other than the offender’s genitalia. Examples are a finger, bottle, handgun, stick, etc.

“(d) *Forcible Fondling*. The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person’s will, or both; or not forcibly or against the person’s will where

the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

“Note: Forcible Fondling includes ‘Indecent Liberties’ and ‘Child Molesting.’

“Nonforcible Sex Offenses (Except ‘Prostitution Offenses’)

“Unlawful, nonforcible sexual intercourse.

“(a) *Incest*. Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

“(b) *Statutory Rape*. Nonforcible sexual intercourse with a person who is under the statutory age of consent.” 34 C.F.R. Part 99, Appendix A.

D. Disclosure to Victim

An institution may disclose the “final results” of such a disciplinary hearing to the *victim* “regardless of whether the institution concluded a violation was committed.” 34 C.F.R. § 99.31(a)(13). Under the Campus Sexual Assault Victims Bill of Rights Act, an institution *must* inform the victim of “the outcome of any campus disciplinary proceeding brought alleging a sexual assault.” 20 U.S.C. § 1092(f)(8)(B)(iv)(II).