

Mr. Jonathan Talisman
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Department of the Treasury
Room 1334
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. Stuart Brown
Chief Counsel
Internal Revenue Service
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Dear Mr. Talisman and Mr. Brown:

This letter responds to your request for an opinion regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) to the reporting requirements of the Hope Scholarship Credit and the Lifetime Learning Credit provisions of the Taxpayer Relief Act of 1997 (the "Act"). Pub. L. No. 105-34, § 25A(c), 111 Stat. 788, 804 (1997). Specifically, on October 21, representatives of my Office and the Department's Office of General Counsel met with Ms. Catherine Livingston of the Department of the Treasury to discuss whether FERPA would prohibit educational agencies and institutions from complying with 26 U.S.C. § 6050S. This section amends the tax code and requires disclosure of certain information to the Internal Revenue Service (IRS). As discussed below, although the Act does not explicitly exempt institutions from complying with FERPA, we believe that Congress intended for institutions to disclose information from student education records, as required by the Act, without first obtaining the consent of the students in question.

Section 25A(c) of the Act states the following:

(c) Returns Relating to Tuition and Related Expenses

(1) In General -- Subpart B of part III of subchapter A of chapter 61 . . . is amended by inserting after section 6050R the following new section:

`Sec. 6050S. Returns Relating to Higher Education Tuition and Related Expenses.

`(a) In General -- Any person--

`(1) which is an eligible educational institution which receives payments for qualified tuition and related expenses with respect to any individual for any calendar year, or

`(2) which is engaged in a trade or business and which, in the course of such trade or business, makes payments during any calendar year to any individual which constitute reimbursements or refunds (or similar amounts) of qualified tuition and related expenses of such individual, shall make the return described in subsection (b) with respect to the individual at such time as the Secretary may by regulations prescribe.

`(b) Form and Manner of Returns -- A return is described in this subsection if such return --

`(1) is in such form as the Secretary may prescribe,

`(2) contains --

`(A) the name, address, and [Taxpayer Identification Number (TIN)] of the individual with respect to whom payments described in subsection (a) were received from (or were paid to),

`(B) the name, address, and TIN of any individual certified by the individual described in subparagraph (A) as the taxpayer who will claim the individual as a dependent for purposes of the deduction allowable under section 151 for any taxable year ending with or within the calendar year, and

`(C) the --

`(i) aggregate amount of payments for qualified tuition and related expenses received with respect to the individual described in subparagraph (A) during the calendar year, and

`(ii) aggregate amount of reimbursements or refunds (or similar amounts) paid to such individual during the calendar year, and

`(D) such other information as the Secretary may prescribe.

(Emphasis added.) Thus, the Act requires postsecondary institutions to collect information on any individual who has paid tuition or related expenses to the institution. Therefore, the Act's reporting requirements apply to all students who have paid tuition or related expenses to a postsecondary institution, and whether a student has applied to receive a tax credit under the Hope Scholarship Credit or the Lifetime Learning Credit provisions of the Act is not a consideration in our analysis of this issue as it relates to FERPA.

Additionally, Ms. Livingston explained that the "other information as the Secretary [of the Treasury] may prescribe" will include:

- o whether the student "is carrying at least ½ the normal full-time work load for the course of study the student is pursuing" (See § 25A(b)(3)(B));
- o whether the student "has completed (before the beginning of such taxable year) the first 2 years of postsecondary education at an eligible educational institution" (See § 25A(b)(3)(C)); and
- o the name and employment identification number of the institution.

FERPA protects the privacy interests of parents in their children's "education records," and generally prohibits the disclosure of education records without the consent of the parent. When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an "eligible student"¹ under FERPA and all of the rights afforded by FERPA transfer from the parents to the student. The term "education records" is broadly defined as all records, files, documents and other materials which:

¹ The term "eligible student" should not to be confused with the same term mentioned in the Act. The Act's use of the term eligible student refers to a student who meets the requirements of the Higher Education Act of 1965, as amended (20 U.S.C. § 1091(a)(1)).

contain information directly related to a student; and
are maintained by the educational agency or institution or
by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); See also 34 CFR § 99.3 "Education Records." Accordingly, information directly related to the student and maintained by the institution such as his or her TIN is information from an education record and is subject to FERPA.

FERPA generally provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining the prior written consent of the student. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A). See also 34 CFR § 99.30. Although there are 13 exceptions to the prohibition that personally identifiable information from education records may not be released without the students' consent, none of those exceptions are applicable here.

In short, the Act conflicts with FERPA because the Act requires postsecondary institutions to disclose information from education records to the IRS and, in some cases, to the parent(s)² of students, and because FERPA generally prohibits a postsecondary institution from releasing educational records or personally identifiable information from those records without the consent of the student. See 20 U.S.C. § 1232g(b)(1) and Pub. L. No. 105-34, § 25A(c), 111 Stat. 788, 804 (1997).

In determining which of two conflicting federal laws controls, the United States Supreme Court has stated that it "must read the statutes to give effect to each if [it] can do so while preserving their sense of purpose." Watt v. Alaska, 451 U.S. 259, 266 (1981). If the statutes are in irreconcilable conflict, then the more recently enacted statute governs. Id. at 267, citing 2A C. Sands, Sutherland on Statutes and Statutory Construction § 51.02 (4th ed. 1973). See also Detweiler v. Pena, 38 F.3d 591, 594 (D.C. Cir. 1994). The Department believes that, as the later enacted and more specific statute, the Act reflects congressional intent that the information specified in 26 U.S.C. § 6050S be reported to the IRS notwithstanding FERPA's privacy provisions.

In addition, please note that FERPA limits the redisclosure of information from education records by third parties that receive such information. We do not believe that these provisions are superseded by the Act. Therefore, information from an education record that the IRS receives from an institution cannot generally be redisclosed without the student's prior written consent. Section 99.33 of the FERPA regulations outlines the limitations that apply to the redisclosure of education records. Section 99.33(a)(1) states:

An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is

²The Act requires postsecondary institutions to disclose information from an education record to any individual whom the student certifies will be claiming the student as a dependent for tax purposes. See 26 U.S.C. § 6050S(d), as amended by Pub. L. No. 105-34, § 25A(c)(1). Such disclosures are permissible under FERPA. See 34 CFR § 99.31(a)(8).

disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

FERPA was amended in 1994 to include sanctions against a postsecondary institution should an improper redisclosure of information from education records occur. The statute states:

If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

20 U.S.C. § 1232g(b)(4)(B). Therefore, if the IRS improperly redisclosed information from a student's education record that it received from a particular institution, that institution could be precluded by FERPA from making further disclosures to the IRS for a period of at least five years.

Further, FERPA establishes certain recordkeeping requirements regarding requests for access to and disclosures of education records. In this regard, FERPA states:

Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals [except as provided below], agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. . . .

20 U.S.C. § 1232g(b)(4)(A). See 34 CFR § 99.32. FERPA also provides that an educational agency or institution does not have to keep a record if the request was from or the disclosure was to: 1) the parent or eligible student; 2) a school official within the educational agency or institution who is determined to have a legitimate educational interest; 3) a party with written consent; 4) a party seeking directory information; or 5) a party requesting or receiving the records as directed by a Federal grand jury or other law enforcement subpoena when the issuing court or agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed. 34 CFR § 99.32(d).

It is our understanding that students will be notified of the disclosure to the IRS. In most cases, students will be asked to provide certain information on a form prepared by the IRS, and submit the form to the institution. The school will then forward information collected on the form to the IRS, as well as the student and, in some cases, the parent(s). The evident purpose of § 99.32 is to ensure that parents and eligible students will be able to learn about disclosures made from the student's education records. In this circumstance, the IRS' procedures will satisfy that purpose because the student will be provided actual notice of the release of information to the IRS.

Accordingly, and to reduce any burden on the public, we have determined that postsecondary institutions will not have to separately keep a record of the disclosure of the information from

student education records to the IRS.

I trust that the above information is responsive to your inquiry. Should you have additional questions regarding FERPA or this matter, you may contact this Office again.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Catherine Livingston
Department of the Treasury

Jasper Howard
Internal Revenue Service