

An Overview of the Family Educational Rights and Privacy Act (FERPA)
As an Impediment to Closing the Achievement Gap for Native American Students
Under the No Child Left Behind Act of 2001
June 2005

The Law. The Family Educational Rights and Privacy Act (FERPA) of 1974, Title V, Sec. 513 of Pub. L. No. 93-380 (1974), currently codified at 20 U.S.C. Sec. 1232g, generally allows *federal, state, and local* education agencies, authorities, and officials access to student records and other personally identifiable information kept by, among, other institutions, the state public schools without the advance consent of parents or students. 20 U.S.C. Sec. 1232g(b); 34 C.F.R. Sec. 99.31(a). These records typically include attendance records, grades, and test scores. FERPA protects access to this information based on concerns for student and parental rights of privacy.

The Law's Uncertainty with respect to Tribal Education Agencies. It is unclear whether Congress intended the education agencies, authorities, and officials of *Indian tribes* to be included among the education agencies, authorities, and officials for whom advance parental or student consent is not required to access these records. It appears that Congress simply did not take into account Tribal Education Agencies (TEAs), *etc.* when it enacted FERPA in 1974. Nor does it appear that Congress has considered TEAs in any subsequent amendments to FERPA. *In April 2005, the U.S. Department of Education opined in a letter that in its view, TEAs are not within the education agencies, authorities, and officials for whom advance parental or student consent is not required (i.e., that advance consent is required for TEAs to access student records and other personally identifiable information covered by FERPA).*

The ESEA provisions for TEDs. In the 1988 Reauthorization of the Elementary and Secondary Education Act (ESEA) of 1965, Pub. L. No. 89-10 (1965), Congress authorized a new program within the Bureau of Indian Affairs in the U.S. Department of the Interior, entitled "Tribal Departments or Divisions of Education." See Title V, Sec. 5119, Pub. L. No. 100-297 (1988). In the 1994 Reauthorization of the ESEA, Congress authorized another new program within the U.S. Department of Education, entitled "Grants to Tribes for Education Administrative Planning and Development (also known as Tribal Education Departments)." See Title IX, Sec. 9125 of Pub. L. No. 103-382 (1994).

Both of these Tribal Education Department (TED) program authorizations are retained in the most recent ESEA reauthorization, the No Child Left Behind (NCLB) Act of 2001, Pub. L. No. 107-110 (2001). See Title VII, Sec. 7135, currently codified at 20 U.S.C. Sec. 7455, and Title X, Sec. 1140, currently codified at 25 U.S.C. Sec. 2020. Congress envisions that TEDs will "plan and coordinate education programs;" "develop education codes and facilitate tribal control in education matters;" "provide support services and technical assistance to schools;" and, "cooperate with federal and state education agencies." See *generally* 20 U.S.C. Sec. 7455 and 25 U.S.C. Sec. 2020. In essence, under these and other ESEA programs, TEDs are very much like SEAs and LEAs.

The Problem. Because of FERPA's lack of clarity, many public school districts and / or states will not allow TEDs (or TEAs) access to the protected records and information of their tribal students unless the requisite parental or student consent is obtained in advance. Very few tribes have the resources to secure timely and regularly the advance consent.

The difficulty of accessing -- or the inability to access -- these records and information on tribal students, most of whom (90 %) attend public schools nationwide, has hampered the efforts of TEDs / TEAs to plan and coordinate education programs (funding for many of which, such as the NCLB Title VII Indian Education Act Formula Grant Program, go directly to LEAs); to develop education codes; to provide support services and technical assistance to schools; and to work with LEAs and SEAs. Most importantly, they have made it hard for TEDs / TEAs to make data-based decisions in planning for and addressing the educational progress and needs of tribal students which would help close the tribal student achievement gaps under NCLB.

The Solution -- Align FERPA with the ESEA provisions regarding TEDs

Because it appears that Congress has never considered the issue of whether TEDs / TEAs are or should be among the agencies, authorities, and officials to whom the protected student records and information can be released without the advance consent, the issue is well-suited to be presented to Congress. And because FERPA provides that access to protected student records and information is not *completely prohibited or restricted* but is simply *contingent* upon the requisite advance consent, there is no reason for Congress not to include TEDs / TEAs as being among those who can access the records and information without advance consent. Such a resolution would eliminate the needless hoops through which TEDs / TEAs must now jump to the detriment of tribal students.

In short, FERPA needs to be clarified by an amendment that includes TEAs (defined at least for FERPA purposes to include TEDs) as being among the education agencies, authorities, and officials to whom protected student records and information can be released without the advance consent of parents or students. Such an amendment to FERPA would be consistent with the TED programs authorized by Congress in the ESEA reauthorizations of 1988, 1994, and 2001, and thus would bring FERPA up to date and in accord with these ESEA laws. Such an amendment would help all education agencies, authorities, and officials -- federal, state, local, and tribal -- implement NCLB.

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