

February 25, 2022

U.S. Department of Education
Student Privacy Policy Office
400 Maryland Avenue, SW
Washington, DC 20202

RE: Request for comments on the listening session held by the Department of Education's Student Privacy Policy Office on Wednesday, February 16, 2022

To Whom It May Concern,

On behalf of the American Association of Collegiate Registrars and Admissions Officers (AACRAO), I write to respectfully submit the following comments in response to the U.S. Education Department's request for input on the Student Privacy Policy Office's listening session held on Wednesday, February 16, 2022. We would like to thank the Department for the opportunity to provide comments and appreciate your willingness to work with the higher education community to advance the interest of our nation's students.

AACRAO is a nonprofit association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions and agencies in the United States and more than 40 other countries. The vast majority of our individual members are campus officials with direct responsibility for admissions, recruiting, academic records, and registration functions. Because they serve as custodians of education records for current and former students, our members are particularly knowledgeable about privacy issues in general, and specifically about information security and privacy requirements of Federal and State laws. Compliance with the Family Educational Rights and Privacy Act (FERPA) has long been a primary area of professional jurisdiction for AACRAO members, who are often the leading FERPA experts on their campuses.

Since its original enactment in 1974, and through the numerous amendments, court decisions, and administrative policy revisions that have further refined that original construct over the years, AACRAO has been constructively engaged with the Department of Education to promote FERPA compliance and achieve the right balance between individual educational privacy rights and the rights of third-parties to obtain access to data for appropriate purposes.

Definition of Education Records

AACRAO strongly urges the Department to clarify that electronic records, including emails that specifically identify the student, are included in FERPA's definition of "education records."

20 U.S.C. 1232g (a)(4). 34 CFR 99.3 broadly defines the term “education records” as records directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. Further, the term “records” is defined as any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

The statutory and regulatory language makes clear that the FERPA’s definition of education records is media-neutral, including any information or data recorded in any medium that is directly related to a student and maintained by the institution or a third-party provider. However, a number of court cases¹ have challenged this definition, creating differing standards and confusion around whether electronic documents, such as emails, are considered education records and thereby protected under FERPA.

In *S.A. v. Tulare County Office of Education*, a California federal district court ruled that emails that were not a part of the student’s permanent file were not considered education records under FERPA because they were not maintained by the institution. An Arizona court issued a similar ruling in *Phoenix Newspapers, Inc. v. Pima Community College*, stating that emails were not education records because they were not centrally maintained by the college. Further, the ruling established that electronic documents are not covered under FERPA if they are spread out within a database and can only be located collectively with a search.

Both of these interpretations contradict the plain reading of the definition of an education record under FERPA and set dangerous precedents for how institutions handle electronic records directly related to a student. If electronic education records are not protected under FERPA, they risk becoming subject to open records laws. As such, emails containing student information as well as data contained in student information systems (SIS) and other student record databases could become part of the public record, greatly diminishing the privacy of students.

A separate ruling involving campus disciplinary records at Miami University of Ohio highlights the potential impact of allowing courts to determine what student information is covered under FERPA or is subject to a state’s open records law. In the case of the *Miami Student v. Miami University*, a state court ruled that student disciplinary records were not covered under FERPA and thus were subject to the Ohio open records law. The Department subsequently filed an injunction in the U.S. District Court for the Southern District of Ohio to prevent institutions in the state from releasing such records. An appellate court later upheld the district court’s final decision in *United States v. Miami University*, which affirmed that disciplinary records are education records and thus the state-ordered release violated FERPA.

In an effort to avoid conflicting legal interpretations and subjecting electronic student records to a patchwork of state open records laws, AACRAO encourages the Department to clearly identify

¹ See *S.A. v. Tulare County Office of Education* (2009); *Phoenix Newspapers, Inc. v. Pima Community College* (2011); *Miami Student v. Miami University* (1997); and *United States v. Miami University* (2002).



electronic records in the definition of educational records to create a national standard and reduce confusion surrounding electronic documents, such as emails.

The association would like to thank you for your consideration of our views regarding existing regulations. We stand ready to work with the Department to protect students' rights regarding the privacy and accuracy of education records and to ensure that institutions remain in compliance with FERPA.

Sincerely,

A handwritten signature in black ink that reads "Melanie Gottlieb".

Melanie Gottlieb
Executive Director