

potential or alleged violations of law to government authorities, that unit or individual would be considered a "law enforcement unit" under FERPA. Under the new amendment, records of that unit that were created and maintained *for a law enforcement purpose* are considered records of a law enforcement unit and, therefore, excluded from the definition of "education records" under FERPA.

The Secretary has revised the proposed regulations to clarify that where a law enforcement unit also performs non-law enforcement functions, the records created and maintained by that unit are considered law enforcement unit records, even where those records were created for dual purposes (e.g. for both law enforcement and disciplinary purposes). Only records that were created and maintained by the unit *exclusively* for a non-law enforcement purpose will not be considered records of a law enforcement unit. For example, if a campus security unit initiates an investigation into an incident on campus relating to a possible violation of law or the student conduct code, the record created and maintained by the unit in connection with this investigation is a law enforcement unit record, whether or not it is ever referred to the local police authorities. If, however, the same unit or individual responsible for law enforcement investigates an incident for the purposes of internal disciplinary actions and creates a record *exclusively* for the purpose of a possible disciplinary action against the student, that record would not be considered a record of a law enforcement unit and would be an "education record" subject to FERPA. It should be stressed that the Secretary expects such occasions to be very rare, especially with incidents involving criminal conduct by students at postsecondary institutions.

Postsecondary institution officials should note also that when they decide to refer a matter to a disciplinary committee rather than to the institution's own law enforcement unit or directly to governmental law enforcement authorities, the institution is not relieved of its responsibilities for complying with the reporting requirements of the Student Right-to-Know and Campus Security Act, as codified in 34 CFR 668.47(a)(6) (Student Assistance General Provisions).

Changes: The definition has been clarified by the insertion of the word "exclusively" to indicate records created and maintained exclusively for internal disciplinary purposes are not law enforcement unit records and are,

therefore, not excluded from the definition of "education records."

Comments: One commenter suggested that the regulations be changed to allow institutions that may not have a law enforcement unit to publicly disclose records that relate to a criminal act but which are not necessarily related to a disciplinary action.

Another commenter expressed concern that, because most public elementary and secondary schools do not have a "law enforcement unit," an individual administrator could be considered a "law enforcement unit" under the proposed definition. The commenter believed this dual role of school administrator and law enforcement official could pose a potential problem for abuse because of his or her access to both education records and law enforcement unit records. He stated that, in such a circumstance, a school official could "essentially confer or remove parents' rights of access to records, or maintain or eliminate confidentiality with respect to certain records by choosing to characterize documents as education records or records of a law enforcement unit."

Discussion: The Secretary has carefully considered whether provisions should be included in the regulations to address these concerns. The definition of "law enforcement unit" has been clarified by adding the term "officially" to describe an office, department, or *individual* who is authorized or designated by the agency or institution to perform law enforcement unit functions. Additionally, a subsection has been added to the definition to further describe a "law enforcement unit" as an *entity or individual* whose function is to maintain the safety and security of the institution.

The inclusion of the term "individual" is intended to permit small educational agencies and institutions to designate a single individual responsible for "law enforcement" and related safety and security functions. The records created and maintained by that individual *for a law enforcement purpose* may be disclosed, without prior consent of the parent or eligible student to whom the records relate, and the parent or eligible student would have no right to inspect and review the records under FERPA. The Secretary believes that the benefits gained by safer school surroundings outweigh any potential problems for abuse of the privacy or access rights under FERPA that might occur by including "individual" in the definition.

However, the Secretary does not have the authority to change the regulations

to allow institutions that do not have a law enforcement unit to publicly disclose records that relate to a criminal act. Such a change would have to be made by Congress.

Change: The Secretary has revised the definition of "law enforcement unit" to include only entities or individuals officially authorized or designated by an agency or institution to enforce local or State law, or to refer to appropriate authorities a matter for enforcement of these laws, or to maintain the physical security and safety of the agency or institution.

Comments: A couple of commenters from State departments of education noted that the definition of law enforcement unit should be clarified to include a city police officer hired by a local educational agency or through special arrangements with local law enforcement authorities.

Discussion: The Secretary believes that the definition of "law enforcement unit" which includes the term "individual," as discussed in the previous comment, will allow schools to designate a single individual responsible for "law enforcement" and related safety and security functions. However, educational agencies and institutions should also be aware of the requirement under § 99.6 of the FERPA regulations to adopt a policy regarding how the agency or institution meets the requirements of FERPA. In that policy, educational agencies and institutions are required to include a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. If agencies and institutions have a policy of disclosing information from education records to officials of their own law enforcement unit, the officials of that unit must be designated under the school's FERPA policy as school officials with a legitimate educational interest. The Department can provide further guidance on the formulation of such a policy.

The Secretary encourages educational agencies and institutions that do not have a separate law enforcement unit to develop working relationships with local police authorities. However, FERPA currently prohibits schools from disclosing information from education records to local police authorities absent the prior written consent of parents or a lawfully issued subpoena or court order.

Changes: None.

Comment: One commenter expressed concern that the proposed regulations do not permit officials of an institution's law enforcement unit to disclose