

PUBLIC SUBMISSION

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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0204
Comment on FR Doc # 2011-08205

Submitter Information

Name: Anne Pace
Address:
Tulsa, OK,

General Comment

These regulations must not be passed. To allow our students' personal, private information to become so easily accessible would be an invasion of their fundamental rights. There is no reasonable need or purpose for government to collect such a database, much less to share it. What a frightening thought.

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0205
Comment on FR Doc # 2011-08205

Submitter Information

Address:
Washington, DC,
Organization: Consortium on Government Relations for Student Affairs

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

***CONSORTIUM ON GOVERNMENT RELATIONS
FOR STUDENT AFFAIRS***

May 23, 2011

ACPA – College Student
Educators International
One Dupont Circle
Suite 300
PO Box 2237
Washington, DC 20036-1188
www.acpa.nche.edu

Association for Student
Conduct Administration
(ASCA)
Central Office
PO Box 2237
College Station, TX
77841-2237
www.theasca.org

The Association of College and
University Housing
Officers-International
(ACUHO-I)
941 Chatham Lane Suite 318
Columbus, OH 43221-2416
www.acuho-i.org

NASPA – Student Affairs
Administrators in
Higher Education
1875 Connecticut Ave., NW
Suite 418
Washington, DC 20009
www.naspa.org

National Intramural-Recreational
Sports Association (NIRSA)
4185 SW Research Way
Corvallis, OR 97333-1067
www.nirsa.org

Washington Representative

Carol Graves Holladay
Hurt, Norton and Associates
501 Capitol Court, NE
Suite 200
Washington, DC 20002
(202) 543-9398 - phone
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Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW.,
Washington, DC 20202

To the Department of Education:

On behalf of our collective memberships of more than 25,000 student affairs administrators employed at colleges and universities throughout the nation, the Consortium on Government Relations for Student Affairs would like to offer our comments and recommendations on the proposed rules section 444 of the General Education Provisions Act, which is also known as the Family Educational Rights and Privacy Act of 1974, as amended (FERPA).

The Consortium for Government Relations for Student Affairs consists of five higher education associations: ACPA – College Student Educators International; the Association of College and University Housing Officers-International (ACUHO-I); the Association for Student Conduct Administration (ASCA); NASPA – Student Affairs Administrators in Higher Education; and the National Intramural-Recreational Sports Association (NIRSA). Together, our members play a key role in educating and working directly with our nation's students and the varied support networks of family members and other university colleagues.

Our goal, on a daily basis, is to enhance the safety, security and well-being of our students and the larger campus community. We share these comments on the proposed rules with the goal of clarification. As stated in the proposed rules, the amendments would enable authorized representatives of State and local educational authorities, and organizations conducting studies, to use SLDS data to achieve these important outcomes while protecting privacy under FERPA. As a collective group of professionals serving students in various ways, our greatest concern remains with the actual privacy of student data or personally identifiable information. While we agree with the goals of States' ability to evaluate education programs, to build upon what works and change what does not, to increase accountability and transparency, and to contribute to a culture of innovation and continuous improvement in education, we do not agree with processes that could risk the privacy of students' data and their ability to know where their data has been used for particular studies.

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Concerns and Requests for Clarifications:

1. It appears that these proposed rules would change the ethics of research and the nature of maintaining privacy. There are guidelines that are followed for human subject research and it appears this would violate those standards by institutional research services losing the ability to control where the data is being released. IRB Research drills home responsible research, addressing clearly research with human subjects, ethical principles, informed consent, working with at-risk populations that need additional protections, HIPPA, beneficence, and the history of why these practices are important
2. In the section of the proposed rules defining who is an authorized representative, the list of officials is expanded to include not only Department of Education officials but any other public or private entities. Do public or private entities include commercial entities or those with private marketing interests in the data? Our institutions have protected our students' data from these types of requests that lead to studies and marketing opportunities that follow from private entities. We strongly disagree with the efforts to open the ability for data to be released to those entities outside of state regulated agencies.
3. The proposed rules appear to require institutions to release data by agreements. Is there an opportunity for the institution to refuse data to be re-disclosed to a third party by a primary contracting entity? If not, is there notification to the institution (and/or students) that the data released to a primary contracting entity are being sent to a third party? In the sections regarding research studies, the rule states if the institution objects to the re-disclosure of the data (personally identifiable information) it has provided can rely on the independent authority it has to further disclose the information on behalf of the agency or institution. The Department is recognizing that this authority may be implied and not explicitly granted. How then is this allowing an institution to protect the privacy of its students' data (personally identifiable information)?
4. If the educational institution has a system in place that allows students to limit the release of their directory information (or prohibit the release) would this limit/prohibition also apply to information requests from federal/state/local agencies or contracting entities, public or private as listed in your authorized representative provision? Is there a student "opt out" option? Where and how does it allow for a student to track and request information from the higher education authority on where their data has been used and for what studies?

Pg. 3

5. Most educational institutions try to limit the amount of surveying/evaluation done with their students so as to avoid survey fatigue, coordinate timing, etc. With this mandated release for research and evaluation purposes (to not only federal/state/local entities but third party entities contracted by the federal/state/local officials), institutions would have no control over the timing and type of surveys/evaluations done with students.

6. The proposed rules expand the definition of educational programs by including, but not limited to, a list of educational options along with job training programs regardless if they are affiliated with the Department of Education. Please clarify, with this change in the definition, could private entities such as bank or corporate training programs access this data for their own purposes not affiliated with the SEA or LEA?

We respect the immense effort to meet a broader goal of research and studies; however, we question the rules being expanded at the risk of our students' privacy. Again, our goals have been to protect student data, allowing them to opt out of their personally identifiable information being included in studies and surveys. This proposed change of FERPA seems to open the flow of information beyond the control of the institution therefore violating a student's privacy. We believe there is a difference between data privacy and security. While the data released may be secure according to the proposed rules, it is violating student data privacy when authority of use is expanded and implied as opposed to in complete control of the institution where it is collected and currently protected.

We appreciate the clarification of these questions and concerns and look forward to your response. If you have questions regarding these comments, please feel free to contact us through Carol Holladay at 202-543-9398.

Respectfully,



Gregory Roberts, Executive Director
ACPA



Billye Potts, Executive Director
ASJA



Sallie Traxler, Executive Director
ACUHO-I



Gwendolyn J. Dungy, Executive Director
NASPA



Kent Blumenthal, Executive Director
NIRSA

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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0206
Comment on FR Doc # 2011-08205

Submitter Information

Name: Marsha Devine
Address:
Sacramento, CA,

General Comment

I am grateful for the opportunity to comment on the proposed amendments to the regulations of the Department of Education implementing the Family Educational Rights and Privacy Act as published at 76 Federal Register 19726 (April 8, 2011). My comments are provided in the attached document.

Attachments

Comment on FR Doc # 2011-08205

Re: U.S. Department of Education Docket ID: ED-2011-OM-0002

As a parent and a student, I am opposed to the following proposed amendments to the Family Educational Rights and Privacy Act of 1974 (FERPA). The proposed amendments transform FERPA from a privacy law to a data access law. Such a significant change should take place through the legislative process to allow for a full and extensive review and discussion of the privacy implications. A 45-day comment period as part of a rulemaking process is an inappropriate mechanism to achieve such a substantial change to the existing law.

The proposed amendments only facilitate greater data access, without enhancing privacy protections, including those articulated by the Organization for Economic Cooperation and Development's 1980 Guidelines for the Protection of Privacy and Transborder Flows of Personal Data (Fair Information Practices), despite assurances from the U. S. Department of Education (USED):

Collection Limitation Principle:

"...data should be obtained by lawful and fair means and, where appropriate, with the knowledge and consent of the data subject."

Parents are not notified, nor will they be required to be notified that personally identifiable and sensitive information on their children are being collected and disclosed to third parties. Parents and students are not permitted to opt out of such data disclosures, except for non-sensitive directory information. The FERPA amendments create an anomaly recognized by Steven Winnick, the presenter and partner in the legal firm, Education Counsel, LLC, who acknowledged this apparent contradiction that parents can opt out of disclosure of directory information, but not the more potentially sensitive data collected by SLDS. Indeed, in the webinar presented by the Data Quality Campaign on April 14, 2011, Mr. Winnick underscored the importance of denying parents the opportunity to opt out by saying, "we don't want parents to get in the way."

Moreover, if the purpose is to create a virtual "cradle to grave" longitudinal record on individuals—from early childhood education through workforce participation—the data can potentially reside at the state and federal levels, as well as at third party repositories indefinitely, which seems to contradict the principle of "limitation" on its face.

Data Quality Principle:

"Personal data should be....accurate, complete and kept up-to-date."

State longitudinal data systems do not guarantee "high quality data." Indeed, so many resources are being directed to the design and implementation of the basic technology to establish these systems that steps to ensure the quality of the data, through detailed and extensive audits, cannot be taken. Consequently, it is highly likely that any research, evaluation, or program audit results based on data from these systems will be flawed. Moreover, most SLDS are retaining snapshot, point-in-time data only, which almost assuredly guarantees that the data will not be current for students. Without this assurance

of accurate, up-to-date data, the risk inherent in collecting and retaining personal and sensitive data is not justified by the perceived and hoped-for benefit.

Furthermore, better quality control over such data can be achieved through small, well-designed studies that have a clear purpose, random samples and other controls, and most importantly, consent from participants. Alternatively, the use of de-identified data can also be used to address legitimate research questions and evaluation questions.

Purpose Specification Principle:

“The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes...and as are specified on each occasion of change of purpose.”

The proposed amendments expanding data access do not address this principle whatsoever.

Security Safeguards Principle:

“Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification, or disclosure of data.”

The proposed amendments do not address this principle, other than to solicit suggestions as to what might constitute “reasonable methods” to ensure that any entity designated as an authorized representative complies with FERPA. The proposed amendments, in creating the data access purpose of the regulations, should provide clear guidance, based on well-understood and widely disseminated standards, on what constitutes reasonable security safeguards.

Openness Principle:

“There should be a general policy of openness about developments, practices and policies with respect to personal data....Means should be readily available of establishing the existence and nature of personal data....as well as the identity and usual residence of the data controller.”

The proposed amendments do not clarify who the official data custodian of SLDS data is or should be, nor do they clarify who, as USED is the data custodian. The proposed amendments do not provide clear guidance to states and educational agencies who is ultimately responsible for the safekeeping of education data records that are disclosed to SLDS or to third parties by the SEAs.

Moreover, these proposed amendments create such a significant shift in the FERPA law and regulations from a privacy law to a data access law that the openness principle is violated simply by trying to achieve this with a 45-day comment period, rather than a full, open and extensive public debate.

Individual Participation Principle:

“An individual should have the right to a) obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him; b) to have communicated to him, data

relating to him within a reasonable time....c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.”

Because the proposed regulations do not address and clarify who is the data controller at each level of disclosure (state, federal, third parties), it would be impossible for parents and students to exercise the rights specified in this principle . The only protection currently afforded through FERPA and its regulations is that parents can request redress at the school level, but not at other levels, where education data records—which might be substantially “changed” if linked or concatenated with other personal records—are collected and maintained.

Accountability Principle:

“A data controller should be accountable for complying with measure, which give effect to the principles as stated above.”

The proposed amendments do nothing to address accountability for data protection. Indeed, they seem to go to lengths to obfuscate who controls the data and obliterate the only data accountability that currently exists, which is that at the school level. This has practical consequences, in that in the event of inevitable data breaches, it is unclear who will be responsible for notifying parents and students that the data have been compromised.

The proposed amendments provide little or no redress for citizens whose privacy rights have been violated. There are no consequences for state and federal misuse of personally identifiable and sensitive data. The USED has never withheld funds due to an enforcement action.

Compliance with the data system mandates in the American Recovery and Reinvestment Act of 2009 compliance is used as a justification to reinterpret FERPA from a privacy law to a law that enables disclosure of extensive personal and sensitive data on almost every US resident to state and federal government entities is disingenuous. If such a broad reinterpretation of FERPA is necessary so that the current Administration’s initiatives can be carried out, then a full and public debate of these privacy issues should take place in Congress.

If the regulatory process continues to be the vehicle by which such significant changes to FERPA are made, I recommend that the USED use the Privacy and Security Rules in the Health Insurance Portability and Accountability Act as a model for the content and process of this much-needed debate.

Thank you for the opportunity to comment on the proposed regulations.

Sincerely,

Marsha L. Devine

PUBLIC SUBMISSION

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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0207
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

Personally identifiable information (PII) should not be re-disclosed without parental permission or notification. Currently, there are circumstances in which parents have "opted out" of disclosing directory information (their "right" under FERPA) and the information (along with educational records) has been re-disclosed by the state, with no notification to district personnel or to the students/parents. While this information was disclosed to an organization which had a purported educational interest, this personally identifiable information was in no way required by the third party – it was simply convenient. What, then, will keep this third party from re-disclosing it to a fourth party with an "educational interest"?

Simply requiring "confidentiality" and a "legitimate interest" is not enough; access to PII should be strictly limited.

The value of longitudinal data can be maintained while also preserving student privacy. At the state level, personally identifiable information can be very closely held and access monitored. PII should be used only for the purpose of creating otherwise meaningless identifiers for use in longitudinal databases. These identifiers should not be used for any purpose other than tying records together for the longitudinal databases, and they should not be visibly tied to the student in any system or report. It can be done programmatically behind the scenes. The otherwise-meaningless-identifier can then be used by third parties to their heart's content.

With the exception of the only-one-data-point-so-everyone-knows-who-he-is case, there is no reason for PII to be redisclosed without parental permission.

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0208
Comment on FR Doc # 2011-08205

Submitter Information

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General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

Comments to ED-2011-OM-0002-0001 due 5.23.2011

In the City of Los Angeles, education has been farmed out to entities not considered part of the State Public School System. This jeopardizes the confidentiality of the students.

If the public cannot obtain records, then these entities should not be able to obtain them. The State of California allows for a Local Education Agency, which includes Charter Schools, to be qualified under the State Public School System.

The term "Public Choice" has been used by the Los Angeles School District LAUSD has a way to undermine the system and place the students' safety and future at risk to unqualified parties. The Board of Education of LAUSD has allowed this and would suffice in your definition of "designated" and there are contracts. The ultimate responsibility is of the Board of Education if challenged civilly or criminally.

There is an Appellate Court decision disallowing outside parties from control of the Public School System.

Any regulations that you incur must not mandate activities or information outside the State law and the ability to prosecute.

Joyce Dillard
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Los Angeles, CA 90031

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0209
Comment on FR Doc # 2011-08205

Submitter Information

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Government Agency Type: State
Government Agency: Arizona Department of Education

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



State of Arizona
Department of Education

Public Comment on Federal Educational Rights and Privacy Act (FERPA) Proposed Regulation Changes:

The Arizona Department of Education supports the proposed regulation changes to FERPA from the United States Department of Education. The changes to FERPA regulations are crucial to allow for the most effective transmission of student data from pre-school through university level education. The proposed regulations are created to facilitate greater access for research and evaluation of student data contained in State Longitudinal Data Systems and will increase accountability and transparency for overall educational outcomes. With this data, we should be able to be innovative and work to improve in areas of need and hone areas where we excel, contributing to our plan to form the best schools modeled from the top nations, states, districts, and schools.

There is no doubt that longitudinal student data is imperative for positive education reform, but at the same time, it is important to maintain privacy protections for our students while expanding these vital educational data needs. Increasing access to data while enhancing privacy protections will provide us with greater information and properly ensure a student's privacy and personal identifying information is secure from unwarranted invasions.

Overall, the proposed regulations strike a desired balance between increased data use for the improvement of education and expanded privacy protection for educational records.

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0210
Comment on FR Doc # 2011-08205

Submitter Information

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Submitter's Representative: Noelle Ellerson

Organization: American Association of School Administrators

Government Agency Type: Federal

Government Agency: ED

General Comment

Attached to this message are comments on behalf of the American Association of School Administrators.

Attachments

Comment on FR Doc # 2011-08205



American Association of School Administrators

May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Potomac Center Plaza Room 5126
Washington, D.C. 20202

RE: Proposed Amendments to FERPA Regulations (Docket ID ED-2011-OM-0002)

Dear Ms. Miles,

This letter is submitted on behalf of the American Association of School Administrators (AASA) in response to the U.S. Department of Education's (USED) proposed regulations for the Family Educational Rights and Privacy Act (FERPA), as published in the April 8, 2011 Federal Register.

AASA supports protection of student data as well as both the strategic and appropriate use of education data to inform instructional, policy and management decisions. The proposed regulations make several strong steps forward in striking an appropriate balance between these two goals. AASA believes that protection of education records is of profound importance, and that any effort allowing for the sharing of student education records with any local, state or federal entities must be done with the utmost caution and consideration. The proposed regulations state, "One of the key purposes of FERPA is to ensure the privacy of personally identifiable information in student education records." AASA strongly agrees, and believes that any effort that would jeopardize the release of student records for the sake of easing the burden placed on schools, parents, or other state/local agencies should not be taken lightly. Much of FERPA's success comes from the conscientious effort of educators to treat student data cautiously. Similar measures for health insurance (the Health Insurance Portability and Accountability Act (HIPAA)) protect individual health information.

Investments in state longitudinal data systems (SLDS) can leverage improved student achievement, but only when the right data gets to the right people at the right time. This requires not only linking and sharing appropriate data across systems to produce better information, but also providing timely and appropriate access and protection to stakeholders. Any implementation of broader access to student data must be accompanied with rigorous, appropriate training and professional development to help minimize misuse and mismanagement of student data. In this context, AASA supports efforts to expand states' authority to share and use student longitudinal data to meet state their state goals and federal policy obligations while protecting student data privacy.

AASA believes that information sharing between school systems and other agencies neither can, nor should, be one-sided. AASA believes that changes must be made to federal regulations to allow for greater exchange of data between local education agencies and state education agencies, as well as other state agencies that serve students, including health and human service agencies and juvenile justice agencies, but only any changes are made in the context of protecting student privacy. It is critical that greater information sharing exist between agencies, so that local education agencies, child welfare agencies and juvenile justice agencies can coordinate their services appropriately. More specifically, it is critical to the safety and security of all students and school personnel that schools know the criminal background of all students they are enrolling.

Supports expanded definition of “authorized representative” (§ 99.3; § 99.35): FERPA currently allows an education agency or institution to disclose personally identifying information (PII) to an “authorized representative” of a state or local educational authority or an agency headed by an official, without prior consent, “for the purposes of conducting – with respect to federal or state supported education programs – any audit, evaluation, or compliance or enforcement activity in connections with federal legal requirements that relate to those education programs.” While previously “authorized representatives” could not include other state agencies, such as health and human services departments, the proposed regulations would expressly permit state and local education authorities to exercise discretion to designate other individuals and entities, including other governmental agencies, as their “authorized representatives” for evaluation, audit, or legal enforcement or compliance purposes of federal or state-supported education programs.

We support this inclusion, and are confident it will lead to an increased ability to conduct evaluations of federal and state supported education programs. As the example from the comments suggests, there would be no reason for a human services or labor department not to serve as the “authorized representative” and receive non-consensual disclosures of PII, for the purposes of evaluating federal legal requirements related to federal or state-supported education programs.

However, because of the clear education-related federal legal requirements on child welfare agencies, we propose an expansion of the definition of “authorized representative” to include: “any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct – with respect to Federal or State supported education programs – any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs or Federal and State education-related mandates governing child welfare agencies, including monitoring of education outcomes of children under their care and responsibility.”

As a point of clarification: While AASA support allowing for greater exchange of data between local education agencies and state education agencies, as well as other state agencies that serve students, we caution against a ‘carte blanche’ approach of data sharing. We urge careful consideration of the types of data that are made available. As an example, we want to avoid any instances where a student’s behavior data from Head Start (regardless of having outgrown the behavior problem) could impede his/her ability to get an interview 20 years later, because the SLDS held on to outdated data.

To appropriately protect the privacy of children and parents, we fully support the proposed requirement of written agreements between a state or local educational authority or agency headed by an official and its “authorized representatives” that require among other things, that they specify the information to be disclosed and the purpose. This is an added layer of protection around confidentiality of records and encourages agencies to clearly document their collaboration around sharing education records and act with fidelity to ensure compliance.

Seeks clarification on regulatory authority to change statute: Currently, FERPA clearly identifies and permits only four entities to disclose PII without consent (20 U.S.C. 1232g(b)(1)(C), (b)(3) and (b)(5)). These four were established by statute and have remained unchanged. While the proposed regulation clearly demonstrates an interest in expanding the list of ‘authorized representatives’, AASA seeks clarification as to whether or not the Department can make such an expansive regulatory change to statutory law.

Supports expanded definition of “Education Program” (§ 99.3, § 99.35): FERPA currently allows “authorized representatives” to have non-consensual access to PII in connection with an audit or evaluation of federal or state-supported “education programs,” or for the enforcement of or compliance with federal legal requirements that relate to those programs. The proposed regulations define the term “education program” as any program that is principally engaged in the provision of education, including, but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an educational authority.

We support this expanded definition. This change will enable the state education agency to identify, for example, a state health and human services agency that administers early childhood education programs, as the “authorized representative” in order to conduct an audit or evaluation of any federal or state supported early education program, such as the Head Start program.

Supports clarification between ‘authorized representative’ and ‘school official’: In the past, the Family Policy Compliance Office (FPCO) has provided recommendations on defining ‘school official’. Given the proposed expanded definition of ‘authorized representative’, it may be advisable to suggest definitions for ‘school official’ and clarify what—if any—inherent rights they may have to education records, so as to avoid confusion between the two terms.

Supports enforcement procedures with respect to any recipient of department funds that students do not attend (§ 99.6): AASA believes that information sharing between school systems and other agencies neither can, nor should, be one-sided. As such, we believe that compliance and enforcement procedures related to FERPA should apply not only to educational agencies or institutions, but also other recipients of Department funds under any program administered by the Secretary.

Seeks clarification on reach of FERPA protections: The proposed regulations extend the privacy protections for broader application of education studies, audits and SLDS. While AASA can reasonably assume that the FERPA protections are enough to protect student privacy in education studies and audits, we seek clarification as to whether or not FERPA protections are enough to protect student privacy within SLDS. If it is found that FERPA protections are not enough to protect student privacy within SLDS, we oppose any movement forward with SLDS until FERPA-quality protections are established and implemented. Protecting student data/privacy is, and should be, a central consideration in this conversation.

Seeks clarification for the definition of “reasonable methods”: AASA urges the Department to be more specific in identifying some reasonable methods in its final regulations. While we agree that state and local education authorities should have flexibility to impose reasonable methods to ensure FERPA compliance by authorized representatives, we think the Department could provide more specificity. The following specific “reasonable methods” with which authorized representatives should be expected to comply should be incorporated into agreements:

- Comply with applicable state data security laws and policies;
- Ensure all employees who will have access to personally identifiable student data participate in training on FERPA and state data privacy and security laws
- Maintain discipline policies, including possible termination of employment, for employees who violate the policies or take actions that result in an unauthorized disclosure of student data; and
- Provide appropriate access to the state or local education authority to review and monitor the authorized representative’s administrative and electronic processes for protecting student data from further disclosures.

We recommend that “reasonable methods” also include requiring that the state or local education authority provide accessible information about the data being shared and the purpose for which they are being shared to parents and other stakeholders, including on the agency’s website. This information should include, at a minimum, the identity of the authorized representative, the purposes for which the information is being disclosed and the scope of the information disclosed to the authorized representative, and policies and procedures to safeguard the information from further disclosure.

Seeks clarification on authority to share data across state lines: There is increasing demand to share data across state lines as states seek to make comparative evaluations or connect data on students who may participate in education in multiple states. For example, a state education authority in Oklahoma may want to conduct a comparative evaluation of student performance with Oregon. Or a K–12 student in Vermont may have attended college in New Mexico, and Vermont would like to include that student’s postsecondary outcome data in a postsecondary feedback report to its high schools. Another example of the issue is that multiple states in the region may want to establish a regional data warehouse to house data as the authorized representative for the states’ education authorities. We are unsure as to whether or not the proposed regulations would permit disclosures for the purpose of evaluating federally or state-supported education programs across state lines. In such cases, the question is whether student data would be protected and whether FERPA would permit the state education authority in one state to designate a state education authority in another state as its authorized representative to permit student data to be disclosed from one authority to the other. We note that in many such instances, the states may be able to accomplish the purposes of such a study without disclosing personally identifiable student data. While we are unaware of anything in the FERPA statute or the current or proposed regulations to bar these arrangements, provided the prescribed safeguards are applied, we request that this interpretation be affirmed in the final regulations or in their preamble.

Speaking more generally, AASA notes that current issues of non-compliance with FERPA mean that any data error or leak is limited to one student, one school, or one district. The proposed regulations and their implications for SLDS would greatly increase the consequences of a data breach, putting student data for an entire state, region or the nation in a compromised position. Further, the expanded definition of ‘authorized representative’, in conjunction with their proposed roles in audits/reports, mean that school districts and states are one report away from regional or national data bases. While AASA understands and supports the importance of building data capacity within and between states, it cannot be at the expense of student privacy.

It is important that any entity working with—or having access to—student data understand and respect the importance of FERPA and its implications for student privacy. Each player—be it the LEA, SEA or another ‘authorized representative—ought to have skin in the game and be accountable, first and foremost, for protecting the integrity and privacy of student data.

The proposed regulations reflect USED’s efforts to reinforce and elevate its focus on privacy, security and confidentiality issues. AASA urges USED to move forward in a manner that both provides for the highest level of student privacy and protection and supports the use of data to improve student achievement.

Thank you for the opportunity to comment. For further information or clarification, please contact Noelle Ellerson (nellerson@aasa.org).

Sincerely,



Noelle Ellerson
Assistant Director, Policy Analysis & Advocacy

PUBLIC SUBMISSION

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|---|
| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: State educational agency |
| Tracking No. 80e30bbb |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0211
Comment on FR Doc # 2011-08205

Submitter Information

Name: Daniel Domagala
Address:
Denver, CO,
Email: domagala_d@cde.state.co.us
Submitter's Representative: Colorado Department of Education
Organization: Colorado Department of Education
Government Agency Type: State
Government Agency: Colorado Department of Education

General Comment

Hi. On behalf of the Colorado Department of Education and State Education Commissioner Robert K. Hammond, I would like to submit the attached letter in support of the proposed rulemaking regulations regarding the Family Educational Rights and Privacy Act (FERPA). Thank you,

Daniel Domagala
Chief Information Officer
Colorado Department of Education
303.866.6961
domagala_d@cde.state.co.us

Attachments

Comment on FR Doc # 2011-08205



COLORADO DEPARTMENT OF EDUCATION

201 East Colfax Avenue • Denver, Colorado 80203-1799
303.866.6600 • www.cde.state.co.us

Robert K. Hammond
Commissioner of Education

Diana Sirko, Ph.D.
Deputy Commissioner

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Ms. Miles,

The Colorado Department of Education (CDE) would like to express its support for the proposed amendments to the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The proposed regulations will allow CDE greater flexibility to conduct research and evaluation of education programs and provide guidance on appropriate agreements related to disclosure and re-disclosure of education data.

In addition, CDE applauds the U.S. Department of Education's creation of the Privacy Technical Assistance Center (PTAC) and the hiring of a Chief Privacy Officer. CDE can now ask PTAC for specific guidance to questions such as the following:

- After CDE has calculated student longitudinal growth data, based on state summative assessment data, for all students in the public schools of the state, what are CDE's responsibilities regarding the disclosure of that information to personnel in the state's districts and schools?
- What are the appropriate restrictions for disclosing to educators any information about students' future longitudinal growth? What are appropriate restrictions for disclosing to educators information about students they have taught, including education data from postsecondary institutions, in order for those educators to assess the effectiveness of their instruction?

Thank you for addressing needed amendments to the FERPA regulations to keep pace with rapidly evolving longitudinal data systems and performance-based usage of individual student information.

Sincerely,

Robert K. Hammond
Commissioner of Education
Colorado Department of Education

PUBLIC SUBMISSION

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|---|
| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: State educational agency |
| Tracking No. 80e30bb6 |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0212
Comment on FR Doc # 2011-08205

Submitter Information

Name: Dawn Williams
Address:
Oklahoma City, OK,
Email: dawn_williams@sde.state.ok.us
Organization: Oklahoma State Department of Education
Government Agency Type: State

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

State of Oklahoma

**Oklahoma State Department of Education
2500 N. Lincoln Blvd.
Oklahoma City OK 73105**

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC, 20202

Dear Ms. Miles,

The Oklahoma Department of Education thanks you for the opportunity to provide comments in response to the U.S. Department of Education's (ED) notice of proposed rulemaking for amendments to the regulations for the Family Educational Rights and Privacy Act (FERPA), published in the Friday, April 8, 2011 Federal Register. We are generally supportive of the proposed amendments, viewing certain of the proposed changes to FERPA as removing obstacles that have long impeded efforts to effectively evaluate educational programs and meet various federal reporting requirements. That said, parts of the proposed amendments we find to be areas of concern, or requiring clarification, so we offer the following comments and recommendations.

1. Authorized Representative: We support this inclusion and are confident that it will facilitate better evaluations of federal and state-supported education programs. We are especially pleased that a state educational agency (SEA) or local educational authority (LEA) will have the ability to designate an individual or entity (e.g., a non-educational state agency or department, such as human services or labor) to access personally identifiable information in student records to conduct any audit, evaluation, or compliance, for the purposes of meeting evaluation requirements related to federal or state-supported education programs on behalf of the SEA or LEA. We agree it is essential that any authorized representative relationship be documented in a written agreement, as referenced in proposed § 99.35(a)(3), and that such agreements should clearly reflect the purpose for which the authorized representative will have access to student records.
2. Reasonable Methods: We are mindful that with the ability to designate an authorized representative, there comes increased responsibility for the SEA or LEA to ensure the protection of student records and student privacy, so we support the requirement that SEAs and LEAs establish policies and procedures for written agreements, as required by proposed § 99.35(3). We do feel that these written agreements may create some barriers to collecting child count data.
3. "Educational authority" is undefined in both the current and proposed regulations. If a distinction exists between the terms "educational agency" and "educational authority," we suggest adding a definition for the latter term. However, if there is no distinction, use of the original terminology ("educational agency or institution") should be consistent throughout the regulations.

Thank you again for the opportunity to comment on the proposed regulations. Should you have questions please contact me at (405) 522-3297, or by e-mail: dawn_williams@sde.state.ok.us.

Sincerely,

Dawn Williams

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Association/Organization |
| Tracking No. 80e30bbd |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0213
Comment on FR Doc # 2011-08205

Submitter Information

Name: Vicki Shipley
Address:
Washington, DC,
Email: vshipley@nchelp.org
Organization: CBA, EFC, NCHELP and SLSA
Government Agency Type: Federal
Government Agency: ED

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington DC 20202

Docket ID ED-2011-OM-0002

Dear Ms. Miles:

On behalf of the Consumer Bankers Association (CBA), Education Finance Council (EFC), National Council of Higher Education Loan Programs, Inc. (NCHHELP) and Student Loan Servicing Alliance (SLSA), thank you for the opportunity to provide the following comments to the Family Educational Rights and Privacy (FERPA) proposed regulations published on April 8th.

The members of the undersigned associations take seriously our duty to protect personally identifiable information (PII), whether that responsibility is derived from federal or state law (e.g., Gramm-Leach-Bliley (GLB), Fair Credit Reporting Act, Fair and Accurate Transactions Act, Interagency Guidelines Establishing Standards for Safeguarding Customer Information ("Interagency Guidelines"), Federal Information Security Management Act of 2002) or standards from the National Institute of Standards and Technology and American National Standards Institute. While we understand the Department's goal of allowing for the effective use of data in statewide longitudinal data systems, the proposed new § 99.60(a)(2) does not advance that goal. More importantly, we do not believe that this proposed change to the FERPA regulation will provide meaningful new protection of PII held by nonprofit organizations, guaranty agencies and lenders, and it may well be beyond the Department's authority to prescribe.

The proposed regulation adds a new § 99.60(a)(2) that, according to the preamble discussion, would hold nonprofit organizations, student loan guaranty agencies, and student loan lenders accountable for compliance with FERPA in connection with "education records" received from educational agencies or institutions. Generally, enrollment and loan eligibility information is the only information we receive from educational institutions (i.e., contained in the school certification) that is not duplicative of information we collect independently from borrowers (or others). With respect to the federal student loan programs, educational institutions are required to provide this information to the providers or servicers of loans to their students and former students. The current FERPA regulations also provide that an educational agency or institution may disclose PII from an education record without consent if the disclosure is in connection with financial aid for which the student has applied or received, if the information is necessary to determine eligibility for the aid, the amount of the aid, or the conditions of the aid, or to enforce the terms of the aid. See § 99.31(a)(4). These are precisely the purposes for which PII is disclosed to nonprofit organizations, guaranty agencies and lenders. It is also important to note, as discussed below, that under GLB nonprofit organizations, guarantors and lenders are already obligated to protect enrollment information.

FERPA applies to “educational agencies and institutions,” which are defined as “any public or private agency or institution which is the recipient of funds under any applicable program.” It is clear from evidence of Congressional intent published in the *Federal Register* on December 13, 1974, as well as from the longstanding interpretation of the Department itself, that Congress intended FERPA to apply to educational institutions attended by students and to state and local educational agencies that govern institutions attended by students. The narrowness of the statute is underscored by the fact that in 1994 Congress felt it necessary to amend the statute in Improving America’s Schools Act (P.L. 103-382) to encompass State educational agencies. Given the legislative history of the statute, which is reflected in the Department’s longstanding regulatory interpretations, we question whether the Department has the legal authority to expand coverage of FERPA to records held by nonprofit organizations, guaranty agencies and lenders, even if those records include education records from educational agencies or institutions.

Moreover, the Department intends to cover nonprofit organizations, guaranty agencies, and lenders “solely for purposes of Subpart E of the FERPA regulations, which addresses enforcement procedures....” The enforcement procedures were created in order to address instances in which “an educational agency or institution...has a policy of denying, or...effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be...” (1) the right to inspect and review the education records of their children, (2) the right to challenge the content of such education records, and (3) the right to consent to their disclosure. Clearly, nonprofit organizations, guaranty agencies, and lenders do not fall within the statutory proscription, and in fact are specifically exempted through the financial records exemption. It makes no sense for an entity to be subject to enforcement procedures when it is not subject to the underlying rule.

In fact the enforcement mechanism for third parties that receive education records from educational agencies and institutions is spelled out in the statute. 20 U.S.C 1232g(b)(4)(B) provides that “[i]f a third party outside the educational agency or institution permits access to such [personally identifiable] 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.” The statute explicitly sets forth an enforcement mechanism that applies solely to educational agencies and institutions. The Department does not have authority to expand the application of remedies to entities other than educational agencies and institutions.

The preamble mentions nonprofit organizations, guaranty agencies and student loan lenders would be covered by the proposed rule. However, except in cases where such an entity is a service provider to an educational agency or institution, the information that a nonprofit organization, student loan guaranty agency, or student loan lender receives is restricted to information which they receive in processing financial aid for a student (or former student). Such information is not subject to the FERPA restrictions. See 34 CFR 99.31(a)(4). For example, the proposed regulation would appear to require a lender to comply with FERPA solely as a result of enrollment information secured by the lender from an educational institution in order to comply with FFELP loan origination due diligence requirements. While FERPA clearly governs how educational institutions and service providers, acting on behalf of educational institutions, protect and share “education records,” it should not apply

to entities that in their individual capacity are required or permitted by law to secure information about students from institutions (e.g. including directory information) in the course of establishing a customer relationship with a student borrower or to provide services during the course of the customer relationship. Moreover, in most cases the information received by such entity from an educational institution or organization is redundant to information received from the student or former student or a third party. In no case should such information be subject to FERPA. If the Department does not accept the argument that non-school entities (including nonprofit organizations, student loan guaranty agencies and student loan lenders) are not educational agencies or institutions and therefore not covered by FERPA, we respectfully request that the proposed regulation, if adopted, be revised to clarify that non-school entities need only comply with FERPA to the extent they receive FERPA-covered information from an educational agency or institution.

It is important to understand that the use, protection, and disclosure of information about an application (including information from a school certification), the resulting loan, and the servicing of a loan by and among schools, lenders, and guarantors is already governed and facilitated by other provisions of law as well as the applicable promissory note. Nonprofits, guarantors and lenders are considered “financial institutions” as defined by GLB. Borrower information collected and retained by such parties in connection with federal and/or private education loans is subject to stringent data use, disclosure, and protection requirements under GLB and the Interagency Guidelines. Such requirements parallel those of FERPA. The use, disclosure, and protection of borrower information by nonprofits, guarantors and lenders in compliance with GLB and the Interagency Guidelines is also subject to audit oversight by the applicable federal functional regulator. It is unnecessarily redundant to subject these organizations to FERPA in connection with data ordinarily secured from educational institutions to make education loans¹. Additionally, the Department’s Master Promissory Note (MPN) and similar promissory notes used by financial institutions for other education loan programs contain specific authorization and consent for release of information pertaining to a borrower’s loans by and among the schools, lenders and guarantors.

Based on the above, we respectfully request that the Department consider modifying the discussion of the proposed section 99.60(a)(2) to exclude any reference that it could include “a nonprofit organization, student loan guaranty agency or a student loan lender.” The proposed change to subpart E of the FERPA regulations which addresses enforcement procedures is duplicative of current laws, regulations and policies which govern the way financial institutions (including nonprofits, guarantors and lenders) protect PII, and thus would impose an unnecessary burden on these organizations. The legal authority for the interpretation is also questionable. In the alternative, we request that the proposed regulation clarify that non-school entities (including nonprofit organizations, student loan guaranty agencies, and student loan lenders) need only comply with FERPA to the extent they receive information from an “education record” while acting in the capacity of a service provider for the educational institution. This would include clarifying that information a loan participant receives in its individual capacity from an educational institution is not an education record for FERPA purposes and/or that the loan participant’s use, retention, and disclosure of such information is not subject to FERPA requirements.

¹ It should be noted that the Federal Trade Commission’s GLB regulations, recognizing the burden of compliance with parallel requirements, specifically state that an educational institution’s compliance with the FERPA shall be deemed to be compliance with the GLB. 16 CFR 313.1. For the same reason, financial institutions also should not be burdened with compliance with two parallel regulatory regimes.

Thank you again for the opportunity to provide these comments and please let us know if you have any questions or would like to discuss this in more detail.

Sincerely,

Consumer Bankers Association
Education Finance Council
National Council of Higher Education Loan Programs, Inc.
Student Loan Servicing Alliance

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Individual |
| Tracking No. 80e30ba2 |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0214
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

This is an invasion of privacy, and I oppose it.

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: State Higher Education Office
Tracking No. 80e30ba0
Comments Due: May 23, 2011
Submission Type: Web

PUBLIC SUBMISSION

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0215
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



IDAHO STATE BOARD OF EDUCATION
650 W. State Street | P.O. Box 83720 | Boise, Idaho 83720-0037
208-334-2270 | FAX: 208-334-2632
email: board@osbe.idaho.gov

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Ms. Miles,

This letter is submitted to comment on the U.S. Department of Education's (ED) proposed rule-making applicable to the Family Educational Rights and Privacy Act (FERPA), as published in the April 8, 2011, Federal Register. The Office of the State Board of Education is committed to both the strategic and appropriate use of education data to inform policy, management and instructional decisions, and the necessary protections for student data. The current FERPA regulations have been a frequent obstacle to achieving these goals through student longitudinal data systems.

Investments in state longitudinal data systems will be leveraged to improve student achievement only when the right data get to the right people at the right time. This requires linking and sharing appropriate data across systems to produce better information, providing timely and appropriate access to stakeholders, and using data to conduct research and evaluation. States have long requested clear and consistent guidance from ED about how FERPA applies to states' authority to share and use longitudinal data to meet their state goals and federal policy obligations while protecting student data.

As the preamble to the proposed regulations acknowledges, broader disclosure of student records for legitimate purposes at the state, system and local levels may increase the risk of unauthorized disclosures. However, the response to this challenge is not to sacrifice the legitimate use of data to inform education decision-making, but rather to require stronger protections relating to how the data are maintained, accessed and used. We support the U.S. Department of Education's proposal to clarify FERPA in order to strengthen student protection and enable key entities to share data. This is essential for Student Longitudinal Data Systems to move successfully forward.

Sincerely,

A handwritten signature in cursive script that reads "Mike Rush".

Dr. Mike Rush, Executive Director
Idaho State Board of Education

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Parent/Relative |
| Tracking No. 80e30bac |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0216
Comment on FR Doc # 2011-08205

Submitter Information

Name: Lisa Hedger
Address:
Issaquah, WA,
Email: sagwa001@msn.com

General Comment

It would be nice if someone was actually focused on educating our children instead of continuous testing and monotonous paperwork that is required from teachers and parents in the public education system. A system that "We the People" pay for, by the way! Check the facts, we our sliding down the achievement scale year after year. We barely teach reading and our mathematics curriculums are a joke.

I am opposed to any further intrusion of government regulation forced upon us. Don't tread on Me!

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Parent/Relative |
| Tracking No. 80e30b9f |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0217
Comment on FR Doc # 2011-08205

Submitter Information

Name: Kourtney Ray
Address:
APO,
Email: bandkray@yahoo.com

General Comment

First, not including AP as a state is a real insult to this military family stationed overseas

I do not want my child to be in a database that can be tracked by those who I have not directly given written permission to obtain information on

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Parent/Relative |
| Tracking No. 80e30ba9 |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0218
Comment on FR Doc # 2011-08205

Submitter Information

Name: Barbara Buswell

Address:

Colorado Springs, CO,

Email: bbuswell@peakparent.org

Organization: PEAK Parent Center

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



PEAK
PARENT
CENTER

Helping Families Helping Children

611 N. Weber, Suite 200
Colorado Springs, CO 80903
● 719.531.9400
Fax: 719.531.9452

May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-7100

Dear Ms Miles,

PEAK Parent Center, Colorado's Parent Training and Information Center, agrees with and joins with the Center for Law and Education in its attached comments and concerns regarding the proposed changes to FERPA regulations.

Sincerely,

Barbara E. Buswell
Executive Director

CENTER FOR LAW AND EDUCATION

www.cleweb.org

reply to:

99 Chauncy Street
Suite 402
Boston, MA 02111
617-451-0855
kboundy@cleweb.org

1875 Connecticut Ave., NW
Suite 510
Washington, D.C. 20009
202-986-3000

May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-7100

Re: Comments on **ED-2011-OM-000**

Dear Ms. Miles:

Attached are comments submitted by the Center for Law and Education in response to the Notice of Proposed Rulemaking (April 8, 2011) re: the Family Educational Rights and Privacy Act. We have identified areas of concern in which we believe that Department's proposed revisions to the regulations promulgated under FERPA are inconsistent with the statute and ought to be addressed more appropriately through legislation. We are especially concerned that the Department's proposed changes to non-consensual disclosure of personally identifiable information for the purpose of creating a more robust SLDS compromise the privacy rights of eligible students and/or parents.

The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities -- from federal policy through state and local implementation.

The following organizations join CLE in submitting these comments:

Council of Parent Attorneys and Advocates (COPAA)
ECAC - Exceptional Children's Assistance Center
Exceptional Parents Unlimited, Central California PTI
Parent Information Center of New Hampshire
PTI Nebraska
Statewide Parent Advocacy Network

We appreciate this opportunity to comment and would be pleased to discuss with the Department constructive approaches for addressing any of the issues we have flagged.

Yours truly,

Kathleen B. Boundy
Co-Director

Enclosure/Attachment

CENTER FOR LAW AND EDUCATION

www.cleweb.org

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kboundy@cleweb.org

1875 Connecticut Ave., NW
Suite 510
Washington, D.C. 20009
202-986-3000

**Comments of the Center for Law and Education
to NPRM re: Family Educational Rights and Privacy Act
(FERPA), 76 FR 19726, April 8, 2011**

U.S. Department of Education Docket ID: ED-2011-OM-0002

General Overriding Concern

In the preamble to the NPRM under the Family Education Rights and Privacy Act (FERPA) issued in the Federal Register (76 FR 19726) April 8, 2011, the U.S. Department of Education (ED) indicates that it is proposing revised regulations under FERPA based on provisions in the American Recovery and Reinvestment Act (ARRA) that relate to the expansion and development of a State Longitudinal Data System (SLDS) consistent with the COMPETES Act. The ARRA provided an infusion of federal funds on a competitive basis to a limited number of States to improve their education data capabilities, including to the extent they did not already do so, assigning all students a unique Statewide student identifier, and collecting such data as yearly test records, student level transcript information, including courses completed and grades earned, college readiness test scores, information about transition from secondary to postsecondary education, including participation in remedial work, and postsecondary and work force information. Because ED recognizes that explicit provisions of FERPA and its current regulations may restrict non-consensual disclosure and re-disclosure of personally identifiable information (PII) in students' education records – information that would help to build the State grantees SDLS and make the system more useful ED has proposed regulatory revisions to allow significantly greater flexibility for inter-agency exchange, including among non-educational agencies and institutions.

While the purpose of making the SLDS more robust and useful to multiple State agencies (not only agencies with direct control of educational agencies and institutions) may help enhance the accountability and monitoring of program quality and effectiveness, the Center for Law and Education (CLE) believes that the proposed changes to the regulations are not consistent with, and undermine, the explicit protections set forth in FERPA, as the authorizing statute. The proposed changes in the regulations reflect serious policy decisions in which the stakeholders – i.e., parents and eligible students whose PII from their education records are at issue – have had minimal opportunity for reflection, discussion, debate and review despite the potential and serious harm that might result to them through disclosure and re-disclosure of PII without adequate safeguards and protections to individuals or entities not under the direct control of the educational agencies and institutions entrusted with such PII. Given the plain language and intent of FERPA to protect disclosure of PPI from students' education records without prior consent by eligible students or parents, CLE believes that the kind of changes proposed in the NPRM should properly and lawfully be made through statutory amendment to 20 U.S.C. § 1232g, and not by revisions to regulations that arguably undermine the protections of the law which, as enacted, was designed to be strictly read and narrowly construed.

Moreover, prior to the introduction of any statutory changes to FERPA for the purpose of facilitating a more robust SLDS, CLE would encourage a study by the Government Accounting Office (GAO) to

examine the extent to which barriers exist under current protections, including but not limited to, non-consensual disclosure of PII under FERPA, that impede effective research and evaluation of educational agencies and institutions and other federal and State supported programs, including those primarily for the purpose of education, that are or may be relevant to children and youths' academic achievement and success in attaining improved educational outcomes. In addition, it would be important for GAO to consider the trade-offs in attempting to balance the facilitation of research and evaluation with the impact on loss of individual rights to privacy and expectations of not disclosing without prior consent PII.

Specific Comments on Proposed Regulations

Definitions (§ 99.3)

ED seeks to build the SLDS and make it more robust and useful by accessing and sharing PII student and family data across State agencies. This outcome is primarily accomplished by ED's proposing to expand two regulatory definitions under FERPA – "authorized representative" and "education program." Together the proposed changes to these definitions have the effect of substantially modifying FERPA by impinging upon privacy rights and protection from non-consensual disclosure of PPI that parents and eligible students possess under current law.

CLE's Position: CLE opposes the proposed changes to the regulations because they are not consistent with the statute. If such changes are believed to be warranted, changes ought to be made through amendment of the statute following open debate, review and discussion of potential benefits and harm from changes in students' expectations of privacy in PII contained in their education records, and consideration of additional, necessary protections from disclosure and re-disclosure of PII.

- **Authorized Representative (§§ 99.3, 99.35)**

ED proposes a new regulatory definition of an "authorized representative." The new proposed definition would expand the term beyond authorized representatives of only those individuals explicitly referenced by statute (i.e., Comptroller General of the United States, the Secretary, or State educational authorities), who have access to student or other records for a statutorily specified purpose – as "may be necessary in connection with an audit and evaluation of Federally supported education programs or in connection with Federal legal requirements that relate to such programs" – or the authorized representatives of the U.S. Attorney General for law enforcement, to include additionally "*any individual or entity designated by a State or local educational agency authority*" to carry out audits, evaluations, or compliance or enforcement activities relating to "*education programs.*"

Because the plain language of FERPA is restrictive and the term "authorized representative" has been interpreted as limited to the officials so designated and does not include other State or federal agencies because they are not under the direct control (e.g., employees or contractors) of a State or local educational agency, [see 76 FR 19728], ED cannot point to the authorizing statute to support the proposed loosening of this authority to access, disclose, and re-disclose PII without prior consent. Indeed, ED acknowledges this "truth" that was incorporated in the preamble to the final FERPA regulations published on December 9, 2008 (73 FR 74806, 74825). However, because ED has changed its mind, and no longer believes that FERPA [irrespective of its statutory language at 20 U.S.C. §1232g(b)(1)(C) and (3)] limits authorization to PII to those either listed specifically in the statute or to authorized representatives under the direct control of State educational authorities for purposes of audit and evaluation of federally supported education programs, or in connection with the enforcement of Federal legal requirements, ED cites its own previously modified regulations to justify this foray into undermining the statutory limitations and protections provided by FERPA.

ED attempts to justify the proposed changes by referencing its prior changes in the 2008 *regulations* that expanded re-disclosure authority as well as the preamble discussion to those regulations, both of which ED suggests “promote the development and expansion of robust SLDS” (76 FR 19727). In the current preamble to the NPRM, ED suggests that, in light of Congress’s intent in the ARRA to have States link data across the sectors, it is necessary [apparently notwithstanding the language of the statute and prior interpretations of “authorized representative”] “to clarify” that PII information may be disclosed without prior consent to an entity or an individual (authorized representative) who is not under the *direct control* of the educational agency or institution. 76 Fed. Reg. 19728. To get around this statutory limitation, ED proposes a new regulatory definition of an “*authorized representative*” that would encompass “*any individual or entity designated by a State or local educational agency authority*” to carry out audits, evaluations, or compliance or enforcement activities relating to “*education programs*.” [As discussed below, by defining the term “education programs” broadly, ED’s proposed change will enable those individuals and entities designated as “authorized representatives” to seek access to and disclose without prior consent PII data from records in the possession, custody, and control of an expanded set of programs in addition to programs receiving Federal education support].

ED rationalizes that this change in the regulations is needed because educational agencies or institutions cannot disclose educational records without prior consent to entities over which they do not have “direct control” with respect to the use and maintenance of education records. See 34 C.F.R. §99.31(a)(1)(B)(2). ED perceives this as a problem because a State educational agency (SEA) is not able to disclose PII from student academic records to another State agency, such as a State department of labor or human services, because it does not have “direct control” over the other agency. In the preamble to the proposed regulations, ED states that there is no reason why a State health and human services or labor department, for example, should be precluded from serving as the authorized representative and receiving non-consensual disclosures of PII to link education, workforce, health, family services, and other data for the purpose of evaluating, auditing, or enforcing Federal legal requirements related to Federal or State supported education programs.

Moreover, ED proposes three additional changes to § 99.35 to ensure “that PII, including PII in SLDS, will be appropriately protected while giving each State the needed flexibility to house information in a SLDS that best meets the needs of the particular State.” 76 FR 19729. First, under proposed § 99.35(a)(2), ED would require the State or local educational authority or agency to use “reasonable methods” to ensure that the designated authorized representative: uses the PII only to carry out audits, evaluations, or enforcement or compliance activities related to education programs; protects the PII from further unauthorized disclosures or uses; and destroys the PII in accordance with FERPA requirements. ED, however, purposefully chose not to define the term “reasonable methods” in order to provide flexibility for the State or local educational authority or agency. ED is soliciting comments on what might be considered “reasonable methods” in order to issue non-regulatory guidance on this matter at a later date. 76 FR 19728. Second, under proposed § 99.35(a)(3), ED would require the State or local educational authority or agency to “use a written agreement” that would: designate the individual or entity as an authorized representative; specify the information to be disclosed and that the purpose is to carry out an audit, evaluation, or enforcement or compliance activity for an education program; require the authorized representative to destroy or return to the State or local educational authority or agency the PII when the information is no longer needed; specify the time period in which the information must be returned or destroyed; and establish policies and procedures to protect the PII from further unauthorized disclosure or use. Third, under proposed § 99.35(d), ED would clarify that if the Family Policy Compliance Office finds that a State or local educational authority or agency or an authorized representative improperly re-discloses PII, the educational agency or institution from which the PII originated would be prohibited from permitting the authorized representative or the State or local educational authority or agency (or both) access to the PII for at least five years.

CLE’s Position: CLE does not support the proposed expanded definition of “authorized representative” as set forth in the NPRM. The new proposed definition is overly broad and not consistent with the specific statutory language in FERPA. Access to PII in students’ records is neither limited to the statutorily identified personnel nor limited, as per the statute, to the identified functions of such officials. 20 U.S.C. §§1232g(b)(1)(C), (b)(3). Of particular concern to CLE is the shift from the current protective regulatory language that restricts access to, use of, and re-disclosure of PII from students’ educational records without prior consent of eligible students or parents to school officials and those under their direct control having a legitimate educational interest, to an overly broad, general authorization for access and disclosure of PII to “*any individual or entity* designated by a State or local educational agency authority” without sufficient protections. Although ED asserts that it has included sufficient protections to ensure that there is an appropriate balance between protecting PII and allowing States the needed flexibility to maintain an effective SLDS, the protections that ED has proposed will have a minimal impact on preventing improper re-disclosures – e.g., ED has not defined “reasonable methods” but, rather, has intentionally left the definition open to allow for “flexibility” on the part of States, and the “written agreement” has no enforcement mechanism. Furthermore, the only possible sanction is that the authorized representative or educational authority/agency (or both) will be denied access to the PII for at least five years. Regardless of the rationale offered by ED or even its merits, CLE opposes the proposed revisions to the regulations as inconsistent with the statute; changes in the law should be made through legislative amendment not contorted rulemaking

- **Education program**

ED also proposes a new definition for an “education program.” The term would be defined as “any program that *is principally engaged in the provision of education*, including but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education.” Under current law and regulations, authorized representatives of the officials expressly listed in §99.31(a)(3) [i.e., U.S. Comptroller General, U.S. Attorney General, Secretary, SEA and LEA officials] “may have access to education records in connection with an audit or evaluation of *Federal or State supported education programs*, or for the enforcement of, or compliance with Federal legal requirements that relate to those programs.” 34 C.F.R. § 99.35 (a)(1); 20 USC 1232(g)(b)(3), (5). By defining an “education program” as principally engaged in providing education *regardless of whether it is administered by an educational authority*, ED would expand authorization for sharing data containing PII without prior parental/eligible student consent with programs that may be administered, e.g., by public health and human services, or labor, which are precluded as recipients of PII under current law. 34 C.F.R. §99.31. Such data sharing would allow other State agencies to take advantage of research opportunities over a wide variety of programs (e.g., HeadStart) not just ED programs, so long as the programs (e.g., adult education, GED programs, workforce training) are principally engaged in the provision of education. By making these changes, it is anticipated that the SLDS will become more useful.

Through these two definitional changes, ED would achieve its goal of making it significantly easier to share non-consensual PPI from education records across State agencies and systems. An SEA or LEA would be able to appoint a non ED agency/entity or individual, who need NOT be among those statutorily authorized officials to access such information, as its authorized representative to share (i.e., disclose and re-disclose) data containing PPI without prior consent by eligible students or parents among agencies, including non-educational agencies and personnel not under the direct control of the educational agency or institution.

CLE’s Position: Because the change in definition of “education program” undermines the plain language and intent of FERPA by, for example, allowing access to such programs as adult literacy and workforce

training that are not administered by an educational agency or institution, CLE opposes the modification of the definition outside of the legislative process.

Other Proposed Changes

- **Directory Information**

In addition to these regulatory provisions, ED identifies what it describes as a small number of additional regulatory provisions and policy statements that “unnecessarily hinder the development and expansion of SLDS consistent with the ARRA.”

The NPRM proposes changes to “directory information,” which is defined as “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed” and includes BUT is not limited to: student’s name, address, telephone listing, e-mail address, DOB, place of birth, enrollment status, awards, participation in sports, most recent education institution attended and whatever additional information that the school district has marked as directory information. First, the NPRM proposes to authorize an educational agency to designate as “directory information” a student ID number or other unique personal identifier that is displayed on a student ID card, provided that the identifier cannot be used to gain access to education records *except when used in conjunction with one or more factors that authenticate the user’s identity*. 34 C.F.R. § 99.3(b)(2),(c).

CLE’s Position: To the extent that ED is defining a student ID as “directory information” not subject to consensual requirements under IDEA, CLE believes that concerns for physical safety and protection from identity theft warrant heightened protection. Instead of authorizing an educational agency or institution to designate a student ID as directory information provided the identifier cannot be used to gain access to education records *except when used in conjunction with one or more factors that authenticate the user’s identity*, CLE urges that a student ID number or other unique personal identifier that may be displayed on a student ID card and is classified as “directory information” shall not be used (even in conjunction with one or more factors that authenticate the user’s identity) to gain access to education records.

- **“Opt-Out”**

The NPRM proposes in a new provision (proposed §99.37(c)(1)) that a parent or eligible student may not use their right to opt out of directory information disclosures to prevent an educational agency from disclosing or requiring a student to disclose the student’s name, *identifier*, or institutional e-mail address in a class in which the student is enrolled. Nor may the parent or eligible student prevent an educational agency from requiring a student to wear, display publicly, or disclose a student ID card or badge that exhibits information designated as directory information. [34 C.F.R. § 99.37(c)(2)].

CLE’s Position: If the identifier is defined in a manner to ensure safety and protection consistent with CLE’s position in the above paragraph, CLE supports this provision.

- **Different Treatment of Directory Information**

The NPRM also proposes that an educational agency or institution would be authorized to indicate in its public notice to parents and eligible students that disclosure of directory information will be limited to specific parties, for specific purposes, or both. Based on this proposed change, access by third parties (e.g., vendors) to directory information could be limited by the educational agency despite the information having been designated as “directory information” for which prior consent is not required. If said

limitations are included in the public notice to parents and eligible students, the educational agency must limit access/disclosure consistent with the notice. [See proposed §99.37(d)]

CLE's Position: This proposed provision would seem to be in the interest of students and their families, although CLE can conceive of how differential treatment of what constitutes "directory information" for different third parties may raise serious policy questions for consideration by school communities, including eligible students and parents.

- **Research Studies**

Section 1232g(b)(1)(F) of FERPA authorizes educational agencies and institutions to disclose PII without prior consent to organizations "conducting studies *for, or on behalf of, educational agencies and institutions*" to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction. Current regulation §99.31(a)(6)(ii) conditions receipt of PII by such an organization conducting studies upon its restricting access to representatives: having a legitimate interest in the information; destroying PII when the information is no longer needed for the purposes of the study; entering a written agreement specifying the purpose, scope, and duration of the study as well as the specific PII to be accessed; and limiting use of PII to the stated purposes of the study consistent with the written agreement. ED, through the NPRM, would amend §99.31(a)(6) by adding a new provision that would "clarify" that these same provisions apply to SEAs so they may enter into agreements on behalf of school districts with organizations conducting studies, after the law's written agreement requirements are met. ED reasoned that the amendment was necessary because ED had previously opined [Dec. 9, 2008, 73 FR 74806, 74826] that an SEA was not authorized to re-disclose PII obtained from LEAs to an organization for research studies unless the SEA had separate legal authority to act on the LEA's behalf. The amendment would expressly allow SEAs to enter into agreements with individuals or entities designated as the SEA's "authorized representative" without limitation regarding access to, disclosure of, or re-disclosure of PII by such "authorized representative" to such PII that was entrusted to LEAs.

Significantly, while the educational agency or institution, as the holder of the obligation to protect PII from non-consensual disclosure, is subject to loss of all Federal funding for violating FERPA's protections of PII from students' education records, the sanction for unlawful re-disclosure by an "authorized representative" designated by the State or local education agency would result in such individual or entity being precluded from entering into an agreement with the State or LEA for a period of 5 years.

CLE's Position: CLE believes that this proposed change that would authorize SEAs to enter into agreements on behalf of school districts with organizations conducting studies may argue for heightened, not weakened, security and protection of students' ID numbers (as discussed above) in light of the NPRM's proposed shift to broaden disclosure of PII from students' education records. Moreover, consistent with rules of statutory interpretation, this proposed revision and amendment of §99.31(a)(6) is another significant change that would have the effect of broadly authorizing the SEA without limitations as specified in the statute and ought to be made by legislation amending the statute.

- **Authority to Evaluate**

The NPRM proposes to make it easier for State or local educational authorities to conduct an audit, evaluation, or compliance enforcement activity by removing current regulatory language requiring a basis of separate Federal, State, or local "authority" to undertake these tasks or activities, given that such authority to engage in such activities does not derive from FERPA. The removal of the specific reference to "authority" would remove a barrier to agencies that do not administer educational agencies or institutions from accessing PII to conduct evaluations of the effectiveness of Federal and State supported Center for Law and Education Docket ID ED-2011-OM-0002

education programs primarily for the purpose of education. These are the agencies that presumably would be encompassed under the NPRM's new definitions of "authorized representative" and "education program" discussed above.

CLE's Position: As described above specifically with respect to the proposed change in the definition of "authorized representative," this proposed change would represent an additional related change in the underlying protections set forth in FERPA, and any such revision ought to be made through legislation not rulemaking.

- **Enforcement Procedures**

Changes proposed through the NPRM will make clear that FERPA's enforcement procedures apply to all educational agencies or institutions, including any public or private agency to which FERPA applies, as well as any SEAs, postsecondary agency, or LEA or any recipient to which funds have been made available under any program administered by the Secretary (e.g., a nonprofit organization, student loan guaranty agency, or a student loan lender), including funds provided by grant, cooperative agreement, contract, subgrant, or subcontract. FERPA's enforcement provisions would therefore apply to any agency or other recipient of ED funds that has inappropriately disclosed or re-disclosed PII, regardless of where the student attends school or if the agency did not generate the original student records.

CLE's Position: CLE supports this proposed change. CLE believes that the need for this proposed revision to current regulations, 34 C.F.R. §§ 99.60-99.67, underscores the importance of SEA and LEAs, IHEs, and all educational agencies or institutions, including any public or private agency to which FERPA applies, being vigilantly held accountable for complying with those provisions of FERPA governing non-consensual access, disclosure, and re-disclosure of PII from students' education records. The very need for expanding ED's limited enforcement authority, as currently construed based on current regulations, should be a warning to ED as to the problems that will lie ahead if the proposed new definitions of "authorized representative" and "education program" are adopted. They would encourage sharing of data among State agencies, organizations and entities over which ED has no jurisdiction and which are not subject to the mandates or protections of FERPA.

PUBLIC SUBMISSION

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|-----------------------------------|
| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Civil Rights |
| Tracking No. 80e30b9e |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0219
Comment on FR Doc # 2011-08205

Submitter Information

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Government Agency Type: Federal

General Comment

Since under the US Constitution, education is not an enumerated power of the federal government, under the 10th Amendment the educational data collection plan and these proposed rules are not only objectionable but entirely unconstitutional. Section entitled "Education Program" (Sec. 99.3, 99.35) allows privacy to be breached even with private education centers (such as Sylvan, Kumon), private and religious preschools, private schools for lower grades as well as for trades, and possibly homeschools. This is not a tool to improve education and not a legitimate use of authority for the Department of Education. There is no benign reason for this federal agency to non-consensually collect information that allows people to be sorted out by their demographic traits and guided toward predetermined workforce outcomes.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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| Category: Student |
| Tracking No. 80e30b9d |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0220
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

It is a massive intrusion on one's liberty, to be able to collect for whatever purposes, and without consent one's personal information. It's personal information for a reason, people's privacy is very important to them

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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| Posted: May 24, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0221
Comment on FR Doc # 2011-08205

Submitter Information

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Organization: Concerned citizen

General Comment

suggested comment:

Since under the US Constitution, education is not an enumerated power of the federal government, under the 10th Amendment the educational data collection plan and these proposed rules are not only objectionable but entirely unconstitutional. Section entitled "Education Program" (Sec. 99.3, 99.35) allows privacy to be breached even with private education centers (such as Sylvan, Kumon), private and religious preschools, private schools for lower grades as well as for trades, and possibly homeschools. This is not a tool to improve education and not a legitimate use of authority for the Department of Education. There is no benign reason for this federal agency to non-consensually collect information that allows people to be sorted out by their demographic traits and guided toward predetermined workforce outcomes

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0222
Comment on FR Doc # 2011-08205

Submitter Information

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Organization: PACER Center

General Comment

PACER Center welcomes the opportunity to comment on the notice of proposed rulemaking under the Family Education Rights and Privacy Act (FERPA) issued in the Federal Register (76 FR 19726) April 8, 2011. As an organization representing children with disabilities and their families, PACER appreciates the efforts made under FERPA to protect disclosure of personally identifiable information (PII) from students' education records without prior consent by eligible students or parents. In general, we support the purpose of making the State Longitudinal Data System (SLDS) more robust and useful to multiple state agencies (not only agencies with direct control of educational agencies and institutions) in order to better evaluate the effectiveness and impact of education programs. With that narrow purpose in mind, PACER Center offers the following comments in the written agreements proposed for §99.35.

Written Agreements

The notice proposes to require the State or local educational authority to have written agreements with authorized users of student data that, among other things, "specify the information to be disclosed and the purpose for which the PII is disclosed..." PACER Center recommends that language be included in §99.35 to specify that the information to be disclosed must be educational in nature. If there is any interest in broadening disclosure of PII under FERPA, it must be clearly educational in nature. Examples of such data in existing SLDS include yearly test records, student level transcript information, including courses completed and grades earned, college readiness test scores, information about transition from secondary to postsecondary education, including participation in remedial work, and postsecondary and work force information. Because of the wider variety of health and other information included in students' with disabilities school records, it is important to clarify that PII disclosed be limited to educational data.

PUBLIC SUBMISSION

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| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0223
Comment on FR Doc # 2011-08205

Submitter Information

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General Comment

In one sentence "NO" to allowing FERPA permission to collect and use any data from state government or state schools.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0224
Comment on FR Doc # 2011-08205

Submitter Information

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Submitter's Representative: Laurie A. Babinski

Organization: Society of Professional Journalists

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

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May 23, 2011

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BY ELECTRONIC POSTING

Ms. Kathleen Styles
Chief Privacy Officer
U.S. Department of Education
400 Maryland Avenue, SW, Room 6W243
Washington, D.C. 20202-5920

Re: Docket ID ED-2011-OM-0002

Dear Ms. Styles:

We submit these comments on behalf of the Society of Professional Journalists (the "Society"), a national non-profit organization dedicated to improving and protecting journalism, in response to the Department of Education's Notice of Proposed Rulemaking published in the Federal Register on April 8, 2011 regarding proposed amendments to the regulation under § 444 of the General Education Provisions Act, also known as the Family Educational Rights and Privacy Act of 1974 ("FERPA"), as amended.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization. It is dedicated to encouraging the free practice of journalism and stimulating the high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, the Society promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Society's interest in FERPA reflects its desire to maintain the free flow of information to the public, and the press as a surrogate of the public, while accommodating legitimate privacy concerns of educational institutions and their students. Specifically, the Society is concerned with the proposed amendment to Section 99.37(d) (Limited Directory Information Policy) that would permit an educational agency or

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institution to specify in the public notice it provides to parents and students that any disclosure of directory information will be limited to specific parties, for specific purposes, or both.

The Department of Education Press Release accompanying the Notice of Proposed Rulemaking indicates that the change was proposed to “prevent[] marketers or criminals from accessing the data.” However, it will also prevent the release of data that does not pose concerns to students’ privacy to those who have a legitimate reason for obtaining the information including the press. The proposed amendment should be reconsidered or the appropriate guidance given to educational agencies or institutions to ensure that the public’s right to know is not further inhibited.

Comment 1:

Providing Educational Agencies And Institutions With A Tool To Absolutely Bar Release To The Press Of Student Directory Information That May Not Implicate Privacy Concerns Harms The Public’s Right To Know

Under sections (a)(5), (b)(1), and (b)(2) of FERPA as currently in effect, an educational agency or institution may disclose directory information without the written consent of parents or eligible students provided that it first notifies them that directory information may be disclosed and provides them the opportunity to “opt out” of disclosure. Such directory information includes students’ names, addresses, and telephone numbers.

The relevant sections in effect do not address whether an educational agency or institution may put into effect a policy that limits who may receive the directory information or for what purposes it may be disclosed. As a result, parents or eligible students who do not “opt out” must assume that their directory information may be released to the public – including the press – for any reason. (Even then the “opt out” provision is virtually meaningless because it is ambiguous and confuses what information may be released.)

Under the proposed amendment, however, educational agencies and institutions have the option of notifying parents or eligible students that it will not disclose directory information to certain parties or for certain purposes. The effect of this change will mean that educational agencies and institutions may – and likely will – decide to notify parents or eligible students that they will not disclose their directory information to the media for any reason. The educational entities would then be prohibited under FERPA from disclosing to the media even directory information that poses no risk to student privacy, such as names and graduating years, and even when the school may in fact want to release such information to assist in an investigation or notify the public of a particular danger.

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Furthermore, parents and eligible students would have no ability to “opt out” of this policy; that is, if an educational agency or institution implements a policy barring the disclosure of student directory information to a particular entity or for a particular reason, the directory information will not be released under those terms no matter the preference of the parent or eligible student.

The effect of the proposed amendment will be to completely bar the press from obtaining any information about any student regardless of the fact that many categories of information pose no risk to student privacy and regardless of the fact that some parents and eligible students may not be concerned with the school providing such information. For example, a student who is recognized for academic achievement or public service by a national or local organization may not mind – and may indeed welcome – the school providing a reporter with the student’s phone number to contact the student for an article.

It is no justification that the school has the choice not to enact a policy prohibiting disclosure to the media as a party or the disclosure of media for the purpose of publicity when enacting such a policy provides obvious administrative advantages. With a limited disclosure policy in place, educational agencies or institutions would avoid spending time and money to train staff to determine which disclosures to the media do not violate FERPA and, in fact, are appropriate and in the public interest. Instead, given the option, schools will undoubtedly put into place a policy that student directory information may not be released to the media, or may not be released for purposes of publicity, investigation or dissemination to the public.

Moreover, by allowing educational agencies and institutions to implement a policy that prohibits disclosure to certain “parties,” the proposed amendment leaves open the possibility that a school may decide that it is unhappy with the probing reporting done by a certain publication and bar disclosure to that publication alone as retribution. For example, a well-known newspaper may conduct a years-long investigation into the underachieving scores and crumbling facilities in a major metropolitan school district. The results, published online and in print as an investigative series, may not be well-received by the leadership of district and individual schools because of what they perceive as unfairness or error. The leadership may be entitled not to speak with reporters from the media organization, but it should not be allowed to use FERPA to punish that newspaper by adding the organization to the list of entities prohibited from receiving directory information. FERPA should be used as a shield, not a sword, and the Department of Education cannot permit the possibility of such unchecked abuses.

Finally, the “opt out” in such circumstance may confuse parents or eligible students who do not understand exactly what they are opting out of when they decide not to have their directory information disclosed. For example, would they be opting out of having directory information disclosed at all, or opting out of the limited disclosure policy? The possibility for confusion alone should prevent the Department from moving forward with the proposed amendment.

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Page 4

Comment 2:

If The Proposed Amendment Is Enacted, Educational Agencies And Institutions Must Be Given The Appropriate Guidance To Preserve The Public's Right To Know

If the Department of Education determines that the proposed amendment providing for limited directory information policies is appropriate, then it must also give detailed guidance to educational agencies and institutions to diminish the negative effect such policies could have on the free flow of information to the public. For example, educational agencies and institutions should be instructed that excluding the media as a whole, particularly when the directory information which would be withheld from the press would otherwise be available to the public, is impermissible. They should also be instructed that discriminating among media outlets as retribution for past or present coverage is an unacceptable use of federal law.

Finally, regardless of whether policies prohibit certain individuals or organizations from receiving student directory information or whether they prohibit the release of such information for certain purposes, educational agencies or institutions must always be allowed to disclose information such as names and class years of all students that poses no risk to privacy interests. Under no circumstances should schools be empowered to use FERPA to withhold the names of students and other non-controversial generic information. The release of such information does not impede the Department's stated goal of "preventing marketers or criminals from accessing" personally identifiable information that presents the risk that a student's privacy would be invaded or the student's identity stolen. There is no legitimate purpose for denying access to generic student directory information and it should be exempted from the proposed amendment.

The media already face challenges accessing information covered by FERPA, which has been widely misconstrued by many educational agencies and institutions to prohibit access to student directory information even when a parent or eligible student has made an informed decision not to "opt out" of disclosure. Furthermore, the amendments may confuse educational agencies and institutions as well as parents and eligible students. Parents and eligible students are already able to "opt out" of disclosure. Educational agencies and institutions should not be allowed to further limit how and to whom student directory information is released. The proposed amendment to section 99.37(d) only creates further opportunity for such confusion and for the widespread abuse of FERPA.

Department of Education

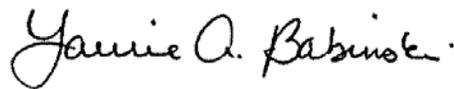
May 23, 2011

Page 5

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On behalf of the Society of Professional Journalists, we submit these comments to request that the Department of Education reconsider its proposed amendments to the regulations governing FERPA to take into account the public interest in the free flow of information when determining how to protect students from the improper and unlawful use of their directory information. The Society is eager to participate in discussions to assist the Department in drafting a workable and effective regulation that protects both the privacy of educational records properly defined and the public's right to know.

Yours very truly,

A handwritten signature in cursive script that reads "Laurie A. Babinski".

Laurie A. Babinski

cc: Hagit Limor, President, Society of Professional Journalists
Joseph Skeel, Executive Director, Society of Professional Journalists
Carolyn Carlson, Past President (1989-90), Society of Professional Journalists

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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| Posted: May 24, 2011 |
| Category: Business |
| Tracking No. 80e30b54 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0225
Comment on FR Doc # 2011-08205

Submitter Information

Name: Andrew Scheberle
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Austin, TX,
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Organization: Austin Chamber of Commerce

General Comment

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Proposed Amendments to FERPA Regulations (Docket ID ED-2011-OM-0002)

Dear Ms. Miles,

The Austin Chamber has invested more than a million private sector dollars with area school districts and UT-Austin toward building a real-time performance management system for high school counselors to increase the region's direct-to-college enrollment rate.

As a Chamber of Commerce in a software town, we represent employers who operate in real-time and we are advising our higher education and public education institutions on how to do so as well. Since talent powers our companies – and because it is the right thing to do – we need a greater number of our high school students to directly enroll in and complete post secondary education.

Campus and school district managers and counselors tasked with and held accountable for increasing the number and percent of students directly enrolling in higher education need timely access to individual level data on college/career readiness, college applications, FAFSA submission, college enrollment, developmental education, K12 & higher education course completion, employment status.

This data is in a bunch of places. Aggregating it at the student level requires federal and state education and workforce agencies, public education and higher education institutions, and not-for-profits to work together in real-time. It needs a nexus. Organizations like the Texas Education Research Centers and the UT-Austin Ray Marshall Center Student Futures Project are examples of such a nexus.

However, agencies and institutions who do not want to play nice, who worry about turf, hide behind the vagueness of the existing FERPA regulations to keep from helping. My worry is the "reasonable methods" provision of the proposed FERPA regulations has the potential to undermine much of what you are trying to accomplish.

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Proposed Amendments to FERPA Regulations (Docket ID ED–2011–OM–0002)

Dear Ms. Miles,

The Austin Chamber has invested more than a million private sector dollars with area school districts and UT-Austin toward building a real-time performance management system for high school counselors to increase the region’s direct-to-college enrollment rate.

As a Chamber of Commerce in a software town, we represent employers who operate in real-time and we are advising our higher education and public education institutions on how to do so as well. Since talent powers our companies – and because it is the right thing to do – we need a greater number of our high school students to directly enroll in and complete post secondary education.

Campus and school district managers and counselors tasked with and held accountable for increasing the number and percent of students directly enrolling in higher education need timely access to individual level data on college/career readiness, college applications, FAFSA submission, college enrollment, developmental education, K12 & higher education course completion, employment status.

This data is in a bunch of places. Aggregating it at the student level requires federal and state education and workforce agencies, public education and higher education institutions, and not-for-profits to work together in real-time. It needs a nexus. Organizations like the Texas Education Research Centers and the UT-Austin Ray Marshall Center Student Futures Project are examples of such a nexus.

However, agencies and institutions who do not want to play nice, who worry about turf, hide behind the vagueness of the existing FERPA regulations to keep from helping. My worry is the “reasonable methods” provision of the proposed FERPA regulations has the potential to undermine much of what you are trying to accomplish.

The Austin Chamber of Commerce has signed the Data Quality Campaign letter and agrees that your objective for FERPA clarification is needed. We have one area where we would like to go further than their letter, to ensure that eligible, appropriate organizations attempting to serve as nexuses can do so effectively.

Reasonable methods for FERPA – Leaving this area vague could allow state agencies to make subjective rule interpretations that could inhibit your desired objectives. Having basic guidelines to define

“reasonable methods” might prevent overly restrictive interpretations that undermine the proposed reforms.

I hope you will consider clarifying reasonable methods to significantly reduce the likelihood of this possibility.

Sincerely,

A handwritten signature in black ink that reads "Andrew Scheberle". The signature is written in a cursive, slightly slanted style.

Drew Scheberle
Sr. Vice President
Greater Austin Chamber of Commerce

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0226
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

As it is currently proposed, the changes to FERPA endanger student privacy rather than protect it. Although on the surface it appears to be an enhancement of privacy laws, these changes allow three potentially dangerous possibilities: that entities not genuinely education providers will gain access to this information; that the information will contain more than academics, including physical characteristics, medical history and financial information of the students' families; that this information may continue to follow students beyond their student years.

The wisest decision is to re-write the changes to explicitly indicate that only schools and colleges have access. Furthermore, it should stipulate that no outside agency (including government agencies other than DOE) could gain access nor could DOE authorize others to access the information. Only academic information could be included. And finally, parents must be apprised every time a request to access the information is made and informed of why and by whom the information is to be granted.

If student privacy is the genuine concern, these changes should not be onerous. And while you're making changes, add stiff legal penalties in terms of incarceration and heavy fines for violators of student privacy. A serious deterrent is needed in this technological age.

PUBLIC SUBMISSION

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| Posted: May 24, 2011 |
| Category: Local educational agency |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0227
Comment on FR Doc # 2011-08205

Submitter Information

Name: Legal Department
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Las Vegas, NV,
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Organization: Clark County School District
Government Agency Type: Local

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

**Clark County School District
Comments – Family Educational Rights and Privacy Act
Notice of Proposed Rulemaking
May 23, 2011**

1. Section 99.3 relating to the definition of “authorized representative” and “education program.”

The Notice of Proposed Rulemaking (“NPRM”) proposes to define the term “authorized representative.” An authorized representative would mean “any entity or individual designated by a State or local educational authority or agency headed by an official listed in §99.31(a)(3) to conduct -- with respect to Federal or State supported education programs -- any audit, evaluation or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs.”

The NPRM comments suggest that an authorized representative can be any public or private entity or official as long as it is related to an “education program.” If so, this should be clarified in the definition as follows: “any public or private entity or individual designated by a State or local educational authority...”

The NPRM has defined “education program” as “any program that is principally engaged in the provision of education.”

In the NPRM, the state health and human services and labor department are included as examples of potential authorized representatives. How far can the audit and evaluation exception be stretched for these types of agencies? For example, under the NPRM changes, could the state health and human services department obtain copies of PII related to student immunization data or student height/weight information to “evaluate” student health concerns? Could this be interpreted as “linking” education and health (as the NPRM comments mention)? Or, would it be more properly designated as relating primarily to “health” rather than education?

It would be helpful to provide more examples of exactly what would not fall within the definition of an “education program.”

Similarly, could the examples related to immunizations and height/weight measurements be deemed a “study” to improve instruction under §99.31(a)(6)? Helping to improve the health of students would ultimately “improve instruction.”

2. Section 99.35 regarding the requirement of a written agreement to designate an authorized representative to conduct an audit or evaluation.

It will be helpful if the Department of Education provides a sample written agreement.

3. Section 99.31 regarding re-disclosure of information under the studies exception.

The NPRM comments regarding the new re-disclosure requirements under the study exception are a bit confusing. It seems the new requirements can be boiled down to the following: (1) the studies exception now also applies to a state or local educational authority or agency headed by an official listed in 34 CFR §99.31(a)(3); (2) re-disclosure is permitted when it fits the studies exception; and (3) a written agreement is required if an organization is going to conduct a study with re-disclosed PII. Is this correct?

An example in the NPRM comments would help clarify. Is this an accurate example? School district (Party A) enters an agreement with the state department of education (Party B). The department of education will conduct a study to improve education. Party A and Party B enter a written agreement. The department of education would like to re-disclose the information to a college university (Party C) who will then conduct a study to improve education with the re-disclosed PII. In order to re-disclose the information, Party B and Party C must enter a written agreement. The school district (Party A) would not be a party to that subsequent contract.

4. Section 99.32(a) relating to recordkeeping requirements.

This comment does not relate to a specific proposed change.

34 C.F.R. §99.32(a) requires that an education agency must maintain a record of each request for access to and each disclosure of PII from the education records of each student. The NCLB requires that schools, upon request, provide the name, address, and telephone number of students to military recruiters and institutions of higher education. We request that the regulations be clarified to permit LEA's to record these disclosures by group, rather than individually in each student's record (which is burdensome).

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| Tracking No. 80e30b39 |
| Comments Due: May 23, 2011 |
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PUBLIC SUBMISSION

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0228
Comment on FR Doc # 2011-08205

Submitter Information

Address:
Washington, DC,
Email: rulemaking@epic.org
Organization: Electronic Privacy Information Center

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

COMMENTS OF ELECTRONIC PRIVACY INFORMATION CENTER

to

THE DEPARTMENT OF EDUCATION

“Notice of Proposed Rulemaking”

RIN 1880-AA86

May 23, 2011

By notice published on April 8, 2011, the Department of Education (“ED”) has proposed to amend the regulations that implement the Family Educational Rights and Privacy Act of 1974 (“FERPA”). EPIC opposes the proposed changes. The Notice of Proposed Rulemaking (“NPRM”) sets out agency recommendations that would undermine privacy safeguards set out in the statute and would unnecessarily expose students to new privacy risks. Pursuant to the ED notice in the Federal Register, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to address the substantial privacy risks raised by the agency’s proposal.

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect constitutional values and the rule of law. EPIC has a particular interest in preserving privacy safeguards established by Congress, including the Privacy Act of 1974,¹ and ensuring that new information systems developed and operated by the federal government comply with all applicable laws.²

¹ 5 U.S.C. § 552a (2011).

² See EPIC: Student Privacy, <http://epic.org/privacy/student/>; EPIC: Children's Online Privacy Protection Act, <http://epic.org/privacy/kids/default.html>; EPIC: Re-identification, <http://epic.org/privacy/reidentification/>; Letter from Lillie Coney, EPIC Associate Director, to

I. The Agency Proposes an Unprecedented and Unlawful Release of Confidential Student Information Otherwise Protected by the FERPA

FERPA prohibits the nonconsensual release of students' "educational records," including the "personally identifiable information contained therein."³ Congress imposed this "direct obligation" under the law "to protect the privacy of [student] records by preventing unauthorized access by third parties."⁴ Congress also provided specific exemptions in FERPA.⁵ The ED's proposals expand a number of FERPA's exemptions, reinterpreting the statutory terms "authorized representative," "education program," and "directory information."⁶ These proposals remove affirmative legal duties for state and local educational facilities to protect private student data.

the Social Security Administration (Sept. 3, 2004), *available at* http://epic.org/privacy/ssn/voter_reg_comments.pdf; Comments of the Electronic Privacy Information Center to the Dep't of Homeland Security, *Notice of Proposed Rulemaking: Implementation of Exemptions; Secure Flight Records*, 72 Fed. Reg. 48,397 (Sept. 24, 2007), *available at* http://epic.org/privacy/airtravel/sf_092407.pdf; Comments of the Electronic Privacy Information Center to the Federal Trade Comm'n, *Privacy Act of 1974: System of Records: Proposed Routine Use: Request For Public Comment*, 72 Fed. Reg. 14,814 (Apr. 30, 2007), *available at* http://epic.org/privacy/idtheft/ftc_comm_043007.pdf; Comments of the Electronic Privacy Information Center to the Office of the Director of National Intelligence, *Privacy Act of 1974*, 75 Fed. Reg. 63, 16698 (May 12, 2010), *available at* http://epic.org/privacy/ODNI_Comments_2010-05-12.pdf; Comments of the Electronic Privacy Information Center to the Dep't of Homeland Security, *Privacy Act of 1974: Department of Homeland Security Office of Operations Coordination and Planning – 003 Operations Collection, Planning, Coordination, Reporting, Analysis, and Fusion System of Records*, 75 Fed. Reg. 69,689 (Dec. 15, 2010); Comments of the Electronic Privacy Information Center to the Dep't of Homeland Security, *Privacy Act of 1974: Department of Homeland Security Office Operations Coordination and Planning – 004 Publicly Available Social Media Monitoring and Situational Awareness Initiative System of Records*, 76 Fed. Reg. 5603 (Mar. 3, 2011).

³ 20 U.S.C. § 1232g(b)(1) (2011).

⁴ *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1140-46 (S.D. Ohio 2000) *aff'd*, 294 F.3d 797 (6th Cir. 2002) (citing 120 Cong.Rec. 39,858, 39,862-39,863 (Dec. 13, 1974); 121 Cong.Rec. 7974 (May 13, 1975)).

⁵ NPRM at 19728.

⁶ *Id.*

Congress exempted "authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities" from FERPA's default prohibition against sharing student data.⁷ Congress narrowed this exemption, specifying that "authorized representatives" of state educational authorities were permitted to "audit and evaluat[e] . . . Federally-supported education programs."⁸ Before the current proposal, the Department's "longstanding interpretation [of the term "authorized representative"] has been that it does not include other State or Federal agencies because these agencies are not under the direct control (*e.g.*, they are not employees or contractors) of a State educational authority."⁹ Under that interpretation, "SEA or other State educational authority may not [disclose student data] to other State agencies, such as State health and human services departments."¹⁰ The agency proposal contemplates withdrawing the current interpretation of "authorized representatives" in order to exempt from FERPA's privacy requirements "any entity or individual designated by a State or local education authority or agency . . . to conduct . . . any audit, evaluation, or compliance or enforcement activity."¹¹

Similarly, the agency proposes to expand an exemption for audits of "education programs." As discussed above, Congress specifically exempted "authorized representatives" to "audit and evaluat[e] . . . Federally-supported education programs."¹² At present, the term "education programs" has no definition, but the agency proposes to include "any program that is principally engaged in the provision of education."¹³ This includes "early childhood education,

⁷ 20 U.S.C. § 1232g(b)(1)(C).

⁸ 20 U.S.C. § 1232g(b)(3).

⁹ NPRM at 19728.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 19729.

elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an educational authority."¹⁴ The agency includes examples of "education" that are principally administered by doctors and social workers rather than educators.¹⁵

Finally, the agency proposes to include student ID numbers as "directory information," a narrow category of information which is exempted from FERPA protections that otherwise apply to student data. The proposal would allow schools to publicly disclose student ID numbers that are displayed on student ID cards or badges.¹⁶ The current definition of "directory information" is "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed."¹⁷ Congress has explicitly limited "directory information" to:

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.¹⁸

The agency proposes to add student ID numbers to regulations that interpret this statutory provision.

II. The Agency Ignores the Purpose of FERPA and Relies on a Fundamental Misreading of Appropriations Legislation

The Department of Education contends that the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act of 2007 ("COMPETES Act") and the American Recovery and Reinvestment Act of 2009 ("ARRA")

¹⁴ *Id.* at 19729-30.

¹⁵ *Id.* at 19730.

¹⁶ *Id.* at 19729

¹⁷ 34 C.F.R. § 99.3.

¹⁸ 20 U.S.C. § 1232g(a)(5)(A).

should influence the agency's interpretation of a Family Educational Rights and Privacy Act of 1974.¹⁹ The Department intends to revise FERPA regulations to reflect what it has deemed “Congress' intent in the ARRA to have States link data across sectors.”²⁰ Specifically, the NPRM the Department issued on April 8, 2011 cites Titles VIII and XIV of the ARRA to justify an unprecedented expansion of statewide longitudinal data systems (“SLDS”) to incorporate “workforce, health, family services, and other data.”²¹ Contrary to the agency's assertions, Congress has not expressed an intention to expand the use of SLDS beyond rudimentary academic data.

The statutory framework Congress designed to establish SLDS is far less sweeping than the ED implies in its Notice of Proposed Rulemaking.²² Congress has passed the Elementary and Secondary Education Act of 1965,²³ the Educational Technical Assistance Act of 2002,²⁴ the Competes Act of 2007,²⁵ and the American Recovery and Reinvestment Act of 2009.²⁶ The Elementary and Secondary Education Act requires states to develop “longitudinal data system[s] that link[] student test scores, length of enrollment, and graduation records over time.”²⁷ The Educational Technical Assistance Act authorized grants for states to develop “longitudinal data systems to efficiently and accurately manage, analyze, disaggregate, and use individual student data, consistent with the Elementary and Secondary Education Act of 1965.”²⁸

¹⁹ Family Educational Rights and Privacy, 76 Fed. Reg. 19726 (Apr. 8, 2011) [hereinafter *NPRM*]

²⁰ *Id.* at 19728.

²¹ *Id.* at 19729.

²² *Id.*

²³ Pub.L.No. 107-110, 115 Stat. 1444 (2002).

²⁴ Pub.L.No. 107-279, 116 Stat 1940 (2002).

²⁵ Pub.L.No. 110-69, 121 Stat 572 (2007).

²⁶ Pub.L.No. 111-5, 123 Stat 115 (2009).

²⁷ 20 U.S.C. § 6311(b)(2)(K)(3)(B) (2011).

²⁸ 20 U.S.C. § 9607 (2011).

The COMPETES Act authorized grants for establishing and improving education data systems that meet the requirements of FERPA.²⁹ Congress stipulated that grants should be used to track three sets of data pertaining to elementary and secondary school students: first, “student-level enrollment, demographic, and program participation information;” second, “student-level information about the points at which students exit, transfer in, transfer out, drop out, or complete P-16 education programs;” and third, “yearly test records of individual students,” “information on students not tested by grade and subject,” “student-level transcript information, including information on courses completed and grades earned,” and “student-level college readiness test scores.”³⁰ For postsecondary students, the COMPETES Act authorizes grants for states to collect “information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework,” and “other information determined necessary to address alignment and adequate preparation for success in postsecondary education.”³¹ The COMPETES Act prohibits the disclosure of Personally Identifiable Information (“PII”) except as permitted under FERPA.³² The Act also requires states to keep an accurate account of any disclosures of student PII, to require data-use agreements for all third parties who access PII, to adopt adequate security measures, and to protect student records from any unique identifiers that heighten the risk of nonconsensual disclosures of PII.³³

Given the omnibus nature of the American Recovery and Reinvestment Act, it is impossible to project congressional intent onto the Act beyond its plain text. The stated purposes

²⁹ See 20 U.S.C. § 9871(C)(i)(I) (2011).

³⁰ 20 U.S.C. §§ 9871(e)(2)(D)(i)-(ii) (2011).

³¹ 20 U.S.C. § 9871(e)(2)(D)(iii) (2011).

³² 20 U.S.C. § 9871 (e)(2)(C)(i)(III) (2011).

³³ 20 U.S.C. § 9871(e)(2)(C)(i)(IV)-(VIII) (2011).

of the Act included "stabilizing state budgets," "preserving and creating jobs," and "providing investments in infrastructure and economic efficiency," but stated nothing of eroding statutory privacy protections for the sake of expanding non-academic uses of student data.³⁴ In its 1,073 pages, the ARRA made no mention of FERPA, nor agency regulations implementing FERPA's protection of student data.³⁵ Still, the Department cites the ARRA seven different times in the first two pages of its NPRM to justify reinterpreting Congress's clear intent in FERPA to safeguard student privacy. Only two provisions of the ARRA explicitly reference SLDS. The first, under Title VIII, provides \$250,000,000 to "carry out section 208 of the Educational Technical Assistance Act . . . which may be used for Statewide data systems that include postsecondary and workforce information."³⁶ The second, under Title XIV, requires governors whose states receive educational money under the ARRA to assure the Secretary of Education that the state "will establish a longitudinal data system that includes the elements described in section 6401(e)(2)(D) of the America COMPETES Act."³⁷ Neither of these provisions contemplate linking of non-academic data.

Expanding third party access to student data is contrary to FERPA, given the purpose of the Act. FERPA prohibits the nonconsensual release of "educational records," including the "personally identifiable information contained therein."³⁸ Congress imposed a "direct obligation" on regulated agencies in order "to protect the privacy of [student] records by preventing

³⁴ Public Law 111-5, Div. A, tit. I, § 3(a)(1)-(5), 123 Stat. 116.

³⁵ *Id.*

³⁶ Public Law 11-5, Div. A, tit. VIII, 123 Stat. 183.

³⁷ Public Law 111-5, Div. A, tit. VIII, § 14005(d), 123 Stat. 282-3.

³⁸ 20 U.S.C. § 1232g(b)(1) (2011).

unauthorized access by third parties.”³⁹ Contrary to the agency's contentions, Congress itself articulated specific reasons for precluding non-educational state agencies from accessing, altering, or storing records containing the personally identifiable information of students. The law’s chief sponsor Senator James L. Buckley specifically intended that FERPA would prevent linking academic data to non-academic data for the purpose of measuring schools' impact. Senator Buckley's statement in the Congressional Record describes FERPA as a safeguard against “the dangers of ill-trained persons trying to remediate the alleged personal behavior or values of students,” which include “poorly regulated testing, inadequate provisions for the safeguarding of personal information, and ill-devised or administered behavior modification programs.”⁴⁰ In support of his concern, Senator Buckley entered into the Congressional Record a *Parade* magazine article decrying “welfare and health department workers” accessing student records that included “soft data” such as “family, . . . psychological, social and academic development . . . personality rating profile, reports on interviews with parents and 'high security' psychological, disciplinary and delinquency reports.”⁴¹

Congress has yet to alter its stance on FERPA legislative safeguards, a prerequisite for the agency’s tracking of 'soft data' and other non-academic characteristics, charting them with SLDS, and sharing the results with non-academic institutions. Still, the agency asserts that the most cursory mention of SLDS in the ARRA constitutes "intent . . . to have States link data

³⁹ *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1140-1146 (S.D. Ohio 2000) *aff'd*, 294 F.3d 797 (6th Cir. 2002) (citing 120 Cong.Rec. 39,858, 39,862-63 (Dec. 13, 1974); 121 Cong.Rec. 7974 (May 13, 1975)).

⁴⁰ 120 Cong.Rec. at 14580-81 (1974).

⁴¹ Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75, 84-85 (2011) (citing Diane Divoky, *How Secret School Records Can Hurt Your Child*, PARADE, Mar. 31, 1974, at 14).

across sectors."⁴² This approach violates elemental rules of statutory interpretation. First, "[i]t is a commonplace of statutory construction that the specific governs the general."⁴³ Congress's specific and explicit decision in FERPA to protect student data from non-academic initiatives takes precedence over Congress's general intention to track student data in the ARRA. Second, "repeals by implication are not favored."⁴⁴ The Supreme Court has explained that this rule is particularly applicable when the implication derives from appropriations legislation:

The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs.⁴⁵ (emphasis in original)

The ED has cited appropriations legislation seven separate times for the contention that Congress implicitly intended to amend a previously enacted statute never actually mentioned in the appropriations legislation.⁴⁶ This is a fundamental misconstruction, which underlies a failure to properly implement Congress's actual intent to protect private student data from non-academic uses.

The disconnect between the ED's proposed rule and the Act of Congress exists because the Secretary of Education has embraced the very "soft data" approach Congress designed

⁴² NPRM at 19728

⁴³ *N. Am. Catholic Educ. Programming Found., Inc. v. F.C.C.*, 437 F.3d 1206, 1209 (D.C. Cir. 2006) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).

⁴⁴ *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) (citing the risks that "the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.").

⁴⁵ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

⁴⁶ See NPRM at 19726-29.

FERPA to prevent.⁴⁷ Previously in 2010, the Department published the following guidance for “Race to the Top” education grant applicants in the Federal Register:

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate special education programs, English language learner programs, early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs as well as information on . . . student mobility, . . . student health, postsecondary education, and other relevant areas.⁴⁸

Now, the Department has designed yet another proposal to accommodate the Secretary's interests in non-academic tracking and data sharing prohibited by FERPA. What follows is a comprehensive review of each significant amendment the Department has proposed to achieve the unauthorized end of "link[ing] education, workforce, health, family services, and other data for the purpose of evaluating, auditing, or enforcing Federal legal requirements related to, Federal or State supported education programs."⁴⁹

III. Expanding "Authorized Representatives": The Agency Proposes an Unauthorized, Unlawful Sub-Delegation of Its Own Authority

The agency has proposed to ease its own previous restrictions on third party access to personally identifiable student data. By statute, Congress has commanded the ED to ensure that state and local educational institutions do not release student records without the written consent of parents, providing a limited number of narrow exceptions to this general rule. One such exception is for "authorized representatives of the Comptroller General of the United States, the Secretary, or State educational authorities."⁵⁰ The agency aims to stretch the term “authorized

⁴⁷ See Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75, 84-85 (2011) (citing Diane Divoky, *How Secret School Records Can Hurt Your Child*, PARADE, Mar. 31, 1974, at 14).

⁴⁸ Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 74 Fed. Reg. 59836 (Nov. 18, 2009).

⁴⁹ NPRM at 19729.

⁵⁰ 20 U.S.C. 1232g(b)(1)(C) (2011).

representatives” past its breaking point, designating non-governmental actors as "representatives" of state educational institutions.⁵¹ Under the proposed regulations, these authorized representatives would not be under the direct control of the educational authorities that provide them access to private student data.⁵² To compensate for blurring the lines of authority, the Department proposes a single requirement that educational entities “use reasonable methods to ensure any entity designated as its authorized representative remains compliant with FERPA.”⁵³ The agency contemplates publishing non-binding, "non-regulatory guidance” to suggest the “reasonable” measures educational entities should adopt.⁵⁴

The term “reasonable” is an unnecessarily vague term of art. The agency designed the standard to “provide flexibility for a State or local educational authority or [the Comptroller, the Attorney General, or the Secretary of Education, or their agency staff] to make these determinations.”⁵⁵ At the very least, the Department should promulgate a robust, specific, mandatory set of “reasonable” measures, with input from the public, including credentialed security experts, and then bring enforcement actions against any regulated entities that fail to adopt them.

To reasonably reflect Congressional intent, however, the Department should retract completely its proposed expansion of the class of "authorized representatives." Just as when Congress delegates powers to agencies, FERPA contemplates limiting the power to make those determinations to entities with commensurate responsibility to ensure full compliance. The model the ED is adopting delegates the interpretation of federal law to non-federal entities. The

⁵¹ NPRM at 19727-29.

⁵² *Id.*

⁵³ *Id.* at 19728.

⁵⁴ *Id.*

⁵⁵ *Id.*

FCC once attempted to adopt a similar model by delegating authority to state utility commissions to make "more 'nuanced' and 'granular'" decisions about telecommunications infrastructure that market incumbents had to share with competitors under federal law.⁵⁶ The United States Court of Appeals for the D.C. Circuit, which also has direct authority to review the ED's decision in this administrative proceeding, struck down the "subdelegation" model as unlawful.⁵⁷ In *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 564 (D.C. Cir. 2004), the D.C. Circuit held that "subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."⁵⁸ The same presumption applies to the Department's proposal here, and the proposal fails to demonstrate any such affirmative showing.

The factors that first persuaded the D.C. Circuit that "subdelegation" models are unlawful are present here as well. The *U.S. Telecom* court noted that the FCC "gave the states virtually unlimited discretion" in interpreting federal-law requirements.⁵⁹ Here, the proposed regulations' "non-regulatory guidance" fails to adequately legally bind the state and local educational institutions that would be tasked with ensuring FERPA compliance. The *U.S. Telecom* court also highlighted that parties aggrieved by state utility commission decisions had no assurance "when, or even whether, the [federal agency] might respond."⁶⁰ Here, the Department of Education has rarely used the broad statutory power Congress granted the agency to "issue cease and desist orders and to take any other action authorized by law."⁶¹ Nor has the agency ever applied the specific sanctions Congress designed to enforce FERPA, namely withholding federal funding

⁵⁶ *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 564 (D.C. Cir. 2004)

⁵⁷ *Id.*

⁵⁸ *Id.* at 565.

⁵⁹ *Id.* at 564.

⁶⁰ *Id.*

⁶¹ *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1145 (S.D. Ohio 2000) *aff'd*, 294 F.3d 797 (6th Cir. 2002).

from universities found to violate students' privacy rights.⁶² The Department routinely fails to use its power and rein in the institutions directly accountable to it. It is unlikely that the agency would be more stringent on institutions outside its direct control.

The D.C. Circuit also discussed the following policy concerns about "subdelegation":

[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," . . . and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship. . . The fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis.⁶³

The ED has premised its proposed regulations on state and local educational institutions' legal authority to ensure FERPA compliance under state and local laws. The agency would unlawfully remove the most fundamental safeguard standing between bad actors and private student data: the threat of federal agency enforcement actions. As discussed above, Congress's intent in drafting FERPA is anything but "an affirmative showing of congressional authorization for such a subdelegation," as the D.C. Circuit would require in this case.⁶⁴ This proposed amendment is thus not only unwise, but also clearly unlawful.

IV. Expanding "Educational Programs": The Agency Uses the Pretext of Education To Justify Exposing Troves of Sensitive, Non-Academic Data

The agency has also proposed to expand the acceptable purposes for which third parties may access student records without notifying parents. The agency intends to reinterpret the statutory term "education programs."⁶⁵ Under existing law, regulated parties can grant

⁶² 20 U.S.C. § 1232g(b)(1) (2011).

⁶³ *U.S. Telecom Ass'n* at 565-66.

⁶⁴ *Id.* at 565.

⁶⁵ NPRM at 19729-30.

"authorized representatives" access to "education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs."⁶⁶ The ED proposes to include as "educational programs" any single "program" that is

principally engaged in the provision of education, including, but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an education authority.⁶⁷

Foreshadowing the ED's lax enforcement of this provision, the agency provides an example that fails even to fall within its own expansive list: "[f]or example, in many States, State-level health and human services departments administer early childhood education programs, including early intervention programs authorized under Part C of the Individuals with Disabilities Education Act."⁶⁸

The reason state-level health and human services agencies administer Part C of the Individuals with Disabilities Act is that Part C is not principally educational. Part C of the Act, while a meritorious program in its own right, is principally engaged in non-academic services provided by: "Audiologists; Family therapists; Nurses; Nutritionists; Occupational therapists; Orientation and mobility specialists; Pediatricians and other physicians; Physical therapists; Psychologists; Social workers; Special educators; and Speech and language pathologists."⁶⁹ Linking state educational records to Part C data would expose a range of personal student information, including data pertaining to "catheterization, tracheostomy care, tube feeding, the

⁶⁶ 34 C.F.R. 99.35(a)(1) (2011).

⁶⁷ NPRM at 19729-30.

⁶⁸ *Id.* at 19730.

⁶⁹ 34 C.F.R. § 303.12(e)(1)-(12) (2011).

changing of dressings or colostomy collection bags, and other health services;"⁷⁰
 "[a]dministration of medications, treatments, and regimens prescribed by a licensed physician;"⁷¹
 "[f]eeding skills and feeding problems; and . . . [f]ood habits and food preferences;"⁷²
 "psychological and developmental tests and other assessment procedures;"⁷³ and "problems in a
 child's and family's living situation (home, community, and any center where early intervention
 services are provided) that affect the child's maximum utilization of early intervention
 services."⁷⁴ For parents struggling to meet the needs of developmentally disadvantaged child
 during an economic recession, these regulations would present a Hobson's choice: forego
 government assistance that can help your child or expose intimate information about the child,
 and furthermore your entire "living situation," to any number of newly appointed and barely
 regulated "authorized representatives."⁷⁵

The agency states that "education may begin before kindergarten and may involve
 learning outside of postsecondary institutions."⁷⁶ Expanding uses of academic data to
 reflect this fact does not require gutting FERPA to link student PII with records
 maintained by state health agencies. The agency should adjust its approach and propose
 narrow, targeted expansions of existing regulations that account for specific advances in
 school accountability. In doing so, it should develop clear, enforceable, and objective
 standards that reflect Congress's intent to protect student data from non-academic
 programs.

⁷⁰ 34 C.F.R. § 303.13(1) (2011).

⁷¹ 34 C.F.R. § 303.12(iii) (2011).

⁷² 34 C.F.R. § 303.12(C)-(D) (2011).

⁷³ 34 C.F.R. § 303.12(10)(1) (2011).

⁷⁴ 34 C.F.R. § 303.12(iv) (2011).

⁷⁵ *Id.*

⁷⁶ NPRM at 19730.

V. Student ID Numbers as "Directory Information": The Agency Insufficiently Safeguards Students from the Risks of Re-Identification

In drafting FERPA, Congress provided an exception to the general prohibition against releasing educational records for the narrow category of "directory information."⁷⁷ The current definition of "directory information" is "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed."⁷⁸

Congress has explicitly limited "directory information" to:

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.⁷⁹

The agency's proposed regulations contemplate designating student ID numbers as "directory information."

This proposal would authorize schools to disclose publicly student ID numbers that are displayed on individual cards or badges.⁸⁰ The agency admits that this measure raises schools "concerns [amongst school officials] about the potential misuse by members of the public of personally identifiable information about students, including potential identity theft."⁸¹ Paired to this acknowledged security risk is a single, insufficient safeguard whose implementation would be impracticable. The proposed regulations would prohibit the release of any student ID numbers sufficient, *on their own*, to provide third parties direct access to students' personally identifiable information. The proposed regulations permit the public release of:

⁷⁷ 20 U.S.C. § 1232g(b)(1).

⁷⁸ 34 C.F.R. § 99.3.

⁷⁹ 20 U.S.C. § 1232g(a)(5)(A).

⁸⁰ *Id.* at 19729

⁸¹ *Id.* at 19732

A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user.⁸²

As a starting point, the Department should change the language of the proposal to stipulate that any “factors” third parties could possibly use in conjunction with disclosed student ID numbers to access student data *must* be factors “known or possessed only by the authorized user.” This differs from the agency's current approach, which includes the “known or possessed only” language as an illustrative example in a non-exhaustive list.⁸³

Still, the ED's fatal assumption is the relative ease with which it contemplates determining whether identifiers can be used to gain access to education records.⁸⁴ The information gleaned from unique identifiers can provide sensitive and potentially embarrassing reports. It can be used for business purposes, as well as by individual citizens employing widely available tools. Re-identification can also be used for many types of investigative reporting, especially investigations involving celebrities or politicians.⁸⁵ It can also be used by parties trying to identify a very small group of individuals with a similar characteristic, or parties adjudicating criminal or divorce proceedings.

⁸² *Id.* at 19737.

⁸³ *Id.* at 19729.

⁸⁴ *See, e.g.*, Latanya Sweeney, *Simple Demographics Often Identify People Uniquely*, Carnegie Mellon University, Data Privacy Working Paper No. 3 (2000); Ross J. Anderson, *The DeCODE Proposal for an Icelandic Health Database*, at 11 (Oct. 20, 1998); Ross J. Anderson, *Security Engineering: A Guide To Building Dependable Distributed Systems* 172 (2008); Fida Kamal Dankar & Khaled El Emam, *A Method for Evaluating Marketer Re-identification Risk*, Proceedings of the 2010 EDBT/ICDT Workshops, ACM, Article 28 (2010).

⁸⁵ Salvador Ochoa, *Re-identification of Individuals in Chicago's Homicide Database: A Technical and Legal Study*, Massachusetts Institute of Technology (2001).

Beyond changing the language, the Department should suspend this proposed regulation and consult with security experts to ensure it will not facilitate unaccountable and unlawful third-party access to education records. As drafted, there is no objective standard for educational entities to ensure that third parties cannot use disclosed identifiers to gain access to undisclosed education records. The Department must develop a binding, rigorous method that educational entities must undertake in order to ensure that student ID numbers cannot be used to breach student privacy.

V. Conclusion

For the foregoing reasons, the EPIC recommends that the Department of Education revise the proposed regulations and fully assess the privacy and security implications of its aims. Proper interpretations of FERPA would, at a minimum: (1) recognize the clearly stated and legally binding intent Congress expressed in FERPA that prioritizes the protection of student data and restricts its uses for non-academic purposes; (2) restrict "authorized representatives" to regulated entities that are under direct agency control via Congress's FERPA funding sanctions; (3) propose only specific expansions of "educational programs" that are justified by recent educational developments and solely engaged in educational purposes; and (4) precede any expansion of third party access to student information with a comprehensive security assessment that doing so will not alter any baseline risk of identity theft, student re-identification, or unlawful disclosure of sensitive student data. EPIC anticipates the agency's specific and substantive responses to each of these proposals.

The current NPRM is contrary to law, exceeds the scope of the agency's rulemaking authority, and should be withdrawn.

Marc Rotenberg
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PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0229
Comment on FR Doc # 2011-08205

Submitter Information

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General Comment

Since under the US Constitution, education is not an enumerated power of the federal government, under the 10th Amendment the educational data collection plan and these proposed rules are not only objectionable but entirely unconstitutional. Section entitled "Education Program" (Sec. Sec. 99.3, 99.35) allows privacy to be breached even with private education centers (such as Sylvan, Kumon), private and religious preschools, private schools for lower grades as well as for trades, and possibly homeschools. This is not a tool to improve education and not a legitimate use of authority for the Department of Education. There is no benign reason for this federal agency to non-consensually collect information that allows people to be sorted out by their demographic traits and guided toward predetermined workforce outcomes.

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Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

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Comment on FR Doc # 2011-08205

Submitter Information

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Submitter's Representative: Gretchen Logue

Organization: Missouri Education Watchdog

General Comment

Missouri Education Watchdog is against changes to the present FERPA laws. These laws are to protect student and family privacy. Many of the changes are quite alarming regarding the information wanted on children and families.

Why does the DOE need to know religious affiliation, political party affiliation, sexual behavior of families and children, for example?

<http://www.missourieducationwatchdog.com/2011/05/personally-identifiable-information-pii.html>

Much of this information is to be used to "supply the workforce". If the government cannot gain access to personal information of students and families, this goal is unattainable. Instead of students finding jobs, the goal of the P20 pipeline is for businesses to find individuals. Why should "educational" data be provided to the Departments of Labor and Health and Human Services for the benefit of the government?

<http://www.missourieducationwatchdog.com/2011/05/big-brother-is-about-to-get-bigger-if.html>

This move to access private information is unconstitutional and any attempt to change FERPA via regulations versus legislative vote should not be allowed and deemed illegal.

There has been much talk about privacy breach concerns regarding credit card and health information being stolen. The Secretary of Education can give us assurances of privacy being guarded, but information is hacked quite frequently and it is doubtful educational data would be any different.

This is an overreach of governmental control and the requested information has less to do with education and more to do with governmental control of the workforce. We request any lessening of FERPA regulations not be considered as these violate personal information and protections.

Americans are quite capable of making their own decisions in their lives and the government does not need intrusive data on private citizens in the name of "education".

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Submitter Information

Organization: World Privacy Forum

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Comments of the World Privacy Forum

Regarding the U.S. Department of Education Notice of Proposed Rulemaking for the Family Educational Rights and Privacy Act, RIN 1880-AA86, Docket ED-2011-OM-0002-0001

Submitted via <http://www.regulations.gov> and via email to FERPA@ed.gov

Regina Miles
U.S. Department of Education,
400 Maryland Avenue, SW.,
Washington, DC 20202.

May 23, 2011

The World Privacy Forum appreciates the opportunity to comment on the Department's proposed rule change to the Family Educational Rights and Privacy Act at 76 Federal Register 19726 (April 8, 2011), <http://www.federalregister.gov/articles/2011/04/08/2011-8205/family-educational-rights-and-privacy>. The World Privacy Forum is a non-partisan, non-profit public interest research and consumer education organization. Our focus is on conducting in-depth research and analysis of privacy issues, in particular issues related to information privacy. More information about the activities of the World Privacy Forum is available at <http://www.worldprivacyforum.org>.

In general, we find the Department's proposed changes to FERPA troubling on a number of grounds. Most significantly, we believe that the Department does not have the legal authority to make all of the changes to the privacy requirements in FERPA that it proposes. We also have strong concerns that the increased sharing of student information that the proposed rule will allow will diminish student privacy in a major and permanent way. WPF does support one proposed change to FERPA, which we discuss in the comments.

I. Department Authority

We seriously doubt the Department has legal authority to weaken or even change the privacy requirements in FERPA in all the ways that it proposes. 20 U.S.C. 9871(e)(2)(C)(i) provides:

Each State that receives a grant under subsection (c)(2) [for statewide P-16 education data systems] shall implement measures to—

(I) ensure that the statewide P–16 education data system meets the requirements of section 1232g of this title (commonly known as the Family Educational Rights and Privacy Act of 1974);

This language makes it clear that the law expressly contemplated application of the existing law and its rules. In passing the American Recovery and Reinvestment Act of 2009 (ARRA), Congress did not amend the preexisting requirement in the America COMPETES Act that requires states developing statewide longitudinal data systems (SLDS) to comply with FERPA. Nor did the ARRA direct the Department to amend the rules to conform to the new requirements. Were there a conflict or significant problem with the existing FERPA regulations, Congress could easily have called for a change or a review. The absence of any such directions in the law leaves the Department without authority to make changes and certainly without any authority to weaken the privacy requirements already in place. In our view, Congress wanted the new data systems to meet existing FERPA standards.

Further, nothing in ARRA’s appropriation of funds for statewide data systems directs, contemplates, or even hints at a change in the FERPA regulation or in existing law quoted above that requires states to comply with FERPA. It is an appropriation and not legislation. We also observe that if any of these other statutes directed or even suggested changes to the FERPA rule, then the authority citation for the changes would have included these other statutes and not just cite to FERPA. The absence of additional citations may be telling.

We note further that the Department declined to make changes to FERPA regulations for SLDS when it changed the FERPA regulations in 2008. The Department said expressly that it was “without authority” to exempt data sharing as requested by those who commented on the previous NPRM. Nothing in ARRA gives the Department authority to do what it said earlier that it had no authority to do. Yet the current NPRM is replete with examples where the Department now proposes to allow activities that it heretofore determined were not permitted, and the only real reason for the change is expedience. If the Department wants to allow additional uses of confidential student records, it should go back to the Congress and ask for the authority. We believe that the Department is well aware of that the legal grounds for changes to FERPA regulations are shaky at best and non-existent at worst. The best outcome here would be a public debate over the proper balance between privacy and the substantive educational objectives, and the right place for that debate is the Congress.

The effect of many of the changes that the Department proposes will be to allow for the disclosure of heretofore confidential student records to agencies, organizations, and private entities that have little to do with education. It is inevitable that this allows the records to be used for secondary purposes, something that FERPA was largely intended to prevent. The result will be that student records will become general input to a wide range of activities, studies, evaluations, and the like on the pretext that there is some education result to be derived eventually. Student and parental records will be scattered to the winds to remote and untraceable parties, used improperly, maintained with insufficient security, and become fodder for marketers, hackers, and criminals. The confidentiality that FERPA promised to students and their families will be lost.

The Department relies on the fiction that vague purpose tests and unenforceable written agreements will provide protections. What the Department is essentially creating is a free-for-all with student data, which will be passed around from one organization to another, used improperly, exposed to the world, or lost. We remind the Department that students are not the only people at risk. Schools may have significant information, including health and financial information, about parents. This information is threatened just as much as student information.

In the longer run, the lack of any remedies for aggrieved individuals under FERPA may result in a burst of legal creativity, as students and parents affected by misuse and lack of security seek remedies. The lack of remedies for aggrieved students and families under FERPA may not protect anyone when data is shared beyond the scope of FERPA or to new entities that are subject to and protected by FERPA's peculiar and limited enforcement scheme. The cost of litigation and the payment of damages could become a burden to schools, states, and others who are responsible. Courts and state legislatures will find it necessary to impose new limits because the Department refused to take the appropriate steps here. It will only take one scandal to produce new restrictions and real sanctions.

If the Department wants to accomplish the objectives reflected in the proposed regulation, it needs clear statutory authority. It should ask the Congress to amend the law so that any new regulation will have a firm basis in law and so that there is an opportunity for public debate over the proper use of student records for secondary purposes.

II. Authorized Representative and Written Agreements

The Department proposes to define the term *authorized representative*. Since this is a term in the current rule, we do not dispute the Department's authority to offer a reasonable definition. However, the proposal highlights an already existing enforcement shortcoming of FERPA. The NPRM states:

Specifically, we would provide, in proposed § 99.35(a)(2), that responsibility remains with the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA. We are not proposing to define "reasonable methods" in the proposed regulations in order to provide flexibility for a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to make these determinations. However, we are interested in receiving comments on what would be considered reasonable methods.

As FERPA information increasingly spreads downstream to third party, fourth party, and even more remote organizations that have not been subject to direct enforcement by the Department, the hope of maintaining compliance with FERPA rapidly approaches zero. We discuss enforcement problems later in these comments.

The Department's objective of having reasonable methods that will "ensure" compliance with FERPA sounds worthy, but there are no such methods. We expressly object to the use of the

word “ensure” because it is unrealistic and misleading. The best the Department can hope for is a method that will provide some incentive to comply.

The proposed change will not accomplish much if it relies mostly on non-binding suggestions. We observe that even severe criminal, civil, and administrative penalties (even with some recent, actual, and aggressive administrative enforcement) have not provided sufficient incentive to “ensure” an end to security and privacy breaches by health care institutions and their business associates subject to HIPAA health privacy and security rules. We object to the suggestion that the Department will issue *non-regulatory guidance* for this purpose. The regulation can and should do better, and the Department should impose binding requirements.

A. Elements that should be included in the required written agreements

Since the Department is already proposing to specify elements of the written agreements, it can certainly specify enforcement and oversight mechanisms that will accomplish more than can be hoped for from *non-regulatory guidance*. We offer the following suggestions for provisions that should be expressly mandated in the written agreements that the Department proposes to require in §99.35(a)(3).

1. Consent. An existing mechanism allows for all of the disclosures that the Department contemplates without changing any regulation. *Parental consent* can support all disclosures, direct or otherwise. If parents view the purposes of a disclosure as worthwhile, consent will be obtainable. It may be more cumbersome than simply eliminating a requirement for consent by conveniently issuing a regulation. Nevertheless, consent is a method that will vastly increase parental involvement, local awareness of data activities, and accountability. The value of these objectives outweighs the difficulty of relying on parental consent.
2. Liquidated damages. The written agreements should be required to include a provision calling for liquidated damages to be paid by an authorized representative to the institution that originally disclosed the information. We suggest that the amount of damages be: a) a percentage of revenues (25% might provide a sufficient incentive) paid by the authorized representative; or b) not be less than \$100 for each record used or disclosed in violation of FERPA. Any damages collected could be kept by the institution or distributed to the data subjects whose privacy was violated.
3. Third party beneficiary. Any written agreement should be required to make students and parents third party beneficiaries of the agreement. The goal is to allow any individual aggrieved by a violation of the confidentiality obligations to sue the authorized representative to recover damages if lawsuits are allowed under state law. This requirement would provide a useful remedy that would allow for private enforcement against authorized representatives (and not against innocent educational institutions).

4. Transparency. Any person seeking to become an authorized representative should be required, under penalty of perjury, to disclose to an educational institution and to the public whether the person has violated or been accused of violating any written agreement that involved the disclosure of data subject to FERPA.

5. Breach Notification. We observe that there have been reported breaches of student records, and there will certainly be more.¹ The Department needs to address who will take responsibility if no state or federal breach notification law applies. If data transferred to an authorized representative is not subject to a state or federal security breach notification law, the written agreement should provide that the authorized representative must provide breach notices to data subjects comparable to those generally required under state laws. Each written agreement should also provide expressly that an authorized representative responsible for a breach will bear the cost of breach notices. A mandatory provision on breach notification will avoid finger pointing and litigation when the issue arises, as it surely will.

6. Audit. Every written agreement should require an annual independent third-party audit of the authorized representative's privacy and security policies and practices. The results of the audit should be publicly disclosed.

B. Other suggestions

First, we are concerned that the current provision is not express enough about data destruction. We recommend that written agreements must have some fixed period for data destruction. Allowing data to be retained forever is an invitation to mischief or worse. We suggest an absolute time limit of five years. If there is a need for data after a fixed period, the parties can revisit the issue and revise the agreement.

Second, we suggest that all written agreements must be public documents either in whole or in part. The purpose is to allow for public oversight of data disclosures without protracted fights over access to records. We doubt that any of these agreements will contain proprietary or other information that would justify withholding, but we would not object if the Department chose to allow for the possibility.

Third, we suggest that anyone entering into a written agreement must specify in the agreement the legal authority for the disclosure. The goal is to ensure that anyone disclosing data must be

¹ See, e.g., *Student Records Found Dumped in Trash Bins* (March 2011), <http://www.myfoxny.com/dpp/news/student-records-found-dumped-in-trash-bins-20110328>; *Hackers may have accessed thousands of SC students' information* (April 2011), <http://www.live5news.com/story/14468839/hackers-may-have-accessed-thousands-of-students-information>; *COTC students' personal information left unsecured* (April 2011), <http://www.newarkadvocate.com/article/20110419/NEWS01/104190308>; *1 stolen Albright laptop found; 1 still missing* (April 2011), <http://readingeagle.com/article.aspx?id=301685>; *More Student SSNs Were at Risk, TEA Says* (April 2011), <http://www.texastribune.org/texas-education/public-education/more-student-ssns-were-at-risk-tea-says/>.

sure that it has legal authority to do so. Including the information in a public agreement will also facilitate public oversight of the activity.

III. Implied Authority

On page 19731 of the Federal Register, we find this paragraph:

In the event that an educational agency or institution objects to the redisclosure of PII it has provided, the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) may rely instead on any independent authority it has to further disclose the information on behalf of the agency or institution. The Department recognizes that this authority may be implied and need not be explicitly granted.

This language tells a state or local authority that it can ignore any school that objects to disclosure of PII it provided to the authority and disclose that school's data anyway. The authority does not even need specific statutory authority to override a school's express objections. Apparently, the Department's view is that anything goes unless it is expressly prohibited by law.

In effect, the Department is saying that it has no intention of enforcing any confidentiality rules that are violated in furtherance of an activity that the Department approves of. There has been precious little enforcement of FERPA to begin with, but this statement essentially guaranteeing that there will be no confidentiality enforcement even for sharing of data done without any legal authority and over the objection of the originating school is shocking. The Department is inviting battles between schools and state authorities over control of student data, and the Department is prejudging that whatever the state authorities want to do is always the right thing. It will surely come back to haunt the Department as states interpret it to mean that anything goes when it comes to sharing student records.

IV. Family Policy Compliance Office Enforcement

The revised § 9935(d) would read:

(d) If the Family Policy Compliance Office finds that a State or local educational authority, an agency headed by an official listed in § 99.31(a)(3), or an authorized representative of a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3), improperly rediscloses personally identifiable information from education records, the educational agency or institution from which the personally identifiable information originated may not allow the authorized representative, or the State or local educational authority or the agency headed by an official listed in § 99.31(a)(3), or both, access to personally identifiable information from education records for at least five years.

This enforcement provision is too narrow. First, it sanctions only the improper redisclosure of PII. Protecting privacy is more than preventing improper disclosures. There are other

inappropriate activities that affect privacy, including *using* records for an improper purpose; examining individual records without justification; not securing records properly; obtaining information by unfair or improper means; not maintaining records with appropriate accuracy, completeness, and timeliness; not specifying the purposes for which records may be used or disclosed; and not allowing access to or correction of records when appropriate. All of these privacy violations should be sanctionable, and the provision should be expressly revised to say so.

Second, the sanction proposed only prevents further disclosures by the educational agency or institution from which the personally identifiable information originated. If a person is found to have violated the rules under which data was obtained, the sanction should prevent that person from obtaining data from *any* educational agency or institution or from any authorized person. The sanction should apply across the board, and a violator should be banned from obtaining student records from any educational institution anywhere in the country. The sanction should apply broadly to subsidiaries and other entities controlled or working with the violator.

Third, we have already stated that the Department does not have the legal authority to authorize the disclosures in this NPRM. We doubt that the Department has the authority to expand the enforcement authority of the Family Policy Compliance Office to cover a third party who is not an educational agency or institution. As the Department well knows, its authority to enforce FERPA is severely limited by the statute. If the Department attempts to sanction anyone who is not an educational agency or institution, the existing denial-of-funds sanction may not be relevant or available.

It is quite likely that anyone the Department seeks to sanction will challenge its authority, and there is a good prospect that a challenge will succeed because the Department is expanding its traditional authority without any new statute that gives it the authority to do so. We could even end up in the worst of all cases, where the Department's authority to authorize new disclosures is not challenged, but its authority to enforce restrictions against some authorized data recipients is denied. The best solution to this problem is to seek an amendment to the statute.

V. Education Program

The proposed definition of *education program* is vitally important because it determines the realm of activities that may contribute and obtain data. The proposed standard – any program that is principally engaged in the provision of education – is far too vague. We do not know what *principally* means. Does education have to be 90% of a program's function? 75%? 51%? 10%? Who is responsible for making the determination? What information must a potential discloser obtain before it can be assured that it is making a lawful disclosure? Can it rely on a statement by a self-proclaimed education program that the program qualifies?

We also do not know what a *program* is. If a commercial website offers training in use of a web browser, would that website qualify? Would that website then be able to seek data on other students on the pretext of determining if its educational efforts are working? Would it matter if the website were owned by a large Internet company with multiple non-educational activities? Would an ad hoc program at a local library aimed at teaching people how to obtain a mortgage

qualify? Would a direct marketer who sells books that purportedly educate readers qualify? Would a neighborhood book club with a stated purpose of sharing knowledge about literature qualify? Does every Boy Scout or Girl Scout troop qualify? What about a summer camp with a batting clinic? Does a Sunday School qualify? Every day, we receive spam messages offering “job training” in a variety of technical skills. Would these seemingly fraudulent training programs also qualify? Could the marketers, hackers, or criminals that run some of these activities obtain information on millions of students to further their attempts to entice students to enroll in their questionable or illegal “educational program” activities? Would a job training program – legitimate or otherwise – located in another country qualify? Could a school share identifiable student data with an *educational program* in Iran or North Korea or in some jurisdiction where the data might be fodder for identify thieves? The proposed rule could be read to allow all of these disclosures and more

The Department needs to draw clearer and tighter lines here. The potential for wholly unwarranted disclosures to recipients who are well beyond any possible enforcement, penalty, or civil action is real and immediate. The Department must make it clear how determinations are to be made and who is to be accountable for those determinations.

VI. Limited Directory Information Policy

The NPRM proposes this change to the directory information provision:

§ 99.37 What conditions apply to disclosing directory information?

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

The World Privacy Forum is pleased to support this change. Indeed, we proposed in our comments on the last round of FERPA regulation changes that there was a need to establish categories of directory information. See Comments of the World Privacy Forum regarding Notice of Proposed Rulemaking, Family Educational Rights and Privacy, 34 CFR Part 99, RIN 1855-AA05, Docket ID ED-2008-OPEPD-0002, May 6, 2008, http://www.worldprivacyforum.org/pdf/WPF_FERPAcomments052008fs.pdf. We reproduce our earlier comments here:

Part of the difficulty here is the treatment of all types of directory information as the same. It is one thing to circulate a student list to parents in the school. It is something else to circulate a full list of every permissible element of directory information to the world outside the school. We suggest that the Department consider establishing categories of directory information.

Some information would be eligible for circulation within the school community, while other information might be eligible for broader circulation. We worry that administrative convenience or regulatory uncertainty may result in schools putting more information into a public directory than is really needed.

While we recognize that the statute allows student directories and that directories can serve useful purposes, a directory is still a major imposition on the privacy of a student and parent. This conclusion is even more important in this era of international identity theft activities than it was when FERPA first became law. The contents of a student directory should be based to some extent on the need-to-know principle.

We suggest that the proposed language be amended to make it expressly clear that a limited disclosure can cover only some rather than all directory information. We further suggest that the Department consider how a school might be able to enforce a disclosure of directory information for a limited purpose if a recipient uses the information for an unauthorized purpose. There is no apparent remedy under FERPA, and the Department might want to require schools making limited purpose disclosures to use written agreements for the disclosures and to use some of the enforcement and oversight elements we suggest above for written agreements.

VII. Other thoughts

A. Ban nationwide data systems

We have other suggestions that go beyond the NPRM and probably beyond the current authority of the Department. The idea follows from the creation, existence, and expansion of statewide longitudinal data systems. These systems will, regardless of the presence or absence of overt identifiers, will become data honey pots. The data will attract other users who have no specific interest in education but who do have an interest in finding data about students and their families. The uses will include, but not be limited to, the police, national security agencies, immigration law enforcers, private litigants, social welfare program, and others. Every database with personal information eventually attracts other users, and it is likely that the databases being created for educational use will be no different.

Statewide longitudinal data systems will attract other users. A nationwide data system will attract other users in large numbers. We do not know whether current plans include any type of nationwide system is contemplated. It would be appropriate for the Department to state expressly that it does not want and will not support any nationwide system of any type, whether a central repository or a central pointer system. A nationwide system would be a privacy disaster of unparalleled dimension, eventually becoming a central record system on every family and every individual in the United States.

B. Protect SLDS against secondary uses and legal process

We also suggest that the Department develop a legislative proposal that would protect each SLDS and any derivative databases from secondary use and from compelled disclosure to law enforcement and private litigants. A possible model for legislation is 13 U.S.C. § 9 covering census records. We cannot determine at this time whether the legislation should be enacted at the federal or state levels (or both), but a single uniform federal law would be the most efficient way to accomplish the goal. It might be helpful to allow state legislation to provide protections that exceed the federal floor. A model here would be the privacy legislation included in the Health Insurance Portability and Accountability Act.

We recommend that the Department study this suggestion outside of the NPRM process and make recommendations to the Congress on the best way to accomplish the purpose. This task should have a high priority because once secondary and tertiary users discover the utility of statewide (and ultimately nationwide) databases with information on every child, every household, and eventually every adult, those users will beat a path to its door.

C. Protect other national student data collections that pose privacy issues

We also note for the record that some large non-profit national educational standardized testing companies collect a great deal of personal and sensitive information from students as a voluntary adjunct to the exam process. For example, parental income, disability status, and much more can be part of the information requested from students. The exams may take place in school settings, but the data collection nevertheless appears to be outside of FERPA's reach. FERPA should be expanded to cover such data collections taking place on school grounds.

We note that this is the kind of data collection that can be readily combined with SLDS data. We also note that because the voluntary data collections are being requested as an adjunct to an exam that most students view as important to their academic future, that students will potentially be favorably biased towards releasing even very sensitive information that they would otherwise not be comfortable releasing. This favorable bias is, we believe, increased by testing that may occur on school grounds.

Respectfully submitted,

s/o

Pam Dixon
Executive Director,
World Privacy Forum
www.worldprivacyforum.org

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0232
Comment on FR Doc # 2011-08205

Submitter Information

Name: Barbara Holthaus
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Austin, TX,
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Submitter's Representative: Barbara Holthaus, Senior Attorney
Organization: The University of Texas System
Government Agency Type: State
Government Agency: The University of Texas System

General Comment

Attached is a PDF document containing of the comments of The University of Texas System regarding the NPRM for thr regulations implementing the Federal Education Rights & Privacy Act of 1974 as amended, Doucument ID ED-2011-0020-0001.

Attachments

Comment on FR Doc # 2011-08205



THE UNIVERSITY OF TEXAS SYSTEM

201 WEST SEVENTH STREET AUSTIN, TEXAS 78701-2981

Barry D. Burgdorf

Vice Chancellor and General Counsel

(512) 499-4462

May 23, 2011

Ms. Regina Miles
U.S. Department of Education
Attention: Docket ID ED-2011-OM-02
400 Maryland Avenue, SW
Washington, DC 20202

Re: The University of Texas System's Comments on Proposed Regulations on Proposed Amendments to Regulations Implementing the Family Educational Rights & Privacy Act of 1974

Dear Ms. Miles:

Please find below the comments and recommendations of The University of Texas System (UT System) in response to the notice of proposed rulemaking (NPRM) published by the Department of Education on April 8, 2011. Thank you for this opportunity to comment.

Authorized Representative (§§ 99.3, 99.35, 99.35(d)), NPRM at pp.19727-19729.

UT System agrees that the proposed changes will permit needed flexibility for sharing PII for audit purposes while ensuring that an entity designated as an authorized representative will safeguard the confidentiality and security of the information it receives from a State or local educational authority, or an agency headed by an official listed in § 99.31(a)(3), (hereinafter "Auditing Agency"). However, it objects to the language proposed in §99.35(d) as overly broad, in that it gives the Family Privacy Compliance Office (FPCO) unfettered discretion to prohibit an educational agency or institution from providing PII to the Auditing Agency, the Auditing Agency's authorized representative, or both, for up to five years in any circumstances where an agreement between an Auditing Agency and the authorized representative results in even a single unauthorized disclosure.

Ms. Regina Miles

May 23, 2011

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There may be situations where the educational agency or institution, which was not involved in the creation or administration of the agreement may have an existing separate agreement to disclose PII from its education records with the third party acting as the authorized representative under which all of the requirements imposed by FERPA for the safeguarding of that PII can be met. In such cases, the regulations should not bar disclosure of PII from education records by the educational agency or institution to the third party based on an issue arising from an agreement over which the educational agency or institution had no control and to which it was not a party. In addition, the rule appears to allow the FPCO to prohibit any disclosures of PII by the educational agency or institution, not just disclosures made pursuant to § 99.31(a)(3).

Accordingly, UT System believes this section should be modified to prohibit an educational institution or agency from subsequently disclosing PHI to an entity for up to five year only upon a finding that the entity was the cause of the unauthorized disclosure. In addition, the “zero tolerance” standard whereby a single redisclosure could provides grounds for such a prohibition should be modified to recognize that in today’s technological environment, it is not feasible to require compliance perfection. Both of these recommendations can be achieved by modifying the language in § 99.35(d) as follows:

(1) If the Family Policy Compliance Office finds that a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) or an authorized representative of a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3), fails to take reasonable efforts to prevent the improperly redisclosures of personally identifiable information from education records accessed pursuant to § 99.31(a)(3), the education agency or institution from which the personally identifiable information originated may not allow the authorized representative, or the State or local educational authority or the agency headed by an official listed in § 99.31(a)(3) or both access to personally identifiable information from education records pursuant to § 99.31(a)(3) for at least five years.

(2) If the Family Policy Compliance Office finds that an authorized representative of a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3), fails to take reasonable efforts to prevent the improper redisclosure of personally identifiable information from education records accessed pursuant to § 99.31(a)(3), the State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) from which the personally identifiable information originated may not allow the authorized representative access to personally identifiable information from education records pursuant to § 99.31(a)(3) for at least five years.

Directory Information (§ 99.3), NPRM at p. 19729.

UT System concurs with this proposed change.

Ms. Regina Miles
May 23, 2011
Page 3

Education Program (§§ 99.3, 99.35), NPRM at pp. 19729-19730.

UT System concurs with this proposed change.

Research Studies (§ 99.31(a)(6)), NPRM at pp. 19730-19731.

UT System concurs with this provision for the most part. However, some of the reasoning set forth in this section of the NPRM appears to be based on the erroneous assumption that State and local authorities and federal officials that are permitted by law to receive PII from educational agencies and institutions for audit purposes are also *presumed* to have inherent authority over the educational agency or institution entities based on its statutory authority to conduct the audit. UT System acknowledges and agrees that, by virtue of the fact that an agency or authority is authorized by a law (other than FERPA) to audit a postsecondary institution, the law that permits the entity to access that institution's PII will often also provide that entity with sufficient authority to enter into agreements with organizations to conduct studies involving the PII received as the result of such an audit. However, this authority cannot be automatically presumed to exist for purposes of the NPRM or FERPA.

Therefore, while UT System agrees, as stated at page 19731 of the NPRM that "in the event an educational agency or institution objects to the redisclosure of PII it has provided, the State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) may rely instead on any independent authority it has to further disclose the information on behalf of the agency or institution"; we request clarification that nothing in the NPRM is intended to convey the impression that such implied authority can be presumed in the absence of clear evidence that establishes such inherent authority.

In addition, we have concerns that proposed § 99.31(a)(6)(v) may, in cases where a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) has disclosed PII under the conditions permitted by § 99.31(a)(6) for research purposes to a third party and the agreement has resulted in a violation of § 99.31(a)(iii)(B), be read to prohibit the educational agencies or institutions that originally provided PII to the State or local educational authority or an agency headed by an official listed in § 99.31(a)(3), as well as the authority or agency that actually entered into the agreement, from providing the third party any access to its PII for at least five years.

As explained in our comments under "Authorized Representative (§§ 99.3, 99.35, 99.35(d))", *supra*, there may be situations where an educational agency or institution, which was not involved in the creation or administration of the agreement between the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and a third party, may have an existing agreement to disclose PII from its education records to the third party for research purposes under which all of the requirements imposed by FERPA for the safeguarding of that PII can be met. In such cases, the regulations should not be able to bar the disclosure of PII from education records by the educational agency or institution to the third party based on an issue arising from an agreement over which the educational agency or institution had no control and to which it was not a party.

Ms. Regina Miles

May 23, 2011

Page 4

Therefore, we request clarification that the language in § 99.31(a)(6)(v) should be read to bar an entity that is subject to FERPA from disclosing PII to a third party only if the entity itself had an agreement with the third party that resulted in a FERPA violation.

Authority to Audit or Evaluate (§99.35), NPRM at p. 19731.

UT System understands the FPCO's desire that FERPA not be perceived as a barrier to the ability of a State or local educational authority, or an agency headed by an official listed in § 99.31(a)(3), to access PII from education records for the purpose of evaluating the effectiveness of Federal or state supported education programs whenever possible. However, the language in this section of the NPRM could be read to encourage the belief that, for example, a statute that expressly authorize a State or local educational authority, or an agency headed by an official listed in § 99.31(a)(3), to conduct an audit of a K-12 education program can or should be read to also provide the agency or authority with an implicit or inherent authority to audit a postsecondary education program, when no such actual authority exists.

Therefore, UT System requests confirmation that neither the NPRM or FERPA should be read to imply that FERPA itself creates any authority, including implied or inherent authority, that would permit a State or local educational authority, or an agency headed by an official listed in § 99.31(a)(3), to access the PII of an educational agency or institution under §99.35, where no such authority is granted by some other Federal or State law.

Directory Information

Section §99.37(Student ID Cards and ID Badges), NPRM at p. 19731-19732.

UT System concurs with this proposed change.

Section 99.37(d) (Limited Directory Information Policy), NPRM at p. 19732.

UT System agrees that the ability to release directory information for some purposes, but not others, may prove useful to educational agencies and institutions that are not subject to public information or "sunshine" laws. However, UT System notes that it nine academic institutions and six health science institutions are subject to the Texas Public Information Act (the Act), which requires release of all information held by or on behalf of the institutions unless the information is expressly designated as exempt from release under the Act or made confidential by other state or Federal law.

Therefore, it is possible that the a Texas public institution of higher education that chooses to make information available under the FERPA directory information exception to one public individual or group could be required by the Act to make that same information available to all other members of the public who request it pursuant to the Act. Accordingly, UT System requests clarification that the ability to limit disclosure of information designated by an institution as directory information as proposed in this section of the NPRM is simply an option an institution may voluntarily adopt; and

Ms. Regina Miles

May 23, 2011

Page 5

failure to implement a limited directory information policy will not subject an institution to enforcement proceedings by the OFPC.

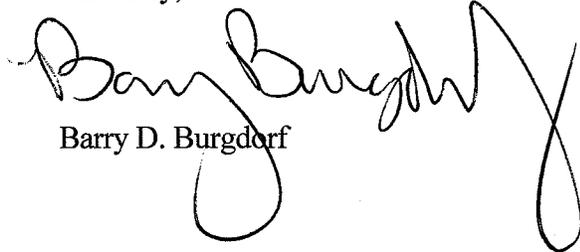
Enforcement Procedures (§ 99.60), NPRM at pp. 19732-19733.

UT System has no comments to provide regarding this proposed change.

CONCLUSION

On behalf of UT System, I wish to again extend my appreciation to the Department for its efforts in providing this NPRM, as well as the opportunity to provide these comments to assist the Department in the further development of the rules applicable to student health plans.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Burgdorf", with a large, stylized flourish extending from the end of the signature.

Barry D. Burgdorf

- c: Francisco G. Cigarroa, M.D., Chancellor
David B. Prior, Executive Vice Chancellor for Academic Affairs
Dr. Kenneth Shine, Executive Vice Chancellor for Health Affairs
Barry McBee, Vice Chancellor and Chief Governmental Relations Officer
William H. Shute, Vice Chancellor for Federal Relations

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0233
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sang Han
Address:
Washington, DC,
Submitter's Representative: Sang Han
Organization: APLU

General Comment

The following letter is submitted jointly by the Association of Public and Land-grant Universities (APLU) and American Association of State Colleges and Universities (AASCU).

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

RE: Docket ID ED-2011-OM-0002

Dear Ms. Miles:

On behalf of this nation's four-year public higher education institutions, we appreciate this opportunity to submit our comments on the proposed changes to the Family Educational Rights and Privacy Act (FERPA) as described in the April 8 *Federal Register* (Vol. 76, No. 68). While we appreciate the stated goal and intent of the proposal, we are concerned about a number of provisions in the Notice of Proposed Rulemaking (NPRM).

As state entities, our members are already subject to a myriad of information and data disclosure requirements. What is more, as we continue to strive to become better stewards of public resources, we believe that properly constructed statewide longitudinal data systems (SLDS) can assist institutions in becoming even more effective. We believe the collection of the right kinds of data, with appropriate safeguards in place, can assist in the creation of policies that lead to positive educational outcomes. Unfortunately, we believe that the proposed changes contained in the NPRM are an unfortunate overreach which could compromise individual privacy.

For example, the NPRM seeks to redefine the term "authorized representative" to include designees of any kind—as determined by the Comptroller General, the Attorney General, the Secretary of Education, or State and local educational authorities—to conduct any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs. This means that individuals who currently do not have access to student records could gain access to individually identifiable student data. We are concerned that this expansion could lead to inappropriate sharing of personally identifiable information, including pieces of data completely unrelated to education. Even individuals trained to deal with FERPA have difficulties. We view the proposed expanded access to individual information by potentially untrained individuals as troubling.

In addition, it appears that the NPRM would allow state and federal agencies to redisclose personally identifiable information to outside parties under the guise of "research studies" without prior approval. We find this proposed change troubling, as the original providers of the data, such as higher education institutions, would not even be aware that information may have

Miles, page 2

been redisclosed after it was provided. Under the new regulations, even if they were aware, they would have no way to object to the sharing of information.

Again, we are very supportive of efforts to develop comprehensive and useful SLDS with built-in privacy safeguards. We ask that you consider how these proposed regulations might be redrafted to deal with our noted concerns and still achieve your important goals.

Sincerely,



Peter McPherson
President
Association of Public and
Land-grant Universities



Muriel A. Howard
President
American Association
of State Colleges and Universities

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0234
Comment on FR Doc # 2011-08205

Submitter Information

Name: Stanley Burton
Address:
Spring, TX,

General Comment

The Department of Education (DOE) has proposed regulatory changes that would gut the primary federal student-privacy statute, the Family Educational Rights and Privacy Act (FERPA). FERPA imposes strict limits on how the government may use so-called Personally Identifiable Information (PII) collected on students by schools or government education agencies. Under the proposed changes to the regulations issued under FERPA, DOE would enable a system of massive data collection on students – potentially including such things as family income range, hair color, blood type, and health-care history – that could then be shared with other government agencies (both federal and in other states) for unspecified purposes. This disclosure of PII could be accomplished without parents' consent, and in most cases without even their knowledge. And because the data-collection and sharing would begin when the student is in preschool and follow him even through his entry into the workforce, the possibilities of breach of privacy and unwarranted use of data are almost limitless.

I strongly object to the DOE gathering information about my child and making that data available to others. Data security is an oxymoron in this day in age. Data breaches occur at all levels public and private. unless and until the DOE can absolutely be sure no data can EVER be breached (I.e. NEVER.) data mining such as this should never be allowed.

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0235
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

I adamantly oppose this regulation. It's an invasion of privacy and a huge over-reach by this administration. Why is Congress not involved in this decision?

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0236
Comment on FR Doc # 2011-08205

Submitter Information

Name: Oliver Warren
Address:
Bremerton, WA,
Email: omwarren@comcast.net
Organization: Kitsap Patriots Teaparty

General Comment

Since under the US Constitution, education is not an enumerated power of the federal government, under the 10th Amendment the educational data collection plan and these proposed rules are not only objectionable but entirely unconstitutional. Section entitled "Education Program" (Sec. Sec. 99.3, 99.35) allows privacy to be breached even with private education centers (such as Sylvan, Kumon), private and religious preschools, private schools for lower grades as well as for trades, and possibly homeschools. This is not a tool to improve education and not a legitimate use of authority for the Department of Education. There is no benign reason for this federal agency to non-consensually collect information that allows people to be sorted out by their demographic traits and guided toward predetermined workforce outcomes.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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| Posted: May 24, 2011 |
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| Tracking No. 80e30af0 |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0237
Comment on FR Doc # 2011-08205

Submitter Information

Name: Paul Lingenfelter
Submitter's Representative: Hans Lorange
Organization: State Higher Education Executive Officers (SHEEO)

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



STATE HIGHER EDUCATION EXECUTIVE OFFICERS

3035 Center Green • Suite 100 • Boulder, Colorado 80301-2251 • 303-541-1606 • FAX: 303-541-1639 • e-mail: sheeo@sheeo.org • www.sheeo.org

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Proposed Amendments to FERPA Regulations (Docket ID ED-2011-OM-0002)

Dear Ms. Miles,

This letter is submitted to comment on the U.S. Department of Education's (ED) above-captioned proposed regulations applicable to the Family Educational Rights and Privacy Act (FERPA), as published in the April 8, 2011, Federal Register. SHEEO is deeply committed to safeguarding individual student privacy as well as to the strategic and appropriate use of education data to inform policy, management and instructional decisions. We believe the proposed regulations strike the appropriate balance between these goals and we appreciate the efforts of the Department of Education to meet both goals by clarifying FERPA regulations.

Many individuals and organizations have responded to your request for comments emphasizing both the interest in the proposed regulations and the need for additional clarity. We have formally endorsed the suggestions from the Data Quality Campaign (DQC) and acknowledge the value of the specific comments and suggestions they have provided. We also have reviewed the comments from the Western Interstate Commission for Higher Education (WICHE) and find those comments useful in raising several important issues and requests for clarity.

Based on feedback from our members SHEEO offers the following additional comments:

- We are pleased to see the proposed definition of the term "authorized representative;" this clarification will facilitate and enhance the capacity for educational research and assessment. Sharing data among agencies is required in statewide longitudinal data systems and in much of the necessary research evaluating education programs.
- We support the definition of "education program" which will help to remove the confusion regarding which programs are covered for evaluation and auditing purposes under the FERPA guidelines. Current interpretations of FERPA have constrained the ability to understand and improve the many educational activities administered outside of the state education authority.
- We also support the emendation of the section about written agreements. The clarifications offered in this change will assist in interagency collaboration as well as collaborations among educational entities while maintaining student privacy.
- We support removal of the provision that a State or local educational authority must establish specific legal authority to conduct an audit or evaluation. We maintain that conducting such evaluations is already a foundational responsibility for state agencies that oversee educational activities, whether such authority is express or implied.

- Privacy safeguards should include, not only very strong procedures to avoid unauthorized access to data, but also the routine use of encryption procedures to prevent tracking individual records to individual students when data are used exclusively for policy research or accountability purposes.
- We encourage an explicit statement regarding the authority of education agencies to share data across state lines. Nothing in the proposed regulations appear to inhibit such sharing but we encourage the recognition of student mobility and an affirmation of the value of data being available wherever students are enrolled.
- Several items would benefit from more explicit definitions or examples including “reasonable methods” in reference to authorized representative’s compliance, “evaluation” and “audit,” along with “legitimate educational interest.”

Thank you again for the opportunity to respond and to participate in the open comment process. We look forward to seeing the proposed regulations with the modest changes suggested above.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul E. Lingenfelter". The signature is fluid and cursive, with a large initial "P" and "L".

Paul E. Lingenfelter
President

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0238
Comment on FR Doc # 2011-08205

Submitter Information

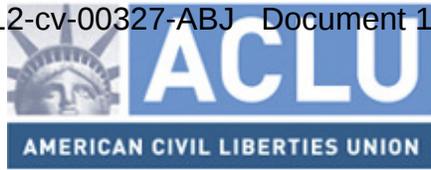
Name: Christopher Calabrese
Address:
Washington, DC,
Organization: The American Civil Liberties Union

General Comment

We write to express our concerns regarding the Department of Education's changes to the existing regulations implementing the Family Educational Rights and Privacy Act (FERPA). This notice of proposed rulemaking (NPRM) represents a significant new privacy invasion. The rules allow much greater access to students' personal information by state officials not working directly on education and by other governmental and private entities that are not traditional education providers. They may allow for the sharing of personal information between states – paving the way for a national database of student records and substantially increasing the risk of lost records and identity theft. All of this information sharing occurs without a parent or student's consent and beyond their control. Final regulations must express more clearly a commitment to keeping personally identifiable information confidential and barring access to that information by those who might otherwise have access to the aggregated information.

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: **Family Educational Rights and Privacy Act (FERPA)
regulatory changes, Docket ID ED-2011-OM-0002**

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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Dear Ms. Miles

On behalf of the American Civil Liberties Union (“ACLU”), America’s oldest and largest civil liberties organization, and its more than half a million members, countless additional supporters and activists, and 53 affiliates across the country, we write to express our concerns regarding the Department of Education’s changes to the existing regulations implementing the Family Educational Rights and Privacy Act (FERPA). 76 Fed. Reg. 19726. FERPA was passed in 1974 to protect the privacy of American students control information sharing among primary, secondary and post secondary institutions.

This notice of proposed rulemaking (NPRM) represents a significant new privacy invasion. The rules allow much greater access to students’ personal information by state officials not working directly on education and by other governmental and private entities that are not traditional education providers. They may allow for the sharing of personal information between states – paving the way for a national database of student records and substantially increasing the risk of lost records and identity theft. All of this information sharing occurs without a parent or student’s consent and beyond their control. Final regulations must express more clearly a commitment to keeping personally identifiable information confidential and barring access to that information by those who might otherwise have access to the aggregated information. When it is necessary to share personal student information the reasons for that sharing and restrictions on information must be very clearly articulated. There must be no creation of a national student database.

All of the concerns in this comment are directed at the sharing of personally identifiable information about students such as identifiable records of student grades, discipline and other personal and private information. We do not oppose general collection of information about students and its use in a non-identifiable form. In fact we believe that the collection of aggregate information on students is a critical tool for civil rights enforcement and in assuring that every student receives equal access to a high quality education.

For example, school discipline and academic success are inherently linked. To better support student achievement, educators, parents, and policy makers must be able to review information on the health of a school's climate. Therefore we support collection and public reporting of information to inform policy makers and advocates about racial disparities in school discipline and other punitive measure that may work to push kids out of school, such as suspensions, expulsions, instances of corporal punishment, school-based arrests, referrals to law enforcement agencies, and referrals to disciplinary alternative schools. To allow for a greater insight, the data should be disaggregated by race, gender, special educational status, socio-economic status, and English proficiency, and cross-tabulated. However, this information should be reported in an anonymous way that allows for accountability while protecting student privacy.

I. Background

In order to understand the privacy implications of sharing student personal information, one must recognize two core facts:

- Educational records are very detailed and sensitive and
- Increased access to records inevitably leads to increased risk of data breaches and data loss.
 - a. *Sensitive Records*

Teachers and schools are intimately involved with students' lives for years. Beyond class attendance and grades they track discipline problems, report on home life and offer detailed evaluations of students. A teacher may need to know much of this information but it is difficult to justify sharing it with a wide range of state officials.

Compounding this problem is the fact that schools are also collecting unnecessary and extraneous information. According to the Fordham Center on Law and Information Policy, which reviewed the state data collection practices on K-12 students in all 50 states, data collected by particular states includes pregnancy, mental health information, criminal history, birth order, victims of peer violence, parental education, medical test results, and birth weight.¹ The study also found that information was not being handled in compliance with current law, and that there were no clear rules for accessing the information. All of this makes any increased disclosure of personally identifiable information a significant privacy problem.

b. Data Breach

Expanding access to educational records is almost certain to lead to an increase in the number of lost or misused records containing personal information on students. The more individuals who access and use personally identifiable student data, the more opportunities there will be for inadvertent disclosures, loss of information from poor security practices, and misuse by individuals within the system.

This problem has already reached epidemic proportions. According to the Privacy Rights Clearinghouse, which monitors data breaches, 8,584,571 student records have been lost from 543

¹ Fordham Center on Law and Information Policy, October 2009: *A Study of Elementary and Secondary School State Reporting Systems*, Available at: <http://law.fordham.edu/center-on-law-and-information-policy/14769.htm>

different breaches since 2005.² These breaches represent a staggering loss of personal information, one that is ongoing. Consider these worrisome headlines from just the last few months:

- *Student Records Found Dumped in Trash Bins* – The personal files from Huntington Learning Center in East Northport, Long Island, were found tossed in a dumpster behind a strip mall. March 28, 2011.³
- *Hackers may have accessed thousands of South Carolina students' information* – In the Lancaster County School District hackers were able to hack into the district's system by monitoring district computers and capturing keystrokes to get passwords. Those passwords gave the hackers access into the records on the state system of more than 25,000 students and more than 2,500 school district employees. April 18, 2011.⁴
- *Central Ohio Technical College students' personal information left unsecured* - 600 students' personal information was left unsecured after sent to storage at Apple Tree Auction Center, where they were left unsecured for less than 24 hours. April 19, 2011.⁵
- *Pennsylvania College laptop stolen* - Albright College's financial aid office had a laptop stolen containing personal information on 10,000 current, former and prospective students, by an employee who sold the computer for to pay for drugs. April 16, 2011.⁶
- *Information on top Texas high school graduates mishandled* - The Social Security numbers of 164,406 students who graduated in the top 10 percent of their class over the past two decades were placed at risk for identity theft because they were sent unencrypted via the mail. April 7, 2011.⁷

In many of these cases, the data loss was not intentional. But the more people that access and handle information on individual students, the greater risk of a data breach.

II. Expanded Access for State Officials

The NPRM expands non-consensual access to student records in at least four ways:

- By increasing the number of officials who can access information on individual students;
- Through inadequate controls on that access; and

² Privacy Rights Clearinghouse, *Chronology of Data Breaches: Security Breaches 2005-Present*. Available at: <http://www.privacyrights.org/data-breach>

³ Day, Andrea. "Student Records Found Dumped in Trash Bins." *Fox News New York*, March 2011. Accessed May 19, 2011 at: <http://www.myfoxny.com/dpp/news/student-records-found-dumped-in-trash-bins-20110328>

⁴ "Hackers May Have Accessed Thousands of SC Students' Information." *Channel 5 News*, April 2011. Accessed May 18, 2011 at: <http://www.live5news.com/story/14468839/hackers-may-have-accessed-thousands-of-students-information>

⁵ Balmert, Jessie. "COTC Students' Personal Information Left Unsecured." *Newark Advocate*, April 19, 2011, Accessed May 19, 2011 at: <http://www.newarkadvocate.com/article/20110419/NEWS01/104190308>

⁶ Henshaw, Steve. "1 Stolen Albright Laptop found; 1 still Missing." *Reading Eagle*, April 16, Accessed May 19 2011 at: <http://readingeagle.com/article.aspx?id=301685>

⁷ Scott, Robert. "More Student SSNs Were at Risk, TEA Says." *The Texas Tribune*, April 7, 2011, Accessed May 19, 2011 at: <http://www.texastribune.org/texas-education/public-education/more-student-ssns-were-at-risk-tea-says/>

- By eliminating the need for express authority to conduct audits of personally identifiable student records.

a. Access by state officials to records on individual students

The NPRM expands the definition of “authorized representatives” to:

any entity or individual designated by a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) [Comptroller General of the US, the AG of the US, The Secretary, state and local educational officials], to conduct—with respect to Federal or State supported education programs— any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs. 76 Fed. Reg. 19728.

The practical result of this change is that state educational officials can designate any state official to access personal information on students without the student or parent’s consent for an almost unlimited spectrum of activities. In fact, this is the precise intent of the language. The Department envisions:

There is no reason why a State health and human services or labor department, for example, should be precluded from serving as the authority’s authorized representative and **receiving non-consensual disclosures of PII to link education, workforce, health, family services, and other data** for the purpose of evaluating, auditing, or enforcing Federal legal requirements related to, Federal or State supported education programs 76 Fed. Reg. 19729 (emphasis added).

While the NPRM requires this access to be limited by a written agreement (discussed below), this protection will be of little comfort to students and parents. This information describes individual students and is both detailed and sensitive. Further, the information was collected for a specific purpose and using it for other purposes is contrary to the expectations of students and their parents and a violation of their privacy.

b. Inadequate controls

The written agreements established by the NPRM to protect personal information are necessary but insufficient. The NPRM usefully describes a number of areas that must be covered by these agreements including designating a particular representative, limiting information disclosures and retention times, and a variety of other protections. We believe additional mandatory requirements must address in more concrete terms the consequences for data breaches. Specifically, contracts should include requirements of liquidated damages, a third party beneficiary clause for data subjects (so students and parents can hold officials liable), a clearly delineated audit provision, and descriptions of notification and other responsibilities when personal information is lost. Written agreements should also be public documents, and they should specify the legal authority for any disclosures.

Even a perfect data sharing agreement would not solve the main problem at issue. This agreement will be useful in providing accountability after breaches and alerting responsible officials to their duties, but it will do little to stop inadvertent breaches or officials acting in bad faith.

c. Eliminating the need for express authority to conduct audits

Much of the authority necessary to access student records is based on the need to perform “audit, evaluation, or compliance or enforcement activity”. Previous regulation has required that such authority must be grounded in some other federal, state or local authority. The Department has stated that “[l]ack of such explicit State or local authority has hindered the use of data in some States.” 76 Fed. Reg. 19735. Therefore under this new regulatory guidance, state and local officials do not require express legal authority to conduct audits of individual student records and these other activities, but rather may “obtain PII when they have implied authority to conduct evaluation, audit, and compliance activities of their own programs.” 76 Fed. Reg. 19735.

Given the amount of personally identifiable information accessible under this new regulation, such an exemption is striking. Officials will no longer have to describe their actual legal authority to conduct and audit. Instead they will simply be able to describe something as an evaluation, audit or compliance activity and gain access to significant amounts of the personal data stored in student records.

III. Sharing personally identifiable student records with outside education groups

The NPRM also greatly increases access to personally identifiable student records for entities outside the formal K-12 and secondary education systems. Specifically, it broadens the definition of “educational program” to:

any program that is principally engaged in the provision of education, including, but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education and adult education, regardless of whether the program is administered by an educational authority. 76 Fed. Reg. 19729, 19730.

This definition would allow an extremely wide variety of parties to be classified as ‘educational programs’ and give those same parties access to the sensitive information contained in individual student records without the student’s or parent’s consent. As previous regulations have made clear currently the definition of educational program is quite limited. 34 C.F.R. 99.1 This change would enable any program that described itself as an educational program to access these records. This could include adult education classes, private tutoring services, day care providers or workforce training course. It is so unbounded that it could extend to websites that promise to “teach you how to make money online from home.” All of these programs would be able access personally identifiable student records for the purpose of evaluating their own educational outcomes. There would be no consent required and no ability to limit this sharing.

The NPRM makes this intention clear, stating that “[t]he potential benefits of this proposed change are substantial, including the benefits of non-educational agencies that are administering “education programs” being able to conduct their own analyses without incurring the prohibitive costs of obtaining consent for access to individual student records. “ 76 Fed. Reg. 19734. It is striking that a regulation nominally aimed at protecting student privacy would concern itself with helping additional parties to gain access to private records and avoid the prohibitive cost of obtaining consent.

Ultimately the combination of these two overarching goals – increased sharing with state officials and increased sharing with outside entities – raise another possibility which might be

permitted under these new rules: the sharing of personally identifiable student information between state systems. Such sharing is a logical progression from these widespread new sharing rules and would pave the way for a national database of student records. Such a system would have all of the same problems of improper access and data breach, but would be magnified by vast number of new users. There would also be an almost irresistible temptation to build on this database for other uses since it would represent a database of almost every American of a certain age, one that would grow over time to become a database of almost all Americans.

Conclusion

The NPRM poses serious privacy concerns. Personally identifiable student records include extremely sensitive information about individuals, yet these rules significantly expand the number of parties who can access a record without requiring consent from the parent or the student. These new parties include state officials not working directly on education as well as private entities that would not traditionally be able to access government educational records. Furthermore, the expansion of access to student records could eventually lead to sharing among states. If this were to happen, it could lead to the creation of an immense database holding sensitive information about most Americans.

Final regulations must express more clearly a commitment to keeping personally identifiable information confidential and barring access to that information by those who might otherwise have access to the aggregated information. When it is necessary to share personal student information the reasons for that sharing and restrictions on information must be very clearly articulated. There must be no creation of a national student database.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Christopher R. Calabrese
Legislative Counsel

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0239
Comment on FR Doc # 2011-08205

Submitter Information

Name: Ayvon Card
Address:
Port Orchard, WA,
Email: acard00@yahoo.com

General Comment

The Constitution does not mention either government schools or keeping records of every thing about a child from birth to death. We need to keep it that way.

There is no way that my children and grandchildren need this process.

This process is a complete waste of our tax money.

I will urge my congress people to oppose it.

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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| Tracking No.: 80e30ab8 |
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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0240
Comment on FR Doc # 2011-08205

Submitter Information

Name: Terry Hartle
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Washington, DC, DC,
Email: th1@acenet.edu
Organization: American Council on Education

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Office of the President

May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue S.W.
Washington, DC 20202

Re: Docket ID ED-2011-OM-002

Dear Ms. Miles:

I write on behalf of the higher education associations listed below to provide comments on the April 8, 2011, notice of proposed rulemaking (NPRM) published in the *Federal Register* regarding the Family Educational Rights and Privacy Act (FERPA).

From its inception, the application and administration of FERPA has been a balancing act that strives to achieve equilibrium between the need to collect and maintain information about individuals for educational purposes on the one hand, and the requirement to protect the individual from the misuse of that data through improper disclosure or dissemination of personally identifiable information on the other. This has never been an easy task, but it is one that has grown increasingly complicated in direct relation to rapid technological advances that bring with them countless opportunities to create vast data warehouses that can be linked and mined with ease. To appreciate the temptation that such databases offer to invade the privacy of the individuals whose personally identifiable data they contain, one needs look no further than the example of the nine employees of an Iowa-based federal contractor who were indicted in 2010 for improperly accessing the student loan records of President Barack Obama.

The issue of balance is at the center of the April 8 NPRM. The proposed regulations would substantially expand not only the amount of information that might be shared, but also the number of individuals who could gain access to it. The privacy side of the equation is acknowledged through related actions taken by the department to create and appoint a new chief privacy officer, to develop a new Privacy Technical Assistance Center, and to issue a series of policy briefs on privacy concerns. However, in the NPRM itself, the needed balance is lacking—a situation we fear will work to the detriment of student privacy and data security.

FERPA Comment Letter

Page 2

May 23, 2011

We believe the proposed regulations unravel student privacy protections in significant ways that are inconsistent with congressional intent. The legislative history of the act clearly establishes that its purpose “is two-fold—to assure parents of students, and students themselves... access to their education records, and to *protect such individuals’ rights to privacy by limiting the transferability of their records without their consent.*” [Joint Statement of Explanation of Buckley/Pell Amendment, 120 Cong. Rec. 39863 (December 13, 1974)—emphasis added.] The statute places the exclusive right to access non-consensual release of personally identifiable information at the disposal of four designated entities: the secretary of education, the comptroller general, the attorney general of the United States, and state and local education officials. By expanding the “authorized representatives” designation to public and private entities acting on behalf of the four statutory designees, the NPRM encourages greater transferability of private records without student consent. The practical effect of this proposal would be to remove control over who gets access to their private educational records and for what reason from students and their families and transfer it to the officials cited in 99.31(a)(3).

Moreover, we believe the requirements set out in the NPRM for maintenance, storage, disposal and re-disclosure are accompanied by weak enforcement measures that will not serve as effective disincentives for noncompliance. For example, we do not believe that a five-year ban on access to personally identifiable information for an entity that has violated the re-disclosure provision would be as effective a deterrent as a substantial monetary penalty. In addition, FERPA requirements are extremely technical and can be misunderstood even by those most familiar with them. Because the proposed regulations will increase access to education records by individuals who are unfamiliar with FERPA and its application and may regard FERPA as an inconvenient barrier to navigate, we fear that student privacy will be compromised.

We are very concerned that the NPRM greatly increases the number of agents acting on behalf of the statutorily-designated entities, while it simultaneously removes the requirement that the authority to collect such data for audit, evaluation or compliance or enforcement purposes must be established by federal, state or local law. We believe this will create significant administrative challenges for institutions of higher education which may begin to receive requests for data from multiple entities without a clear understanding of what authority resides in the entity making the request and what protections—if any—are conveyed or guaranteed in regard to the data.

We share the department’s commitment to educational excellence, and we are actively involved in a variety of ways to promote this goal. However, we believe the proposed regulations jeopardize important FERPA protections by expanding the number

FERPA Comment Letter

Page 3

May 23, 2011

of individuals who may access personally identifiable information without consent, the basis on which they may obtain that access and the ability to re-disclose it to other parties.

Sincerely,



Molly Corbett Broad
President

MCB/lw

On behalf of:

ACPA – College Student Educators International
American Association of Colleges of Nursing
American Association of Collegiate Registrars and Admissions Officers
American Association of State Colleges and Universities
American Association of University Professors
American Council on Education
APPA, “Leadership in Educational Facilities”
Appalachian College Association
Association for Biblical Higher Education
Association of American Law Schools
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent Colleges of Art & Design
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Association of Research Libraries
Conference for Mercy Higher Education
Council for Christian Colleges & Universities
Council of Independent Colleges
Council of Opportunity in Education
Hispanic Association of Colleges and Universities
Lutheran Educational Conference of North America
National Association of College and University Business Officers
National Association of Independent Colleges and Universities

FERPA Comment Letter

Page 4

May 23, 2011

National Association of Student Financial Aid Administrators

Thurgood Marshall College Fund

UNCF

Women's College Coalition

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0241
Comment on FR Doc # 2011-08205

Submitter Information

Name: Virginia Scantlebury
Address:
Shoreline, WA,

General Comment

Under the US Constitution education is not an enumerated power of the Federal Government. In addition, under the 10th Amendment the educational data collection plan and these proposed rules are not only objectionable but entirely unconstitutional. The Section entitled "Education Program" (Sec. 99.3, 99.35) allows privacy to be breached even with private education centers (such as Sylvan, Kumon), private and religious preschools, private schools for lower grades as well as for trades and possibly homeschools. This is not a tool to improve education and not a legitimate use of authority for the Department of Education. There is no reason for this federal agency to non-consensually collect information that allows people to be sorted out by their demographic traits and guided toward predetermined workforce outcomes.

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0242
Comment on FR Doc # 2011-08205

Submitter Information

Name: Cheryl Whelan
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Topeka, KS,
Email: cwhelan@ksde.org
Submitter's Representative: Cheryl Whelan
Organization: Kansas State Department of Education
Government Agency Type: State
Government Agency: Kansas State Department of Education

General Comment

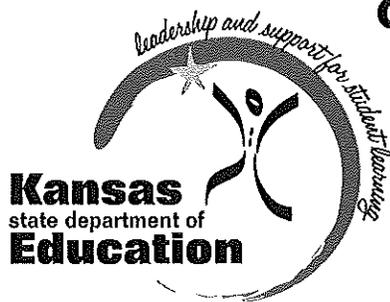
Please see attached comments.

Attachments

Comment on FR Doc # 2011-08205

Office of General Counsel

785-296-3204
785-296-7933 (fax)



120 SE 10th Avenue • Topeka, KS 66612-1182 • (785) 296-6338 (TTY) • www.ksde.org

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Proposed Amendments to FERPA Regulations (Docket ID ED-2011-OM-0002)

Dear Ms. Miles:

Thank you for the opportunity to provide comments and recommendations in response to the notice of proposed rulemaking published in the Federal Register on Friday, April 8, 2011, regarding amendments to the Family Educational Rights and Privacy Act (FERPA) regulations. This letter represents comments on the proposed amendments from the Kansas State Department of Education (KSDE).

We believe that the proposed regulations strike a proper balance between protecting the privacy of education records while allowing for the effective use of data in statewide longitudinal data systems (SLDS). Please consider the following comments and recommendations on the notice of proposed rulemaking.

Authorized Representative (§§99.3, 99.35)

The KSDE is pleased that the proposed regulations include a definition of authorized representative. This will assist state education agencies in managing education data to evaluate the effectiveness of education programs. However, we propose the addition of the word “state” to the second half of the definition to ensure consistency within the definition and to minimize confusion. With this addition, authorized representative would be defined as “any entity or individual designated by a State or local educational authority or agency headed by an official listed in §99.31 (a) (3) to conduct—with respect to Federal or State supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal or State legal requirements that relate to those programs.” (emphasis added)

Reasonable Methods (§99.35(a)(2))

The proposed regulations provide that the State or local educational authority or agency headed by an identified official maintains responsibility to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA. The Department does not define reasonable methods and instead plans to issue non-regulatory guidance on this topic.

Regina Miles
Page 2

We recognize that state education agencies may utilize different methods to ensure compliance with FERPA based on available technologies and governance structures. However, when the Department issues non-regulatory guidance, the KSDE encourages the Department to clarify the procedures and processes the Department expects educational agencies to utilize in identifying violations. The Department should consider the lack of legal authority for state education agencies to independently verify the destruction of all personally identifiable information (PII) from education records by authorized representatives. Even with the written agreement required by §99.35(a)(3), state education agencies have no legal authority nor, in many instances, the staff capability to physically verify the destruction of PII and must rely on representations from the authorized representative.

In addition, the proposed regulations do not discuss the steps a state education agency must or should take if the state education agency receives a complaint that an authorized representative violated FERPA and/or did not destroy the PII as required. The KSDE requests that the Department address such a scenario in the non-regulatory guidance to provide direction to state educational agencies upon receipt of such a complaint.

Directory Information (§99.3)

The definition of directory information allows the release of information from a student's education record which would not generally be considered harmful or an invasion of privacy if disclosed. With the current definition, release of the date and location of birth appears to be allowed. The KSDE believes that this information should be excluded from the definition of directory information. Date and place of birth, along with the mother's maiden name, are utilized to verify identity for credit card and banking services. The mother's maiden name very often is part of the student's name thus making identity theft easier. Also, providing date and place of birth along with mother's maiden name provides no additional useful information to the directory user.

Improper redisclosure of PII (§99.33)

The proposed regulations clarify the enforcement policies involving redisclosure of PII stating that if the Department finds that a State or local education authority, an agency headed by an identified official, or an authorized representative improperly rediscloses PII in violation of FERPA, the educational authority that provided the data is required to deny that representative further access to personally identifiable data for at least five years.

The KSDE understands and appreciates that substantial consequences are a must, and believes that disbarment is an appropriate remedy for FERPA violations. However, the KSDE encourages the Department to clarify the proposed regulation and consider several suggestions in relation to improper redisclosure.

Regina Miles
Page 3

- The proposed regulation requires denial of access to an authorized representative. Although the authorized representative definition found in §99.3 defines that term as an individual or an entity, the KSDE believes that the Department should clarify its intent in §99.33. Does the Department intend disbarment of the individual, the entity, or both? In addition, if an individual is disbarred, does that disbarment follow the individual if the individual begins employment with another entity which receives PII? In that scenario, is the original entity still subject to disbarment? Finally, if one department of a university is subject to disbarment, is the entire university subject to disbarment? The KSDE recommends that the Department include specific language leaving these issues to the discretion of the educational authority that provided the data.
- The KSDE requests the authority to differentiate between flagrant violations as opposed to inadvertent violations. To impose the same disbarment penalty on both types of violations appears unduly harsh and does not further the intent of FERPA.
- The KSDE requests that the Department further define disbarment procedures to provide clarity around potential remedies and due process requirements. What processes and procedures must an educational authority utilize, what is the standard of proof and what is the appeal authority, if any?

Research Studies (§99.31(a)(6))

The proposed regulations clarify that nothing in FERPA or its implementing regulations prevents a State or local educational authority or agency headed by an identified official from entering into agreements with organizations conducting research studies and, as part of such agreements, prevents the use of PII on behalf of the education agencies and institutions. The KSDE fully supports this clarification. The information housed in our state's longitudinal data systems is important to utilize for the purpose of research to improve the education system as a whole.

However, the KSDE encourages the Department to adopt a clear definition of research to provide further clarity around these disclosures. As currently defined, providing data to masters or doctoral students completing a thesis or dissertation is not addressed. These students could be defined under the university research umbrella but, in many cases, they are not university employees and have no ties to the institution other than as a student.

In addition, this provision raises issues between FERPA, and the Freedom of Information Act (FOIA) or state open records acts. The KSDE encourages the Department to strengthen language to ensure that FERPA protections extend to protect personally identifiable education records against FOIA or state open records act requests.

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Page 4

Education Program (§§99.3, 99.35)

The proposed regulations define the term “education program” to mean any program that is principally engaged in the provision of education, including but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education regardless of whether the program is administered by an educational authority.

The KSDE supports the Department’s broadening of the term education program. In order to understand and improve the business of education, policymakers and practitioners must know the impact of services provided prior to kindergarten, outside the school day, and after high school graduation.

However, the KSDE recommends further clarification within the education program definition. The phrases “principally engaged” and “not limited to” raise questions as to what other types of programs may fall within the definition of education program. Does this definition include programs providing social services such as counseling even though those programs are not included in the list of examples? Are institutions for incarcerated youths or state hospitals where school-age students may be placed on a long-term basis “principally engaged” in education? The regulations should provide criteria by which an education agency may determine if a program falls within the definition of education program when not specifically mentioned in the definition.

Written agreements (§99.35)

The proposed regulations require written agreements between a State or local educational authority or an agency headed by an identified official and its authorized representative. The regulations propose specific points with regard to the content of these written agreements that include provisions on the purpose of the disclosure, time period for the work, and policies that protect against redisclosure.

The KSDE supports these proposed changes. Formal written agreements provide necessary privacy safeguards while allowing data use to appropriately evaluate education programs. However, the KSDE would like a certain level of flexibility in crafting these written agreements, and is concerned that listing the required elements will prevent the KSDE from requiring additional elements. So, the KSDE proposes adding the language “including but not limited to” to clarify that the KSDE may include additional provisions in written agreements.

In addition, the KSDE is concerned about the language found in §99.35(a)(2)(iii). That language indicates that the only purpose for which release of PII is authorized is for an audit or evaluation or Federal or State supported education programs, or to enforce or to comply with

Regina Miles
Page 5

Federal legal requirements that relate to those programs. The KSDE suggests clarification on whether the Department considers evaluation to include research intended to improve education and not strictly the evaluation of the effectiveness of a current program.

Thank you for the opportunity to provide comments to the proposed regulations. If you have any questions regarding these comments, please contact Cheryl Whelan at (785) 296-3204 or by e-mail at cwhelan@ksde.org.

Sincerely,



Cheryl Whelan
General Counsel
Kansas State Department of Education

CW:

PUBLIC SUBMISSION

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|---------------------------------------|
| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: State Agency (Other) |
| Tracking No. 80e30ab3 |
| Comments Due: May 23, 2011 |
| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0243
Comment on FR Doc # 2011-08205

Submitter Information

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Submitter's Representative: State of Michigan
Organization: Center for Educational Performance and Information
Government Agency Type: State
Government Agency: State Budget Office

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
STATE BUDGET OFFICE
LANSING



CENTER FOR EDUCATIONAL
PERFORMANCE AND INFORMATION

THOMAS E. HOWELL
DIRECTOR

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

RE: Proposed Amendments to FERPA Regulations
Docket ID ED-2011-OM-0002

Dear Ms. Miles:

Thank you for the opportunity to review and provide comments in response to the notice of proposed rulemaking published in the Federal Register on Friday, April 8, 2011, regarding amendments to the Family Educational Rights and Privacy Act (FERPA). The comments herein are provided by the Center for Educational Performance and Information (CEPI), State Budget Office for the state of Michigan.

The proposed FERPA regulations will allow states to meet the requirements set forth by the America Competes Act as well as State Fiscal Stabilization Fund reporting requirements, as well as ensure that research and evaluation using our statewide longitudinal data system (MI School Data) can be used to improve educational outcomes while continuing to protect individual student records.

We thank you for considering the following comments and recommendations on the notice of proposed rulemaking.

General Comment on Entity Language

The regulations use various terms to refer to entities and it is unclear if this is an intentional differentiation. Specifically, *agency*, *institution*, and *authority* appear to be used similarly in different sections.

- §99.31(a)(6)(ii): "State or local education authority"
- §99.31(a)(6)(iii): "educational agency or institution"
- §99.31(a)(6)(v): "educational agency or institution or State or local educational authority or agency"
- §99.37(c)(2): "educational agency or institution"

Recommendation: If there is a distinction between these terms, we would suggest adding a definition and example for each. It would be helpful to clarify if other state agencies are included in any of these terms (e.g., workforce development agencies; social service agencies, etc.)

Ms. Miles
Page 2
May 23, 2011

§99.3 – Authorized Representative

We are pleased to see the proposed addition of the term “authorized representative.”

Recommendation: We suggest adding the word *state* to the second part of the definition, “an authorized representative would mean any entity or individual designated by a state or local educational authority or agency headed by an official listed in §99.31 (a) (3) to conduct—with respect to Federal or State supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal or State legal requirements that relate to those programs.” Consistently using both Federal and State will serve to minimize confusion in implementation.

§§99.3, 99.35 – Educational Program

We are in support of the Department’s broadening of the term educational program. However, the definition states that “*Education Program* means any program that is principally engaged in the provision of education, including, but not limited to...” The use of the terms “principally engaged” as well as “including, but not limited to” are both unclear and could be interpreted quite liberally to include programs that are not the intent of the Department.

Recommendation: We would like to see further clarification of the term “principally engaged.” Examples of programs that are and are not principally engaged in the provision of education would be helpful as well. There are many programs not under the auspices of the State Education Agency that would be very interested in sharing data and may consider themselves to be “principally engaged” in education of some sort. This language makes it especially difficult to enforce the protection of personally identifiable information when it seems to open the gates to interpretation.

Additionally, we do support the recommendations set forth by the EIMAC membership to further define and clarify the programs under the “including, but not limited to” clause.

§99.31(a)(6) – Research Studies

The proposed regulations clarify that State or local educational authorities or agencies can enter into agreements with organizations conducting research studies. We fully support this clarification.

Recommendation: We would like to see the department adopt a clear definition of research to provide further clarity around these disclosures.

§§99.31(a)(6)(v), 99.35(d)—Improper Redisclosure of PII

Both of these sections discuss barring access to personally identifiable information using the term “may.” However, the preamble to the regulations state that “the educational agency or institution from which the PII originated would be prohibited from permitting the entity responsible for the improper redisclosure [...] access to the PII for at least five years.” This language suggests that access “shall” be prohibited in these cases.

Ms. Miles
Page 3
May 23, 2011

The regulations also do not address procedures for addressing improper disclosures such as an option for an entity (third party or authorized agency) to come into voluntary compliance prior to debarment. Specifically, we are concerned about the potential scenario where the state education agency or one of its "authorized representatives" has been found to have improperly disclosed data. We are concerned that a local education agency would be prohibited or could exempt themselves from reporting PII to the state education agency.

Recommendation: We would like clarification if the SEA "shall" or "may" bar access in the cases of unauthorized disclosure of personally identifiable information, or if it is the SEA's discretion as to whether to bar either third parties or authorized representatives from further access in these cases. We would prefer the use of the term "may" so as to have the discretion to distinguish between disclosures in other authorized educational agencies as opposed to third parties so as to not prevent the business of education from continuing.

Additionally, we would like clarification as to whether the "authorized representative" or "third party" refers to the individual, the organization, or both. For example, if an individual designated as an authorized representative inappropriately discloses personally identifiable information and is subsequently barred from further access, is the organization with whom the individual associated also barred from access? We are concerned with both the potential for the individual to change organizations and thereby regain access to the data; and alternatively, with the organization assigning a new individual in order to regain access.

We would also ask that the Department define debarment procedures to include clarity around potential remedy and due process for violations. We suggest that these procedures include the ability to differentiate the consequences and impose harsher penalties for flagrant violations and lighter sentences on lesser misdemeanors.

§99.35(a)(2)—Reasonable Methods

The proposed regulations state that the educational authority or agency is responsible for using reasonable methods to ensure FERPA compliance. No definition of reasonable methods is provided as it is the Department's intent to issue non-regulatory guidance in this area. We are concerned that some of the methods proposed may be unreasonable and onerous, especially considering that the U.S. Department of Education has already approved masking rules established in state Accountability Workbooks for adequate yearly progress (AYP) determination.

Recommendation: We ask that the Department recognize and distinguish between those methods that are "best practice" and minimum standards. We request that the Department suggest minimum standards and leave flexibility for how states define and implement processes and practices to meet those standards. We would also request that the guidance encourage differentiated solutions for meeting the needs of research while maintaining security, confidentiality and privacy.

Ms. Miles
Page 4
May 23, 2011

§99.35(a)(3)—Written Agreements

The proposed regulations would require written agreements between a State or local educational authority or an agency headed by an identified official and its authorized representative. The proposed regulation states that these agreements are only to carry out an audit, evaluation, or activity for the purpose of enforcement or to ensure compliance with Federal legal requirements related to Federal or State supported education programs.

Recommendation: We would request that the Department add the word *state* in the portion of the statement “to ensure compliance with Federal *and state* legal requirements.” This consistency will help minimize confusion as to when the written agreements are required.

We would suggest clarification on whether the Department considers evaluation to include research intended to improve education and not strictly the evaluation of effectiveness of a current program.

The addition of the phrase “including but not limited to” will also help to provide states flexibility to add additional provisions to the written agreement if needed.

§99.35—Authority to Audit or Evaluate

The proposed regulations remove the provision that a State or local education authority or other agency headed by an identified official must establish legal authority under other Federal, State or local law to conduct an audit, evaluation or compliance or enforcement activity. The proposed regulation would permit state or local authorities to disclose data to any entity or person designated as an authorized representative. This change also permits education data to be shared in a centralized state agency that is not the education agency.

We support this change, as it will now provide state education agencies with the ability to obtain PII from post-secondary institutions in order to evaluate their own programs and determine whether students are adequately prepared for continuing their education in a post-secondary environment.

Recommendation: We would request that the Department issue non-regulatory guidance or best practices on the boundaries between agencies, data stewardship, and what constitutes an educational purpose outside of an education agency.

§99.60 – Enforcement Procedures

This section addresses the Family Policy Compliance Office’s authority to take appropriate enforcement action. However, it is unclear if this extends to those agencies designated as “authorized representatives” who may not receive direct funds from the Department.

Ms. Miles
Page 5
May 23, 2011

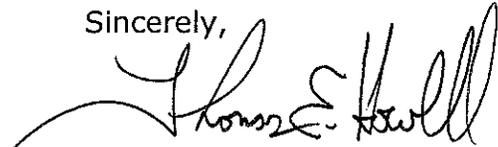
For example, the Department of Labor may provide funding for certain workforce training and education programs rather than the Department of Education. How are they subject to enforcement, especially if they have been designated as an "authorized representative" by the education agency?

Recommendation: We request that the Department add language to clarify enforcement for cases in which the Department has not provided any funding to the "other recipient."

In summary, we fully support the general goals and the specific proposed regulatory changes. However, we suggest further refinement and clarification as detailed in this letter.

If you have any questions regarding these comments, please contact me at 517-241-2374 or by e-mail at howellt@michigan.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas E. Howell". The signature is fluid and cursive, with a large initial "T" and "H".

Thomas E. Howell, Director

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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| Category: Association/Organization |
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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0244
Comment on FR Doc # 2011-08205

Submitter Information

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Email: Isoronen@nsba.org
Submitter's Representative: Lisa Soronen
Organization: National School Boards Association

General Comment

See attached file(s).

Attached are comments to the notice of proposed rulemaking regarding FERPA.

Attachments

Comment on FR Doc # 2011-08205



NSBA

*Working with and
through our State
Associations, NSBA
Advocates for Equity and
Excellence in Public
Education through
School Board Leadership*

May 23, 2011

The Honorable Arne Duncan
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington D.C. 20202

Dear Mr. Duncan:

The National School Boards Association (NSBA), representing through our state associations approximately 14,500 school districts, offers the following comments to the recent notice of proposed rulemaking regarding the Family Educational Rights and Privacy Act (FERPA). As discussed in more detail below, NSBA does not support a number of the proposed changes to the FERPA regulations. FERPA is a data privacy law. The proposed changes facilitate data sharing well beyond the scope of the current FERPA statute. Broadening FERPA beyond its data privacy purpose should be done legislatively and not through regulations. More specifically, if Congress wants FERPA to be used to facilitate data sharing it should modify the statute and create clear exceptions to facilitate information sharing.

Definitions – Authorized Representative

First, NSBA suggests that the Department of Education's (DOE) proposed definition of "authorized representative" is overly broad. A more logical interpretation of "authorized representative" that keeps more with the purposes of FERPA is DOE's longstanding view that limits an "authorized representative" of the Comptroller General of the United States, Secretary of Education, etc. to an employee or contractor of such person or entity. This interpretation makes sense because it recognizes that the Comptroller General of the United States, Secretary of Education, etc. would never be personally involved in data gathering for an audit of a federal supported education program. Instead, one of his or her employees or contractors would be involved upon being so authorized.

As a practical matter, it is not clear how the effective use of data in statewide longitudinal data systems (SLDS) as envisioned by the COMPETES Act or ARRA necessitates designation of others beyond an employee or a contractor as authorized representatives. Under what circumstances would others besides these two types of representatives conduct an audit or evaluation of a Federal or state education program that would necessitate non-consensual disclosure of PII?

Second, NSBA notes that FERPA is a very complicated law. Will “reasonable methods” and a written agreement likely ensure that “authorized representatives” unfamiliar with the privacy concerns inherent in educational programs comply with FERPA?

Third, if for some reason, such an authorized representative, state or local educational authority, or agency headed by an official listed in § 99.31(a)(3) makes an improper re-disclosure, DOE proposes that the educational agency or institution from which the personally identifiable information (PII) originated would be prohibited from permitting the entity responsible for the improper re-disclosure access to data for at least five years. NSBA suggests that instead of requiring the educational agency or institution to deny access to data for five years, the entity responsible for the re-disclosure should be *prohibited from requesting* PII from the educational agency or institution for at least five years. It is unfair to put the onus on the originating educational agency or institution to deny access to the entity that made an improper disclosure. After all, the educational agency or institution did not make the improper disclosure and was reasonably relying on “reasonable methods” and a written agreement to prevent improper re-disclosure. Likewise, the educational agency or institution may not even be aware that an improper re-disclosure has been made. In a similar vein, NSBA encourages DOE to modify current § 99.33(e) to state that if a third party improperly re-discloses PII from education records that third party may not *request* PII from the originating education agency or institution for at least five years.

Fourth, DOE states that “a written agreements [must be developed] between a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and its authorized representative, other than an employee (*see* proposed § 99.35(a)(3)).” NSBA is unclear why the “other than an employee” language is included in this sentence and what this language means.

Research studies

In this section DOE proposes that a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) be able to disclose PII to organizations conducting studies. NSBA suggests that this proposal exceeds the statutory authority of FERPA. The studies exception to FERPA allows for disclosures of PII without consent to “organizations conducting studies *for, or on behalf of*, educational agencies or institutions.” 20 U.S.C. § 1232g(b)(1)(F). The “for, or on behalf of” language indicates that the educational agency or institution to which the PII relates wants and agrees to the study being conducted and is aware of the study’s purpose and the intended use of results. NSBA suggests that if a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) wants to turn over non-consensual PII to an organization conducting a study then it should be required to first obtain written consent from the original disclosing educational agency or institution in which the educational agency or institution approves the release of PII to the organization conducting such a study.

Authority to Audit or Evaluate

First, NSBA found the discussion of this proposed change very confusing and difficult to understand. School administrators, parents, and other people not well-versed in FERPA may read the commentary to the regulations and will have difficulty comprehending this change unless it is clarified. NSBA suggests that in the final regulations DOE completely and clearly explains in the commentary exactly what it is trying to accomplish and provides a number of clear examples.

NSBA found the following two sentences in particular confusing:

However, we believe that our prior guidance and statements made in the preambles to the notice of proposed rulemaking published on March 24, 2008 (73 FR 15574), and the final regulations published on December 9, 2008 (73 FR 74806), may have created some confusion about whether a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) that receives PII under the audit and evaluation exception must be authorized to conduct an audit or evaluation of a Federal or State supported education program, or enforcement or compliance activity in connection with Federal legal requirements related to the education program of the disclosing educational agency or institution or whether the PII may be disclosed in order for the recipient to conduct an audit, evaluation, or enforcement or compliance activity with respect to the recipient's own Federal or State supported education programs.

And, second, the Department would clarify that FERPA permits non-consensual disclosure of PII to a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity with respect to the Federal or State supported education programs of the recipient's own Federal or State supported education programs as well as those of the disclosing educational agency or the institution.

DOE appears to be suggesting in this section that an educational agency or institution can disclose non-consensual PII to a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) so that such officials can use the data to evaluate *another* educational agency or institution's program, regardless of whether the authority to conduct such an evaluation is established by another law. If NSBA's understanding is correct, nothing in the FERPA statute states that a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) have authority to receive non-consensual PII from one educational agency or institution to evaluate another educational agency or institution. If Congress wanted the audit or evaluation exception to be so broad it could have written 20 U.S.C. § 1232g (b)(3) to clearly permit data sharing for evaluation purposes between all educational agencies or institutions. Furthermore, as a practical matter, this regulatory change could be very burdensome on school districts that will have to respond to countless data requests, not supported by any legal authority, to help officials evaluate other educational agency or institution's programs.

If NSBA is correct about what the deletion of § 99.35(a)(2) is intended to mean and if DOE concludes despite NSBA's objections that it wants this practice to be allowable under FERPA, NSBA does not think that deleting § 99.35(a)(2) will make DOE's intentions clear. If DOE wants this to be clear it needs to write a regulation stating that a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) has authority to collect non-consensual PII from one educational agency or institution to evaluate another regardless of whether the planned evaluation is authorized by any legal authority.

Limited directory information policy

First, NSBA would like DOE to clarify that under the proposed rules related to limited directory information policies, school districts that choose *not* to adopt a policy of limiting access to directory data for specific purposes or specific parties may still limit access to directory information to whomever they want for whatever reason they want *under FERPA* (state law may require disclosure). This is the case because FERPA does not require the mandatory release of information to anyone for any reason.

Second, regarding DOE's suggestion that school districts adopt non-disclosure agreements with parties to which they disclose directory data, NSBA suggests that such agreements are unrealistic. First, school districts may have difficulty identifying who may re-disclose data. Second, school districts have no authority and limited resources to enforce such agreements. Third, making recipients sign such agreements could be a significant administrative burden for school districts that receive many requests for directory data, even if they have adopted a limited directory information policy.

Respectfully submitted,



Lisa E. Soronen
NSBA Senior Staff Attorney

PUBLIC SUBMISSION

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| Status: Posted |
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| Category: State educational agency |
| Tracking No. 80e30aa1 |
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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0245
Comment on FR Doc # 2011-08205

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Organization: Virginia Department of Education
Government Agency Type: State
Government Agency: Virginia Department of Education

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



COMMONWEALTH of VIRGINIA

DEPARTMENT OF EDUCATION

P. O. BOX 2120
RICHMOND, VIRGINIA 23218-2120

May 24, 2011

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Proposed Amendments to FERPA Regulations (Docket ID ED-2011-OM-0002)

Dear Ms. Miles,

This letter is submitted to comment on the U.S. Department of Education's (ED) above-captioned proposed regulations applicable to the Family Educational Rights and Privacy Act (FERPA), as published in the April 8, 2011, Federal Register. The Virginia Department of Education (VDOE) has been a recipient of significant funds via the Statewide Longitudinal Data System grant program. VDOE is committed to continuing to enhance the data system to collect and use data to improve student achievement in the Commonwealth. These proposed regulations strike the needed balance between data use for the improvement of education and the privacy protection of educational records. Please consider the following comments and recommendations on the notice of proposed rulemaking.

Authorized Representatives (§§99.3)

The proposed regulation would add a definition of the term authorized representative. Under the proposed definition, an authorized representative would mean any entity or individual designated by a State or local educational authority or agency headed by an identified official to conduct – with respect to federal or State supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs.

We appreciate the added definition and are pleased to see that the term is applied in ways that permit states and local school districts the flexibility needed to accomplish critical work that requires personally identifiable information, including evaluations of federal and State supported programs.

Education Program (§§99.3)

The proposed regulations define the term "education program" to mean any program that is principally engaged in the provision of education, including but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an educational authority.

VDOE applauds the Department's broadening of the term education program. In order to understand and improve the business of education it is important for policymakers and practitioners to know the impact of services provided prior to kindergarten, outside the school day, and after high school

Ms. Regina Miles
May 23, 2011

graduation. With this expanded definition, state education agencies can evaluate appropriately and audit learning throughout the educational process.

Written Agreements (§ 99.31)

The proposed regulations would require written agreements between a State or local educational authority or an agency headed by an identified official and its authorized representative. The regulations propose specific points with regard to the content of these written agreements that include provision on purpose of the disclosure, time period for the work, and policies that protect against redisclosure.

VDOE agrees that formal written agreements provide necessary privacy safeguards while allowing for data to be used appropriately to evaluate education programs and provide information to improve student outcomes.

Reasonable Methods (§ 99.35 (a)(2))

The proposed regulations provide that the responsibility remain with the State or local educational authority or agency headed by an identified official to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA. No definition is given in these regulations as ED intends to issue non-regulatory guidance on the subject.

VDOE appreciates the flexibility offered by issuing non-regulatory guidance. The protection of student information is a top priority of state and local education agencies and methods used to ensure compliance with FERPA can vary based on available technologies and governance structures.

We would also like to offer the following points for consideration in defining guidelines around “reasonable methods” for ensuring FERPA compliance:

- The guidance should set the minimum standards for “reasonable methods” and leave flexibility for the states to define and implement processes and practices to meet those standards.
- The guidance should encourage differentiated solutions for meeting the needs for research and for maintaining security, privacy, and confidentiality.

Improper redisclosure of PII (§99.35 (d))

As written, the proposed provisions appear to mandate at least a five-year debarment in the case of any unauthorized redisclosure with no room to make a judgment as to whether that sanction is appropriate. While we recognize the seriousness of unauthorized redisclosure, VDOE recommends that ED further clarify the process required for disbarment from further disclosures, including what procedures will be used to ensure accurate and fair determinations in the case of a proposed debarment.

To ensure fairness and to make the remedy more realistic, we recommend that the proposed regulations authorize debarments against the particular departments or units of an agency or institution that are responsible for having made the improper redisclosures, rather than compelling debarment against the entire agency or institution. We also note by contrast that the principal means of enforcing FERPA — withholding ED funds from the agency or institution — is subject to provisions that provide the agency or institution an opportunity to come into voluntary compliance. That provision in the FERPA statute may not be applicable to the debarment remedy. However, in the spirit of that policy, we recommend that the regulation build in room for judgment by ED as to whether a debarment is appropriate and the scope and nature of that action.

Ms. Regina Miles
May 23, 2011

Enforcement Procedures (§ 99.60)

As written, the proposed new paragraph 99.60 (a)(2) could be interpreted too broadly, for example, to mean that ED could initiate enforcement proceedings against organizations that hold PII from education records even for reasons wholly disconnected with an alleged unauthorized disclosure, because the organization happened to receive funding from ED. This could seemingly authorize, for example, FCPO investigation into re-disclosure by a social services agency of an SSN that was given by a beneficiary to the agency not in connection with an education data re-disclosure, but in connection with an application for public benefits. VDOE recommends further clarification of this paragraph to avoid this interpretation.

Additionally, in the proposed new paragraph 99.60 (a)(2) the term “recipient” is used, but it is not clear whether the term is describing a “recipient of PII” or a “recipient of funds,” or both. In the provided guidance for this section under “Significant Proposed Regulations,” ED describes the proposed section as authorizing enforcement against “other recipients of Department funds under any program administered by the Secretary.” Thus, it would appear that the “recipient” in the proposed new paragraph would mean simply “recipient of funds.” For the reasons set forth above, however, this allows for too broad of an interpretation, and thus VDOE recommends clarification of this term to provide for enforcement only in those circumstances involving disclosures and redisclosures of PII from education records.

Finally, in the proposed new paragraph 99.60 (a)(2) the term “State or local educational authority” is used, but this term is not clearly defined here or elsewhere in the regulations. In the provided guidance for this section under “Significant Proposed Regulations,” ED provides an example of “State educational authorities” as “e.g., SEAs and State postsecondary agencies.” Moreover, in this same guidance section, ED asserts its history of providing non-regulatory guidance on the term “educational agency or institution” as not including “non-school types of entities” such as “State or local educational authorit[ies].” VDOE recommends additional clarification of these terms.

Sincerely,



Bethann H. Canada,
Director of Educational Information Management
Virginia Department of Education

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0246
Comment on FR Doc # 2011-08205

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General Comment

The attached comments on behalf of over 20 individuals, advocacy organizations, and agencies focus on the unique and significant impact of the FERPA regulations on children in foster care and the need for revisions to FERPA to address the unique situation of these youth. Education agencies and health and human services agencies across the country are increasingly seeking to share data and information to improve educational outcomes for children in care. However, obstacles to automated data sharing (both at the student specific and aggregate level) significantly impede the ability of both agencies to assess and respond to the educational needs of children in care or improve their poor educational outcomes. Moreover, obstacles to information-sharing between education and child welfare agencies related to individual students play a significant role in the wide academic achievement gap between children in foster care and their peers. We submit these comments and recommendations to promote necessary information exchange, while protecting and preserving the educational privacy rights of students and parents that FERPA is designed to safeguard.

Attachments

Comment on FR Doc # 2011-08205

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Washington, D.C. 20202-2641

The following comments were transmitted electronically via the internet at <http://www.regulations.gov>.

**Comments and Recommendations for Regulations under the
Family Educational Rights and Privacy Act**

Submitted By

**Education Law Center
Juvenile Law Center
And
All Undersigned Organizations and Agencies**

May 2011

Pursuant to the notice published in the Federal Register on April 8, 2011 (76 Fed. Reg. 19726), the undersigned organizations and agencies hereby submit comments and recommendations on regulations to be issued under the Family Educational Rights and Privacy Act (FERPA).

In framing our comments, we focus on the unique and significant impact of the FERPA regulations on children in foster care and the need for revisions to FERPA to address their unique situation. As discussed herein, education agencies and health and human services agencies across the country are increasingly seeking to share data and information to improve educational outcomes for children in care. However, obstacles to automated data sharing (both at the student specific and aggregate level) significantly impede the ability of both agencies to assess and respond to the educational needs of children in care or improve their poor educational outcomes. Moreover, obstacles to information-sharing between education and child welfare agencies related to individual students play a significant role in the wide academic achievement gap between children in foster care and their peers by, for example, contributing to inappropriate school placements, enrollment delays, and lost credits. We submit these comments and recommendations to effectively address these barriers and ensure and facilitate necessary information exchange, while protecting and preserving the educational privacy rights of students and parents that FERPA is designed to safeguard.

Who We Are

The Education Law Center – PA (“ELC”) is a non-profit education advocacy organization that advocates on behalf of Pennsylvania’s most educationally “at risk” children. In its more than 35

years of operation, ELC has contributed to policy reforms and also helped thousands of individual children in foster care obtain the educational services they desperately need to achieve life-long stability.

Juvenile Law Center (“JLC”) is the oldest multi-issue public interest law firm for children in the United States. JLC uses the law to ensure that youth, particularly those in the child welfare and juvenile justice systems, receive fair and developmentally appropriate treatment. JLC gives special attention to issues of access to education, physical and behavioral health care, employment and housing.

ELC and JLC work with parents, foster families, child welfare agencies, education agencies, and others to advocate for better educational opportunities for children in out-of-home care. JLC and ELC collaborate to improve educational outcomes for the thousands of youth in care in Pennsylvania and nationally through individual advocacy, impact litigation, and policy reform.

We are joined in these comments by a wide variety of organizations, agencies and advocates who work with or on behalf of children in foster care. The list includes representatives from both education and child welfare who share a common goal of meeting the educational needs of children in care.

OVERVIEW

The Achievement Gap

It is well documented that youth in foster care are among the most educationally at risk of all student populations. They experience lower academic achievement, lower standardized test scores, higher rates of grade retention, and higher dropout rates than their peers who are not in foster care.¹ Based on a review of studies conducted between 1995 and 2005, one report estimated that about half of foster youth complete high school by age 18 compared to 70% of youth in the general population.² Other studies show that 75% of children in foster care are working below grade level, 35% are in special education, and as few as 11% attend college.³

We know some of the specific barriers facing youth in care – high rates of school mobility; delays in school enrollment; inappropriate school placements; lack of remedial support; failure to transfer full course credits; and difficulties accessing special education services.⁴ We also know that some of these particular challenges are exacerbated and sometimes even created by the

¹National Working Group on Foster Care and Education statistics factsheet at <http://www.casey.org/Resources/Publications/pdf/EducationalOutcomesFactSheet.pdf> ?.

²Wolanin, T. R. (2005). *Higher education opportunities for foster youth: A primer for policymakers*. Washington, DC: The Institute for Higher Education Policy.

³Only 11% of the youth in foster care in Washington State who were in the high school classes of 2006 and 2007 were enrolled in college during both the first and second year after expected high school graduation. By comparison, 42% of Washington State high school students in the class of 2006 enrolled in college during the first year after they were expected to graduate from high school and 35% were enrolled in college during both the first and second year after graduating from high school (Burley, 2009).

⁴National Working Group on Foster Care and Education statistics factsheet at <http://www.casey.org/Resources/Publications/pdf/EducationalOutcomesFactSheet.pdf> ?.

inability of child welfare agencies and local educational agencies to access and share education records and data at a state or local level as well as the inability of foster parents, unaccompanied youth, surrogate parents and caseworkers to access education records at an individual level. For example, delays in school enrollment for this highly mobile population often occur when a child's initial entry into foster care or a subsequent placement change involves changing schools.^{5 6}

These delays are often caused by the failure to transfer records in a timely manner which often results from confusion about, or barriers created by, FERPA.^{7 8} Delays in school enrollment negatively impact students in many significant ways such as causing children to fall behind academically, forcing students to repeat courses previously taken, and undermining future attendance. A caseworker's inability to access education records also contributes to inappropriate classroom placements, and makes it more difficult to evaluate school stability issues or identify and address special education needs.⁹

A Unique Situation

Children and youth in foster care are in a unique situation that is unlike that of other students; it is a situation that is not addressed – nor perhaps contemplated - by FERPA regulations when initially drafted or thereafter. For a child who is in foster care, the child welfare agency and court have intervened to remove the child from the home of their parents and to make decisions about what is in the best interest of the child, in lieu of his or her parents. These decisions include determining their living placement, medical care, and deciding when and where a child will be educated. During the time that the child is under the care and responsibility of the child welfare agency, the agency is responsible for ensuring that his or her educational needs are met.

These children most often enter foster care abruptly. They are placed with an agency that lacks prior knowledge of the child's background or educational needs. And yet, it is the caseworker who is charged with the responsibility of determining a child's new living placement and, as part of that undertaking, is specifically obligated to consider the appropriateness of the child's current

⁵ One-fifth of the Illinois children aged 11 to 17 years old who entered foster care without first receiving in-home services were either not enrolled in school or had been absent for so long that they were effectively not enrolled. Many of these youth had become disengaged from school and remained disengaged after entering foster care (Smithgall, et al., 2010).

⁶ Approximately half of the caregivers of school-aged foster children in nine San Francisco Bay Area counties who were interviewed in 2000 had had to enroll their foster child in school, and 12% of those caregivers had experienced enrollment delays of at least two weeks (Choice, et al., 2001 [response rate; 28%]).

⁷ Forty-two percent of the 8- to 21-year-old New York City foster youth who were interviewed in 2000 had experienced a delay in school enrollment while in foster care, and nearly half of those who experienced a delay attributed it to lost or misplaced school or immunization records (Advocates for Children in New York, 2000).

⁸ More than three quarters of the California group home operators who were surveyed in 2000 reported that educational records for foster children in group homes are either "frequently" or "almost always" incomplete, 60% reported that the transfer of educational records is "frequently" or "almost always" delayed when youth change schools or group home placements, three quarters reported that youth recently placed in group homes experience long delays when attempting to enroll in public school, and more than two thirds reported that educational placement decisions were "frequently" or "almost always" compromised by incomplete school records (Parrish, et al. 2001 [response rate: 48%]).

⁹ Failure to immediately enroll foster children in their new school when they change schools during the school year was a major problem identified by the four focus groups conducted in California with representatives from child welfare, education, and other agencies as well as foster youth and caregivers (Zetlin, Weinberg, & Shea, 2006).

educational setting, decide whether it is in the best interest of the child to remain in the same school, or seek to immediately enroll a child in a new school with all of his or her school records. Without knowing the child, as a parent would, a caseworker who can't promptly access a child's education records cannot effectively make decisions in the child's best interests.¹⁰

Expanding Role of Child Welfare in Addressing Educational Needs

To improve the educational outcomes of children in foster care, federal law has historically placed a number of requirements on child welfare agencies related to education. Title IV-E of the Social Security Act has for a long time required child welfare agencies to maintain the child's "educational reports and records" in the family case plan.¹¹ The Child and Family Service Reviews (CFSRs), federal reviews that measure how states are meeting the needs of children in the foster care system, have always included a well-being benchmark focused on meeting the educational needs of children in care as part of that review. Specifically, child welfare agencies are evaluated on whether a child's education record is included in the case plan.

However, the most significant changes to child welfare law and a marked expansion of the responsibility of child welfare in addressing education issues occurred with the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections). Fostering Connections now requires significant responsibilities of child welfare agencies related to education. Child welfare agencies are mandated to, among other things: 1) ensure school stability for children in care (including immediate transfer of records when a child changes school); 2) ensure children are enrolled and attending school; and 3) consider the proximity and appropriateness of the school when making living placement decisions.¹² Additionally, most state laws mandate that a child welfare agency to whom legal custody of a child has been given by the court has the "right and duty" to provide for the education of the child.¹³

Despite these requirements, in many jurisdictions, child welfare agencies are often denied access to the educational records of the youth they serve. This significantly limits their ability to comply with child welfare legal requirements and address educational issues on behalf of their clients, resulting in delays in school enrollment, inappropriate school placements and lack of educational support, failures to receive full course credits, and difficulties accessing special education services.

Expanding Interagency Data Exchange and Interoperability

Additionally, states across the country have undertaken system-wide efforts to share data and information to assess and improve educational outcomes for children in care through cost-

¹⁰ As one signatory to these comments, Michael McPartlin of the City College of San Francisco Guardian Scholars Program noted, "[current] data standards for foster youth are abysmal. Collection of K-12 records is slow and impedes educators correctly guiding students resulting in unnecessary delays in completion of high school. This carries over to post-secondary where the local community college has to engage in a whole series of assessments due to lack of relevant primary or secondary school data being made available in a timely way. Learning and psychological disabilities are not known resulting in uninformed educational guidance."

¹¹ 42 U.S.C.A. § 675(1)(C).

¹² 42 U.S.C.A. § 675(1)(G) and 42 U.S.C.A. § 671.

¹³ See e.g., 42 P.a.C.S.A. § 6357.

effective and streamlined interagency data systems. The benefits of such interoperability are well known within the Department, particularly for highly mobile students, as it permits schools to better exchange data about students who move from one place to another. Interagency systems can be used to streamline, simplify, and reduce costs for federal and state data reporting requirements, thus easing the technical and administrative burden on reporting agencies. These efforts have been strongly supported by the Department. See <http://www.ed.gov/open/plan/digital-systems-interoperability>. However, these important efforts are often impeded by an inability to access any education data. Overall, information sharing between child welfare and education agencies is essential to ensuring that each agency meets its federal and state legal obligations and also meets the educational needs of these children.

These amendments are also needed to advocate for and advance interoperability, a relatively new term but not a new concept. Historically, it refers to “service integration” and breaking down the service silos that surround each of the distinct services which students and their families deal with on a daily basis. Interoperability involves how human need manifests itself in real life, which is complex and nuanced, with overlapping components, including but not limited to education, human services, health and behavioral health services, child welfare and juvenile delinquency services for children, youth and their families. For those many intersecting needs to be met for a child efficiently and effectively, and for the solutions in place to do the most good, education services must improve their ability to integrate and coordinate its services among the agencies intended to help the individual child, youth and family. Interoperability is about putting the children and youth at the center of the service spectrum and eliminating barriers between programs to make them easily navigable. For children and youth attending school, education services must be willing and accessible to integration. Therefore, FERPA must be amended to permit sharing information with other health and human services agencies involved with the individual child, youth and family.

To address these current barriers around data collection and information sharing between child welfare and education at both the aggregate and individual levels, we offer comments and make recommendations based on the following three objectives:

OBJECTIVE 1: Encourage and increase the collection of data and information sharing relating to the education of children in foster care. We believe this goal can be accomplished by supporting several of the proposed amendments and making minor changes to those proposed amendments to permit child welfare agencies at the federal, state, and local levels to access education records for the purpose of conducting audits, evaluations, and ensuring compliance with federal and state mandates.

OBJECTIVE 2: Ensure that child welfare agencies with legal custody of a student in foster care are able to meet federal and state legal requirements to address the educational needs of that child by having prompt and continued access to the student’s education records. We believe that this goal can be effectuated by creating a limited amendment to the parental notification and consent requirements, permitting disclosure to child welfare agencies in those cases where a student is in the custody of a child welfare agency.

OBJECTIVE 3: Ensure that the adults with special education decisionmaking rights for children in foster care are able to access education records and make decisions. We believe this goal can be effectuated by expanding the definition of parent to include “an IDEA parent.”

**COMMENTS AND RECOMMENDATIONS REGARDING
PROPOSED AMENDMENTS TO REGULATIONS UNDER FERPA**

1) OBJECTIVE 1: Encourage and increase the collection of data and information sharing relating to the education of children in foster care.

COMMENT: Collecting, evaluating, and sharing information regarding the education of children in foster care is essential to improving their poor educational outcomes. The information we gather and share across systems allows us to track trends, deficits, and improvements for children in foster care. It can help shape both education and child welfare policies, programs, and practices and support increased funding for effective programs. Moreover, in light of federal and state legal requirements on child welfare agencies related to education, information sharing and data collection between child welfare and education is essential to ensuring state compliance with federal and state mandates.

Specifically, Fostering Connections requires child welfare agencies to provide assurances that all children eligible under Title IV-E are enrolled in, and attending, school. In addition, this law requires child welfare agencies to ensure school stability for children in out of home placements by coordinating with local education agencies unless school stability is not in a child's best interest. Of course, ensuring that child welfare professionals are assessing a child's best interests, and ensuring school enrollment and attendance requires child welfare agencies to obtain information and records from education agencies.

Current data collection efforts, however, do not and cannot adequately serve these purposes, in part because of FERPA. Existing state-level or regional data is scattered and narrow in scope and is not shared across systems. We have insufficient national data that tracks children over time, consistently defines the scope of the population, or relies on consistent measures for assessing educational outcomes. A "silo effect" – in which the education agency does not know about the children's involvement in the foster care system, and the child welfare agency knows little about children's educational status and needs – further hinders data collection efforts and limits the ability of both agencies to improve educational outcomes.

Current FERPA regulations present barriers around the sharing of personally identifiable education records for the purpose of ensuring compliance with applicable laws and also improving educational outcomes of children in care, which has increasingly become a focus of both child welfare and education agencies. By amending FERPA regulations to facilitate data collection and information sharing across these agencies, while adequately maintaining confidentiality protections in the manner described by the proposed amendments, we can significantly improve educational outcomes for children in care.

RECOMMENDATIONS: We strongly support the following proposed regulations on the ground that they will operate to significantly expand the ability of states, school districts, educational institutions, and research institutes to collect and analyze data regarding children in care by authorizing the sharing of educational records for research and expanding the definitions of "authorized representative," "education program," and "authority to audit or evaluate."

a) Support and further expand definition of “authorized representative” (§ 99.3; § 99.35)

FERPA currently allows an education agency or institution to disclose personally identifying information (PII) to an “authorized representative” of a state or local educational authority or an agency headed by an official, without prior consent, “for the purposes of conducting – with respect to federal or state supported education programs – any audit, evaluation, or compliance or enforcement activity in connections with federal legal requirements that relate to those education programs.” While previously “authorized representatives” could not include other state agencies, such as health and human services departments, the proposed regulations would expressly permit state and local education authorities to exercise discretion to designate other individuals and entities, including other governmental agencies, as their “authorized representatives” for evaluation, audit, or legal enforcement or compliance purposes of federal or state-supported education programs.

We strongly support this inclusion, and are confident it will lead to an increased ability to conduct evaluations of federal and state supported education programs. As the example from the comments suggests, there would be no reason for a human services or labor department not to serve as the “authorized representative” and receive non-consensual disclosures of PII for the purpose of evaluating federal legal requirements related to federal or state-supported education programs.

However, because of the clear education-related federal legal requirements on child welfare agencies, we propose an expansion of the definition of “authorized representative” to include: “any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct – with respect to Federal or State supported education programs – any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs or Federal and State education-related mandates governing child welfare agencies, including monitoring of education outcomes of children under their care and responsibility.”

To appropriately protect the privacy of children and parents, we fully support the proposed requirement of written agreements between a state or local educational authority or agency headed by an official and its “authorized representatives” that require among other things, that they specify the information to be disclosed and the purpose of obtaining it. This is an added layer of protection around confidentiality of records and encourages agencies to clearly document their collaboration around sharing education records and act with fidelity to ensure compliance. For the purposes of child welfare agencies, they would not have access for purposes other than those required of them by federal or state law (*i.e.* the requirement that they ensure that children eligible for federal reimbursement of foster care are enrolled and attending school).

b) Support expanded definition of “Education Program” (§ 99.3, § 99.35)

FERPA currently allows “authorized representatives” to have non-consensual access to PII in connection with an audit or evaluation of federal or state-supported “education programs,” or for the enforcement of or compliance with federal legal requirements that relate to those programs. The proposed regulations define the term “education program” as any program that is principally engaged in the provision of education, including, but not limited to early childhood education,

elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an educational authority.

We certainly support this expanded definition. This change will enable the state education agency to identify, for example, a state health and human services agency that administers early childhood education programs, as the “authorized representative” in order to conduct an audit or evaluation of any federal or state supported early education program, such as the Head Start program.

c) Support and expand authority to support “research studies” (§ 99.31(a)(6))

We support the proposed changes to clarify that nothing in FERPA prevents education agencies from entering into agreements with organizations conducting studies to improve instruction, etc. and redisclosing PII on behalf of the education agency that provided the information. However, to meet the needs of children in foster care, we propose that the following language be added to the list of objectives for which studies and disclosure of PII is authorized. Specifically, in addition to “improving instruction, administering state aid program and developing and validating tests,” we propose an amendment to include: “assessing the educational needs of students under the care and responsibility of the child welfare agency.”

2) OBJECTIVE 2: Ensure that child welfare agencies with legal custody of a student in foster care are able to meet the educational needs of that child by having prompt and continued access to the student’s education records.

COMMENT: To comply with federal and state legal requirements, and to ensure that the educational needs of children in their care are met, child welfare agencies and dependency courts must have prompt and continuing access to the education records of children in foster care. As described above, federal law currently places a number of education-related requirements on child welfare agencies that necessitate access to education records and information. Specifically, child welfare agencies must: 1) maintain the child’s educational records in the case plan;¹⁴ 2) ensure school stability for children in care (including immediate transfer of records when a child changes school); 3) ensure children are enrolled and attending school, and 4) consider the proximity and appropriateness of the school when making living placement decisions.¹⁵ Unfortunately, in many jurisdictions, child welfare agencies are denied access to the education records of the youth they serve – limiting their ability to comply with child welfare legal requirements and address educational issues on behalf of their clients.

RECOMMENDATIONS: The goal of these two recommendations is to ensure that child welfare agencies have the necessary access to education records to meet their federal and state legal responsibilities. For children under the care and responsibility of the child welfare agency, there is a clear duty to provide for their educational needs. Furthermore, because of the sensitivity of the information around child welfare cases, child welfare agencies are already bound by stringent federal and state confidentiality laws and safeguards that strictly limit redisclosure of information relating to a child in their care. To meet obligations imposed on

¹⁴ 42 U.S.C.A. § 675(1)(C).

¹⁵ 42 U.S.C.A. § 675(1)(G) and 42 U.S.C.A. § 671.

child welfare agencies who are acting *in loco parentis*, they must have timely access to education records.

To meet this critical need, we suggest two recommendations. The first recommendation creates an exception so that when a child is in the custody of a child welfare agency, information relevant to the child's education can be shared with that custodial agency. The second recommendation clarifies that, for purposes of the court order exception, additional notice is not necessary for parents who are parties to a dependency case. Both of these changes are necessary to give jurisdictions flexibility as to how to permit records to be shared with child welfare agencies. In some communities, obtaining a court order to share these records with the custodial child welfare agency (as well as with other relevant parties including children's attorneys and advocates) will be a direct and efficient process. In other communities, where courts have not, will not, or cannot in a timely manner issue such orders, the new exception to allow access to custodial child welfare agencies will be more advantageous. Each change allows states and communities flexibility to determine the most appropriate option to allow child welfare agencies access to needed education records.

a) Create a new exception to allow child welfare agencies access to records:

A variety of other exceptions to parental consent already exist, including an exception for the juvenile justice system. This new exception would permit schools to allow access to education records to child welfare agencies in those cases where the child welfare agency has care and responsibility for a student.

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests...

(17) The disclosure is to the state or local child welfare agency with custody of a student. Re-disclosure by child welfare agency shall be permitted in compliance with federal and state child welfare confidentiality laws and policies.

b) Clarify in regulations that additional notice of disclosure is not required under the existing court order exception for dependency cases because parents already have been provided notice through the court case (34 C.F.R. § 99.31(a)):

FERPA currently allows for release of education records without parental consent under a court order, as long as parents are provided advance notice of the release, and an opportunity to object. However, in child welfare cases, the parent is already a party to the case where the court order is being issued and therefore already has the opportunity to challenge the release of school records if they so desire. To require schools to "re-notify" parents who are already on notice of the court order is redundant and serves as an unnecessary barrier. Therefore, the following clarification would prevent the need for additional notification for parents who are parties to the dependency case.

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with--

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An ex parte court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(D) A court order issued in a dependency case.

3) OBJECTIVE 3: Ensure that the special education needs of children in care are met.

COMMENT: The current definition of parent under FERPA is as follows: “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” It is estimated that between one-third and one half of children in foster care need special education services compared with eleven percent of all school age children.¹⁶ Under the Individuals with Disabilities Education Act (“IDEA”) a child who receives special education services is represented by an “IDEA parent” throughout the special education process.¹⁷ The duties of an IDEA parent include: consenting to an evaluation to determine eligibility; participating in decisions regarding the special education services a student receives; and challenging a school district’s decision through a hearing and appeal process. In many cases, youth who are in the child welfare system are represented by “surrogate parents” who may be appointed by a school district or by a judge to serve in this capacity.¹⁸ These surrogate parents, like all other IDEA parents, must be able to obtain prompt and continued access to education records of the children and youth they represent.¹⁹ Frequently the foster parent is the IDEA parent. Without these IDEA parents to advocate for them, children in care often cannot gain access to the special education services they require, or the IDEA parents is forced to act as a rubber stamp for school district’s proposal.²⁰ In addition, an IDEA parent is

¹⁶ Terry L. Jackson & Eve Müller, *Foster Care and Children with Disabilities* (National Association of State Directors of Special Education, Inc., Forum, February 2005), available at http://www.dredf.org/programs/clearinghouse/Forum-Project_Foster-Care-and-Children-with-Disabilities-overview_Feb05.pdf.

¹⁷ 20 U.S.C. §1401(23).

¹⁸ 20 U.S.C. §1415.

¹⁹ Amy Levine, *Foster Youth: Dismantling Educational Challenges*, Human Rights, Fall 2005, Vol. 32, No. 4, p.5. Available at <http://www.abanet.org/irr/hr/Fall05/fosteryouth.html>.

²⁰ *Id.*

closely involved in the student's educational life and is well-positioned to determine whether and under what circumstances disclosure of the student's education records should be permitted.

RECOMMENDATION: In light of the critical role of IDEA parents in advocating on behalf of children in care, we strongly urge that the definition of parent set forth in the FERPA regulations be amended to make explicitly clear that this includes IDEA parents. Expanding the definition of parent in this way will ensure that all IDEA parents are able to obtain prompt and continued access to the education records of the students with disabilities they represent.

a) Clarify in regulations that definition of "Parent" includes a child's IDEA parent (34 C.F.R. §99.3)

We propose that the current definition of parent be expanded to include a specific reference to an "IDEA parent" as defined under 34 C.F.R. § 300.300(a).²¹

"§99.3...

'Parent' means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian, or an IDEA parent as defined by 34 C.F.R. § 300.300(a) who is acting on behalf of the student."

Conclusion

We greatly appreciate your consideration of these Comments. We believe that addressing the current obstacles to information-sharing and data collection between education and child welfare is critical to closing the achievement gap for children in foster care.

By creating a FERPA exception to authorize child welfare agencies to access education records of children in their custody, state and local agencies can effectively address the educational needs of children in care and ensure full compliance with new federal and state mandates. The proposed changes will also greatly facilitate and support the growing collaboration between education and child welfare to collect and analyze data and develop reforms to improve educational outcomes for this educationally at-risk population.

Thank you for this opportunity to present comments to these important regulations. For further information please contact:

Jessica Feirman

Maura McInerney

²¹ **34 C.F.R. 300.300** – [Definition of "parent" in conjunction with IDEA regulations]

"(a) Parent means--

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act."

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

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Comment on FR Doc # 2011-08205

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Government Agency Type: State
Government Agency: Oregon Department of Education

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

SUSAN CASTILLO
State Superintendent of Public Instruction



OREGON DEPARTMENT OF EDUCATION
Public Service Building, 255 Capitol Street NE, Salem, Oregon 97310
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May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue
Washington, D.C. 20202

Subject: Comments on Proposed Amendments to FERPA Regulations

Dear Ms. Miles,

Thank you for the opportunity to participate in the process of amending the Family Educational Rights and Privacy Act (FERPA). This letter includes our comments, recommendations, and clarifying questions in response to the notice of proposed rulemaking published in the Federal Register on April 8, 2011. This comment was developed by the Oregon Department of Education, in consultation with our statewide longitudinal data system (SLDS) partners.

GENERAL COMMENTS

In general, we are pleased with the direction and intent of the proposed changes to the FERPA regulations. In our efforts to improve public education, quality data is integral to informed decision-making. We agree with language from the CCSSO comment, "The proposed changes to the FERPA regulations will allow us to facilitate better research and evaluation using our statewide longitudinal data systems (SLDS)..." We are pleased the proposed amendments will allow increased coordination between data partners. Furthermore, we applaud the intention to increase enforcement and strengthen data protection practices.

Please consider the following comments and recommendations on the notice of proposed rulemaking.

AREAS OF CONCERN OR IN NEED OF CLARIFICATION

1. Scope of Enforcement and Reporting Requirements

Under the proposed regulations, USED will have the authority to investigate and enforce sanctions on entities receiving USED funds that have been found in violation of the law. It is unclear to our department how this will affect contractors. For example, if a contractor at a for-profit entity violates the law while performing work for a USED funded agency, what is the liability of that institution? If an institution suspects there has been a violation, what is that institution's responsibility for reporting? Under the proposed rules, it is not clear how contractors are subject to this rule.

Recommendation: Clarify the enforcement and reporting language surrounding contractors.

2. Debarment

In our reading of the proposed changes, we believe it is implied that individuals found to be in violation of the law will be disbarred. It is our belief that the offending organization, not just the individual, should also be barred from funding and access to data.

Additionally, while our Department supports effective penalties for violating FERPA laws, we would also suggest remediation as an option. In some instances, a violation may not be so egregious as to warrant immediate debarment. In other cases, debarment of a contractor or partner agency may place a financial burden on an institution or impede implementation of a SLDS. Remediation can be an effective and preventative tool when used to correct procedures or behaviors that have lead to a limited violation.

Recommendation: Clarify the intent of the rule to specify if it is the individual, the institution, or both that will be disbarred. It is our recommendation that the institution be included. We recommend including remediation as a more moderate intervention in cases of limited violation.

3. Various Entities

The proposed language of the rule uses multiple terms in reference to entities. It is not clear to this Department if there is a distinction between the terms: agency, institution, and authority, or if these terms may be used interchangeably.

Recommendation: Include definitions for these terms if there is a distinction between them. If there is no distinction, simplify the text by using a single term.

4. Definition of "Educational Program"

It is the opinion of this Department that the definition of an educational program is insufficient for use with early childhood programs. In many instances, data is collected from sources that may not be *principally engaged* in education. These sources include Women, Infants and Children (WIC) nutrition programs and child care programs. We would like to see language that describes and includes programs and agencies whose data is integral to early childhood data collection. Specifically, we would like clarification that data collected from these programs and agencies is covered by FERPA once we have it, even if these agencies would not be described as *principally engaged* in education.

Additionally, it is not clear whether the definition of an educational program includes programs that focus on the education of parents and families or if it is limited to just the child. For example, would work with pregnant mothers through Early Head Start be considered an educational program?

Recommendation: Clarify the definition of an educational program to include programs relevant to early childhood. It is our recommendation that this definition include programs that educate parents and families. Specify that data collected from relevant, yet potentially non-educational programs is covered under FERPA once entered into the SLDS.

5. Use of Social Security Numbers as a Linking Mechanism

In our efforts to build a robust SLDS that contains workforce information, we have been hampered by rules preventing the exchange of social security numbers. In most cases, the social security number is the primary, and most logical linking field to connect education and workforce records. Explicitly allowing the use of SSN for this purpose will lead to improved data quality and will enhance research efforts.

Recommendation: Amend the rule to explicitly allow the exchange of social security numbers as a linking mechanism for workforce information.

6. “Reasonable Methods”

Though this Department appreciates the flexibility in the proposed rule for states to define “reasonable methods” for themselves, this term is too vague. This will leave data protection methods open to too much interpretation and variability. It would be helpful, particularly for states involved in regional data sharing, to have defined minimum reasonable standards. These standards should refer to appropriate state laws. For example, how should data be protected during transit versus when it is at rest? Minimum standards could address the judicial use of firewalls and masking of data fields with highly sensitive information. At a minimum, we would ask that encryption standards be specified for data.

Recommendation: Expand the definition of “reasonable methods” to include minimum standards for data protection and encryption. It is our recommendation that the language should direct organizations to consult applicable state laws.

7. Written Agreements

The proposed language refers to “written agreements” between institutions and authorized users of data. Rather than vague terms like “agreement” and “contract,” we proposed these agreements be formally called “data exchange agreements.” This is an industry-standard term in information security and will clarify the intent of the agreements.

Recommendation: Amend the proposed language, replacing “written agreement” with “data exchange agreement.” Require as a component of the agreement that any authorized users who will conducting research with the data must provide documentation indicating current IRB protocols are in place.

We support the direction and intent of the proposed amendments to FERPA. However, we believe further clarification is necessary to strengthen data protection requirements and to better facilitate the exchange of data between SLDS partners. Please consider the recommendations detailed in this letter to modify and refine the final amendments.

If you have any questions regarding this comment, please contact Katie Bechtel, Enterprise Communications Coordinator at (503) 947-5632 or by email at katie.becht@state.or.us.

Sincerely,

Doug Kosty
Assistant Superintendent of Assessment and Information Services
Oregon Department of Education

Josh Klein
Chief Information Officer
Oregon Department of Education

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Organization: Wisconsin Department of Public Instruction
Government Agency: Department of Public Instruction

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Tony Evers, PhD, State Superintendent

Re: Docket ID ED-2011-OM-0002

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-5920

RE: Comments on Proposed Amendments to FERPA Regulations

Dear Ms. Miles:

Thank you for the opportunity to comment on the proposed regulations. I fully support efforts to revise FERPA regulations to allow for efficient, safe, and confidential education data exchange.

A comprehensive state longitudinal data system that stretches from pre-kindergarten through postsecondary is necessary to conduct a critical review of effectiveness of educational methods and strategies in order to improve academic achievement, increase graduation rates, prepares students for the workforce, and close the achievement gap. While changes made to FERPA in 2008 were welcome and have assisted in this endeavor, there are still areas of confusion and concern. The requirements of America Competes Act as well as other federal education grants are at times in conflict with the data restrictions in FERPA. Therefore, changes to FERPA regulations that allow an education agency, whether the agency is a local education agency, a post-secondary institution, a state education authority, or a state higher education agency, to exchange data with other agencies about education programs is essential. Furthermore, the ability of these agencies to work with researchers to conduct the analysis is also essential.

Sincerely,

A handwritten signature in black ink that reads "Tony Evers".

Tony Evers, PhD
State Superintendent

TE/jk

Enclosure

Re: Docket ID ED-2011-OM-0002

Comments from Wisconsin State Superintendent of Public Instruction and the Wisconsin Department of Public Instruction

Support of proposed provisions:

- Wisconsin would like to commend the Department of Education on clarifying the issues surrounding pupil privacy and data sharing for the purpose of conducting research studies leveraging data contained in the State Longitudinal Data System. The clarifications provided by the Department allow Wisconsin to move forward with plans to foster research partnerships using SLDS data on questions of particular interest to the state.
- Wisconsin also commends the Department for clarifying the enforcement mechanisms in place for violations of FERPA. These regulations provide clarity and inform all parties involved in a data sharing agreement of the ramifications of any breach.
- Wisconsin welcomes the change to allow the disclosure of data from postsecondary institutions to SEAs and LEAs for the purpose of evaluating the effectiveness of K-12 programs in preparing students for college. This is a vital update to FERPA to allow P-20 data agreements to move forward and be used for guiding best practice at the K-12 level.
- The state also is pleased about the clarification of rules for sharing data among agencies to audit or evaluate education programs. Such a change will build a greater understanding of all of the programs that affect students and make evaluations of the effectiveness of these programs possible. This is a welcome development.
- Appreciate the guidance on the required components of written agreements with authorized representatives. This guidance creates clarity around what is necessary for SEAs to specify with an authorized representative before entering into a formal legal partnership with them.

Areas in need of clarification:

- We would ask that the definition of education program, as given in 99.3 and 99.35 be clarified with language like the following: “*Education program* means any program that is principally engaged in the provision of education to students in early childhood through postsecondary, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education.”
- Reasonable methods. As used in 99.35(a) (2)

Currently, Wisconsin includes such reasonable methods in any data exchange. These include requirements that limit access to identified individuals, require training of people

who access the data, storage security requirements to prevent unauthorized access, and the return of data or evidence of destruction of data at the conclusion of the study. We also reserve the right to review any document being published as a result of the data to insure proper suppression of data to prevent the inadvertent identification of a pupil. While Wisconsin believes it has a reasonable method of ensuring the protection of pupil privacy, it is probably different from that required by other states or institutions. The trend in data analysis and education research is to do comparisons across institutions and jurisdictions. It would be helpful to have a standard of “reasonable methods” that could be used by all state or local educational authorities.

Such security protocols are amendable to nonregulatory guidance; however, suppression rules need to be more uniform. While nonregulatory guidance would be helpful and the Privacy Technical Assistance Centers will be useful, the department should consider codifying, through this regulation, suppression rules.

- The NPRM uses the phrase “audit and evaluation” at several points. We would ask for clarification about the definition of both audit and evaluation and the distinction between the two. Evaluation could be defined as “Evaluation includes all manner of studies, assessments, measurements, appraisals, research, and other efforts, including analyses of statistical or numerical data derived from education records.” Which is consistent with previous statements by USED in the 2008 NPRM.

Recommended additions

- We would ask for specific guidance from the Department on the proper suppression rules of publically reported data to create consistency across states in reporting.
- The DPI would request specific guidance about data sharing and security with partners who may host data overseas. We would suggest that no personally identifiable information from an educational agency be allowed to be stored in a data system outside the jurisdiction of the United States.
- Clarify the statute, ownership and privacy of data associated with the *National School Lunch Program Act (NSLP)*. While we recognize the USDA regulations currently control this data, the USDOE should recognize that socio economic status is of great interest in evaluating the effectiveness of programs. Generally, the only economic status data collected by schools is that required for the NSLP. By assigning income data collected under the NSLP as strictly under the regulations of USDA (even though it is a record collected and maintained by a school, concerning and enrolled student), separate privacy rules, that are more restrictive for this subset of data, have developed. This is burdensome and creates confusion due to the apparent overlap with reporting requirements in NCLB for economically disadvantaged students. (For an example of how this has been handled with other types of data, see the HIPAA/FERPA resolution).

- Given the severity of the penalty by debarring access to personally identifiable information for five years we would seek guidance on the entities that are subject to this penalty. For example, if an LEA improperly discloses PII on students in its district, can it be subject to this penalty? Or, if it is found that an SEA has improperly disclosed, it seems to prohibit an LEAs release of data that may otherwise be required by state and federal law to be sent to the SEA. Similarly, if an institute of higher education has been found to have improperly disclosed, it seems to prohibit either an LEA or SEA from providing data that would assist a pupil applying for admission or attending said institution. The proposed regulations are not clear on this. We would also suggest that the procedure for reviewing the violation and assessing the penalty be made clear. Will there be an opportunity for the authorized representative to appeal the decision?
- Wisconsin would also request that the Department consider revisiting the recordation requirements for logging access to student records. As LEAs and SEAs rollout technology solutions for accessing and viewing data in their longitudinal data systems the frequency of access to student education records will increase dramatically. According to guidance previously received from FPCO, we are under the understanding that SEAs and LEAs are required to log whenever a student record is accessed to build a summary report of aggregate, but non-redacted, data. Does this also apply whenever an individual student record is accessed by an authorized representative in digital form? Whenever data is disclosed to an outside agency for purposes of an audit or evaluation? Specific guidance about which types of disclosures of a student's academic record must be logged and which are considered routine should be given to avoid considerable additional reporting requirements for LEAs and SEAs. The access logs for student records could easily grow to be larger than the student records themselves if each time a software tool queries student records to generate a report must be logged and stored.

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Family Educational Rights and Privacy

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Comment on FR Doc # 2011-08205

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General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

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May 23, 2011

Ms. Regina Miles
U.S. Department of Education
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Washington, DC 20202-7100

Re: Comments on **ED-2011-OM-000**

Dear Ms. Miles:

Attached are comments submitted by the Center for Law and Education in response to the Notice of Proposed Rulemaking (April 8, 2011) re: the Family Educational Rights and Privacy Act. We have identified areas of concern in which we believe that Department's proposed revisions to the regulations promulgated under FERPA are inconsistent with the statute and ought to be addressed more appropriately through legislation. We are especially concerned that the Department's proposed changes to non-consensual disclosure of personally identifiable information for the purpose of creating a more robust SLDS compromise the privacy rights of eligible students and/or parents.

The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities -- from federal policy through state and local implementation.

The following organizations join CLE in submitting these comments:

Council of Parent Attorneys and Advocates (COPAA)
ECAC - Exceptional Children's Assistance Center
Exceptional Parents Unlimited, Central California PTI
Parent Information Center of New Hampshire
PTI Nebraska
Statewide Parent Advocacy Network

We appreciate this opportunity to comment and would be pleased to discuss with the Department constructive approaches for addressing any of the issues we have flagged.

Yours truly,

Kathleen B. Boundy
Co-Director

Enclosure/Attachment

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**Comments of the Center for Law and Education
to NPRM re: Family Educational Rights and Privacy Act
(FERPA), 76 FR 19726, April 8, 2011**

U.S. Department of Education Docket ID: ED-2011-OM-0002

General Overriding Concern

In the preamble to the NPRM under the Family Education Rights and Privacy Act (FERPA) issued in the Federal Register (76 FR 19726) April 8, 2011, the U.S. Department of Education (ED) indicates that it is proposing revised regulations under FERPA based on provisions in the American Recovery and Reinvestment Act (ARRA) that relate to the expansion and development of a State Longitudinal Data System (SLDS) consistent with the COMPETES Act. The ARRA provided an infusion of federal funds on a competitive basis to a limited number of States to improve their education data capabilities, including to the extent they did not already do so, assigning all students a unique Statewide student identifier, and collecting such data as yearly test records, student level transcript information, including courses completed and grades earned, college readiness test scores, information about transition from secondary to postsecondary education, including participation in remedial work, and postsecondary and work force information. Because ED recognizes that explicit provisions of FERPA and its current regulations may restrict non-consensual disclosure and re-disclosure of personally identifiable information (PII) in students' education records – information that would help to build the State grantees SDLS and make the system more useful ED has proposed regulatory revisions to allow significantly greater flexibility for inter-agency exchange, including among non-educational agencies and institutions.

While the purpose of making the SLDS more robust and useful to multiple State agencies (not only agencies with direct control of educational agencies and institutions) may help enhance the accountability and monitoring of program quality and effectiveness, the Center for Law and Education (CLE) believes that the proposed changes to the regulations are not consistent with, and undermine, the explicit protections set forth in FERPA, as the authorizing statute. The proposed changes in the regulations reflect serious policy decisions in which the stakeholders – i.e., parents and eligible students whose PII from their education records are at issue – have had minimal opportunity for reflection, discussion, debate and review despite the potential and serious harm that might result to them through disclosure and re-disclosure of PII without adequate safeguards and protections to individuals or entities not under the direct control of the educational agencies and institutions entrusted with such PII. Given the plain language and intent of FERPA to protect disclosure of PPI from students' education records without prior consent by eligible students or parents, CLE believes that the kind of changes proposed in the NPRM should properly and lawfully be made through statutory amendment to 20 U.S.C. §1232g, and not by revisions to regulations that arguably undermine the protections of the law which, as enacted, was designed to be strictly read and narrowly construed.

Moreover, prior to the introduction of any statutory changes to FERPA for the purpose of facilitating a more robust SLDS, CLE would encourage a study by the Government Accounting Office (GAO) to

examine the extent to which barriers exist under current protections, including but not limited to, non-consensual disclosure of PII under FERPA, that impede effective research and evaluation of educational agencies and institutions and other federal and State supported programs, including those primarily for the purpose of education, that are or may be relevant to children and youths' academic achievement and success in attaining improved educational outcomes. In addition, it would be important for GAO to consider the trade-offs in attempting to balance the facilitation of research and evaluation with the impact on loss of individual rights to privacy and expectations of not disclosing without prior consent PII.

Specific Comments on Proposed Regulations

Definitions (§ 99.3)

ED seeks to build the SLDS and make it more robust and useful by accessing and sharing PII student and family data across State agencies. This outcome is primarily accomplished by ED's proposing to expand two regulatory definitions under FERPA – "authorized representative" and "education program." Together the proposed changes to these definitions have the effect of substantially modifying FERPA by impinging upon privacy rights and protection from non-consensual disclosure of PPI that parents and eligible students possess under current law.

CLE's Position: CLE opposes the proposed changes to the regulations because they are not consistent with the statute. If such changes are believed to be warranted, changes ought to be made through amendment of the statute following open debate, review and discussion of potential benefits and harm from changes in students' expectations of privacy in PII contained in their education records, and consideration of additional, necessary protections from disclosure and re-disclosure of PII.

- **Authorized Representative (§§ 99.3, 99.35)**

ED proposes a new regulatory definition of an "authorized representative." The new proposed definition would expand the term beyond authorized representatives of only those individuals explicitly referenced by statute (i.e., Comptroller General of the United States, the Secretary, or State educational authorities), who have access to student or other records for a statutorily specified purpose – as "may be necessary in connection with an audit and evaluation of Federally supported education programs or in connection with Federal legal requirements that relate to such programs" – or the authorized representatives of the U.S. Attorney General for law enforcement, to include additionally "*any individual or entity designated by a State or local educational agency authority*" to carry out audits, evaluations, or compliance or enforcement activities relating to "*education programs.*"

Because the plain language of FERPA is restrictive and the term "authorized representative" has been interpreted as limited to the officials so designated and does not include other State or federal agencies because they are not under the direct control (e.g., employees or contractors) of a State or local educational agency, [see 76 FR 19728], ED cannot point to the authorizing statute to support the proposed loosening of this authority to access, disclose, and re-disclose PII without prior consent. Indeed, ED acknowledges this "truth" that was incorporated in the preamble to the final FERPA regulations published on December 9, 2008 (73 FR 74806, 74825). However, because ED has changed its mind, and no longer believes that FERPA [irrespective of its statutory language at 20 U.S.C. §1232g(b)(1)(C) and (3)] limits authorization to PII to those either listed specifically in the statute or to authorized representatives under the direct control of State educational authorities for purposes of audit and evaluation of federally supported education programs, or in connection with the enforcement of Federal legal requirements, ED cites its own previously modified regulations to justify this foray into undermining the statutory limitations and protections provided by FERPA.

ED attempts to justify the proposed changes by referencing its prior changes in the 2008 *regulations* that expanded re-disclosure authority as well as the preamble discussion to those regulations, both of which ED suggests “promote the development and expansion of robust SLDS” (76 FR 19727). In the current preamble to the NPRM, ED suggests that, in light of Congress’s intent in the ARRA to have States link data across the sectors, it is necessary [apparently notwithstanding the language of the statute and prior interpretations of “authorized representative”] “to clarify” that PII information may be disclosed without prior consent to an entity or an individual (authorized representative) who is not under the *direct control* of the educational agency or institution. 76 Fed. Reg. 19728. To get around this statutory limitation, ED proposes a new regulatory definition of an “*authorized representative*” that would encompass “*any individual or entity designated by a State or local educational agency authority*” to carry out audits, evaluations, or compliance or enforcement activities relating to “*education programs*.” [As discussed below, by defining the term “education programs” broadly, ED’s proposed change will enable those individuals and entities designated as “authorized representatives” to seek access to and disclose without prior consent PII data from records in the possession, custody, and control of an expanded set of programs in addition to programs receiving Federal education support].

ED rationalizes that this change in the regulations is needed because educational agencies or institutions cannot disclose educational records without prior consent to entities over which they do not have “direct control” with respect to the use and maintenance of education records. See 34 C.F.R. §99.31(a)(1)(B)(2). ED perceives this as a problem because a State educational agency (SEA) is not able to disclose PII from student academic records to another State agency, such as a State department of labor or human services, because it does not have “direct control” over the other agency. In the preamble to the proposed regulations, ED states that there is no reason why a State health and human services or labor department, for example, should be precluded from serving as the authorized representative and receiving non-consensual disclosures of PII to link education, workforce, health, family services, and other data for the purpose of evaluating, auditing, or enforcing Federal legal requirements related to Federal or State supported education programs.

Moreover, ED proposes three additional changes to § 99.35 to ensure “that PII, including PII in SLDS, will be appropriately protected while giving each State the needed flexibility to house information in a SLDS that best meets the needs of the particular State.” 76 FR 19729. First, under proposed § 99.35(a)(2), ED would require the State or local educational authority or agency to use “reasonable methods” to ensure that the designated authorized representative: uses the PII only to carry out audits, evaluations, or enforcement or compliance activities related to education programs; protects the PII from further unauthorized disclosures or uses; and destroys the PII in accordance with FERPA requirements. ED, however, purposefully chose not to define the term “reasonable methods” in order to provide flexibility for the State or local educational authority or agency. ED is soliciting comments on what might be considered “reasonable methods” in order to issue non-regulatory guidance on this matter at a later date. 76 FR 19728. Second, under proposed § 99.35(a)(3), ED would require the State or local educational authority or agency to “use a written agreement” that would: designate the individual or entity as an authorized representative; specify the information to be disclosed and that the purpose is to carry out an audit, evaluation, or enforcement or compliance activity for an education program; require the authorized representative to destroy or return to the State or local educational authority or agency the PII when the information is no longer needed; specify the time period in which the information must be returned or destroyed; and establish policies and procedures to protect the PII from further unauthorized disclosure or use. Third, under proposed § 99.35(d), ED would clarify that if the Family Policy Compliance Office finds that a State or local educational authority or agency or an authorized representative improperly re-discloses PII, the educational agency or institution from which the PII originated would be prohibited from permitting the authorized representative or the State or local educational authority or agency (or both) access to the PII for at least five years.

CLE’s Position: CLE does not support the proposed expanded definition of “authorized representative” as set forth in the NPRM. The new proposed definition is overly broad and not consistent with the specific statutory language in FERPA. Access to PII in students’ records is neither limited to the statutorily identified personnel nor limited, as per the statute, to the identified functions of such officials. 20 U.S.C. §§1232g(b)(1)(C), (b)(3). Of particular concern to CLE is the shift from the current protective regulatory language that restricts access to, use of, and re-disclosure of PII from students’ educational records without prior consent of eligible students or parents to school officials and those under their direct control having a legitimate educational interest, to an overly broad, general authorization for access and disclosure of PII to “*any individual or entity designated by a State or local educational agency authority*” without sufficient protections. Although ED asserts that it has included sufficient protections to ensure that there is an appropriate balance between protecting PII and allowing States the needed flexibility to maintain an effective SLDS, the protections that ED has proposed will have a minimal impact on preventing improper re-disclosures – e.g., ED has not defined “reasonable methods” but, rather, has intentionally left the definition open to allow for “flexibility” on the part of States, and the “written agreement” has no enforcement mechanism. Furthermore, the only possible sanction is that the authorized representative or educational authority/agency (or both) will be denied access to the PII for at least five years. Regardless of the rationale offered by ED or even its merits, CLE opposes the proposed revisions to the regulations as inconsistent with the statute; changes in the law should be made through legislative amendment not contorted rulemaking

- **Education program**

ED also proposes a new definition for an “education program.” The term would be defined as “any program that *is principally engaged in the provision of education*, including but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education.” Under current law and regulations, authorized representatives of the officials expressly listed in §99.31(a)(3) [i.e., U.S. Comptroller General, U.S. Attorney General, Secretary, SEA and LEA officials] “may have access to education records in connection with an audit or evaluation of *Federal or State supported education programs*, or for the enforcement of, or compliance with Federal legal requirements that relate to those programs.” 34 C.F.R. § 99.35 (a)(1); 20 USC 1232(g)(b)(3), (5). By defining an “education program” as principally engaged in providing education *regardless of whether it is administered by an educational authority*, ED would expand authorization for sharing data containing PII without prior parental/eligible student consent with programs that may be administered, e.g., by public health and human services, or labor, which are precluded as recipients of PII under current law. 34 C.F.R. §99.31. Such data sharing would allow other State agencies to take advantage of research opportunities over a wide variety of programs (e.g., HeadStart) not just ED programs, so long as the programs (e.g., adult education, GED programs, workforce training) are principally engaged in the provision of education. By making these changes, it is anticipated that the SLDS will become more useful.

Through these two definitional changes, ED would achieve its goal of making it significantly easier to share non-consensual PPI from education records across State agencies and systems. An SEA or LEA would be able to appoint a non ED agency/entity or individual, who need NOT be among those statutorily authorized officials to access such information, as its authorized representative to share (i.e., disclose and re-disclose) data containing PPI without prior consent by eligible students or parents among agencies, including non-educational agencies and personnel not under the direct control of the educational agency or institution.

CLE’s Position: Because the change in definition of “education program” undermines the plain language and intent of FERPA by, for example, allowing access to such programs as adult literacy and workforce

training that are not administered by an educational agency or institution, CLE opposes the modification of the definition outside of the legislative process.

Other Proposed Changes

- **Directory Information**

In addition to these regulatory provisions, ED identifies what it describes as a small number of additional regulatory provisions and policy statements that “unnecessarily hinder the development and expansion of SLDS consistent with the ARRA.”

The NPRM proposes changes to “directory information,” which is defined as “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed” and includes BUT is not limited to: student’s name, address, telephone listing, e-mail address, DOB, place of birth, enrollment status, awards, participation in sports, most recent education institution attended and whatever additional information that the school district has marked as directory information. First, the NPRM proposes to authorize an educational agency to designate as “directory information” a student ID number or other unique personal identifier that is displayed on a student ID card, provided that the identifier cannot be used to gain access to education records *except when used in conjunction with one or more factors that authenticate the user’s identity*. 34 C.F.R. § 99.3(b)(2),(c).

CLE’s Position: To the extent that ED is defining a student ID as “directory information” not subject to consensual requirements under IDEA, CLE believes that concerns for physical safety and protection from identity theft warrant heightened protection. Instead of authorizing an educational agency or institution to designate a student ID as directory information provided the identifier cannot be used to gain access to education records *except when used in conjunction with one or more factors that authenticate the user’s identity*, CLE urges that a student ID number or other unique personal identifier that may be displayed on a student ID card and is classified as “directory information” shall not be used (even in conjunction with one or more factors that authenticate the user’s identity) to gain access to education records.

- **“Opt-Out”**

The NPRM proposes in a new provision (proposed §99.37(c)(1)) that a parent or eligible student may not use their right to opt out of directory information disclosures to prevent an educational agency from disclosing or requiring a student to disclose the student’s name, *identifier*, or institutional e-mail address in a class in which the student is enrolled. Nor may the parent or eligible student prevent an educational agency from requiring a student to wear, display publicly, or disclose a student ID card or badge that exhibits information designated as directory information. [34 C.F.R. § 99.37(c)(2)].

CLE’s Position: If the identifier is defined in a manner to ensure safety and protection consistent with CLE’s position in the above paragraph, CLE supports this provision.

- **Different Treatment of Directory Information**

The NPRM also proposes that an educational agency or institution would be authorized to indicate in its public notice to parents and eligible students that disclosure of directory information will be limited to specific parties, for specific purposes, or both. Based on this proposed change, access by third parties (e.g., vendors) to directory information could be limited by the educational agency despite the information having been designated as “directory information” for which prior consent is not required. If said

limitations are included in the public notice to parents and eligible students, the educational agency must limit access/disclosure consistent with the notice. [See proposed §99.37(d)]

CLE's Position: This proposed provision would seem to be in the interest of students and their families, although CLE can conceive of how differential treatment of what constitutes "directory information" for different third parties may raise serious policy questions for consideration by school communities, including eligible students and parents.

- **Research Studies**

Section 1232g(b)(1)(F) of FERPA authorizes educational agencies and institutions to disclose PII without prior consent to organizations "conducting studies *for, or on behalf of, educational agencies and institutions*" to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction. Current regulation §99.31(a)(6)(ii) conditions receipt of PII by such an organization conducting studies upon its restricting access to representatives: having a legitimate interest in the information; destroying PII when the information is no longer needed for the purposes of the study; entering a written agreement specifying the purpose, scope, and duration of the study as well as the specific PII to be accessed; and limiting use of PII to the stated purposes of the study consistent with the written agreement. ED, through the NPRM, would amend §99.31(a)(6) by adding a new provision that would "clarify" that these same provisions apply to SEAs so they may enter into agreements on behalf of school districts with organizations conducting studies, after the law's written agreement requirements are met. ED reasoned that the amendment was necessary because ED had previously opined [Dec. 9, 2008, 73 FR 74806, 74826] that an SEA was not authorized to re-disclose PII obtained from LEAs to an organization for research studies unless the SEA had separate legal authority to act on the LEA's behalf. The amendment would expressly allow SEAs to enter into agreements with individuals or entities designated as the SEA's "authorized representative" without limitation regarding access to, disclosure of, or re-disclosure of PII by such "authorized representative" to such PII that was entrusted to LEAs.

Significantly, while the educational agency or institution, as the holder of the obligation to protect PII from non-consensual disclosure, is subject to loss of all Federal funding for violating FERPA's protections of PII from students' education records, the sanction for unlawful re-disclosure by an "authorized representative" designated by the State or local education agency would result in such individual or entity being precluded from entering into an agreement with the State or LEA for a period of 5 years.

CLE's Position: CLE believes that this proposed change that would authorize SEAs to enter into agreements on behalf of school districts with organizations conducting studies may argue for heightened, not weakened, security and protection of students' ID numbers (as discussed above) in light of the NPRM's proposed shift to broaden disclosure of PII from students' education records. Moreover, consistent with rules of statutory interpretation, this proposed revision and amendment of §99.31(a)(6) is another significant change that would have the effect of broadly authorizing the SEA without limitations as specified in the statute and ought to be made by legislation amending the statute.

- **Authority to Evaluate**

The NPRM proposes to make it easier for State or local educational authorities to conduct an audit, evaluation, or compliance enforcement activity by removing current regulatory language requiring a basis of separate Federal, State, or local "authority" to undertake these tasks or activities, given that such authority to engage in such activities does not derive from FERPA. The removal of the specific reference to "authority" would remove a barrier to agencies that do not administer educational agencies or institutions from accessing PII to conduct evaluations of the effectiveness of Federal and State supported Center for Law and Education Docket ID ED-2011-OM-0002

education programs primarily for the purpose of education. These are the agencies that presumably would be encompassed under the NPRM's new definitions of "authorized representative" and "education program" discussed above.

CLE's Position: As described above specifically with respect to the proposed change in the definition of "authorized representative," this proposed change would represent an additional related change in the underlying protections set forth in FERPA, and any such revision ought to be made through legislation not rulemaking.

- **Enforcement Procedures**

Changes proposed through the NPRM will make clear that FERPA's enforcement procedures apply to all educational agencies or institutions, including any public or private agency to which FERPA applies, as well as any SEAs, postsecondary agency, or LEA or any recipient to which funds have been made available under any program administered by the Secretary (e.g., a nonprofit organization, student loan guaranty agency, or a student loan lender), including funds provided by grant, cooperative agreement, contract, subgrant, or subcontract. FERPA's enforcement provisions would therefore apply to any agency or other recipient of ED funds that has inappropriately disclosed or re-disclosed PII, regardless of where the student attends school or if the agency did not generate the original student records.

CLE's Position: CLE supports this proposed change. CLE believes that the need for this proposed revision to current regulations, 34 C.F.R. §§ 99.60-99.67, underscores the importance of SEA and LEAs, IHEs, and all educational agencies or institutions, including any public or private agency to which FERPA applies, being vigilantly held accountable for complying with those provisions of FERPA governing non-consensual access, disclosure, and re-disclosure of PII from students' education records. The very need for expanding ED's limited enforcement authority, as currently construed based on current regulations, should be a warning to ED as to the problems that will lie ahead if the proposed new definitions of "authorized representative" and "education program" are adopted. They would encourage sharing of data among State agencies, organizations and entities over which ED has no jurisdiction and which are not subject to the mandates or protections of FERPA.

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0250
Comment on FR Doc # 2011-08205

Submitter Information

Name: Larry Williamson
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Broken Arrow, OK,

General Comment

I stridently OPPOSE any attempt by federal rules, regulations or judicial 'interpretation' to diminish or change in any way the protection provided by FERPA to the privacy of government-collected data on students and their families. NO, NO, NO to this naked attempt by the DOE to usurp the authority of Congress and circumvent FERPA Statutes by administrative regulation. Many are watching, and many are not fooled.

Larry Williamson

PUBLIC SUBMISSION

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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0251
Comment on FR Doc # 2011-08205

Submitter Information

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Organization: Forum for Youth Investment

General Comment

As addressed in further detail in the attached letter, I applaud the Secretary's proposed amendments to the FERPA regulations, and offer one suggestion to improve the definition of "education program."

The Secretary's definition of "education program" is a step in the right direction, however it does not go far enough, and will leave out programs which are fundamental to student success, yet might not be principally engaged in the "provision of education," such as: programs to promote physical, social, mental and emotional health; programs to support young people in foster care; programs to prevent school dropout, juvenile delinquency, substance abuse, bullying, suicide, teen pregnancy, and youth homelessness; and dropout recovery programs.

I urge you to amend the definition of "education program" to the following:

Education program means any program that is principally engaged in the provision of education, establishing conditions for learning, or fostering child and youth development, including, but not limited to, early childhood education, elementary and secondary education, dropout prevention and recovery, afterschool programs, children's health programs, youth development programs, foster care programs, juvenile delinquency prevention, substance abuse prevention, bullying prevention, suicide prevention, teen pregnancy prevention, youth homelessness prevention, postsecondary education, special education, job training, career and technical education, and adult education.

Attachments

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May 23, 2011

The Honorable Arne Duncan
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Attention: Comments for proposed changes to Family Educational Rights and Privacy Act (FERPA) regulations

Dear Secretary Duncan:

I appreciate the opportunity to submit comments on the U.S. Department of Education's Federal Register Notice regarding the proposed priorities, requirements, and definitions for the FERPA program.

As you know, across the country, community leaders face two stark realities. On one hand, they understand the vital importance of providing children and youth with a seamless continuum of supports from cradle to college and career. On the other hand, they are handed a fragmented set of funding streams with which to do the job. When fragmented policies are implemented unchecked, young people suffer the consequences. A child struggles to complete his homework, never realizing that he needs glasses because his teachers were trained to focus on academic test scores, not healthcare needs. A homeless youth spends her nights in the hospital waiting room because the doctors and nurses do not know that there is a transitional living program down the street. Other children receive foster care but not health care, shelter without education, counseling yet no daily adult supervision. Promises are made, but not kept. Young people fall through the cracks. This is the norm, but it does not have to be the rule.

If we don't provide our policy makers the information they need to see how fragmented programs and policies could fit together, and if we don't provide our direct service providers the information they need to see a complete picture of their client's needs and available supports, we will continue to fail our young people. Fragmented data systems waste government resources – that alone should be a compelling enough reason to act. But the greatest waste of all is the loss of young lives shattered by missed warning signs, missed connections, and missed opportunities to intercede. This is why it is deplorable that: **child and youth data systems are every bit as fragmented as child and youth policies and programs are.**

A small sampling of fragmented federal efforts underway to create data systems with child and youth information includes: Head Start allocates \$100M to State Advisory Councils on Early Childhood Education and Care which must “develop recommendations for a unified data collection system for public early childhood programs and services”; McKinney-Vento Homeless Assistance Act (\$70M) requires local education agencies to “collect and disseminate data and information regarding the number and location of homeless children and youth, the education and related services such children and youths receive, and the extent to which the needs of homeless children and youth are being met”; the National Youth in Transition Database (NYTD) will collect case-level information on youth in care including the services paid for or provided by the State agencies that administer the Chafee Foster Care Independence Program (CFCIP), as well as the outcome information on youth who are in or who have aged out of foster care; the Workforce Data Quality Initiative (\$15M) will “provide competitive grants to support the development of longitudinal data systems that integrate education and workforce data,” and on and on and on.

Even in the ARRA alone there were multiple funding streams created for disparate efforts to create data systems which contain information about children and youth. For example, the Department of Education is providing \$245M for “statewide, longitudinal data systems to improve student achievement,” while the Centers for Medicare & Medicaid Services was appropriated \$140 million a year for FY 2009 through 2015 (and \$65 million for FY2016) to accelerate the adoption of certified electronic health records (EHRs) by health professionals through the development of systems and incentives

These efforts are being implemented, by and large, in isolation from each other, even though in many cases they are collecting information about the same children. Instead of pooling resources to develop one effective, interconnected, interagency set of data systems, many states and localities are developing parallel data systems – one for each federal, state, local and foundation-funded grant. **These parallel data systems often make redundant technological expenditures, collect overlapping sets of information, and are built in ways which inhibit the flow and transfer of data among them. As a result, despite new resources devoted to data systems, most state and local policy makers and practitioners still do not have the information they need to be effective.**

Innovative states and communities have been developing interagency data systems to support the holistic needs of young people. Too often FERPA stands as their chief obstacle.

That is why I applaud the Secretary’s proposed amendments to the FERPA regulations, as well as offer one recommendation to make the definition of “education program” even stronger.

Definition of “authorized representative”

I applaud the department for:

- providing state and local education authorities to determine who to designate as its authorized representative for audits, evaluations, and compliance or enforcement activity;
- clarifying that an authorized representative does not have to be under the direct control of an educational authority;
- expressly allowing education authorities to designate other State and Local agencies – such as health and human services departments, departments of labor – to serve as authorized representatives for audits, evaluations, and compliance or enforcement activity;
- stating that all State or Local agencies that serve children and youth can serve as an authorized representatives and receive non-consensual disclosures of PII to link education, workforce, health, family services, and other data for audits, evaluations, and compliance or enforcement activity;
- permitting educational agencies to non-consensually disclose PII to other State agencies or to house data in a common State data system, such as a data warehouse administered by a central State authority for audits, evaluations, and compliance or enforcement activity

Definition of “education program”

I applaud the department for:

- defining “education program” broadly to explicitly including programs not administered by an education authority
- explicitly including early childhood education programs, job training, career and technical education and adult education all could be programs administered by an education.

I believe, however, that this definition does not go far enough, and will leave out programs which are fundamental to student success, yet might not be “principally engaged in the provision of education,” such as: programs to promote physical, social, mental and emotional health; programs to support young people in foster care; programs to prevent school dropout, juvenile delinquency, substance abuse, bullying, suicide, teen pregnancy, and youth homelessness; and dropout recovery programs.

I urge you to amend the definition of “education program” to the following (additions in underlined italics):

Education program means any program that is principally engaged in the provision of education, establishing conditions for learning¹, or fostering child and youth development, including, but not limited to, early childhood education, elementary and secondary education, dropout prevention and recovery, afterschool programs, children’s health programs, youth development programs, foster care programs, juvenile delinquency prevention, substance abuse prevention, bullying prevention, suicide prevention, teen pregnancy prevention, youth homelessness prevention, postsecondary education, special education, job training, career and technical education, and adult education.

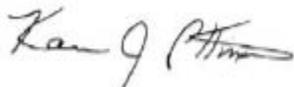
Other

I applaud the department’s revisions to:

- Research Studies
- Authority to Evaluate

Thank you for the important work you have undertaken to improve the ability of communities and states to create interagency data systems. In particular we urge you to broaden the definition of “education programs” to allow your changes to have maximum positive impact.

Sincerely,



Karen Pittman
President and CEO
Forum for Youth Investment

¹ The definition of “conditions of learning” which is in the Successful, Safe, and Healthy Students Act of 2011 (S.919) could be used here.

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Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

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Comment on FR Doc # 2011-08205

Submitter Information

Address: Texas
Government Agency Type: State
Government Agency: Texas Education Agency

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

Comments of the Texas Education Agency on the
Proposed Rule of the Department of Education
Amending 34 CFR Part 99
Published April 8, 2011
Docket ID ED-2011-OM-0002-0001

1. Section 99.3 and 99.35. Authorized Representative

The term “authorized representative” is not defined in the current regulations. Section 99.31(a)(3) currently authorizes the disclosure of personally identifiable information from education records to authorized representatives of State and local educational authorities subject to Section 99.35. The proposed amendment to section 99.3 adds a definition of “authorized representative” to mean “any entity or individual designated by a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) to conduct – with respect to Federal or State supported education programs – any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs.” The Department’s discussion of the proposed change states that the change is intended to rescind the Department’s longstanding construction that other state or federal agencies may not be the authorized agent of a state educational authority. However, the proposed definition does not address out-of-state entities. Is it possible for an entity or individual, including a state agency or official, to be designated as an authorized representative of a state or local educational authority of a different state? The Texas Education Agency recommends that the definition of authorized representative be limited to any entity or individual of the same state as the State or local educational authority. In the alternative, the Texas Education Agency suggests that out-of-state authorized representatives be limited to other State educational authorities.

In the proposed amendment to section 99.35(a)(2), the responsibility remains with the State or local educational authority to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA. Additionally, the proposed amendment to section 99.35(a)(3) requires written agreements between a State or local educational authority or agency and its authorized representative. The Texas Education Agency currently utilizes a written agreement with its authorized representatives in which the authorized representative specifies the information to be disclosed and the purpose for the disclosure, agrees to maintain the confidentiality of the information and limit access to the information, and report any known instances of missing data. Additionally, the authorized representative is required to provide internal audit reports regarding compliance with the written agreement and must submit detailed procedures for protecting the confidentiality of the information, including where the information will be stored and how access is technically, physically, and administratively restricted to authorized individuals. The written agreement must also include procedures for how and the dates by which the information will be destroyed upon completion of the audit or evaluation. The Texas Education Agency requires this information from its authorized representatives as a reasonable method to ensure the entity designated as an authorized representative remains compliant with FERPA. The Texas Education Agency recommends that “reasonable methods” be defined in the regulations and include the ability to audit services of the authorized representative and

specifically state that a transfer of information must be limited to only the information necessary to conduct the applicable audit or evaluation. Further, the Texas Education Agency suggests that a common identifier be used as an additional reasonable method to eliminate the sharing of Social Security Numbers, names, and dates of birth (age as of Sept. 1 may be used as an alternative). The sharing of a method to generate this common identifier between the State or local educational authority and its authorized representative would allow for personal level data to be matched without an unnecessary transfer of Social Security Numbers. This process was recommended as an appropriate internal practice by the National Center for Education Statistics in its SLDS Technical Brief, *Guidance for Statewide Longitudinal Data Systems*, (NCES 2011-602), and the benefits would be equally applicable in a policy to share personally identifiable information externally with an authorized representative.

The proposed amendment to section 99.35(a)(3) also provides that the written agreement between a State or local educational authority or agency and its authorized representative must provide for the return and destruction of personally identifiable information when it is no longer needed for the specified purpose in accordance with the requirements of section 99.35(b)(2). The proposed amendment fails to address the required return or destruction of personally identifiable information in the context of a statewide longitudinal data system (SLDS) that does not have a future end date. How is the requirement for the return or destruction of personally identifiable information to be handled when the data sharing has no foreseeable end to the specified purpose?

Next, the Texas Education Agency asserts that the proposed definition of authorized representative, the reasonable methods necessary to ensure an authorized representative's FERPA compliance, and the written agreements required to share personally identifiable information will dramatically increase administrative costs. The proposed amendments will result in a substantial increase in requests for student-identifying information that must be vetted and processed by staffs that are currently shrinking and at a time when additional resources are limited.

Proposed section 99.35(d) clarifies that if the Family Policy Compliance Office finds that a State or local educational authority or an authorized representative of a State or local educational authority improperly redisclosed personally identifiable information in violation of FERPA, the educational agency or institution from which the personally identifiable information originated would be prohibited from permitting the entity responsible for the improper disclosure access to personally identifiable information for at least five years. However, the proposed regulation fails to address the liability on the part of the State or local educational authority that provided personally identifiable information to an authorized representative that redisclosed the personally identifiable information in violation of FERPA. The Texas Education Agency is concerned that it could be held legally responsible for the disclosure of personally identifiable information to an authorized representative over whom it does not have direct control, such as another state agency, if the authorized representative improperly redisclosed the information. Therefore, the Texas Education Agency recommends the proposed amendments provide that the State or local educational authority is released from FERPA compliance requirements in regard to data that is provided to an authorized representative over which the educational authority does not have direct control. In the alternative, the Texas Education Agency requests that the proposed amendments be clarified to provide that a State or local educational authority retains control over the entity or individual designated an authorized representative through the required written

agreements to ensure personally identifiable information is protected from unauthorized disclosure.

Finally, in lieu of the proposed definition of “authorized representative,” the Texas Education Agency suggests declaring a state agency or other entity responsible for an “educational program” as defined in the proposed regulations as educational authorities for the limited purpose of the administration of their Federal or State supported education programs. Such entities would be subject to the enforcement power of the Family Policy Compliance Office.

2. Section 99.3. Directory Information.

The Texas Education Agency has no comment regarding the proposed amendment to section 99.3 and the definition of “directory information.”

3. Section 99.3 and 99.35. Education Program

The term “education program” is not currently defined. Section 99.35(a)(1) provides that authorized representatives may have access to personally identifiable information from education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs. The proposed amendment defines the term “education program” to mean “any program that is principally engaged in the provision of education, including, but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an educational authority.” If an entity requests access to personally identifiable information for an audit of its education program, does the State or local educational authority that received the request have the responsibility to verify that the program at issue meets this definition? The Texas Education Agency is concerned about disputes regarding what qualifies as an education program. How are these disputes to be handled? Does the Texas Education Agency have the ability to deny access to personally identifiable information if it determines that the requesting entity does not administer an “education program” or does the entity requesting access to the information make the determination that its program is an applicable education program? The Texas Education Agency requests further clarification of this proposed amendment.

4. Section 99.31(a)(6). Research Studies.

Section 99.31(a)(6)(ii)(C) currently requires an educational agency or institution enter into a written agreement with an organization conducting a study that specifies the purpose, scope, and duration of the study. The proposed amendments add a new paragraph (a)(6)(ii) that states nothing in FERPA or its implementing regulations prevents a State or local educational authority or agency headed by an official listed in section 99.31(a)(3) from entering into agreements with organizations conducting studies under section 99.31(a)(6)(i) and redisclosing personally identifiable information on behalf of the educational agencies and institutions that provided the information in accordance

with the requirements of section 99.33(b). There is also a proposed amendment to section 99.31(a)(6) to require written agreements between a State or local educational authority and any organization conducting studies with redisclosed personally identifiable information. The proposed amendments to this section are unclear as to whether the amendments are applicable to only a State or local educational authority or any entity or individual conducting a study of its educational programs. Further, the proposed amendments are unclear as to whether the State educational authority is required to assist other entities conducting studies concerning their educational programs by providing personally identifiable information it received from educational agencies and institutions. The Texas Education Agency requests further clarification of these proposed amendments.

5. Section 99.35. Authority to Audit or Evaluate.

Section 99.35(a)(2) currently provides that authority for a State or local educational authority to conduct an audit, evaluation, or compliance or enforcement activity must be established under other Federal, State or local authority because that authority is not conferred by FERPA. The proposed amendment to this section removes the provision that a State or local educational authority must establish legal authority under other Federal, State, or local law to conduct an audit, evaluation, or compliance or enforcement activity. Therefore, authority to conduct such audits may be expressed or implied. The Texas Education Agency is concerned about disputes regarding authority to conduct such audits. How are these disputes to be handled? Does the Texas Education Agency have the ability to deny access to personally identifiable information if it determines that the requesting entity does not have authority, express or implied, to conduct an audit or evaluation or does the entity conducting the audit have the sole discretion to make a determination regarding its authority to conduct an audit or evaluation? The Texas Education Agency requests further clarification of this proposed amendment.

6. Section 99.37(c). Directory Information

The Texas Education Agency supports the proposed amendment to Section 99.37(c).

7. Section 99.37(d). Limited Directory Information.

Section 99.37(a) requires an educational agency or institution to provide public notice of the types of directory information that may be disclosed and the parent's or eligible student's right to opt out. The proposed amendment to section 99.37(d) would clarify that an educational agency or institution may specify in the public notice it provides to parents and eligible students that disclosure of directory information will be limited to specific parties, for specific purposes, or both. The Texas Education Agency recommends that the proposed regulations explicitly state that the declared directory information remains confidential except for the limited disclosure to specific parties and/or for specific purposes.

Docket ID ED-2011-OM-0002-0001
Page 5 of 5

8. Section 99.60. Enforcement Procedures With Respect to Any Recipient of Department Funds That Students Do Not Attend.

The Texas Education Agency has no comment in regard to the proposed amendments to section 99.60.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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| Posted: May 24, 2011 |
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| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0253
Comment on FR Doc # 2011-08205

Submitter Information

Name: Pat Tarzwell
Address:
Shelton, WA,
Email: ptarzwell@alphatest.com
Submitter's Representative: Norm Dicks
Organization: none
Government Agency Type: Federal
Government Agency: ED

General Comment

Please consider these facts, collecting information on American citizens, specific to each one individually, from birth to death, is unconstitutional, (4th, 9th and 10th amendment to the Constitution of The United State of America); it does nothing to help in the education of one person; it brings in an unnecessary risk to the security of information on each and every citizen of this nation; it increases the cost to an agency, to develop the means to secure this data, which it neither has the experience or proven ability to maintain. In light of these facts, I strongly urge you to reject this proposed rule.

Pat Tarzwell
Shelton, WA

As of: March 27, 2012
Received: May 23, 2011
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Comments Due: May 23, 2011
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PUBLIC SUBMISSION

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0254
Comment on FR Doc # 2011-08205

Submitter Information

Address: United States,

General Comment

Need to adequately assure authorized representative is FERPA compliant or using the information for legitimate educational purposes.

An information warehouse for SLDS does not provide a time period when the information is no longer needed and returned to the institution - how will this work?

Previously the originating institution retained the right to refuse disclosure, now redisclosure without consent is possible. Protections are needed to permit the originating institution to review and evaluate the legitimacy of a request for information.

The educational institution must be able to retain control over which entities PII is redisclosed to. It should be clarified that the initial disclosure of PII itself is not sufficient to support implied authority for redisclosure.

The original disclosing institution must be given the opportunity to evaluate the request when the information is needed to conduct a study of another entity's programs to avoid abuse and mishandling of confidential student information.

No where is the parent or student given any ability to suppress release of their PII. The privacy rights of the individual have been removed so that SLDS can have everything within the educational record of an individual. Parents have a harder time getting information about their college age dependent than a clerk in a redisclosed entity.

Would encourage a provision requiring notification to the student when PII is being disclosed or redisclosed to an outside entity for the purpose of evaluating the outside entity's program. Need a provision permitting the student to object to the disclosure of PII either in its entirety or individual components should the student not want to participate in the study. If a student can opt out of directory information disclosure, they should have the same rights for disclosure of PII. These

Case 1:12-cv-00327-ABJ Document 10-5 Filed 06/29/12 Page 194 of 244
provisions are necessary since the SEA can redisclose without the express consent of the original institution.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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| Posted: May 24, 2011 |
| Category: Academic/Think Tank |
| Tracking No. 80e30a69 |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0255
Comment on FR Doc # 2011-08205

Submitter Information

Name: Christopher King

Address:

Austin, TX,

Email: ctking@austin.utexas.edu

Organization: Ray Marshall Center, University of Texas at Austin

General Comment

My comments are provided in the attached file. Thank you.

Attachments

Comment on FR Doc # 2011-08205



LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS
THE UNIVERSITY OF TEXAS AT AUSTIN

Ray Marshall Center for the Study of Human Resources • (512) 471-7891 • FAX (512) 471-0585
3001 Lake Austin Blvd., Suite 3.200 • Austin, Texas 78703-4204 • www.utexas.edu/research/cshr

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Re: Proposed Amendments to FERPA Regulations (ED-2011-OM-0002)

Dear Ms. Miles,:

We applaud the proposed amendments to the FERPA regulations and, with a few important exceptions detailed below, support comments on the amendments that are being submitted by the national Data Quality Campaign. If implemented, these amendments would substantially improve the environment for conducting much-needed research using linked student records, while at the same time addressing confidentiality and security concerns. The proposed changes would restore access to such data, which was adversely affected in 2001 when the US Department of Education issued more restrictive FERPA guidance. Researchers and evaluators have faced a far more challenging and expensive process for accessing and using student data over the past decade.

Background

Before providing comments, it's important to note that researchers at the University of Texas at Austin's Ray Marshall Center have decades of experience working with confidential, individual-level administrative records that have been linked for longitudinal research and evaluation efforts funded by federal, state and local entities, most often to provide critical data to shape policy and program improvements. The Center operates under strict confidentiality and security policies that it has developed and refined over time working with the University's Institutional Review Board, its funders and its research partners around the nation, many of whom are leading researchers in this area. As a result, there has never been a single instance of disclosure of confidential data from any of the many research projects in which Center researchers have been engaged.

Key research efforts Center researchers have been involved with over the years related to linked individual-level data clearly demonstrate our *bona fides* in this arena, including, among others:

- A series of welfare reform evaluations since 1985, including the *Texas JOBS Program Evaluation* (1990-1995), the multi-state *JOBS/Food Stamp E&T Evaluation* (1995-2000), and the *Achieving Change for Texans Welfare Reform Waiver Demonstration Evaluation* (1996-2002);
- Numerous state and local job training program evaluations and benefit-cost analyses since the 1980s;

- The multi-state *Administrative Data Research and Evaluation (ADARE) Consortium*, of which the Center was a founding member (1998-ongoing);
- A two-state (Florida and Texas) study of secondary and postsecondary career and technical education participation and outcomes with MPR Associates for the *National Assessment of Vocational Education*, which linked all high school records in these states to postsecondary course-taking and Unemployment Insurance wage records (1998-2003);
- The *Central Texas Student Futures Project* (2005-2013), which has linked high school seniors' exit survey data to public education, National Student Clearinghouse and UI wage records; and
- Service on national advisory panels and committees addressing the uses and abuses of such data for research and evaluation, including the National Academy of Sciences, the Data Quality Campaign and many others.

Comments in Support of the Proposed FERPA Amendments

Along with the Data Quality Campaign, we support the following changes contained in the proposed FERPA regulations:

- Interpreting FERPA's provisions that authorize disclosures of student data from a statewide longitudinal data system without written parent or eligible student consent for evaluation, audit and compliance activities related to federally and state-supported education programs
 - ✓ To encompass evaluations (and audits) of federally and state-supported education programs administered by the agency or institution receiving the disclosures, as well as programs of the disclosing agency,
 - ✓ To relate to federally and state-supported education programs administered by noneducational agencies, and
 - ✓ To provide more flexibility to state and local education authorities in designating authorized representatives to conduct evaluations and audits;
- Interpreting FERPA's provision on research studies aimed at improving instruction to permit state agencies to enter into agreements for studies on behalf of educational agencies and institutions in their state;
- Requiring written agreements with authorized representatives that perform education evaluations or audits and requiring "reasonable methods" designed to protect the data against improper disclosures; and
- Adding and expanding authorities to enforce against FERPA violations through debarments from receiving further disclosures or withholding of funds.

Exceptions or Edits to the Proposed Changes

We offer some exceptions and suggested edits to the proposed FERPA amendments, as noted below.

Definition of Education Program. One of the key aspects of the Ray Marshall Center's Student Futures Project is following students as they move from high school to postsecondary education and the labor market; however, language that defines an education program in the proposed amendments does not currently include this line of research. Specifically, we propose that within § 99.3, an education program would be defined to include "...transitions from secondary to postsecondary education...."

Access to PII for Purposes Other Than Evaluating Educational Programs. The proposed FERPA amendments allow access to other statewide data holders, including such organizations as the state workforce agencies, departments of health and human services and others as well as their versions authorized representatives. The proposed regulations do not allow direct access to personally identifiable information (PII) data to these organizations for evaluating their own programs, which may not be strictly educational in nature, but whose evaluations might benefit considerably from using such data. It would be

beneficial if these other state entities could utilize PII educational information in their own evaluations to better predict program participant success, better target services to individuals, and to use educational attainment as a measure in the evaluation of their programs to account for selection bias and/or determine how educational attainment moderates and/or mediates program success.

Debarment. The proposed amendments state that if an authorized representative releases PII in violation of FERPA it shall be barred from receiving PII for at least 5 years. FERPA provisions in these circumstances should provide some flexibility, including 1) opportunities for coming into compliance with FERPA, and 2) determining the type and length of punishment. Current FERPA provisions allow those in violation of FERPA an opportunity to enter into compliance prior to any sanction being imposed. The proposed amendments should make clear that such opportunities still exist.

Reasonable Methods. The proposed FERPA regulations also indicate that State Education Agencies (SEAs) and Local Education Agencies (LEAs) should use “reasonable methods” to ensure FERPA compliance by their authorized representatives. Reasonable methods should remain “undefined” within the FERPA statute due to differing nature of what reasonable methods should be for LEAs compared to SEAs. Often, LEAs designate an authorized representative to perform research because performing that research at the LEA is cost-prohibitive; by defining stricter measures of “reasonable methods,” an additional cost to the LEA is implied. LEAs might prefer to base their “reasonable methods” on the reputation of an organization or on its history of working on other projects with the LEAs. SEAs may or may not have greater resources than LEAs, but may choose other modes of determining “reasonable methods” that should naturally differ in proportion to the size of their records.

Exceptions to the Data Quality Campaign’s FERPA Comments

As referenced above, the national Data Quality Campaign is providing extensive comments in support of the proposed FERPA amendments, which we largely support. The one statement we take exception to states that “...the following specific ‘reasonable methods’ with which authorized representatives should be expected to comply should be incorporated into agreements:

- ◆ Comply with applicable state data security laws and policies;”

Along with many of our colleagues, we take the view that including this statement would encourage states that have adopted restrictive data security and data-sharing policies over the past decade to continue doing so under the proposed FERPA regulations. Restrictive interpretations by states have been a large part of the problem for those seeking to conduct research with such data as we explained at length in *Beyond the Numbers* (C. King, D. Schexnayder and H. Gourgey), a 2006 LBJ School of Public Affairs policy research project that was the basis for launching the *Central Texas Student Futures Project*.

Thank you for the opportunity to comment on the proposed amendments to FERPA. We hope they are adopted largely as written and as soon as possible. Many of the State Longitudinal Data Systems and Workforce Data Quality Initiative grants (funded by USDOE and USDOL, respectively) could be less than successful if these changes are not implemented in a timely manner.

Respectfully,



Christopher T. King
Director

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Parent/Relative |
| Tracking No. 80e30a38 |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0256
Comment on FR Doc # 2011-08205

Submitter Information

Name: Vicki Reyes
Address: TX
Submitter's Representative: self
Organization: household
Government Agency Type: Local
Government Agency: citizen

General Comment

This issue should be brought forward to Congress to vote on not the DOE or any other agency. I believe this is an intrusion into our privacy and I do not support the proposed rule.

PUBLIC SUBMISSION

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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0257
Comment on FR Doc # 2011-08205

Submitter Information

Name: MARILYN SORENSEN
Address:
TULSA, OK,
Email: sorensen33@juno.com

General Comment

Family Educational Rights and Privacy...you are talking about taking away our rights to privacy.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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| Status: Posted |
| Posted: May 24, 2011 |
| Category: Student |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0258
Comment on FR Doc # 2011-08205

Submitter Information

Name: AJ Whitecotton
Address:
Twin Falls, ID,

General Comment

I do not believe that the Ferpa law should be amended. The government cannot secure things in the national interest and now they want to be able to catalog students for life. Most working people know what is wrong with the schools and educators have been studying children now for several generations and the education just keeps getting worse. Just get kids back to the basics, reading writing and arithmetic and they will learn the rest on their own if they have to. Teach them how to learn and stop babying them and telling them they never will fail. When the adults guiding them grow up again then the children will grow up and accept responsibility.

PUBLIC SUBMISSION

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| Tracking No. 80e30a35 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0259
Comment on FR Doc # 2011-08205

Submitter Information

Name: Woody Hertzog
Address:
Sammamish, WA,
Email: woodyiii@yahoo.com

General Comment

Education is not a provided power to the federal government. And under the 10th amendment the collection of data is both not acceptable to me, and is unconstitutional.

This is not a legitimate use of authority for the Department of Education.

I am against the collection of information that allows people to be sorted out by their demographic traits and guided toward a predetermined workforce.

Woody Hertzog
Sammamish, WA

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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| Posted: May 24, 2011 |
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| Tracking No. 80e30a34 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0260
Comment on FR Doc # 2011-08205

Submitter Information

Name: Bruce McKay
Address:
Novato, CA,
Email: teddlybar@hotmail.com
Submitter's Representative: N/A
Organization: Self
Government Agency: N/A

General Comment

I fail to see the necessity of eroding parental and student privacy rights in the name of convenience. Statistical analysis of overall student performance only requires a statistically relevant sampling. Work within the current guidelines to have researchers obtain permission from the parent or student to access their files. If the researcher cannot garner enough support from the parents and students to create a statistically valid sample, then the researcher should go back to the drawing board and come up with a better argument or ask whether their study is really necessary. Given the porous nature of current government databases as well as poor past performance of governmental organizations of staying within the bounds of their constitutional authority it makes no sense to erode parental and student privacy rights for more governmental access when the current regulations are adequate. The request to change/expand access is simply another example of either intrusiveness or bureaucratic laziness.

PUBLIC SUBMISSION

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| Category: Individual |
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| Submission Type: Web |

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0261
Comment on FR Doc # 2011-08205

Submitter Information

Name: Lorie Wolf
Address:
Laguna Beach, CA,

General Comment

The Family Educational Rights and Privacy Act was created to protect families privacy. Changing the act as proposed assumes that there is no entity within the U.S. Government that would misuse this information. Creating a database of all students inherently brings up security issues as do the incorporation of individual's information. I wholly do not support the development and use of private citizens' information and I urge you to find an ALTERNATE way to assess progress of children.

Many people would happily participate VOLUNTARILY in a "lifetime" academic study, but the key is that it should be voluntary so as not to violate the premise of FERPA in the first place.

I would like to make clear out of concerns for my and my family's privacy that the "Department of Education" or any agency or representative of the U.S. Government does not have my permission to access my own or my children's educational records at any time by any one (no matter the reason or person) without my written consent. To attempt to regulate around parental consent or an individual's consent will never serve the inherent right to freedom citizen's of the United States guaranteed by our Constitution.

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PUBLIC SUBMISSION

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0262
Comment on FR Doc # 2011-08205

Submitter Information

Name: Susan Brown
Address:
Austin, TX,
Email: judy.schooling@thecb.state.tx.us
Submitter's Representative: Judy Schooling
Organization: Texas Higher Education Coordinating Board
Government Agency Type: State
Government Agency: Texas Higher Education Coordinating Board

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

Texas Higher Education Coordinating Board (THECB) Comments:
Proposed Changes to Family Education Rights and Privacy Act (FERPA) Rules
Department of Education
34 CFR Part 99
RIN 1880-AA86
Docket ID ED-2011-OM-0002
(Federal Register, Vol. 76, No. 68, April 8, 2011, Proposed Rules)

Comment from the Texas Higher Education Coordinating Board regarding proposed changes to 34 CFR Part 99 follows:

I. Audits, Evaluations, Compliance, or Enforcement Activities

Proposed Additions to Definitions (§ 99.3) and Applicable Conditions for Disclosure (§ 99.35)

Authorized Representative (proposed addition to § 99.3) “means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct—with respect to Federal or State supported education programs—any audit, evaluation or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs.”

Comment 1: Further specification or guidance may be needed regarding criteria for determining whether or not and how an audit, evaluation, compliance, or enforcement activity regarding a program is determined to relate to Federal legal requirements. Definitions and examples of audit, evaluation, compliance, and enforcement activities may be helpful.

Comment 2: Please provide clarification or guidance regarding possible qualifications to be used in designating an authorized representative and whether or not an authorized representative may be from another state.

Education Program (proposed addition to § 99.3) “means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education.”

Comment 3: Please provide clarification, guidance, and examples for determining whether or not a program is principally providing education. The assumption is that such programs must be subject to Federal legal requirements.

Applicable Conditions (proposed changes to § 99.35) – In proposed § 99.35 (a)(2) the State or local education authority or other entity that is a Department of Education funding recipient and discloses personally identifiable information (PII) for Federal or State program purposes to its authorized representative “is responsible for using reasonable methods to ensure that...its authorized representative” uses PII for only purposes intended, secures these data from any unauthorized disclosure, and destroys these data as required. In addition, proposed §99.35(a)(3)(i-v) states that a written agreement must: (a) specify the authorized representative, the PII to be disclosed and purpose for its use, the return or destruction of the PII by the authorized representative, and the deadline for the

5/23/2011

PII return or destruction; and (b) “establish policies and procedures, consistent with FERPA and other Federal and State confidentiality and privacy provisions, to protect [PII] from further disclosure...and unauthorized use.”

Comment 4: Please consider offering further guidance and examples of acceptable templates for written agreements between a disclosing educational agency/institution and an authorized representative who is a recipient of PII for audit, evaluation, compliance, and enforcement purposes. The assumption is that reasonable methods for protecting PII can be stated and/or referenced in the written agreement. Please consider developing example written agreement templates that employ NCEC recommended best practices, as found in its technical briefs, and other industry standards regarding IT system and data security and PII protections. These written agreement templates could serve as default or starting documents for a disclosing authority to help establish use of reasonable methods to ensure only intended uses of PII. Some best practices to prevent unauthorized disclosure of PII could include assignment of an alternate identifier unique to an individual student and corresponding removal from the student record the social security number and other PII such as name, date of birth, zip code, etc., that when used in combination may lead to an unauthorized and unintended disclosure.

Comment 5: From the perspective of state educational agencies with well-developed student longitudinal data systems, and especially in states with large numbers of educational entities, an exponential increase in administrative time and resources is a potential result of the proposed rules, made more difficult in the current climate of shrinking state budgets. Please consider offering guidance for planning and streamlining administrative processes and tools while ensuring protection of PII would be helpful and much appreciated.

II. Research Studies

Proposed Additional and Revised Paragraphs (§ 99.31)

Applicable Conditions for Disclosure without Prior Consent (proposed § 99.31(a)(6)(ii)) – Proposed § 99.31(a)(6)(ii) makes explicit that: “Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information [PII] from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of § 99.33(b).” While an expanded list of educational authorities may now execute agreements with organizations conducting studies, these written agreements must also: specify the purpose, scope, time period, and data to be redisclosed; require use of PII only for the purpose of the study; prohibit unauthorized disclosures of parents’ and students’ PII; and require return or destruction of all PII when no longer needed for the study and by a specific deadline.

Comment 6: Similar to Comment 2, please provide guidance regarding how to evaluate an organization’s capacity to conduct a study in compliance with the written agreement and FERPA and whether or not an organization may be from another state.

Comment 7: Similar to Comment 4, please consider providing further guidance of acceptable templates for written agreements regarding the allowable types of research studies. The assumption is that

5/23/2011

reasonable methods for protecting PII can be stated and/or referenced in the written agreement, along with best practices to be employed to prevent any unauthorized and unintended disclosure.

Comment 8: Similar to Comment 5, any guidance regarding planning and streamlining administrative processes and tools while ensuring protection of PII would be helpful, especially for education authorities not previously listed under the studies exception.

III. Improper Redisclosures

Proposed Revision of Redesignated § 99.31(a)(6)(v) and Addition of § 99.35(d)

Research Studies – The proposed revision of redesignated § 99.31(a)(6)(v) states that: “If the Family Policy Compliance Office determines that a third party, outside the educational agency or institution, or the State or local educational authority or agency headed by an official listed...violates paragraph (a)(6)(iii)(B) of this section, then the...agency...may not allow the third party responsible for the violation...access to [PII] from education records for at least five years.”

Audits, Evaluations, Compliance, or Enforcement Activities – The proposed addition of § 99.35(d) that: “If the Family Policy Compliance Office finds that a State or local educational authority, an agency headed by an official listed in § 99.31(a)(3), or an authorized representative of a State or local educational authority or an agency headed by an official listed...improperly rediscloses [PII]...the educational agency or institution from which the [PII] originated may not allow the authorized representative...access to [PII] for at least five years.”

Comment 9: As part of recommended best practices, please consider making available to agencies developing written agreements a list of research organizations and authorized representatives known to the Family Policy Compliance Office as having made improper disclosures of PII, along with the date of determination. Please clarify whether or not a research organization or authorized representative found to have made improper disclosure of PII would be prevented from entering into written agreements with a different educational authority to obtain PII. Please consider debarment of an individual who has made improper disclosures of PII, i.e., the individual could not be provided data by any entity—not only the one from which the PII, which was disclosed, originated.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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| Posted: May 24, 2011 |
| Category: Association/Organization |
| Tracking No. 80e30a28 |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0263
Comment on FR Doc # 2011-08205

Submitter Information

Name: Daren Bakst
Email: dbakst2@clhe.org
Organization: Council on Law in Higher Education

General Comment

The Council on Law in Higher Education (CLHE) comment is attached.

Attachments

Comment on FR Doc # 2011-08205

Docket ID ED-2011-OM-0002

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202
Sent Via: Federal eRulemaking Portal at <http://www.regulations.gov>

RE: Family Educational Rights and Privacy Act Notice of Proposed Rulemaking

Ms. Miles:

On behalf of the Council on Law in Higher Education (CLHE), I want to thank the Department of Education for this opportunity to provide comments on the April 8, 2011 FERPA proposed regulations.

CLHE is an independent nonprofit organization that conducts analysis on policy and legal issues affecting the higher education system. Colleges and universities from across the country, along with law firms and other organizations, receive our information and analysis.

Since the organization was founded in 1998, CLHE has focused extensively on FERPA, along with privacy and information security issues in general. The organization strongly supports student rights, including meaningful privacy protections.

This comment will first provide a brief overview of our views. Secondly, as requested in the notice, the comment will address issues in the same order as the proposed regulations.

I. Brief Overview

Many of the proposed changes lack statutory authority under FERPA. There also is nothing in the American Recovery and Reinvestment Act of 2009 (ARRA) or the American Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act (COMPETES Act) that conflict with FERPA thereby rendering any FERPA statutory requirement moot.

While Congress has shown support for statewide longitudinal data systems (SLDS), it has not amended FERPA. The Department itself has not attempted to argue in the proposed regulations that ARRA or the COMPETES Act has preempted FERPA in any manner based on a statutory conflict.

Instead, the Department appears simply to be supporting SLDS. This support is demonstrated by the following passage that discusses the authority to audit or evaluate educational programs:

The Department intends these clarifications to promote Federal initiatives to support the robust use of data by State and local educational authorities to evaluate the effectiveness of Federal or State supported education programs.

It *may* be sound policy to push SLDS, however, this does not give the Department the authority to ignore the plain language and intent of FERPA to achieve that policy objective. Congress is the lawmaking body and must choose to make any statutory changes, including changes to FERPA.

The Department spends a significant amount of time in the proposed regulations discussing the policy objectives of ARRA and the COMPETES Act. Yet, in these FERPA proposed regulations, the Department does not discuss in any significant manner how it is ensuring that FERPA is implemented and enforced consistent with the critical goals and intent of the FERPA statute.

In fact, the proposed regulations focus on how FERPA is an obstacle to achieve the policy objective of SLDS. The goals of FERPA, and as a result, student privacy, play a secondary role to data sharing programs.

II. Specifics

Authorized Representative (99.3, 99.35)

There may not be a definition of "authorized representative" in the statutes, but the statutory language does provide some clear guidance on its face. The statute specifically allows disclosure of PII, in limited situations, to the Comptroller General, the Attorney General, the Secretary of Education, and state and local educational authorities.

The proposed regulations would allow the above-mentioned agencies to designate any entity or individual, be it public or private, to serve as the authorized representative of the agency.

For example, as stated in the proposed regulations, "there is no reason why a State health and human services or labor department, for example, should be precluded from serving as the authority's authorized representative and receiving non-consensual disclosures of PII..."

The effect of such an interpretation is to read out the statutory language providing for only specific agencies to receive PII. If Congress intended for a state labor agency or other third party to receive such data, it would have said this directly in the statute.

It appears that such an interpretation would allow agencies to designate almost anyone it wants so long as some type of argument can be made that the entity or individual is conducting, "with respect to Federal or State supported education programs—any audit,

evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs."

It begs questions, such as:¹

- Would this allow one state to designate an agency in another state as an authorized representative?
- Could individual state politicians be considered authorized representatives?
- Could private companies that have very strong interests in the data independent of the reason for the disclosure, be authorized representatives?

As stated in the proposed regulations, it has been *longstanding* Department policy to consider an authorized representative as someone who is under the direct control of the specifically listed agencies. Such a policy was specifically explained in the "Hansen memorandum."

This policy reflects a proper interpretation of the statute (limits authorized representatives to those agencies specifically listed in the statute) and addresses the practical problems of agencies trying to control the disclosure of information.

By limiting it to individuals under the direct control of the agencies, there is some assurance that the specific agency will be accountable and take appropriate measures. Under the proposed language, the agencies would be able, and may be required to if a state legislature so desires, to disclose information to third parties that are unlikely to take measures to prevent the improper disclosure of PII.

The proposed regulations characterize the current interpretation as being "restrictive." The opposite is true. The interpretation allows the agencies to go beyond just allowing employees to have access to data by allowing third parties to have access to data as well.

Recommendation: Codify the "Direct Control" standard into the FERPA regulations.

Education Program (99.3, 99.35)

By changing the requirement that "education programs" be administered by educational agencies or institutions, the Department is creating both legal and practical problems.

Looking at the legal perspective, the Department is taking an unreasonable interpretation of the term "educational program" in order for outside entities to evaluate educational programs that are completely unrelated to educational agencies and institutions, as well as completely unrelated to students.

¹ These scenarios likely would be answered in the affirmative, especially when considering the other proposed changes in the regulations.

This interpretation would, for the first time, allow institutions to disclose information on students even if the disclosure of PII is for a purpose not directly related to a student or does not serve some specific function for the institution. While all other permissible disclosures are related to students and institutions, for the audit and evaluation disclosure, there would be a special exception. Such an inconsistency in relation to all the other disclosures is further evidence that "education program" is being interpreted improperly.

The practical problems of this extreme interpretation also are significant. An "educational program" can mean almost anything as proposed in the regulations. Anyone can be an education provider—the definition of "education program" does not limit who can be a provider. The definition of "education program" also does not require anything more than the program is "principally engaged in the provision of education."

While such a broad interpretation may help a state health agency review the records of college students so it can look back and see the success of a Head Start program, as discussed in the proposed regulations, it also *may* lead to the following sample situations, *assuming the program is federal or state-supported*:

- A public education television station receives PII to evaluate demographics of contributors.
- Planned Parenthood, as part of its health education programs, receives PII to evaluate their programs.
- The National Rifle Association, as part of its educational programs about gun safety, receives PII.
- Voter education/get-out-to-vote groups receive PII to evaluate their programs.

The term "education" does not just mean classroom education and when not limited to what educational agencies or institutions do, the term can be extremely broad (as demonstrated in the above examples).

Combined with the definition of "authorized representative," almost any entity, be it public or private (or even an individual) could have access to PII so long as one program that it runs is "principally engaged in the provision of education."

Recommendation: Do not change the existing FERPA regulations that require educational programs to be those administered by educational institutions and agencies.

Authority to Audit or Evaluate (99.35)

As the proposed regulations explain, FERPA does not create authority for authorized representatives to audit or evaluate programs. Therefore, the FERPA regulations require that some type of legal authority be established.

This requirement is necessary to ensure that institutions and agencies are *properly* disclosing PII to "auditors and evaluators" as allowed under the FERPA statute.

Allowing authority to be established if it is "express or implied" would permit institutions and agencies to disclose PII to entities even if that agency has no right, outside FERPA, to access the information.

This interpretation makes little sense given that the audit/evaluation exception involves compliance and enforcement-related activities—these are activities where legal authority must be established (i.e. a government agency has no ability to enforce a law if it does not have clear legal authority to enforce a law—it can't just argue that the authority is implied).

It is unclear what "express or implied" means. Since legal authority is not required, this would suggest that "express" or "implied" does not mean that the authority must be expressed or implied in law. It is difficult to determine what would be express if it were not expressly authorized in law.

As for implied, the Department appears to intend that "implied" can be ascertained by the situation and not what a law would imply. This would allow agencies to have an almost unlimited ability to claim it has a right to PII.

From a practical perspective, institutions and agencies would have no objective way to figure out whether they can or should disclose PII under the audit or evaluation exception. If a state agency claims authority exists because it is implied, regardless of what the law states, an institution or agency would have to struggle to figure out whether disclosing the information violates FERPA.

By requiring legal authority, there is a practical objective way for institutions to properly comply with FERPA—they would just need to review the legal authority that is used as justification for the disclosure.

Recommendation: Maintain the existing FERPA requirement that there must be legal authority for a third party to receive PII to conduct audits and evaluations.

Directory Information (99.37)

Prohibiting the directory information opt-out provision to cover students wearing ID cards and ID badges for safety reasons is consistent with the notion that FERPA was not designed to prohibit institutions from properly functioning—it also is comparable to the existing exception under 99.37 prohibiting the directory information opt-out from being used in a class (name, identifier, or email address may be disclosed).

In the proposed regulations, there is no limit on what directory information may be included on the ID card. This could be problematic, if for example, institutions required unnecessary information such as address or phone number (such information could even pose safety risks to the student wearing the ID).

Recommendation: Make the proposed change but specify the directory information that can be displayed bearing in mind that some information would be unnecessary.

Section 99.37(d) (Limited Directory Information Policy)

Under existing law, institutions already can decide who will or will not receive directory information. Even so, there has been confusion as to whether FERPA allows institutions to formally disclose directory information for specific parties and/or specific purposes only.

This proposal does give institutions more clarity regarding directory information and allows them to feel more confident in having a directory information policy without fear of the information being misused.

It also would be helpful if this proposed change clarified that institutions can have different policies based on each specific type of directory information. For example, it would be very useful for institutions to be able to communicate that certain directory information may be disclosed to specific parties but not other types of directory information.

Recommendation: Make the proposed change but also clarify the change may apply to each type or subset of directory information.

Enforcement Procedures With Respect to Any Recipient of Department Funds That Students Do Not Attend (99.60)

The FERPA statute does not authorize the Department to expand who must comply with FERPA. The entire statute is drafted in a manner that makes it very clear that "educational agencies or institutions" do not cover student loan lenders, nonprofits, etc.

The FERPA statute states, "No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution..."

The third party entities discussed in the proposed regulations would not be covered—for example, a student does not attend a student loan lender. The entire statute covers requirements that would not apply to these third parties.

Recommendation: Do not expand the FERPA enforcement coverage.

I again appreciate this opportunity to provide comments on the proposed regulations. As the Department finalizes the regulations, I hope that it will respect and protect the very important privacy objectives of FERPA.

Sincerely,

Daren Bakst, J.D., LL.M.
President
Council on Law in Higher Education

PUBLIC SUBMISSION

As of: March 27, 2012
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Status: Withdrawn
Posted: May 24, 2011
Category: Four-Year Public Institution of Higher Education
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Submission Type: Web

Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0264
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

We don't even need the Department of Education. Look what happened to the education system as a whole as a result of the Berkeley and Kent state problems that were caused by a group called the Students for Democratic Studies from Michigan in the 60's. How is it that Bernadine Dorhn was a FBI most wanted person, but now teaches in the system that was corrupted and continues to be corrupted from that time on? Is it interesting that her husband is none other than William Ayers of the Weather Underground? And is it also interesting that the wife of Tom Hayden of the SDS, is the still running free treasonous Jane Fonda. Instead of improving the education system, we now have people running around out of high school that cannot do reading, writing or arithmetic because the government has used and abused the education system for political reasons. It's about learning to depend on the government to cause us all more problems, not solutions. I'd like to know how the government will ever expect to make my life better, by breathing down my neck things that we all know are not reality. Whether these matters take on an electronic form, it doesn't mean anything. We are all electrified by what our current system of government is already doing for the masses of the elites. The elites are the ones without the education, and we don't need their uneducated and various Departments of Hell to exist for an idealist group of people who are already serving a wayward master. The progressives that want the One World Government are only after one thing besides just one size rule fits all, they want to see what they can get away with at everybody else's expense. Why reintroduce the same old philosophy over and over again; it probably already exists in one manner or another. For the self-esteem of the government, it keeps getting recreated, with no further development or purpose and citizens treated non-discriminately criminal. The government is no longer of, by or for the people.

PUBLIC SUBMISSION

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|-----------------------------------|
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| Received: May 23, 2011 |
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| Posted: May 24, 2011 |
| Category: State agency |
| Tracking No. 80e30a20 |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0265
Comment on FR Doc # 2011-08205

Submitter Information

Organization: Minnesota Department of Education and Minnesota Office of Higher Education

General Comment

We appreciate the opportunity to submitted our comments on these proposed FERPA regulations. Our comments are in the attached document.

Attachments

Comment on FR Doc # 2011-08205



May 20, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

**Re: Docket ID ED-2011-OM-0002
Amendments to 34 C.F.R. Part 99
Comments Due May 23, 2011**

Dear Ms. Miles,

These comments are respectfully submitted in response to recently proposed amendments to the Family Education Rights and Privacy Act (FERPA) implementing regulations, found at 34 C.F.R. Part 99.

The Minnesota Department of Education and the Minnesota Office of Higher Education support the proposed changes to the FERPA regulations. We believe that these changes will make it easier for states to create strong longitudinal data systems, and to support relevant research on education programs and outcomes. The end result will be an enhanced ability to build stronger and more innovative public education systems that prepare our students for future job opportunities and allow them to be fully engaged and informed citizens.

We appreciate in particular the discussion language affirmatively stating that state education agencies (SEAs) have implied authority to conduct an audit, evaluation, enforcement or compliance activity, and that the Family Policy Compliance Office (FPCO) intends these clarifications to promote the robust use of data by SEAs and local education agencies (LEAs) to evaluate the effectiveness of education programs. *See* 76 Federal Register 19731 (discussion of amendments to 34 C.F.R. § 99.35 that govern authority to audit or evaluate). We also support the FPCO's discussion of the role of SEAs and state higher educational agencies in performing and supporting research and evaluation of publicly funded education programs for the benefit of multiple educational agencies and institutions. *See* 76 Federal Register 19730.

Education Programs, Proposed 34 C.F.R. § 99.3 and 34 C.F.R. § 99.35

It is clear that the FPCO and the US Department of Education understand the states' role in supporting education at the local level by encouraging strong research into educational practices and by engaging in strong state-level evaluations of various education programs that will guide LEAs in finding and using the most effective educational practices and programs.

However, after reviewing the proposed FERPA regulation amendments, it is unclear the extent to which these proposed amendments will assist states seeking to include Head Start/Early Head Start data in their statewide longitudinal data systems. The proposed changes clearly anticipate that Head Start/Early Head Start is included in the scope of the definition of "education program" for FERPA purposes. We

understand, and appreciate, that this proposed definition will allow SEAs to disclose data to Head Start/Early Head Start entities so that those entities can conduct evaluations of Head Start/Early Head Start program effectiveness. However, we believe that inclusion of Head Start/Early Head Start data in the states' statewide longitudinal data system is important in order to make it as comprehensive and fully useful as possible. In our state, many Head Start/Early Head Start programs receive some state funding, and thus are subject to limited state oversight. However, Head Start/Early Head Start remains a program that is primarily federally funded, with federal reporting and oversight requirements. Therefore, we request and encourage the FPCO to work with the federal Head Start program oversight team at the US Department of Health and Human Services (HHS) to develop policy guidance language on this issue, and to recommend strategies that states can use to ensure that Head Start/Early Head Start data is included in statewide longitudinal data system, especially in states that provide substantial resources to Head Start/Early Head Start.

We would especially appreciate guidance about how HHS intends to implement the privacy regulations described in Section 641a of the Head Start Act, which calls for "policies, protections, and rights equivalent to those provided to a parent, student, or educational agency or institution under section 444 of the General Education Provisions Act (20 U.S.C. 1232g)." *See* Improving Head Start for School Readiness Act of 2007, Pub. L. No. 110-134, § 8 (42 U.S.C. § 9836A(b)(4)(A)).

Authorized Representative, Proposed 34 C.F.R. § 99.3 and 34 C.F.R. § 99.35(a)(2)

We request that FPCO clarify that by changing the definition of authorized representative, it intended that an SEA could designate and enter into written agreements with an authorized representative, and that schools and LEAs in the state will be able to share data with the SEA's authorized representative without any further action on the schools' part, based on the SEA's existing designation and written agreement.

Enforcement Authority and Procedures, Proposed 34 C.F.R. § 99.31(a)(6)(iii)(C)(4)(v), 34 C.F.R. § 99.35(d) and 34 C.F.R. § 99.60

The explicit extension of FPCO's authority to enforce FERPA, along with the clarification that SEAs must take responsibility for data privacy and handling of data by the entities to which they redisclose data, will help balance student privacy rights with the enhanced ability to link data between and use data from multiple data sources with information relevant to education program efficacy. However, it is unclear how FPCO will implement its ability to enforce its FERPA oversight authority over SEAs. We suggest that FPCO clarify its proposed language or discuss whether SEAs will be able to challenge an FPCO finding, or take corrective actions in order to avoid an FPCO finding, and how, if the FPCO does make a finding against an SEA, this will impact the SEA's independent federal requirements to report information to the federal government and to the public?

Student Privacy Protections, Proposed 34 C.F.R. § 99.31(a)(6)(iii)(C) and 34 C.F.R. § 99.35(a)(2) and (a)(3)

Overall, while we find the proposed changes to the FERPA regulations to be useful and carefully calculated to help states better share collected student data in more effective ways to design and support strong education programs, FERPA is primarily a student data privacy and parental access law. It was not designed to support or promote statewide longitudinal data system or extensive data sharing for evaluation and research purposes. The only privacy protections contained in the proposed regulations essentially extend to SEAs the same responsibilities and oversight that apply to LEAs, which have always been able to share data as anticipated in these proposed regulations. We believe that that these privacy protections are not strong enough, given the much-expanded ability to gather together and compare large amounts of data about individual students from multiple sources and life stages, and also to share that data

with other entities, however legitimate they may be. We recommend that FPCO consider additional protections to ensure student privacy.

Limiting Data Use to the Purpose for Which It Was Created or Shared

Finally, it is clear in the current FERPA regulations as well as these proposed changes that entities which receive data from LEAs and SEAs for research purposes, under 34 C.F.R § 99.31(a)(6), may not use data for purposes other than those for which the data was shared, as outlined in the written data sharing agreement. However, there is no such limitation on data shared with SEAs or their authorized representatives, or the federal education agency or its authorized representatives. We suggest that FPCO include in its regulations stronger limitations on the use of data by SEAs, the federal education agency, and their authorized representatives, so that when the data is collected for one purpose it cannot be easily used for an entirely different audit, evaluation, or compliance or enforcement activity. Data that is collected for one purpose often has limited use for another purpose because of specific collection methodologies, and this can result in false conclusions if the data is used for different purposes. Furthermore, state and federal laws require LEAs and SEAs to give prior notice when they collect personally identifiable data, such as explaining to the individual who will become the subject of the collected data who is authorized to receive the data and how it will be used. Therefore, we would like FPCO to consider regulatory language that puts greater restrictions on the ability of SEAs, the federal education agency, and their authorized representatives, to use data collected for a particular purpose for other, unrelated and undisclosed purposes.

Thank you for the invitation to comment on these proposed regulations, and for your work in crafting regulations that will improve states' ability to use student data for compliance, evaluation and research purposes to improve student learning while maintaining individuals students' privacy rights.

Respectfully,

Dr. Brenda Cassellius

Brenda Cassellius, Ed.D.
Commissioner
Minnesota Department of Education

Dr. Sheila Wright

Sheila Wright, Ph.D.
Director
Minnesota Office of Higher Education

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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| Posted: May 24, 2011 |
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| Tracking No. 80e308d5 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0266
Comment on FR Doc # 2011-08205

Submitter Information

Name: Diane Kerchner
Address:
San Dimas,
Email: ladydimarie@verizon.net

General Comment

I descend from the father of the youngest signor of our U.S. Constitution...Elias Dayton is the father, and Jonathan Dayton is the son. I hold our country's Bill of Rights dear to me.

We did not evolve as a nation by taking rights away from families, but rather by strengthening them. A citizen's privacy is historically a right in the US of A. A parent's right to care and have full responsibility for one's child is also fundamental to being American. Therefore, removing one's parental rights to basically control who does and who does not have access to their child's education records is unamerican, to say nothing of being illegal. There are many sound reasons for this.

Parents know their children best because they have experienced life with them and nurtured them and helped them become the good citizens this nation needs. Parents have the right to choose to privately educate their children or publically do so. But nowhere in our Constitution or Bill of Rights does it give the government be it state or federal the right to remove parental rights and take them on for themselves as an entity. Such attempts must be stopped if we are to call ourselves the nation founded as the USA. Our founding fathers warned us about governments which might try to do such.

America has worked for over 200 years. All laws which attempt to remake America into something else must never come into being. In fact, it is possible that some such vile attempts undermine the basic fiber of our society, let alone our nation. Shame on every party who supported this attack on parental rights.

We will have to systematically run each one of these people out of our government leadership positions. Every elected official is expendable. Leadership comes with responsibility for being ethical, for it comes at the price of American freedom, for which we, the people, hold each elected official

DO THE RIGHT THING AND DO NOT PASS THIS RULE.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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| Status: Posted |
| Posted: May 24, 2011 |
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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0267
Comment on FR Doc # 2011-08205

Submitter Information

Name: Keith Bryant
Address:
Silverdale, WA,

General Comment

Your proposed amendment to 444 are outrageous

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
| Category: Parent/Relative |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0268
Comment on FR Doc # 2011-08205

Submitter Information

Name: Lee Duncan
Address:
Orem, UT,
Email: leeduncan@gmail.com

General Comment

I am strongly opposed to the changes proposed for the current FERPA law. It make no sense whatsoever that in the name of privacy we gut the privacy controls in this law. The federal government needs to butt out of these kinds of decisions and leave them to the states.

Please do not accept the proposed changes.

I don't even understand how you can propose a rule change for a law passed by Congress.

Only in this administration would this kind of rule be proposed. Just more federal morass. We don't need it.

If a kid had a bad year and then changed, all of that is out in the world potentially forever with not oversight - ask Mark Zuckerberg about that. He wants our kids too.

Everybody ought to just lay off the kids and not try to turn everyone into a numbered zombie.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
| Status: Posted |
| Posted: May 24, 2011 |
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| Tracking No. 80e30c39 |
| Comments Due: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0269
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

The government can't be trusted. The schools are being pushed into a liberal socialist agenda, as a parent, I will not tolerate an infringement of mine of any childs right to privacy.

I blame this on OBAMA, the Marxist, Socialist, and traitor to the American people.

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0270
Comment on FR Doc # 2011-08205

Submitter Information

Name: Stan Lewis
Address:
Houston, TX,

General Comment

I am strongly against the proposed revisions to the Family Educational Rights and Privacy Act (FERPA).

As a parent I have little to no rights (other than those given by my child) to their educational records, yet the proposed rules allow unlimited access to an unlimited number of people (I am not included)

This is a travesty and another example of government overreach, privacy piracy and nanny state

These changes must be discarded

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
| Received: May 23, 2011 |
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Docket: ED-2011-OM-0002
Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0271
Comment on FR Doc # 2011-08205

Submitter Information

Name: Frank
Address:
Arlington, VA,
Email: director@splc.org
Submitter's Representative: Frank LoMonte
Organization: Student Press Law Center

General Comment

The comments of the Student Press Law Center regarding proposed rule ED-2011-OM-0002-0001, regarding the Family Educational Rights & Privacy Act (FERPA), are attached. We appreciate the opportunity to have input into this important policy decision.

Attachments

Comment on FR Doc # 2011-08205

Comments of the Student Press Law Center
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-1904 www.splc.org splc@splc.org

Family Educational Rights and Privacy; Notice of Proposed Rulemaking
RIN 1880-AA86
Docket ID ED-2011-OM-0002
U.S. Department of Education, Office of Management
May 23, 2011

Introduction and Statement of Commenter's Interest

The Student Press Law Center ("SPLC"), a 501(c)(3) nonprofit founded in 1974, is an educational and advocacy organization that supports student journalists at the college and high-school levels, and their faculty advisers, nationwide. The SPLC teaches student journalists how to use open-records laws and open-meetings laws to cover news stories of importance to a campus audience, and also educates journalists about legal obstacles they may encounter in attempting to gather information, including the Family Educational Rights and Privacy Act ("FERPA").

As an advocate for the ability of the media to gather and report newsworthy information about schools and colleges free from unnecessary obstructions, the SPLC is concerned that any change to the "directory information" provisions of FERPA not impose unwarranted barriers to obtaining basic facts needed for news reporting.

Comments to Section 99.37(d) (Limited Directory Information Policy)

The Student Press Law Center supports the stated intent of the proposed revision to Section 99.37(d) to encourage more schools to make some level of directory information publicly available. Student directories are in many cases indispensable resources for journalists covering campus news. When there is an emergency on campus, the student directory can provide essential contacts enabling journalists to obtain and disseminate reliable information. In a situation such as the 2007 Virginia Tech shootings, in which a campus is in a state of lockdown, journalists who cannot gain physical access to the premises can still gather information if they can locate sources by phone or email. The fact that Congress incorporated a directory information exception into FERPA attests to the recognized societal usefulness of making basic identifying information publicly accessible.

While the goal of making it more palatable for schools to offer directory information is a commendable one, the language of Section 99.37(d) as proposed gives inadequate guidance to schools and may result in a proliferation of confusing and counterproductive applications. The language "specific parties" or "specific purposes" is insufficiently descriptive as to the method of implementation, and should be fortified with greater detail so that schools effectively implement the language as intended. In particular, use of the phrase "specific parties" suggests an individualized determination that is not practically workable.

The SPLC's primary institutional concern is for the continued availability of directory information at the collegiate level. Almost every college student is of the legal age of adulthood, and many are engaged in activities in which there is significant public interest, whether as athletes, entertainers, business entrepreneurs, or political activists. It is often necessary for journalists to use the student directory to arrange interviews with these newsmakers, or simply to use the directory to confirm basic information (spelling of name, correct year in school, and so on). Any changes to FERPA's directory information regulations should be undertaken in recognition of the importance of keeping student directories accessible for legitimate news-gathering purposes.

Colleges frequently make directory information available in searchable form online. A system that contemplates restricting directory information to specific parties or for specific purposes necessarily suggests that directories no longer be publicly available online. The net result of such a system may well be the opposite of the Department's stated intent, resulting in a net decrease in the accessibility of directory information.

It is not clear from the Proposed Rule how the Department envisions that those within the limited universe of authorized directory information recipients are to be chosen. Whether the selection of "specific parties" is made by the college or is made by each individual student, the concept that disclosure might be limited to "specific parties" is problematic for several reasons.

For example, a college that selects "specific parties" to obtain directory information might select only the incumbent vendors with which it currently does business – class rings, caps-and-gowns, and so on – either through oversight or through an intentional effort to protect favored businesses against competition. This would make it especially difficult for a company that begins operating in mid-school-year to have fair access to directory information on the same terms as its competitors.

Further, withholding eligibility for directory information could become a tool for schools to engage in retribution against disfavored media outlets, social or political causes, or parental activist groups. At present, once the determination is made to have a campus directory, the directory must be made available on equal terms to all requesters. This safeguards against use of the directory as a reward-and-punishment mechanism. It is the experience of the Student Press Law Center after 37 years of working with the student media that college administrators regularly abuse their authority to withhold access to information from media outlets that they believe portray them in an insufficiently favorable light. For instance, a media outlet with an editorial policy critical of the college administration may find itself uninvited from news conferences or cut off from receiving media credentials to desirable sporting events. In those situations, access to a student directory can be a "lifeline" for the media to get in direct contact with news sources that the college administration cannot control.

The ability to pick-and-choose among directory information recipients invites viewpoint-based discrimination. If a campus group “Students Opposing Tuition Increases” wants access to a student directory for purposes of distributing information or recruiting members, that group should have access on exactly the same terms as a group with a competing viewpoint (“Students for Higher Tuition”). Empowering institutions to make individualized determinations, with no federally mandated standards, as to which recipients do and do not “deserve” access to a student directory is an invitation to abuse.

Alternatively, if it is the Department’s intent that individual students (or parents) make the determination as to which “specific entities” may obtain their directory information, rather than the school making a blanket determination applicable to all, use of the phrase “specific entities” presents similar practical and logistical problems.

A literal application of the concept of disclosure “limited to specific parties” might suggest some type of fill-in-the-blank option, in which the student could enumerate individual requesters and authorize this or that individual requester to have access to directory information. This is unworkable. For example, suppose a college athlete decides that his hometown newspaper should have access to his directory information so that he can receive coverage in the newspaper that his parents read – but in the middle of the school year, a new news organization begins serving that community. The student will of course not have anticipated the creation of a new media entity and will not have authorized those journalists to receive his directory information.

To enable each student to make a personalized determination as to who may view his directory information would present a significant practical problem: the person who chooses the most limited disclosure will necessarily set the standard for the entire directory publication. If a single college student decides that his directory information may be seen only by Jones Class Ring Co., then *the entire directory* may not be shared with anyone except Jones.

We assume that the Department did not literally mean that the FERPA form would become a confusing menu of individual business entities. Nevertheless, that is a fair reading of the term “specific parties,” and – if not clarified – at least some schools will interpret it in that manner.

Even if the Department envisions that the determination of “specific recipients” and “specific purposes” be made on a more generic level rather than organization-by-organization, the implementation raises many practical problems. A college administration that is hostile to public scrutiny may make a categorical determination to exclude all media organizations from access to the campus directory – even if that is not the wish of those listed in the directory. Allowing each college and each school to define the scope of these generic categorical exclusions will create confusing line-drawing issues. For instance, if an administrator decides that “commercial entities” or “business entities” are excluded from accessing the directory, would that include charitable solicitors, issue-advocacy organizations, political campaigns, or

Comments of the Student Press Law Center

RIN 1880-AA86

Docket ID ED-2011-OM-0002

May 23, 2011

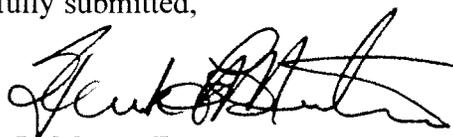
for-profit colleges? If there are to be categories of users who can and cannot access directory information, then the Department (perhaps with the consultation of Congress) – not thousands of individual decision-makers around the country – should design those categories after careful study and consideration.

Alternatively, assuming that the Department intends for the selective opt-out to be made at the election of the individual and not the educational institution, practical problems arise. The directory-information election typically is made once at the start of the school year. A person who is given the choice to opt out from disclosure to “news media” may make a one-time selection not anticipating involvement in newsworthy events. Understandably, people often do not foresee the many purposes for which the news media might legitimately need to contact them on a deadline basis. A college student may witness a fire, win an award, volunteer for a prominent politician, or start the next Facebook company – any one of which would be a matter of public interest. The campus directory is at times the only practical method of contacting these individuals.

As the foregoing illustrates, modifying the concept of directory information is a complex undertaking with many potential unintended consequences. The proposal as drafted inadequately constrains the discretion of educational institutions in a way that invites misuse, and gives inadequate implementation guidance that is certain to lead to confusion.

RECOMMENDATION: Proposed subsection 99.37(d) should be rescinded for further discussion among interested stakeholders, with consideration of the facts that (1) many colleges make directory information available online, thus rendering it impracticable to limit availability to specific parties or for specific purposes and (2) differential standards may be appropriate for the K-12 versus colleges levels, as there is greater public interest in the accessibility of contact information for those enrolled in postsecondary education.

Respectfully submitted,



Frank D. LoMonte, Esq.
Executive Director
Student Press Law Center

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0272
Comment on FR Doc # 2011-08205

Submitter Information

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Address:
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Email: maureenw@ccsso.org
Submitter's Representative: EIMAC
Organization: Council of Chief State School Officers

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Proposed Amendments to FERPA Regulations (Docket ID ED–2011–OM–0002)

Dear Ms. Miles,

Thank you for the opportunity to provide comments and recommendations in response to the notice of proposed rulemaking published in the Federal Register on Friday, April 8, 2011 regarding amendments to the regulations for the Family Educational Rights and Privacy Act (FERPA). This letter represents comments on the proposed amendments from the Education Information Management Advisory Consortium (EIMAC) of the Council of Chief State School Officers (CCSSO). EIMAC is CCSSO's network of state education agency (SEA) officials tasked with recommending policy and practice with regard to data collection and reporting, information system management and design, and assessment-related data issues. The comments made here express the collective voice of the 47 SEA members currently engaged in the EIMAC consortia.

State education agencies are committed to creating a public education system that prepares every child for lifelong learning, work, and citizenship. In order to fulfill this promise we know that we need to use quality data to make decisions from the policy level to the classroom. The proposed changes to the FERPA regulations will allow us to facilitate better research and evaluation using our statewide longitudinal data systems (SLDS) in order to do just this. Use of quality data will increase our accountability and transparency, allow us to measure outcomes and continuously improve the way we approach the business of education. State education agencies are equally as committed to protecting and securing the privacy and confidentiality of individual student records.

These proposed regulations strike the needed balance between data use for the improvement of education and the privacy protection of educational records. Please consider the following comments and recommendations on the notice of proposed rulemaking.

Authorized Representatives (§§99.3, 99.35)

The proposed regulation would add a definition of the term "authorized representative". Under the proposed definition, an authorized representative would mean any entity or individual designated by a State or local educational authority or agency headed by an identified official to conduct – with respect to federal or State supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs.

EIMAC members are pleased to see a definition being applied to the term Authorized Representative. This will assist state education agencies in handling education data to evaluate the effectiveness of education programs. We would like to recommend the addition of the word "state" to the second half of the definition so that the full definition reads: "an authorized representative would mean any entity or individual designated by a State or local educational authority or agency headed by an official listed in §99.31 (a) (3) to conduct—with respect to Federal or State supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal *or State* legal requirements that relate to those

programs.” Consistently referring to both Federal and State will serve to minimize confusion in implementation.

Reasonable Methods (§ 99.35 (a)(2))

The proposed regulations provide that the responsibility remain with the State or local educational authority or agency headed by an identified official to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA. No definition is given in these regulations as the Department intends to issue non-regulatory guidance on the subject.

EIMAC members appreciate the flexibility offered by issuing non-regulatory guidance. The protection of student information is a top priority of state education agencies and methods used to ensure compliance with FERPA can vary based on available technologies and governance structures.

EIMAC members would like to take this opportunity to applaud the Department for the establishment of the Privacy Technical Assistance Center (PTAC) and the hiring of a Chief Privacy Officer (CPO). We are excited to work with both the CPO and PTAC on these issues. PTAC is in an excellent position to provide both technical assistance and a library of best practices around securing data, ensuring privacy, and defining reasonable methods that meet the needs of both the Department and State and local agencies.

EIMAC members would like to offer the following points for consideration in defining guidelines around “reasonable methods” for ensuring FERPA compliance:

- The guidance should set the minimum standards for “reasonable methods” and leave flexibility for the states to define and implement processes and practices to meet those standards.
- The guidance should encourage differentiated solutions for meeting the needs for research and maintaining security, privacy, and confidentiality.
- The guidance should include examples of best practices for governing and securing data both “at rest” and “in flight”.

Written Agreements (§ 99.35)

The proposed regulations would require written agreements between a State or local educational authority or an agency headed by an identified official and its authorized representative. The regulations propose specific points with regard to the content of these written agreements that include provisions on purpose of the disclosure, time period for the work, and policies that protect against redisclosure.

EIMAC members applaud the Department for including this provision. Formal written agreements provide necessary privacy safeguards while allowing for data to be used to appropriately evaluate education programs and provide information to improve student outcomes. We want to be sure that in listing the specific points to be laid out in a written agreement the Department is not creating a minimum standard, but instead providing state agencies with the flexibility to draft agreements that meet state-specific needs. The addition of the phrase “including but not limited to” will help to make clear the flexibility of a state agency to include additional provisions if needed.

This is another area where the assistance provided through PTAC will be well positioned to showcase best practices with regard to written agreements. EIMAC members look forward to working with PTAC staff to identify and share best practice around the privacy and security of personally identifiable data.

Education Program (§§99.3, 99.35)

The proposed regulations define the term “education program” to mean any program that is principally engaged in the provision of education, including but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an educational authority.

EIMAC members applaud the Department’s broadening of the term education program. In order to understand and improve the business of education it is important for policymakers and practitioners to know the impact of services provided prior to kindergarten, outside the school day, and after high school graduation. With this expanded definition, state education agencies can appropriately evaluate and audit learning throughout the educational process.

That said, EIMAC members would recommend further clarification and definition of education programs. We ask for clarification around early childhood programs that take place in a variety of settings and under the jurisdiction of a variety of authorities or agencies. We also ask for the inclusion of extended learning opportunities and afterschool programs.

Accordingly, we recommend that the NPRM further define “publicly-funded early childhood education programs” to include but not be limited to those programs and services that are, in whole or in part, designed to advance school readiness of children from birth through the age at which a child may start kindergarten in a given state, such as Head Start; Early Head Start; child care (licensed or regulated by the state or funded by the Child Care and Development Block Grant); home visiting; pre-kindergarten; infant-toddler; and early intervention for infants, toddlers and preschoolers funded through the IDEA programs. We also recommend defining extended learning opportunities to include but not be limited to before- and after-school programs; weekend, vacation, and summer programs; extended-day and -year initiatives; and digital/distance learning.

EIMAC members understand the importance of setting clear boundaries in defining education programs. We want to be sure that we have the flexibility to use comprehensive data in effective and secure ways to improve the education system for all students and become a truly data driven enterprise.

Research Studies (§ 99.31 (a)(6))

The proposed regulations clarify that nothing in FERPA or its implementing regulations prevents a State or local educational authority or agency headed by an identified official from entering into agreements with organizations conducting research studies and, as part of such agreements, prevents the use of PII on behalf of the education agencies and institutions.

EIMAC members fully support this clarification. The information housed in our statewide longitudinal data systems is best utilized for the purpose of research to improve the education system as a whole. EIMAC members urge the Department to consider adopting a clear definition of research to provide further clarity around these disclosures.

This provision also brings up often confusing issues between FERPA and the Freedom of Information Act (FOIA). EIMAC members would like the Department to strengthen language to ensure that FERPA protections extend to protect personally identifiable education records against FOIA requests.

Improper redisclosure of PII (§99.33)

The proposed regulations clarify the enforcement policies around redisclosure of PII stating that if the Department finds that a State or local education authority, an agency headed by an identified

official, or an authorized representative there of improper redisclosures of PII in violation of FERPA, the educational authority that provided the data would be required to deny that representative further access to personally identifiable data for at least five years.

EIMAC members understand and agree that substantial consequences are needed. A debarment from access to PII is an appropriate consequence for FERPA violations. We would however like the Department to consider several suggestions in relation to the improper redisclosure.

- EIMAC members would first ask the Department to define the debarment procedures to include clarity around potential remedy and due process for violations.
- We would also ask that states have the ability to differentiate degrees of offenses and impose potentially harsher penalties on flagrant violations, and lighter sentences on lesser misdemeanors. For example, the posting of an aggregate report that is found to improperly suppress the N size may not need the same penalty as leaving a data set with PII in a public place.
- Finally, we would ask the Department to clarify whether penalties are uniformly levied on an individual or an organization/agency. If an individual working for an authorized representative is responsible for the improper redisclosure and leaves the organization/agency is that agency still disbarred? Moreover, if the individual is then hired at a second organization/agency that is also an authorized representative should she be allowed access to PII?

Authority to Audit or Evaluate (§99.35)

The proposed regulations would remove the provision that a State or local education authority or other agency headed by an identified official must establish legal authority under other Federal, State or local law to conduct an audit, evaluation, or compliance or enforcement activity. This proposed regulation would permit state or local education officials to disclose data to any entity or person designated by the state or local education authority for the purpose of evaluating or auditing federal or state-supported education programs or enforcing compliance with federal legal requirements. This change would also permit education data to be housed in a centralized state data agency that is not an education agency, while not permitting disclosure of data to a non-education agency solely for that non-education agency's purposes.

EIMAC members are supportive of this clarification. Clarifying our ability to use a centralized data facility to house education data provides states with the ability to make cost effective warehousing decisions where the technology is available while maintaining the privacy, security, and confidentiality of those data under other provisions of FERPA. However, EIMAC members urge the Department to issue non-regulatory guidance or provide best practice through the Privacy Technical Assistance Center on the boundaries between agencies, data stewardship, and what constitutes an educational purpose outside of the education agency. A centralized data center must still include strong data governance with the education agency maintaining ownership of the educational data.

Enforcement procedures with respect to any recipient of Department Funds that students do not attend (§99.60)

The proposed regulation would clarify that in addressing enforcement procedures, an "education agency or institution" includes any public or private agency or institution to which FERPA, as well as any State education authority or local educational authority or any other recipient to which funds have been made available under any program administered by the Secretary. This clarification extends the ability of the department to investigate and enforce alleged violations of FERPA by State and local education authorities beyond those entities that enroll students.

This clarification is welcomed and needed. EIMAC members fully support the expansion of enforcement procedures and welcome additional accountability.



State education agencies and EIMAC members have long awaited clarification to FERPA and we thank you for the comprehensive language provided in these proposed amendments. In closing, we ask only that you finalize changes with all due speed. As we race to meet deadlines for creating the State Fiscal Stabilization Fund comprehensive P-20 data systems by September 2011, we hope to have the necessary FERPA guidance finalized.

Thank you again for your attention to these comments.

Sincerely,



Carissa Miller
Deputy Superintendent, Assessment
Division
Idaho Department of Education
EIMAC Board Chair



Dan Domagala
Chief Information Officer
Colorado Department of Education
EIMAC Board Chair Elect

PUBLIC SUBMISSION

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Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0273
Comment

Submitter Information

Name: Branes, Chairman Wallace

Address:

Wethersfield, CT,

Organization: State of Connecticut Employment and Training Commission

Government Agency Type: State

Government Agency: State of Connecticut Employment and Training Commission

General Comment

See attachment.

Attachments

comment



STATE OF CONNECTICUT

EMPLOYMENT AND TRAINING COMMISSION

WALLACE BARNES
CHAIRMAN

May 20, 2011

Regina Miles
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, D.C. 20202

Dear Ms. Miles:

The Connecticut Employment and Training Commission (CETC) serves as the Governor's Statewide Workforce Development Policy Board. I am writing these comments in response to the Federal Register Notice published April 8, 2011 that proposed to amend the regulations implementing section 444 of the General Education Provisions Act, which is also known as the Family Education Rights and Privacy Act of 1974, as amended (FERPA).

1. § 99.3 What definitions apply to these regulations?

We welcome your expansion of the definition of "authorized representative". Connecticut has produced a "Legislative Report Card" for over ten years. This legislatively mandated report has matched outcomes for both federally funded and state funded workforce training programs with the Unemployment Insurance Wage system. Resulting aggregate data has been used to report on employment outcomes, earnings and wage gains.

The Legislative Report Card has proven to be a useful tool in developing trend analysis regarding workforce program outcomes.

2. § 99.31 Under what conditions is prior consent not required to disclose information?

Connecticut has experience developing agreements between and among agencies that enable the sharing of information for evaluative purposes. Providing clarification regarding the content of such agreements and the consequences for disclosure of private information will be a valuable resource as the State develops long term evaluations.

3. § 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

Connecticut has participated in a number of USDOL sponsored workforce training programs (which provide both credit/certificate and non-credit programs) through our community college system. The proposed regulations ensure that the State is able to evaluate the value of these programs as a long term educational investment for the system as well as preparing students for good jobs.

Ms. Regina Miles

May 20, 2011

Page 2

We appreciate the opportunity to comment on the proposed regulations and welcome the recommended revisions. Without these revisions, Connecticut will find it difficult to continue the analysis and evaluation of educational and workforce programs that we have been working on for the past 10 years.

Sincerely yours,

A handwritten signature in black ink that reads "Wallace Barnes". The signature is written in a cursive, flowing style.

Wallace Barnes, Chairman
Connecticut Employment and Training Commission

cc: Glenn Marshall, Commissioner, Connecticut Department of Labor
Michael Meotti, Commissioner, Connecticut Department of Higher Education

PUBLIC SUBMISSION

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| As of: March 27, 2012 |
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Family Educational Rights and Privacy

Comment On: ED-2011-OM-0002-0001
Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0274
comments

Submitter Information

Name: Sue Schneider

Address:

New York, NY,

Email: sue.schneider1@gmail.com

General Comment

See attachment

Attachments

Comment



To: The U.S. Department of Education
Re: RIN 1880-AA86
(DOCKET ID ED- 2011-OM - 0002)

May 19, 2011

SUBJECT: Circumventing Congress to pass FERPA amendments.
Sharing the "eligible" adult students' records with his/her parents.

The DOE's proposal to amend FERPA sans Congressional approval - an under-the-radar tiny proposal no one seems to be paying attention to - is a perfect argument for the Tea Partiers and for smaller government.

In this age of Wiki-leaks, and hackers breaking into banks, hospitals, schools, stores, credit card records, etc. exposing us all to identity theft, **the USDOE wants to open students' private records to several huge federal agencies** - requiring that, in order to receive funding, states must participate in a debacle that throws \$100 million more on top of the \$500 million already spent? This is bizarre.

What is motivating this? Greed. Lobbyists. Money. I ran a private remedial reading school for disabled, disadvantaged adults funded by the state. I have seen myriad abuses. This is not a move to improve education. It is big business. The only ones who will benefit are "for-profit" schools and educational testing and publishing companies and job placement services. By accessing DOE information at the Department of Labor, **they intend to mine this personal information for their own profit.** And then it is out there forever - a huge irretractible mistake.

Big Brother is indeed alive-trying to put one over on us - and, I'm horrified to say - he is, as many have asserted to my denials, a Democrat.

In 1974, FERPA was voted into law to guarantee parents access to their minor child's educational records and to protect the student's privacy. All others, including the press and the government, were excluded, without express permission from the parents. **Back then, everyone seemed to understand the damage exposing private information could cause.** Things became somewhat confused when, in the guise of respecting the "eligible" adult student's privacy, at age 18, colleges transferred all communication to the student, excluding parents.

For 35 years, FERPA remained essentially intact; no one seemed to notice the impact it was having on our children. In those 35 years, the exclusion of parents increased as their children (18, 19, 20, and 21-year-olds) drowned on campus from lack of support. Most of us only became aware of FERPA as a result of the tragedy at Virginia Tech. In 2008, Congress expanded communication between the student's



schools, and voted to share information **for the students' benefit**. But these amendments fell far short of clarifying the law, and they did nothing to include parents – **even though, according to the law-makers who actually drafted the original bill, excluding parents was never their intent.**

If any proposal calls for **earmarks, this is it. Tag on a stipulation that parents must be kept involved throughout their child's schooling, including college,** certainly as long as they are paying or contributing. This does not even set a precedent. "Under the Affordable Care Act, if your (Healthcare) plan covers children, **you can now add or keep your children on your health insurance policy until they turn 26 years old.**" - <http://www.healthcare.gov/law/provisions/youngadult/index>.

But - wait- my child's education records include MY personal information too. As a result, all information in the DOE files must remain separate from the Departments of Labor and Health & Human Services. **Separation provides checks and balances and ensures privacy. And sharing this information would be an invasion of my privacy.** I didn't sign on for that.

Any mention of family members in the records must preclude dissemination of that information to any other agency, unless the parents - as well as the eligible college student - agree to a release. That will make it impossible to implement the record-sharing, you say? Then perhaps it should be impossible.

My personal information is part of my child's education records, records that, according to FERPA, were supposed to be sacrosanct, private. Do I want my personal information circulating among federal agencies – vulnerable to hackers and the highest bidder? No. **If the DOE expects families to be open and honest in order to help their children, why would you even consider this?**

What is being proposed in the name of ensuring our children's future employability, is misguided and disingenuous. It comes at the expense of our freedom and our individual family privacy. Google instantaneously knows everything about my personal and purchasing habits when I hit SEND. FaceBook knows everything else. We have already been hacked. But they admit to being in it for the money. To allow this additional back-door rape of our privacy by government would be unforgivable.

How brilliant the founding fathers were. How careless we are with their legacy. I expected more of this administration; I still do. Retract this proposed amendment. And rethink FERPA. Our right to privacy must be guarded passionately.

Respectfully submitted,

A handwritten signature in black ink that reads "Sue Schneider". The signature is fluid and cursive, written over the typed name.

Sue Schneider