

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-DRAFT-0030
Comment on FR Doc # 2011-08205

Submitter Information

Name: William Burt
Address:
St. Clair, MO,
Email: bburt73@gmail.com
Submitter's Representative: none
Organization: none
Government Agency Type: Federal
Government Agency: ED

General Comment

My comment is, I want the Federal Department of Education to go into the dustbins of history, as a experimental nightmare. This is one of the biggest, most expensive intrusions, by the Federal government, into the education of our children, which should come under the perview of state and local control.

Elimination of this boondoggle would save taxpayers a lot of money, which is something we do not have, as we owe \$14.3 trillion and the debt is escalating at an exponential rate.

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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-0002-0002
Comment on FR Doc # 2011-08205

Submitter Information

Name: Bradley Wilson
Address:
Raleigh, NC,
Email: bradleywilson08@gmail.com
Government Agency Type: State

General Comment

I oppose any changes to FERPA that would, in any way, restrict access to directory information as it is currently defined.

As a victim of identity theft myself, I understand the consequences but believe the benefits to access to this information outweigh any statistically insignificant potential for harm.

People need to take personal reasonable precautions to protect their identity. That is NOT the job of the state. And directory information (name, grade, major, address, hometown, etc.) certainly is not enough to constitute identity theft.

Further, I encourage you to revisit the unintended consequences for FERPA. For example, public school newspapers are being told that because of FERPA, they can't post a student's name on their NEWS website. Make it clear, that such information is not restricted by FERPA.

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-0002-0003
Comment on FR Doc # 2011-08205

Submitter Information

Name: Karen Guenther

Address:

Lewisville, TX,

Email: kandrguenther@netzero.com

General Comment

The FERPA policy needs to be rewritten so yearbooks and other official school publications are not included in the wording.

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-0002-0004
Comment on FR Doc # 2011-08205

Submitter Information

Name: Katharine Hohorst

Address:

Greenwich, CT,

Email: kate@hohorst.net

Submitter's Representative: Kate Hohorst

Organization: Greenwich Highschool PTA sStudent Emnployment Service

Government Agency Type: Federal

Government Agency: ED

General Comment

We are a nonprofit organization that operates an online web-based jobs program that matches local employers with students for work that takes place after school or on weekends or during holidays.

The service assists all youth in the town of Greenwich between the ages of 14 and 24 and operates primarily as a free rapid communication job referral system. The service is operated by PTA volunteers who administer the program from the high school during lunch hours.

All data and files are off-site and no job training takes place.

It is our understanding that the

1. high school students employment record is not an educational record under Ferpa.
2. students do not have to share their employment record with the school authorities
3. Since the activity takes place after school, the right to the on line service is considered a "privilege" not a "right".

Please confirm that this will continue to be the case under the revised FERPA.

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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-0002-0005
Comment on FR Doc # 2011-08205

Submitter Information

Name: Adam Khan

Address:

Austin, TX,

Email: adam.m.khan2214@gmail.com

Submitter's Representative: Lloyd Doggett

Organization: [Student at the Liberal Arts and Science Academy High School]

Government Agency Type: Federal

Government Agency: ED

General Comment

I do not believe the proposed rules do any justice to a massive group of Americans whose ranks the government states it wishes only to swell—those who have attended college. Section 99.31 of the National Archives and Records Administration's Code of Federal Regulations clearly defines the groups to which a student's personal information may be referred without the student's consent—for specifics the text is of course available, but in broad terms I see specifically empowered governmental officials, educational institutions, and institutions funding that education. It undermines the authority of public and private institutions across the country for other organizations to micromanage the educational process in the ways proposed. If an institution of higher learning declares a student to have met the requirements of the degree the student has earned, the scrutiny ought to stop there or be expanded with the student's consent. These rules challenge the established wisdom that the institutions of higher learning themselves know best about higher education; making America more competitive, the reason provided for the proposed rules, is better done by any number of methods—e.g. taking concrete steps to improve the quality of her public education—than by continuing to eat away the cherished freedom of millions of Americans.

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-0002-0006
Comment on FR Doc # 2011-08205

Submitter Information

Name: Janna Lilly
Address:
Austin, TX,
Email: janna.lilly@austinisd.org
Organization: Austin ISD
Government Agency Type: Local

General Comment

Thank you for developing clarification around FERPA requirements. I would request that you also include guidance related to parents who want to visit the classroom of their child (which is their right and we encourage parent participation) and how to address the FERPA rights of students with disabilities in that class. What guidance can you provide that encourages appropriate parent visitation while ensuring FERPA for the students with disabilities? Are we violating the FERPA rights of students with a disability when we allow visitation if no formal indicators are present that the child is a child with a disability? Are we required to get parental consent for all students in the class to allow another parent to visit?

Feel free to contact me for greater description/examples. etc.

Thank you.

Janna Lilly
Director of Special Education
Austin ISD
Austin, TX

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Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0007
Comment on FR Doc # 2011-08205

Submitter Information

Email: keithhf@yahoo.com

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

At page 19727, "Significant Proposed Regulations"

The Secretary may want to consider clarifying the supremacy of the *National School Lunch Program Act* over the *Family Educational Rights and Privacy Act* insofar as the disclosure of children's names and eligibility status (for free or reduced price meals or free milk) without parental consent is concerned.

According to the U.S. Department of Agriculture, the disclosure of children's names and eligibility status (for free or reduced price meals or free milk) without parental consent is governed by the *National School Lunch Program Act*, not the *Family Educational Rights and Privacy Act*. (See U.S., Department of Agriculture, Food and Nutrition Service, "Eligibility Manual for School Meals" (January 2008), <http://www.fns.usda.gov/cnd/Governance/notices/iegs/EligibilityManual.pdf>, accessed July 6, 2010, pp. 55 and 94.)

Section 7 CFR 245.6(f)(2)(i) to (iv) allows the disclosure of children's names and eligibility status (for free or reduced price meals or free milk) without parental consent for the administration or enforcement of, among other things, a "State health program or State education program administered by the State or local education agency". The use or disclosure of information about children eligible for free or reduced price meals or free milk in ways not specified in section 7 CFR 245.6 requires the written consent from the child's parent or guardian prior to the use or disclosure. See 7 CFR 245.6(i).

Since the U.S. Department of Agriculture claims that the disclosure of children's names and eligibility status (for free or reduced price meals or free milk) is NOT governed by the *Family Educational Rights and Privacy Act*, I assume that the requirements of the *National School Lunch Program Act* are not subordinated to the requirements of the *Family Educational Rights and Privacy Act* when children's names and eligibility status are subsumed in an "education record" (as defined in section 34 CFR 99.3). In other words, I assume that the disclosure of children's names and eligibility status without parental consent is allowed under the *National School Lunch Program Act* and the *Family Educational Rights and Privacy Act* if the disclosure is for the purpose of administering a State education program administered by the DOE.

At page 19728, proposed section 34 CFR 99.35, re: written agreements

Given the severity of the penalty for improperly redisclosing personally identifiable information in violation of FERPA (i.e., prohibiting access to the same for at least five years), the Secretary may want to consider requiring these written agreements to include the submission of a notarized statement to the State or local educational authority or agency attesting to the destruction or return of the personally identifiable information by the authorized representative.

At page 19730, proposed section 34 CFR 99.3, re: "education program"

The Secretary may want to consider including juvenile institutions and institutions for the deaf and the blind since not all states provide for the education of individuals in these institutions through their SEA or LEAs.

At page 19732, proposed section 34 CFR 99.60, re: recipients of Department funds

The Secretary may want to consider expanding the scope of FERPA to include section 26 U.S.C. 501(c) organizations that students do not attend and that are not recipients of Department funds, if personally identifiable information in student education records is disclosed to these organizations in order to:

1. Conduct education research for or on behalf of public schools, including public charter schools, to improve instruction; and
2. Operate a health or education program that is administered by the SEA or LEA.

At page 19736, re: Clarity of the Regulations

The Secretary may want to consider utilizing the Ramseyer drafting convention (wherein statutory material to be repealed is bracketed and stricken, and new statutory material is underscored) when publishing proposed or final regulations, or both. Given the public's nearly unlimited and almost instantaneous access to the Federal Register through digital documents posted at <http://www.federalregister.gov/>, there is little or no reason to limit the length of proposed and final regulations as if they were available only in paper form.

Use of the Ramseyer drafting convention would place less importance on the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of the preamble and reduce the likelihood of discrepancies between the description and the actual text of the proposed regulations. It should be noted that the description of the proposed regulations does not have the force and effect of law, and that the actual text of the proposed regulations would supersede a conflicting description of the same.

At page 19736, re: Federalism

The Secretary may want to consider explaining when Executive Order 13132 or Executive Order 12372 (as implemented by 34 CFR part 79), or both, apply to proposed regulations. As noted at 64 FR 43259 (August 10, 1999), the requirements contained in Executive Order 13132 ("Federalism") supplement but do not supersede the requirements contained in Executive Order 12372 ("Intergovernmental Review of Federal Programs"). No declaration concerning federalism implications was made when 34 CFR part 200 was amended to mandate states' use of the "four-year adjusted cohort graduation rate" (see 73 FR 22020 and 73 FR 64436) and no one took note of that fact or seemed to mind.

Arguably, a declaration that a program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79 (see 73 FR 22040, 73 FR 64507, and 76 FR 19737) does not operate as an automatic waiver of Executive Order 13132. If such a declaration did operate as a waiver of Executive Order 13132, then the Secretary's finding that the proposed regulations in sections 34 CFR 99.3, 34 CFR 99.31(a)(6), and 34 CFR 99.35 may have federalism implications is unnecessary.

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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-0002-0008
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

See attached:
"Comment to NPRM_FERPA_directory info.doc"

Attachments

Comment on FR Doc # 2011-08205

34 CFR 99.3(a) defines "directory information."

While use of the information listed under an institution's directory should be used for official purposes, students have been harassed because of sensitive information, such as address, phone number, readily available to the public. For instance, a student at UCLA received numerous phone calls because he shared the same name as a suspect in connection to a stabbing at a college football game. Though this student was not involved in the incident whatsoever, his privacy and safety were at risk because his information was available to the public (source: "Daily Bruin, "UCLA student or suspect: a case of mistaken identity prompts closer look at private information posted online" It is the duty of the institution to ensure the well-being of the individual and because current FERPA regulations regarding directory information are so lax, the availability of directory information jeopardizes students' right to privacy.

Also, the disclosure of address, phone number(s), and date of birth/place of birth can make students vulnerable to identity theft. For instance, many credit bureaus and other financial institutions use date of birth as an authentication method to verify an individual's identity. If such information are readily available to the public, individuals have little control over their personal information.

If legitimate organizations, such as alumni groups, would like a student's information, the institution should create a formal request process whereby requesters can submit a request to the custodian of student records. This or other designated school official will approve or deny the request and verify that the request and subsequent release of such information is in compliance with the law and protects the student's right to privacy. Even with current options that students can elect to either release certain information or opt out completely, many students are not aware that their information is accessible. Revising the current definition of "directory information" will appeal to those who value transparency (the right to know) and privacy (the students' right to their own information) by placing privacy at the forefront and transparency as a secondary goal.

I suggest deleting: "address;" "telephone listing;" and "date and place of birth;" from 34 CFR 99.3(a) and placing said terms in paragraph (b). Doing so will further protect a student's identity and safety but also give legitimate organizations access to sensitive information if and only if their intents are not to put the student at risk.

I propose ED revise the regulatory text to read as follows:

34 CFR 99.3(a): Directory information includes, but is not limited to, the student's name; electronic mail address; photograph; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight

and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

34 CFR 99.3(b): Directory information does not include a student's—

- (1) Social security number;
- (2) Student identification (ID) number, except as provided in paragraph (c) of this section;
- (3) Address;
- (4) Telephone listing; or
- (5) Date and place of birth.

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Family Educational Rights and Privacy

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Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0009
Comment on FR Doc # 2011-08205

Submitter Information

Name: Danielle Rhodus
Address:
Middletown, OH,
Email: drhodus@middletowncityschools.com
Submitter's Representative: MCSD
Organization: MCSD
Government Agency Type: Local
Government Agency: public school

General Comment

As a parent of a college student, high school student and an educator I do not support the suggested changes to FERPA. Our children's and young adults privacy is crucial in this age of identity theft and misuse of public information for personal agendas. Please consider the students and their families before allowing them to become research projects and statistics for public use. Please preserve their rights to privacy and protection from the wrong hands. As a parent, I had to sign the FERPA to access my own child's college grades and information. Please explain how outside parties can get access to that when I cannot? This is a mistake in the making. Too much access is being allowed to our children and their personal information. Please consider this.

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-0002-0010
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sandra Regula
Address:
Rocky River, OH,
Email: slregula@cox.net

General Comment

I would not want information about my child released to anyone for any purpose without my knowledge and am not in favor of the changes.

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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-0002-0011
Comment on FR Doc # 2011-08205

Submitter Information

Name: Susan Ward
Address:
Pittsburgh,
Email: susanadana432@verizon.net

General Comment

FERPA needs to be updated incorporating language to require Colleges and Universities to :

- 1) Provide a FERPA exception authorization form, that the student fills out allowing parents access to student records.
- 2) Require colleges & universities to maintain a centra file of these completed authorization forms, both in hardcopy and electronic media.
- 3) With the student completed authorization, this allows parents access to professors, advisors, administrators, health providers, etc...school officials effective during the period of enrollment.

This language enables students that want their parents involved in their education decisions to access important education records enabling parents and school officials to make informed academic decisions.

With the cost of education loans now at a rate of interest supplied by Sallie Mae at 15%, students are exiting colleges and unversities with college loan debt exceeding \$100,000 US dollars. At 15% interest rate, our United States Government has successfully saddled our youth with a mortgage financed on a credit card. With the extraordinary cost of a college education, the youthful naive student needs parental guidance to prevent them from making a costly education decision at 15% interest rate.

In addition, the universities are hiding behind FERPA in order to avoid talking to parents of students. When someone hides behind something, this is an indicator that the person is guilty of something is a coward.

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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-0002-0012
Comment on FR Doc # 2011-08205

Submitter Information

Name: Debra Yates
Address:
South Lake Tahoe, CA,
Email: debyates1@yahoo.com
Organization: Lake Tahoe USD
Government Agency: School District

General Comment

My career is approaching 30 years in Government/School Finance and one thing is for sure someone always wants more data! I have seen the level of requirements grow to an absolute insane level - a level that over the past couple years in completely unmanagable. Yes, we can charge programs indirect costs, but rarely do agencies CREATE positions to process the endless requests for everything from A-Z. Why would we shift precious dollars to labor to process more paper?

This really needs to stop and it would be nice if some of the nonsense is rolled back! I just sat in a meeting today with our Principals and they all agreed that TESTING is another area out of control.

Unless those that make these laws and decisions sit in the trenches it seems they are far too removed to get any real sense as to the negative impact "just one more request" could have.

In closing - could someone show me statistical data that clearly demonstrates that student achievement has grown as dramatically as all the rules - regulations - and requests for more information. i.e. accountability

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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-0002-0013
Comment on FR Doc # 2011-08205

Submitter Information

Name: Thomas Purwin
Address:
Jersey City, NJ,
Email: tpurwin@jcboe.org
Organization: Jersey City Public Schools
Government Agency Type: Local
Government Agency: School District (LEA)

General Comment

Local Education Agencies (LEAs) should be required to identify to State Education Agencies (SEAs) a FERPA COMPLIANCE LIAISON who would be responsible for defining ``reasonable methods'' to ensure that the LEA remains compliant with FERPA, including the development of LEA FERPA Policies and Procedures.

The Local Education Agencies (LEAs) FERPA Liaison would be responsible for providing professional development to LEA data handlers to prevent unintentional disclosures of personally identifiable information (PII).

There should be an aggressive dissemination and communication effort to provide FERPA information/resources (Sample Non-Redisclosure Agreements, Researcher Agreements, etc..) to LEAs, especially one-school districts (Charter Schools, etc..) to ensure compliance by all LEAs, not just the large LEAs with additional resources.

Student Identification Numbers that do not represent Social Security numbers should be included as Directory Information. Also, Staff Identification Numbers that do not represent Social Security numbers should be available for establishing Student/Teacher Data Links, as long as the Staff Identification Number does not, by itself, reveal the teacher's identity.

Even if Parents Opt-Out of the use of Directory Information, LEAs should be allowed to mandate the use of student ID Cards and/or badges displaying directory information for security and systems integration (Entry systems, Food Services Point of Sale Systems, etc...) purposes. LEAs can embed

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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-0002-0014
Comment on FR Doc # 2011-08205

Submitter Information

Name: Arianna Chapman
Address:
Maplewood, MN,

General Comment

After reviewing this proposed rule by the Department of Education, I will say that I agree with it for the most part. I agree with it because it is very important for some access to be available to the student databases in order to really see what types of educational needs and programs could be beneficial. I mean as a parent, I would prefer that nobody extra is accessing my child's records, but if it benefits her in the long run by helping to get grants or programs added that could be useful to her, then why not allow it. However, I only agree if they are sure that the information would only be going to official people on an absolute need to know basis and not just to anyone.

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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

Submitter Information

Name: David Cantillon
Address:
Cleveland, OH,
Email: dcantillon@proforma.com
Organization: Special Education Family Support Team
Government Agency Type: Local

General Comment

As a parent of a child with Down Syndrome and a participant in multiple parent support groups in Cleveland, I felt obligated to make a comment.

Full disclosure is likely to benefit children with special needs, but should never be used to validate shortfalls in teacher performance. My fear is that disclosure would be used as a tool to invalidate parental/guardian requests for support when earlier IEP's never specified areas needing attention. There should be limits to a district's ability to circumvent their own failings. For instance, a developmentally disabled teen needing additional support shouldn't be denied Modifications just because an older IEP was unclear.

If a parent sued a district over their educational rights, I could see a school district representative saying something like, "There were no provisions for modifications K-7, and yet now we're being sued for modifications?" There needs to be a clause limiting the bias disclosure would weigh on a case of school district negligence. (There are grandparents raising grandchildren who are more responsible than their children were and shouldn't be penalized for becoming stronger advocates)

PUBLIC SUBMISSION

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Comment On: ED-2011-OM-0002-0001
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Comment on FR Doc # 2011-08205

Submitter Information

Name: Christine Shaw
Address:
Honolulu, HI,
Email: Christine_Shaw@notes.k12.hi.us
Organization: Hawaii Department of Education
Government Agency Type: State
Government Agency: Hawaii Department of Education

General Comment

We are seeking clarification on the last paragraph in the section regarding Research Studies (§99.31(a)(6)), which states, "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...may rely instead on any independent authority it has to further disclose the information on behalf of the agency or institution..."

If an agency providing PII indicates that PII should NOT be redisclosed by the data recipient, but the recipient wishes to redisclose, does the recipient have the right to find another authority to approve redisclosure and override the request of the PII provider?

It is unclear whether the proposed verbiage allows data/PII recipients to override the wishes of the data provider by going through another approving authority (e.g., legal counsel, etc.) to gain redisclosure approval. Or, is the verbiage provided to allow state/local educational authorities with a means to provide data at the state level even if schools, districts, etc. are reluctant to have PII redisclosed?

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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

Submitter Information

Name: Raymond Yeagley
Address:
Portland, OR,
Email: Raymond.Yeagley@nwea.org
Organization: Northwest Evaluation Association

General Comment

NWEA is a nonprofit organization providing assessment, professional development, and research services to SEAs and LEAs. As a user of PII on behalf of LEAs and SEAs, we find the proposed changes in FERPA to be very positive. We are specifically supportive of changes permitting redisclosure and contracting rights to organizations not under the direct control of the educational authority.

NWEA currently must create a burden for itself and LEAs, when conducting research using statewide data, because we must secure separate authority from each participating LEA in the study. We believe the proposed §99.31(a)(6)(ii) permitting a state or local educational authority or agency to enter into agreements with research organizations for statutorily-specified purposes, and to redisclose data held in the SLDS, will reduce the data burden and the compliance effort associated with the studies, with no loss of protection for the PII being redisclosed.

Further, NWEA is pleased with the opening of pipelines between PK-12 education, higher education, and workforce data providers. We believe this will bring dramatically greater value to the data at each level through integration in a longitudinal fashion. NWEA has not yet conducted research across these levels, but sees significant benefit from endeavors that will become possible as a result of this change.

Finally, NWEA applauds the Department's general efforts in recent years to reduce the burden on education providers, researchers, and other data users to access and use these data for the benefit of our nation's children. We recognize and fully support the intent of FERPA to protect sensitive information about our citizens, but believe the law's intent is not to create roadblocks for the legitimate and responsible use of the data to improve educational services and increase student learning. The Department is taking significant and positive steps to support the statutory intent while decreasing the burden of compliance.

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Tracking No. 80c3b2f2
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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-0002-0018
Comment on FR Doc # 2011-08205

Submitter Information

Name: Cheri Dooley
Address:
Memphis, TN,
Email: cgcausey@memphis.edu

General Comment

Authorized Representative (§§ 99.3, 99.35)

As a current student I do appreciate the proposed amendments to § 99.3 in defining the previously undefined term 'authorized representative'. I believe it is a necessary step to ensure the privacy protections outlined in FERPA.

Directory Information Statute: Sections (a)(5)(A), (b)(1), and (b)(2) of FERPA (20 U.S.C. 1232g(a)(5), (b)(1), and (b)(2))

I also appreciate the proposed regulation that would modify the directory information further narrowing what the educational institution is able to disclose. With so much of our personal information online and so many institutions being hacked, I believe we can not be too cautious in who has access to our school records as well as what information they are able to access.

Also regarding section 99.37(c) (Student ID Cards and ID Badges), while my university does not currently require us to wear ID badges on campus, I would not be opposed to this and do believe they (the university) should at their discretion, and for our protection be able to require students to do so.

Enforcement Procedures With Respect to Any Recipient of Department Funds That Students Do Not Attend (§ 99.60)

I appreciate the diligence in ensuring the privacy of my records and that they are used only as specified. The ability for FPCO to enforce and deal with FERPA violations is crucial. Ensuring their ability to see that all agencies are compliant seems common sense.

I would be interested to know more about how my educational institution complies with all the reporting requirements outlined. I would like to know if there is a way for me, as a student to help ensure my privacy is maintained and to know that my university is not in violation.

Thank you for your time and attention.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: April 26, 2011
Status: Posted
Posted: April 28, 2011
Category: Parent/Relative
Tracking No. 80c39fe4
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-0002-0019
Comment on FR Doc # 2011-08205

Submitter Information

Name: Ayrton Sena
Address:
Greeley, CO,
Email: globe7dice@yahoo.com

General Comment

How do I give my mom permission to check on me at college and college info?

PUBLIC SUBMISSION

As of: March 27, 2012
Received: April 26, 2011
Status: Posted
Posted: April 28, 2011
Category: Student
Tracking No. 80c3a015
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-0002-0020
Comment on FR Doc # 2011-08205

Submitter Information

Name: Ani Chen
Address:
Seattle, WA,
Email: aachen@brynmawr.edu

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

On April 26, 2011, the Supreme Court heard oral arguments in *Sorrell v. IMS Health*. Although the case specifically addresses data mining in pharmaceuticals, it has relevance for FERPA. The Family Educational Rights and Privacy Act is important in protecting the personal information of countless students and families. This information not only keeps the bureaucratic wheels of government turning, but also helps State and Federal officials to make informed decisions about education policy.

Specifically regarding Sec. 99.35 of the proposal, I advocate penalties for State or Federal entities' misuse of that personal information. Although I am currently a student at a private liberal arts college, I was educated in a traditional, American public school. Year in and year out, I and my family provided highly detailed and personal information so that the school district could evaluate my high school, especially, as a whole. From standardized tests to immunization records, every bit aided district, State, and Federal officials in their policy decisions.

This constant provision of data required a lot of trust on the part of me and my family. It then follows that I fully agree with Sec. 99.35 of the proposed amendments to FERPA. Entities and authorities misusing personal information must be subject to harsh penalties—I venture more than the minimum five years, suggested by the Department of Education. It strengthens democracy by building reciprocal trust between the people and the government.

With privacy becoming increasingly anachronistic, it is up to the government to protect as much of its citizens' privacy as possible. Although the US Constitution does not specifically address the right to privacy, Supreme Court precedent has cited the 9th Amendment in establishing precedent for privacy. Sec. 99.35 thus reinforces that legacy of precedent by enacting a penalty for data mining. Government must be for the people and by the people—not for the gains of corporations or other illegitimate entities. Education must be for the people and by the people—not for the gains of corporations or other illegitimate entities.

PUBLIC SUBMISSION

As of: March 27, 2012
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Category: State Agency (Other)
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Comments Due: May 23, 2011
Submission Type: Paper

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-0002-0021
Manager, Research & Planning

Submitter Information

Name: Gallagher Tom

Address:

Casper, WY,

Organization: Department of Labor, Research & Planning Section

Government Agency Type: State

Government Agency: Department of Labor

General Comment

Comment, see attachment

Attachments

Comment

THE STATE



OF WYOMING

MATTHEW H. MEAD
GOVERNOR

Department of Employment

P.O. BOX 2760
CASPER, WY 82602

RESEARCH & PLANNING SECTION

(307) 473-3807

April 27, 2011

Docket ID ED-2011-OM-0002

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

Dear Ms. Miles:

I am writing as part of a State Labor Department in support of the proposed revision to FERPA rules.

Given the pivotal role of the concept of "evaluation" in determining the legitimacy of the use of student records it would be advantageous to efficient implementation of new rules if this term were defined. Evaluation takes several forms from impact to process analysis. Indeed, it would not be unreasonable to view evaluation as engaging in, and a sub-set of, research to improve instructional programs.

The definition of evaluation should include reference to typical forms of evaluation and anticipated evaluation outputs as well as characterizing evaluation in terms of the broader concept of research. A definition easily understood by educational administrators lacking a technical background in evaluation and research would facilitate informed decisions underpinning and expediting data sharing agreements.

Thank you for your time and consideration.

Tom Gallagher

A handwritten signature in black ink that reads "Tom Gallagher".

Manager, Research & Planning

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 04, 2011
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Posted: May 04, 2011
Category: Association/Organization
Tracking No. 80c3f2dd
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-0002-0022
Comment on FR Doc # 2011-08205

Submitter Information

Name: Nancy Conneely

Address:

Silver Spring, MD,

Email: nconneely@careertech.org

Submitter's Representative: Nancy Conneely

Organization: National Association of State Directors of Career Technical Education

General Comment

Attached please find comments from the National Association of State Directors of Career Technical Education on the proposed changes to the FERPA law.

Attachments

Comment on FR Doc # 2011-08205

**Family Educational Rights and Privacy Act
Docket ID ED-2011-OM-0002**

May 4, 2011

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

Dear Ms. Miles:

The National Association of State Directors of Career Technical Education Consortium submits the following comments in response to the *Federal Register* notice published on April 8, 2011 proposing amendments to the regulations implementing section 444 of the General Education Provisions Act, also known as the Family Educational Rights and Privacy Act (FERPA).

The National Association of State Directors of Career Technical Education Consortium (NASDCTEc) represents the state and territory agency heads responsible for secondary, postsecondary and adult career technical education (CTE).

Please consider the following comments in support of the amendments published in the *Federal Register*.

Proposed Regulations

Definitions

Authorized Representative

We support the proposed definition of “authorized representative” which states that any entity or individual designated by a State or local educational authority or agency may conduct an audit, evaluation, or compliance or enforcement activity of a Federal or State supported education program. We agree with the Department’s rationale that FERPA should be interpreted to allow states to link data across sectors, such as education and workforce. Such a definition would permit state departments of education to disclose data to state departments of labor or workforce that could be used to evaluate education programs such as those supported by the Carl D. Perkins Career and Technical Education Act (Perkins). Doing so would allow state departments of education to assess their CTE programs and meet Federal accountability requirements.

Additionally, we believe that the requirement of a written agreement between a State or local education agency that includes the information to be disclosed, the purpose of disclosure, the return or destruction of data when finished, and the policies and procedures ensuring protection of data is a reasonable one and will ensure the confidentiality of student data.

Education Programs

We strongly support the Department’s proposed regulation that would for the first time define “education program” in the law. This definition would have the effect of decreasing confusion and ensuring that data sharing is not limited in cases where it is unclear if a program is considered an education program under FERPA.

We are also pleased to see the inclusion of career and technical education, job training, and adult education as part of this proposed definition. This reinforces the notion that not all education programs are administered by a state education agency, but may be overseen by a state labor or workforce agency. For example, while CTE programs are administered by state departments of education in many places, in Kentucky their CTE programs are run by the Department of Workforce Investment. Under the current FERPA law, this could be interpreted to mean that CTE programs administered in Kentucky are not education programs. This is clearly not the case, and the proposed definition will ensure that there is no confusion.

It is vitally important that all education programs, regardless of which agencies administer them, benefit from the data shared through the statewide longitudinal system. Doing so will give the programs greater access to student data across the P-16 spectrum, allowing them to better evaluate their programs.

Authority to Audit or Evaluate

We support the proposed regulation that would remove the requirement that a State or local educational authority or other agency must establish legal authority under other Federal, State or local law to conduct an audit, evaluation, or compliance or enforcement activity. This change would promote greater sharing of data across agencies for the purposes of auditing or evaluating

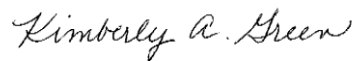
an education program in order to meet State and Federal requirements and for program improvement.

The proposed regulation would, for example, allow postsecondary institutions to share student data with K-12 agencies so that secondary programs can determine whether they are successfully preparing students for postsecondary education. For CTE programs, which support both secondary and postsecondary education, this provision would allow states to better collect federally-mandated Perkins Act accountability data at both learner levels and to determine program effectiveness.

We agree with the goals of the proposed changes to the FERPA law and believe they will go a long way in ensuring greater sharing of data across learner levels and across agencies, while still maintaining the privacy and confidentiality of student data. These changes will help states better evaluate program effectiveness and meet State and Federal accountability requirements. Thank you for the opportunity to make these comments.

If you have any questions or need additional information, please contact Nancy Conneely, NASDCTEc's Public Policy Manager, at 301-588-9630 or nconneely@careertech.org.

Sincerely,

A handwritten signature in cursive script that reads "Kimberly A. Green".

Kimberly A. Green
NASDCTEc Executive Director

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 05, 2011
Status: Posted
Posted: May 05, 2011
Category: Individual
Tracking No. 80c3f93e
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-0002-0023
Comment on FR Doc # 2011-08205

Submitter Information

Name: Chris Boswell
Address:
Falls Church, VA,
Email: cboswell@carolina.rr.com

General Comment

In an effort to enhance the privacy and security of student data, I would like to see some stronger language included around the specific measures that institutions should have in place to protect that data. While I understand the potential cost implications and benefits that principles based legislation often have over rules based legislation, I do believe that the public deserves to have their personal information protected in the same fashion, regardless of the state they reside or institution they attend. The State of Massachusetts feels the same way regarding the commercial businesses that collect personal information of its constituents. This is why in their privacy laws they included an outline of basic security measures that should be put in place to protect its constituent data.

At the end of the day, legislation is also only as strong as the oversight that is in place to see it enforced. It is unclear at the moment what the auditing requirements are, if any, to determine if violations may have occurred unbeknownst to management (who performs the audit, is it independent, how often do audits occur, etc.). There are commercially available data loss prevention solutions on the market today that can quickly determine, for instance, if PII has been transmitted outside of the organization. Even if specific measures such as these are not spelled out, general requirements could be incorporated into the legislation to ensure that institutions monitor operations for signs of loss or evidence of breaches.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 07, 2011
Status: Posted
Posted: May 11, 2011
Category: Association/Organization
Tracking No. 80c422c4
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-0002-0024
Comment on FR Doc # 2011-08205

Submitter Information

Name: Helen Tibbo
Address:
Chicago, IL,
Email: tibbo@email.unc.edu
Submitter's Representative: Nancy Beaumont, Executive Director
Organization: Society of American Archivists
Government Agency Type: Federal
Government Agency: ED

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



May 6, 2011

Regina Miles
Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-5920

Comments re Docket ID ED-2011-OM-0002

Dear Ms. Miles:

I write to you on behalf of the Society of American Archivists (SAA) to comment on proposed rule changes to the Family Educational Rights and Privacy Act, 34 CFR Part 99, RIN 1880-AA86, Docket ID ED-2011-OM-0002. SAA is the national professional organization representing more than 6,000 archivists and archival institutions throughout the United States.

The Society has no issue with the proposed changes outlined in the “Notice of Proposed Rulemaking.” As presented, they seem to strike a reasonable balance between fostering innovation in education and protecting personally identifiable information (PII).

The Society is concerned, however, about an issue that is not addressed in the proposed rulemaking: The definition of an “Eligible Student” found in 34 CFR 99.3. This definition does not make clear that FERPA rights lapse or expire upon the death of an “Eligible Student.” Archivists who work with student records frequently are contacted by genealogists, historians, and others who have an interest in the past and who are seeking individual student records. The lack of a clear statement in the definition of “Eligible Student” regarding the effect of death upon FERPA privacy rights often leads to confusion and inconsistent policies among institutions that hinder the public’s search for historical information. In the context of this proposed rulemaking, regulations that properly protect PII while a student is alive can become an impediment to individuals

and research groups wishing to conduct longitudinal research on the effectiveness of educational reforms.

We note that officers of the Department's Family Policy Compliance Office have stated in correspondence that eligibility ends with death. In the past, members of the Society have shared email messages from officers Ellen Campbell and Bernie Cieplak to this effect. However, the Society is concerned that the regulations themselves do not include the interpretation shared by Ms. Campbell and Mr. Cieplak with our members.

Because this interpretation is not stated clearly in the definition of an eligible student, educational institutions that review the regulations but do not contact the Family Compliance Office may determine erroneously that an individual remains an "eligible student" after death. The Society also is concerned that an institution with conservative legal counsel, even if advised by the Family Policy Compliance Office of its interpretation regarding the impact of death on an individual's status as an eligible student, may nevertheless continue closure of the records after death because the advice of the Family Compliance Office is not stated clearly and unambiguously in the FERPA rules themselves.

The proposed rules, which make sense while a student is alive, could become impediments to the effective research use of student data once a student is deceased. Thus the Society requests that the Department state clearly and unambiguously in the definition of "Eligible Student" found in 34 CFR 99.3 that eligibility ends with the death of the eligible individual.

Sincerely,

A handwritten signature in cursive script that reads "Helen R. Tibbo".

Helen R. Tibbo
President, 2010 – 2011

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 11, 2011
Status: Posted
Posted: May 11, 2011
Category: Individual
Tracking No. 80c6c34f
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Submission Type: Paper

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-0002-0025
Public Comment

Submitter Information

Name: Clifford Ramirez
Address:
Claremont, CA,
Organization: Claremont Graduate University
Government Agency Type: State

General Comment

See attached comments

Attachments

comment

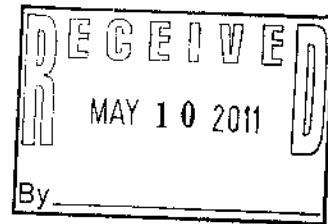


Office of Admission and Records

18 April 2011

Office of Information and Regulatory Affairs
OMB, Attn: Desk Officer, US Department of Education
400 Maryland Avenue SW
Washington DC 20202

RE: 4000-01-U
Department of Education
34 CFR Part 99
RIN 1880-AA86
Docket ID ED-2011-OM-0002



Dear Colleagues and Regulators:

These comments are respectfully submitted in response to recently proposed amendments to the Family Educational Rights and Privacy Act (FERPA).

99.3 – Definition of Authorized Representative

The proposed definition is adequate; however, the inclusion of this definition may cause some consternation regarding the lack of definitions in 99.3 for *school official* and *legitimate educational interest*.

In the past, the Family Policy Compliance Office (FPCO) has provided recommendations on defining these two terms and it may be prudent for the regulators to consider inclusion of these suggested definitions to avoid confusion between *school official* and *authorized representative*. Including the definitions will help provide a foundation for *legitimate educational interest*, which is used as an important operational qualifier regarding the use of personally identifiable information (PII) from education records by authorized representatives. Note that the term *legitimate educational interest* is also not defined in FERPA.

Harper Hall East • 160 East Tenth Street • Claremont, California 91711-6165

admiss@cgu.edu • Tel: 909.621.8069 / student.records@cgu.edu • Tel: 909.621.8285 / Shared Fax: 909.607.7285

A MEMBER OF THE CLAREMONT COLLEGES

AR 0053

99.31(a)(6)(iii) – Exception for Agreements Regarding Studies

The proposed amendment provides permission for educational agencies or institutions to disclose PII from education records to the State or local authorities specified earlier. For some, the question will arise about whether an institution is *compelled* to provide such information when there is no statutory requirement to do so. Is an institution correct in determining that it may refuse to provide such information based upon 99.31(d)?

Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

In fact, 99.31(a)(12) refers to disclosures to parents of students who are not eligible students or to the student.

Citation of 99.31(d) was a common refrain throughout the discussions that led to the amendments and final FERPA regulations published December 9, 2008 (73 FR 74806).

99.31 and 99.35 – Extension of FERPA Requirements to Education Programs

The requirement of a written agreement between educational agencies or institutions with those entities conducting studies is important and necessary. However, some of the requirements for the agreement may be problematic to define and may thus go unresolved or overlooked.

- **Specifying a Time Period for the Study.** While an ad hoc study initiated by an educational agency or institution may have deadlines for the reporting of results, a time period may not be easy to define for the use of PII from education records for Statewide Longitudinal Data Studies (SLDS). Has such a period for data retention been established by the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Act?
- **Penalty for Unauthorized Rediscovery.** The regulations specify that if an entity conducting a contracted study further discloses PII from education records without prior authorization, that entity would not be able to receive PII from education records for a period of five years. While the stipulation is important, the severity of this penalty may raise business concerns and other relevant questions about the importance of concluding a study that has already been contracted. Further, should the regulations require that the entity that makes an unauthorized disclosure be required to surrender all PII from education records already in its possession?

Later in this document, I have other comments on the viability of penalties for unauthorized disclosure of PII from education records by entities that receive this data for SLDS.

99.37 – Regarding Directory Information Disclosures

99.37(c)(2) – ID Badges. Would there be any situations where a student might be excepted from wearing badges with PII, even if the PII displayed is directory information?

In higher education, such situations may arise when the eligible student is in a witness protection program or if the individual is being stalked and may have petitioned a court for other protections.

Unless educational activities were being conducted in a high security area, the use of ID badges would probably not apply to postsecondary institutions, which often host conferences and other professional development activities that regularly draw non-students into the campus environment. Providing badges for this population would be impossible.

99.37(d) – Limited disclosures. Adopting this provision would add confusion and may raise unnecessary allegations of improper disclosure of directory information from parents and eligible students. There is no requirement in FERPA that an educational agency or institution adopt or designate any PII as directory information. And even if the educational agency or institution does designate directory information, there is nothing to compel the institution to disclose such information to any party (99.31(d)). A clear and more compelling need for such a distinction as the limited disclosure of directory information is critically lacking.

Concerns about Enforcement of FERPA with Education Programs and SLDS

The proposed revisions to FERPA appear to extend privacy protections for a broader application of educational studies (audits) and the SLDS. In fact, while the value of these studies and the SLDS are highly exemplified in the proposal discussion, the application of regulatory protections falls considerably short and may, in fact, require legislation outside FERPA.

Expanding the definition of *educational agency or institution* in 99.60 is encouraging, but largely symbolic. Encouragement comes from the realization on the part of the regulators that PII from education records communicated to a system such as an SLDS must entail privacy protections. But are the protections of FERPA sufficient to protect the privacy of information in SLDS databases?

FERPA applies to entities that receive federal funding (99.1) and entities that do not comply with FERPA may have those federal funds withheld (99.67). In fact, since the enactment of FERPA in 1974, funds have never been withheld. The FPCO has always worked with entities to bring them into compliance whenever cause or an alleged violation was identified.

How will this apply to the SLDS entities? The undertaking of the SLDS essentially takes over and provides a government-funded umbrella for the accreditation of educational programs throughout the United States. In many ways, the effort is an extension of strategies to ensure that educational grants and financial aid funds are both responsibly disbursed and utilized. Under

this kind of structure, there is a direct control by the Department—an arrangement that might address all but the most fundamental concerns of privacy.

The concept of the SLDS, in fact, creates the kind of government database that prompted concerns and initiated the dialogue for privacy in the 1970's. That is, what the SLDS establishes is a government database of PII about citizens. Even if the compilation of data is left to States and individual agencies contracted to conduct educational studies and audits, the understanding on the part of the public is one of a government database, especially since provisions have already been adopted for extensive data sharing between entities and between states.

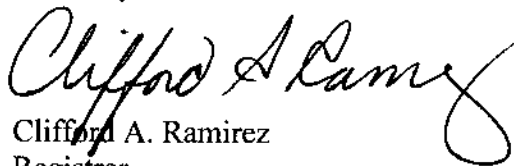
In the climate of the early 1970's, the US Department of Health, Education, and Welfare identified a Code of Fair Information Practices and Congress passed the Privacy Act of 1974, largely focusing on government databases. In many ways, the SLDS argue for their own Privacy Act, one that will assure American citizens that the privacy rights codified by our predecessors continue to be upheld and valued by government today.

The application of FERPA to the SLDS is a start. But because these SLDS databases seem as if they will operate outside our educational systems and behind government doors, certain other assurances need to be better defined. Without having reviewed all of the literature about the SLDS, the following are provisions seem minimal for compliance and assurance to citizens of their Constitutional rights.

- The SLDS must disclose to their constituents what kind of data is being collected about them.
- The SLDS should provide an avenue for constituents to review the data being maintained about them and to request amendments wherever necessary.
- The SLDS should provide assurances about and be liable for its security. In the same way that the Privacy Act of 1974 identified financial penalties for employees of government agencies who disclosed information without the proper authorization, the same should be codified for the SLDS systems and their administrators.
- Because SLDS is more governmental than our educational institutions, there should be Section 1983 provisions for citizens to file law suits against any agency for an alleged violation of individual privacy.

Thank you for the opportunity to offer these comments. Please let me know if I can assist in any further way.

Sincerely,



Clifford A. Ramirez

Registrar

Cliff.ramirez@cgu.edu

(909) 607-4124

About the Submitter

A higher education professional since 1990, I have worked in the registrar's offices of the University of California Los Angeles (UCLA), Antioch University Los Angeles, Pomona College, and now the Claremont Graduate University. At UCLA, I developed an expertise in FERPA and have conducted numerous FERPA workshops for conferences and other professional development events. My first workshop, *Managing the Privacy of Student Records* (LRP Publications, 2002), was the basis of my first book. Most recently, I published my sixth book, *FERPA Clear and Simple* (Jossey-Bass, 2009), incorporating all of the 2008 Amendments.

PUBLIC SUBMISSION

As of: March 27, 2012
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Posted: May 11, 2011
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Tracking No. 80c6c604
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-0002-0026
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

Under the section Definitions (§ 99.3) Authorized Representative (§§ 99.3, 99.35), Tribal Education Agencies, as identified in the Elementary and Secondary Education Act, should be afforded the same ability to access and release information without the advance consent the same as state agencies. There are many, if not all, federally recognized tribes that provide support and assistance for their tribal members. This amendment would reduce expenses by eliminating administrative hoops, which in turn could allow a tribal education agency to provide more preventative measures and support to their tribal students.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 11, 2011
Status: Posted
Posted: May 11, 2011
Category: Local educational agency
Tracking No. 80c6c480
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-0002-0027
Comment on FR Doc # 2011-08205

Submitter Information

Name: Brett Campbell
Address:
Las Vegas, NV,
Email: bdcampbell@interact.ccsd.net
Organization: Clark County School District
Government Agency Type: Local

General Comment

Regarding the proposed amendment to 99.35 of FERPA...Removing the memorandum of understanding requirement can be a positive, the Institutional Review Board, or similar process, can be viewed as written contract between the school and external agency. This amendment as written can be interpreted as a bypass of the IRB process and a violation of the Common Rule of 34 CFR and related regulations and laws. Such violation may lead to violating the intent of FERPA, exposing private information. The amendment of FERPA at large needs to be more specific in what constitutes a "written agreement" in that the external agencies must comply with the protection of human subjects. As more private businesses move into education, the lack of knowledge and protection of children's rights will be violated.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 17, 2011
Status: Posted
Posted: May 17, 2011
Category: Lobbyist
Tracking No. 80d03abb
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-0002-0028
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jenni White

Address:

oklahoma city, OK,

Submitter's Representative: President

Organization: Restore Oklahoma Public Education

General Comment

Do not change the FERPA documents from existing. Do NOT include ANY information from the Longitudinal Data System. DO NOT allow schools or any organization to collect any more information from student other than Name, address and contact information. PERIOD.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 17, 2011
Status: Posted
Posted: May 17, 2011
Category: Education Consultant
Tracking No. 80d03902
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-0002-0029
Comment on FR Doc # 2011-08205

Submitter Information

Name: Paul Gammill
Address:
Crofton, MD,
Email: Paul.gammill@comcast.net

General Comment

Sections (b)(1)(C), (b)(3) and (b)(5) of FERPA (20 U.S.C. 1232g(b)(1)(C), (b)(3) and (b)(5)) of the statute clearly identify and permit only four entities to disclose PII without consent. These four were established by statute and have been unchanged for many years thus these need to be expanded by statute alone. While the NPRM explains the desire to greatly expand the list of such "authorized representatives" such a clearly defined and established statute can not be expanded by a regulatory change. Such an expansive regulatory change to established statutory law exceeds the legal authority of the Department.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 17, 2011
Status: Posted
Posted: May 17, 2011
Category: Individual
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Comments Due: May 23, 2011
Submission Type: Paper

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-0002-0030
Comment

Submitter Information

Name: Bernard Fryshman, Ph.D.

Address:
Brooklyn, NY,

General Comment

See attachment

Attachments

Comment

Bernard Fryshman, Ph.D.
1016 East Second Street
Brooklyn, NY 11230
(718) 253-4857

May 6, 2011

Comments regarding 34 CFR Part 99
RIN 1880-AA86
[Docket ID ED-2011-OM-0002]
Family Educational Rights and Privacy

I. General Comments

The price to pay for an education should not include the risk of having a child's entire life become public. Growing up is a time when children should be free to make mistakes, to grow, to change, to adapt, and to be different. They should not have their early records become public, an albatross to be carried along for the rest of their lives.

The release of Personally Identifiable Information (PII) should not take place in a manner which provides access to this data to as many as 5,000 different individuals. [States exchange information with each other. Assume that each state has, on average, 100 people to authorize access to this information.]

Since these records will remain intact for at least two decades, the danger of an unauthorized release and misuse of such records becomes real. More troubling is the fact that the Department of Education is prepared to undertake a national initiative affecting all children in all states, when there isn't the slightest indication that the use of such longitudinal data will have any possible benefit or outcome.

There are states which have gathered such data over many years. Shouldn't ED have sought evidence of useful strategies and policies which emerged from a study of such data? If there are none, what justification is there to this massive, costly, and risky gathering of data?

Recommendation:

Until such time as there is concrete evidence that the extended use of existing statewide longitudinal data systems will result in improved educational outcomes, nothing further should be done to amend the regulations relating to FERPA.

II. Clarity of the Regulations

Although I recognize that I am not intimately involved in matters relating to FERPA and the gathering of data, nonetheless I believe I should have been able to read the regulations with a great deal more understanding than was the case.

I venture to say that had these regulations been more readable to the public, there would have been far more interest and commentary, given the fact that the proposed action could endanger the future of so many American children. It is unfortunate that comments must be received before May 23, 2011 because a concerted effort to rewrite these regulations in plain language would have been immensely helpful.

Sincerely,

A handwritten signature in black ink that reads "Bernard Fryshman". The signature is written in a cursive style with a long, sweeping underline.

Dr. Bernard Fryshman

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 17, 2011
Status: Posted
Posted: May 17, 2011
Category: Business
Tracking No. 80d02317
Comments Due: May 23, 2011
Submission Type: Paper

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-0002-0031
Public Comment

Submitter Information

Name: Chairman Pauken Tom

Address:

Austin, TX,

Submitter's Representative: Ronald Congleton and Andres Alcantar

Organization: Texas Workforce Commission

Government Agency Type: State

Government Agency: Texas Workforce Commission

General Comment

See Attachment

Attachments

Comments

Texas Workforce Commission

A Member of Texas Workforce Solutions

Tom Pauken, Chairman

Ronald G. Congleton
Commissioner Representing
Labor

Andres Alcantar
Commissioner Representing
the Public

Larry E. Temple
Executive Director

May 10, 2011

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

RE: Comments to the U.S. Department of Education Concerning Proposed Regulations Regarding Family Educational Rights and Privacy; Published in the *Federal Register*, April 8, 2011 (Vol. 76, No. 68) [Docket ID ED-2011-OM-0002]

Dear Ms. Miles:

The Texas Workforce Commission (TWC) appreciates the opportunity to provide comments to the U.S. Department of Education (DOE) regarding the proposed amendments to regulations implementing the Family Educational Rights and Privacy Act (FERPA).

TWC is responsible for workforce development programs, and current FERPA regulations create a challenge when evaluating such programs. TWC supports clarifying amendments to authorize limited and secure disclosure of student records to workforce or other noneducation agencies for the limited purpose of evaluating outcomes and strengthening workforce-related services.

The sharing of such information will provide tremendous opportunities for education and workforce agencies to better inform students, workers, and job seekers regarding choices in developing their talent for the marketplace. This information will also advance efforts to enhance occupational supply and demand assessments. We support this effort to consider limited use of such information.

One method of accomplishing this goal is to align the exception to disclosure and safeguards under FERPA with the exception to disclosure and safeguards under U.S. Department of Labor regulations at 20 CFR §603.5(e) and (f), which allow a governmental entity access to unemployment compensation information—including wage records—for use in the performance of official duties. This alignment will standardize the complex requirements of data sharing and safeguard procedures. Traditional education programs cannot be treated separately from workforce training programs, because they both lead to addressing the needs of the labor market.

It is critical that entities charged with service delivery and oversight of the Workforce Investment Act and other programs be supported in efforts to improve efficiency to ensure we maximize available program funds directly for effective service delivery. Agencies such as TWC should not be forced to rely on resource-intensive follow-up surveys when automated record matching is a more cost-effective and accurate technological option. The proposal to clarify that FERPA

Regina Miles

Page 2

May 10, 2011

regulations allow for the use of education records by workforce agencies to monitor and evaluate job training programs is an essential step forward to effective use of limited resources.

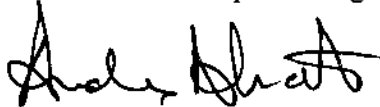
Sincerely,



Tom Pauken
Chairman



Ronald G. Congleton
Commissioner Representing Labor



Andres Alcantar
Commissioner Representing the Public

cc: Larry E. Temple, Executive Director, TWC

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 13, 2011
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Posted: May 17, 2011
Category: Other
Tracking No. 80c7a2f6
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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-0002-0032
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

The NPRM summary mentions some of the proposed changes are to enable authorized agencies/representative so achieve SLDS outcomes while continuing to protect privacy.

Requesting clarification -- that although the SLDS is referenced in the summary, the proposed changes and, subsequently, file regulations are not solely for for SLDS data sharing, but for any data sharing conducted by various data information systems, etc.

PUBLIC SUBMISSION

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Received: May 13, 2011
Status: Posted
Posted: May 17, 2011
Category: Parent/Relative
Tracking No. 80c7a035
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-0002-0033
Comment on FR Doc # 2011-08205

Submitter Information

Name: Susan Ward
Address:
Pittsburgh, PA,
Email: wards@westinghouse.com

General Comment

1) FERPA Release Form - make this form readily accessible to Parents and Students on the .gov website and at all federally funded universities and colleges.

Require the universities to maintain a database of all completed forms at the registrar's office.

comment: the universities loose the completed release forms and do not have blank forms available. This hinders release of authorized records.

2) Please updated the law to reflect current media and technology.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 12, 2011
Status: Posted
Posted: May 17, 2011
Category: PO
Tracking No. 80c7733b
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-0002-0034
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mary Waggoner

Address:

Everett, WA,

Email: mwaggoner@everettsd.org

Organization: Everett Public Schools

Government Agency Type: Local

Government Agency: school district

General Comment

What do you mean when saying that the enhanced privacy will be achieved through an expansion of the requirements for written agreements and the Department's enforcement mechanisms?

What will the expanded written requirements be? What will the cost of those expended written requirements be? Are that a school district's responsibility? Will they come with funding to pay for the clerical time to oversee more written agreements?

Are you doing away with the "opt out" aspect of FERPA, or will you now require every student's guardian or parent to specifically "opt in?"

Before the regulations are changed, consideration should be given to the costs to local school districts and the erosion of state and federal funding for districts to support staff necessary to comply with regulations. Districts are cutting support staff to save teachers, and rightfully so. At the same time, the accountability and compliance issues have increased, requiring more staff support time to keep school systems from being out of compliance.

PUBLIC SUBMISSION

As of: March 27, 2012
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Posted: May 17, 2011
Category: Education Consultant
Tracking No. 80d03b7a
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-0002-0035
Comment on FR Doc # 2011-08205

Submitter Information

Name: Paul Gammill
Address:
Crofton,
Email: Paul.Gammill@comcast.net

General Comment

While the example provided sounds reasonable, the proposed expansion of the established Authority to Evaluate provision, 99.35(a)(2) provides a very risky loophole that would allow the creation of one or more national databases. A national educational database is currently prohibited under the No Child Left Behind Law. However, this proposed exception would allow an SEA to collect student data wherever that student attended an institution or higher education. This could encompass virtually every state and territory in the U.S. that a student attended. And this would be true for every state and Territory educational agency. Additionally, the stated reason for this proposed change is to improve research. However, a competent researcher will typically want to get comparison data on students who did not attend the SEA as well as students who attended other states and also attended the same institute of higher education. The end result is the potential to create not just a single educational national database, as is prohibited, but rather 50 or more potential national databases. And these potential databases will be allowed to house not just individual level educational data but other information such as health and employment.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 17, 2011
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Posted: May 17, 2011
Category: Association/Organization
Tracking No. 80d104c7
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-0002-0036
Comment on FR Doc # 2011-08205

Submitter Information

Name: Will Estrada
Address:
Purcellville, VA,
Email: william@hsllda.org
Organization: HSLDA

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

HSLDA
Advocates for Homeschooling

J. MICHAEL SMITH, ESQ.
PRESIDENT (CA, DC, VA)

JAMES R. MASON III, ESQ.
SENIOR COUNSEL (DC, OR)

SCOTT A. WOODRUFF, ESQ.
SENIOR COUNSEL (VA, MO)

DARREN A. JONES, ESQ.
ATTORNEY (CA)

WILLIAM A. ESTRADA, ESQ.
ATTORNEY (CA)

MICHAEL P. FARRIS, ESQ.
CHAIRMAN (DC, WA)

DEWITT T. BLACK III, ESQ.
SENIOR COUNSEL (AR, SC, DC)

THOMAS J. SCHMIDT, ESQ.
ATTORNEY (CA)

MICHAEL P. DONNELLY, ESQ.
ATTORNEY (MA, NH, WV, DC)

SCOTT W. SOMERVILLE, ESQ.
OF COUNSEL (VA, MD)

MARY E. SCHOFIELD, ESQ.
OF COUNSEL (CA)

May 17, 2011

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

Re: Public Comments on the Proposed Rule Change to regulations implementing FERPA, as requested in 76 F.R. 19726-01 on April 8, 2011.

Dear Ms. Miles:

By way of introduction, the Home School Legal Defense Association (HSLDA) is a national advocacy organization which has as its primary purpose the protection of the right of parents to educate their children at home. We currently have over 80,000 member families in all 50 states.

We thank you for this opportunity to comment on the Department of Education's proposed rule change to the regulations implementing the Family Educational Rights and Privacy Act of 1974 (FERPA) on behalf of our nationwide membership, as requested in 76 F.R. 19726-01 on April 8, 2011.

We understand that the intention behind these proposed regulations is to allow the states greater flexibility to comply with recently enacted laws, while also maintaining a high degree of protection for the personally identifiable information of students. However, we are concerned that there will be unintended consequences to these proposed rules that will weaken FERPA. There is a strong likelihood that the personally identifiable information of students who were previously enrolled in public schools and subsequently

Ms. Regina Miles, Department of Education

6/7/2012

Page 2 of 6

enrolled in homeschool programs by their parents could be at risk. And we are concerned that the Department does not have the legal authority to adopt these proposed rules.

We are concerned by two of the proposed regulations, and also have two general concerns. We believe that these changes have the potential to severely weaken FERPA and the privacy of student data:

- 1) The proposed definition of “authorized representative” will allow a greater number of individuals and organizations access to student data, thereby providing more opportunities for student data to be mishandled or lost;
- 2) The proposed definition of “education program” will create far too broad of a definition, thereby providing more opportunities for student data to be mishandled or lost;
- 3) More clarification is needed for the proposed changes regarding Research Studies and Authority to Audit or Evaluate; and
- 4) Does the Department of Education have the legal authority to make these changes?

Issue 1: The proposed definition of “authorized representative” will allow a greater number of individuals and organizations access to student data, thereby providing more opportunities for student data to be mishandled or lost

HSLDA is concerned that this proposed definition is overbroad. We believe that 34 C.F.R. § 99.31(a)(3) intentionally limits the officials who may authorize a representative to receive data. § 99.31(a)(3) permits authorized representatives of the following individuals or entities to receive personally identifiable information: “(i) The Comptroller General of the United States; (ii) The Attorney General of the United States; (iii) The Secretary; or (iv) State and local educational authorities.”

Under the Department’s proposed definition, however, authorized representatives can come from just about anywhere. Could a local school district superintendent designate an adjunct professor at a local community college as an “authorized representative” and thereby allow that person to receive personally identifiable information? Could a for profit research or marketing firm – under the guise of conducting a program evaluation of a federal or state supported education program – be designated an “authorized representative” by a local school district and receive access to personally identifiable information?

We do not believe that the accompanying amendment to § 99.35 which provides that the responsibility remains with the State or local educational authority or agency headed by

Ms. Regina Miles, Department of Education

6/7/2012

Page 3 of 6

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 will eliminate the danger posed to student data privacy. FERPA enforcement actions are, unfortunately, a rare occurrence. And even if this section is used to enforce a violation of FERPA, this would be a small consolation to the potentially thousands of students who may have had their personally identifiable information compromised.

The numerous stories of data breaches and lost personal information which frequently assail us in news reports should serve to warn the Department that broadening the definition of “authorized representative” to allow even more entities and individuals access to personally identifiable information is a perilous idea.

Issue 2: The proposed definition of “education program” will create far too broad of a definition, thereby providing more opportunities for student data to be mishandled or lost.

HSLDA is very concerned with the proposed definition of “education program.” § 99.35(a)(1) allows certain entities or individuals non-consensual 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.

While we agree that a definition of “education program” may be helpful, the proposed definition is incredibly overbroad. If the Department wants to allow personally identifiable information to be accessed for research purposes, then the answer is to request consent from the student or their parents themselves, not to allow even more personally identifiable information to be given away without consent.

There are potentially millions of students in the programs that would be considered “education programs” under the proposed definition. Should personally identifiable information of adults in career and technical education be shared non-consensually? Should private school and homeschool students who are able to use IDEA special education services have their personally identifiable information shared without their consent?

We urge the Department to narrowly define “education program” to limit the dangers posed to student privacy from an overbroad definition.

Issue 3: More clarification is needed for the proposed changes regarding Research Studies and Authority to Audit or Evaluate.

Ms. Regina Miles, Department of Education

6/7/2012

Page 4 of 6

HSLDA believes that more information is needed for why the Department is proposing changing the regulations in these two subject areas. We are concerned anytime there are proposed changes which would allow greater non-consensual disclosure of personally identifiable information. HSLDA believes that existing parental consent disclosure provisions – not rule changes – provide a way to avoid any changes that could weaken FERPA. If school officials ask parents for their consent to disclose student specific data for a good reason, parents will usually give this consent. Greater parental involvement at all levels of a child's education, not greater bureaucratic authority to waive FERPA's privacy provisions, should be central to any changes to the regulations implementing FERPA.

We are concerned that the proposed regulations regarding research studies appear to increase the number of individuals and entities who can receive students' personally identifiable information. As previously stated, the more times personal data are disclosed – especially when the disclosure is non-consensual – the greater the chances of mishandling or theft of the data.

We are also concerned with the proposed regulations regarding Authority to Audit or Evaluate. We wish to see greater clarification for why it is necessary to remove the provision that a State or local educational authority or other agency headed by an official listed in § 99.31(a)(3) must establish legal authority under other Federal, State or local law to conduct an audit, evaluation, or compliance or enforcement activity.

While we applaud any attempt to promote greater transparency and evaluation of Federal or State supported education program, we are concerned that this will allow personally identifiable information to be disclosed to a wide array of entities who may seek this data under the guise of an audit or evaluation. Eliminating the legal authority requirement appears to open the door wide to personally identifiable information being accessed, possibly for the wrong reasons.

Issue 4: Does the Department have the legal authority to make these changes?

HSLDA believes that if provisions in FERPA limit the implementation of certain federal law, the Department should ask Congress to amend FERPA. Such changes should not be made through amendments to the regulations implementing FERPA.

However, the Department's proposed regulations appear to make many changes to FERPA, changes which we do not believe were intended in either the America COMPETES Act or the ARRA. Indeed, the COMPETES Act, which was signed into law on August 9, 2007, expressly provides at 20 U.S.C. 9871(e)(2)(C)(i):

Each State that receives a grant under subsection (c)(2) shall implement measures to – (I) ensure that the statewide P-16 education data system meets the

Ms. Regina Miles, Department of Education

6/7/2012

Page 5 of 6

requirements of section 1232g of this title (commonly known as the Family Educational Rights and Privacy Act of 1974); (II) limit the use of information in the statewide P-16 education data system by institutions of higher education and State or local educational agencies or institutions to the activities set forth in paragraph (1) or State law regarding education, consistent with the purposes of this subchapter; (III) prohibit the disclosure of personally identifiable information except as permitted under section 1232g of this title and any additional limitations set forth in State law...

Nothing in the ARRA amended this, or authorized the Department to make changes such as those in the Department's proposed regulations.

Indeed, HSLDA believes that Congress' intent with regards to federal involvement in any statewide longitudinal data systems and all other databases of personally identifiable information of students is summed up in 20 U.S.C. § 7911, which reads:

““SEC. 9531. PROHIBITION ON NATIONWIDE DATABASE. “Nothing in this Act (other than section 1308(b)) shall be construed to authorize the development of a nationwide database of personally identifiable information on individuals involved in studies or other collections of data under this Act.”

Congress inserted this language into ESEA to protect students and families from the danger of having their personal information lost or stolen, and to protect against central registries of student's personally identifiable data that many criticize as big brother centralized planning. Currently, the states and federal government track disaggregated data on students, leaving no clear reason for why there has to be more detailed, personally identifiable information kept on students, other than what is required in their own schools. Collection and storage of this information in such a database is dangerous to privacy rights, is not necessary, and cannot be funded with federal dollars due to this provision in federal law.

We believe that Congress' intent behind Section 9531 was to also prohibit federal funding of state data systems that are interconnected with another state's data system, if any of the databases contain student-specific, personally identifiable information. Such data systems are *de facto* national databases, and lead to the same concerns about loss of privacy and failure to protect personal information.

Additionally, the General Education Provisions Act (GEPA), codified at 20 U.S.C. § 1221, *et seq.*, puts numerous limitations and prohibitions on retaining, using, and distributing personally identifiable information on students. HSLDA is concerned that overall, the Department's proposed regulations are not authorized by any act of Congress, and may indeed fall afoul of certain provisions.

Ms. Regina Miles, Department of Education

6/7/2012

Page 6 of 6

Conclusion

HSLDA believes that the Department should reexamine the proposed regulations in light of our four concerns laid out above. The privacy and security of the personally identifiable information of students – many of whom are young children – is more important than any data tracking system.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Michael Smith". The signature is fluid and cursive, with a large loop at the end.

J. Michael Smith, Esq.
President

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 18, 2011
Status: Posted
Posted: May 18, 2011
Category: State educational agency
Tracking No. 80d4360b
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-0002-0037
Comment on FR Doc # 2011-08205

Submitter Information

Name: Nancy Mosher

Address:

Flint, MI,

Email: moshern@michigan.gov

Organization: Michigan Department of Education- Low Incidence Outreach

Government Agency Type: State

General Comment

Protecting the privacy of students is crucial. However, I am in support of the use of data sharing with caution. Since the responsibilities for students who are eligible for special education services and programs in Michigan belong to several agencies within state government, including community health, data sharing for early identification and follow up are part of 2 or 3 agencies, including those with HIPA requirements. Our loss to follow-up numbers after early identification of a hearing loss is affected by our inability to share information.

Additionally, for transforming our educational system, data is crucial. Students who are Deaf/Hard of Hearing have a high graduation rate, but do not stay employed, according to data. Being able to research the courses, etc which made our students successful after graduation, would contribute to our increased success with transition services. Thank you for the opportunity to submit comments.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 18, 2011
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Category: Parent/Relative
Tracking No. 80d2c574
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-0002-0038
Comment on FR Doc # 2011-08205

Submitter Information

Name: Fawn Curry

Address:

Redmond, OR,

Email: pureclean2010@yahoo.com

General Comment

The portion I have read I am interpreting as taking away parent rights to know what is going on with their children. As a parent of a child with ADHD/oppositional defiance disorder I feel it is imperative for me to know what is going at school or otherwise with my child. Not only because I am his biggest advocate, but also because I need to know what he is talking about when he comes home from school and tells me that the school put him through testing or otherwise and be able to explain it to him with an informed answer. Parents and children should have the right to be and stay informed about what is going on in their lives.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 17, 2011
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Posted: May 18, 2011
Category: Parent/Relative
Tracking No. 80d17acd
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-0002-0039
Comment on FR Doc # 2011-08205

Submitter Information

Name: Therese Gorman

Address:

Hillsboro, OR,

Email: therese.marie.gs@gmail.com

General Comment

I am in favor of anything that will expose the mediocrity and farce of what is called "special education" in this country. The school districts hide behind "confidentiality" and there is no way for parents to connect with each other to compare notes, share information, and organize to improve the sorry state of services to their children with special needs. I would not be in favor of sharing information with people who are just going to blindly rubber stamp the programs they are reviewing. I would hope that truly independent entities and consumer watchdog groups would have access to this information, so that the truth can be exposed about what's really going on in special education.

PUBLIC SUBMISSION

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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-0002-0040
Comment on FR Doc # 2011-08205

Submitter Information

Name: Linda Van de Riet
Address:
Eureka, MO,
Email: lvanderiet@charter.net

General Comment

I do not want such a bill to pass. This is a violation of my privacy by going around my Constitutional rights as an American citizen. This will be done through government regulations that I have no control over and will give any government entity the right to my private information just by saying that they have this right without my consent. This allows any level of government dictatorial control over my student and my family through the school system. I am ABSOLUTELY against this bill and expect that it will be killed.

PUBLIC SUBMISSION

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Posted: May 20, 2011
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Tracking No. 80dc11cb
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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-0002-0041
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mimi Lufkin
Address:
Cochranville, PA,
Email: mimilufkin@napequity.org
Organization: National Alliance for Partnerships in Equity

General Comment

Please see the attached letter.

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

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 National Alliance for Partnerships in Equity (NAPE), our 39 member states, and our 160 organizational affiliate members, I want to thank you and the other staff of the U.S. Department of Education for the opportunity to provide comments on the proposed amendments to the regulations implementing the Family Educational Rights and Privacy Act (FERPA).

It might interest you to know that NAPE is a consortium of state and local agencies, corporations, and national organizations committed to the advancement of equity and diversity in classrooms and workplaces. NAPE promotes programs and policies that reduce barriers commonly found in education and workforce development systems. Our members work in a variety of settings including K-12 public education, community and technical colleges, and four-year colleges and universities. Our organization is the nation's largest group of equity advocates in career and technical education. Our members are the equity advocates that link the school, community, and business and industry in providing services to students, families, and school personnel to promote and support nontraditional students' success in classes and careers.

NAPE supports your efforts to identify and address the balance between every individual's right to privacy and the need to collect critical student data to evaluate and improve education. This letter provides guidance in the spirit of this careful balance.

Broadening Representatives that May Receive Data for Evaluation/Audit

Subject to privacy safeguards, the proposed regulations authorize state and local education officials (without written parent consent) to disclose personally identifiable student data to any designated entity or person for the purpose of evaluating, auditing or enforcing federal compliance with state-or federal-supported education programs.



Comment:

The effect of the proposed change would be to authorize education agencies, subject to privacy safeguards, to store/disclose data in/to workforce and other non-education agencies to match the education and other data in order to evaluate education programs. For career and technical education, which collaborates with workforce development and other non-education agencies to prepare students for college and careers, the ability to evaluate seamlessly inter-related parts of the career preparation system is an essential component of accountability.

Disclosing Postsecondary Data to K-12 systems/agencies

The proposed regulations authorize postsecondary institutions or data systems to disclose student data back to K-12 data systems or school districts for the purpose of evaluating how well the district had prepared students for college.

Comment:

This proposed amendment enables school districts to evaluate how well they prepared students for college by accessing and reviewing enrollment, persistence, and remediation rates, and the success of former secondary students in postsecondary education. For career and technical education, the ability to analyze all relevant data for a student's education and career path – and not artificially stop the analysis solely because the student aged-out of a K-12 system – would be a positive amendment.

Scope of educational programs subject to audit and evaluation

The proposed regulations broadly define "education programs" that may be the subject of an evaluation or audit as the basis for disclosures under FERPA. The definition includes any program principally engaged in education, including, among other programs, job training, whether or not the program is administered by an educational agency or institution.

Comment:

Student data could be disclosed to authorized representatives designated by a state or local education authority for the purpose of evaluating job training programs administered by non-education agencies. It is fiscally responsible and strengthens accountability to better use and analyze data within the job training system, as it is an important component of the career and technical education pathway.



State or local education agency disclosures for research

The proposed regulations provide that nothing in FERPA prevents a state or local education authority from re-disclosing data on behalf of educational agencies or institutions for a research study.

Comment:

This provision would for the first time make the research provision in FERPA applicable to state-level data, thereby facilitating use of state-level student data for research studies that benefit schools, postsecondary institutions, and educational agencies in the state.

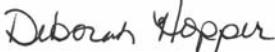
Final Comment:

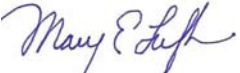
Overall, the proposed regulations include provisions to better align FERPA with state and local longitudinal data systems that will better facilitate the use of student data for robust evaluation, research, and accountability purposes. In our work with state and local education agencies, we often see policy-makers hampered in their decision-making because they are unable to access and evaluate the full picture of students served through career and technical education in the K-12 system, the postsecondary system, and workforce development.

NAPE members know from experience that at each transition point – middle school to high school; high school to postsecondary education; postsecondary education to career – we disproportionately lose the most vulnerable students. Students in educational programs nontraditional for their gender, students of color, and students with disabilities persevere, but persevere in fewer numbers and at lower rates than their comparable peers. To strengthen our workforce, improve our global educational standing, and better serve the needs of all students, we need greater flexibility regarding data access and evaluation. I respectfully submit these recommendations with the hope that the amendments to the regulations implementing FERPA will guide school and state-based decision-makers towards achieving an improved educational experience for all students, a better-prepared workforce, and maintain the balance that ensures student privacy and security.

If NAPE can be of further assistance, please contact Joyce Ayers at jayers@napequity.org

Most sincerely,


Deborah Hopper
President


Mimi Lufkin
Chief Executive Officer

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 20, 2011
Status: Posted
Posted: May 20, 2011
Category: Individual
Tracking No. 80dbc5c7
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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-0002-0042
Comment on FR Doc # 2011-08205

Submitter Information

Name: kathy holleman

Address:

king george, VA,

Email: hawkspiritwoman@verizon.net

Government Agency: D.O.E.

General Comment

As a parent of a Middle School student, I have the right to decide what information is given out and to whom it is to be given. I am against this purosed new rule that would take my freedom of choice away! I know what is best for my own child, and I do not need government to do this for me.

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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-0002-0043
Comment on FR Doc # 2011-08205

Submitter Information

Name: Brian Clark

Address:

Houston, TX,

Submitter's Representative: n/a

Organization: n/a

Government Agency: n/a

General Comment

This is an invasion of privacy and the government has no constitutional authority to access this information.

My family will not consent.

PUBLIC SUBMISSION

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-0002-0044
Comment on FR Doc # 2011-08205

Submitter Information

Name: Vida McEndollar
Address:
High Ridge, MO,
Email: vidamc@gmail.com

General Comment

This country does not need to have the privacy of students assaulted by new government regulations. The DOE should not have the right to do anything to jeopardize that privacy. The government needs to back away from trying to find out more and more about the citizenry. This is nothing but one more step in trying to control the people by starting to collect data at younger ages.

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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-0002-0045
Comment on FR Doc # 2011-08205

Submitter Information

Name: Ronnie
Address: United States,

General Comment

Arne Duncan this is an invasion of privacy and the government has no constitutional authority to access this information. STOP!

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 19, 2011
Status: Posted
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Tracking No. 80d92061
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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-0002-0046
Comment on FR Doc # 2011-08205

Submitter Information

Name: Andrew Palmer
Address:
Kansas City, MO,
Email: andrew.hm.palmer@gmail.com

General Comment

I object to the modifications of FERPA for the following reasons. 1) DOE is weakening longstanding student privacy protections by greatly expanding the universe of individuals and entities who have access to Personally Identifiable Information, by broadening the definition of programs that might generate data subject to this access, and by eliminating the requirement of express legal authority for certain governmental activities; 2) DOE's proposed interconnected data systems could be accessed by other departments, such as Labor and Health and Human Services, to facilitate social engineering such as development of the type of "workforce" deemed necessary by the government; and 3) DOE is attempting to evade Congress by pushing through these radical policy changes by regulation rather than legislation.

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Category: Academic/Think Tank
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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-0002-0047
Comment on FR Doc # 2011-08205

Submitter Information

Name: David Longanecker

Address:

Boulder, CO,

Organization: Western Interstate Commission for Higher Education

Government Agency Type: Regional

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Western Interstate Commission for Higher Education

3035 Center Green Drive Suite 200 Boulder, CO 80301-2204 303.541.0200 (ph) 303.541.0291 (fax)

May 19, 2011

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

RE: Comments concerning proposed regulations on the Family Educational Rights and Privacy Act published in the *Federal Register*, April 8, 2011 (Docket ID #ED-2011-OM-0002)

Dear Ms. Miles:

The Western Interstate Commission for Higher Education (WICHE) appreciates the opportunity to provide comments in response to the Notice of Proposed Rule Making on new regulations governing the Family Educational Rights and Privacy Act (FERPA). As the principal federal statute addressing the privacy and security of student records, FERPA plays a vital role in safeguarding individual privacy as well as in determining the extent to which such information can be used to improve educational policy and practice.

WICHE is a regional compact representing 15 Western states and dedicated to promoting student access to and success in high-quality postsecondary education for residents of the West. In doing so, WICHE is active in providing policy solutions and expertise, facilitating dialogue among policymakers and practitioners, and broadening access through regional student exchange programs, among other activities. One current effort is particularly concerned with the proposed changes to FERPA regulations. With support from the Bill and Melinda Gates Foundation, WICHE has been leading a project to develop a pilot multi-state longitudinal data exchange that incorporates secondary education, postsecondary education, and workforce data. The data exchange is a logical extension of the statewide longitudinal data systems development efforts currently sponsored by the federal government and by each state. In taking a regional view spanning education and workforce segments, the data exchange is aimed at providing public policymakers a more comprehensive picture of human capital development, and its ebbs and flows, than is possible by looking exclusively within a single state. The project holds great promise in helping states to more effectively align their educational investments and their workforce development needs and to improve educational attainment for individuals from all groups and backgrounds. The data exchange project proceeds from the assumption that the best use of multi-state data is for policy and practice-relevant research, for which aggregate reports and analytical work are most suitable, and not for transactional or operational purposes where real-time data on individuals is necessary. Four states are initial participants in this project: Oregon, Washington, Idaho, and Hawaii.

www.wiche.edu

ALASKA ARIZONA CALIFORNIA COLORADO HAWAII IDAHO MONTANA NEVADA NEW MEXICO
NORTH DAKOTA OREGON SOUTH DAKOTA UTAH WASHINGTON WYOMING

AR 0093

U.S. Department of Education

May 19, 2011

Page 2

With rising federal expectations for state utilization of longitudinal data through the SLDS and Race to the Top competitions and the assurances embedded within the State Fiscal Stabilization Fund, there has been a growing need to clarify FERPA and to provide greater flexibility in the use of student-level data. In general, WICHE commends the Department for taking necessary steps to do just that while trying to strike a balance between provisions enabling greater data sharing with tougher and clearer enforcement mechanisms that will help to ensure security and preserve privacy. Most importantly, the proposed changes would eliminate a number of barriers currently preventing or unnecessarily hindering the sharing of data among educational and workforce partners within a state, which have reduced states' ability to make effective use of their data. Others will no doubt comment at greater length about the provisions broadening access to the data, but WICHE fully supports those related to a more reasonable definition of "authorized representative" and "education program" and to the expanded permission for disclosures related to research studies, without which the whole point of longitudinal data systems development and related investments is seriously eroded.

Instead, WICHE will focus its specific observations and reactions to the NPRM to the lessons it is learning about how FERPA has impacted our data exchange development effort to date. A project of this nature encounters all the widely-cited challenges related to current interpretations of FERPA, and which the Department is seeking to address through this NPRM. But the nature of our attempt to combine data from multiple states, together with our project's particular focus on workforce outcomes, leads us to raise the issues that follow.

- *Specifically authorize the exchange of data among education agencies and "educational authorities" in different states for the purpose of examining human capital development and its mobility from a regional view.* Despite the Department's attempts in the ARRA SLDS RFA and elsewhere to encourage states to link data with their neighbors, data sharing activity across state lines has been limited to date. WICHE's project is the most systematic effort to do so currently underway. Nothing in the NPRM appears to explicitly prohibit a state or local educational agency from designating a public entity in a different state as an authorized representative to which it may disclose personally identifiable information (PII) for the purpose of conducting educational research or evaluation, or to designate a duly empanelled multi-state data exchange governance body. Yet state attorneys general who have frequently taken a narrow view of FERPA disclosures may prohibit the disclosure of PII across state lines on the grounds that such sharing does not serve their own state's public interest sufficiently well to justify it. It would be helpful for states seeking to take a regional view of educational supply and workforce demand that such a use be explicitly stated within the regulations as allowable. Other state agencies or a multi-state governance body obtaining data from originating states should be expected to uphold the same standards for data security and confidentiality already captured in the NPRM for other authorized representatives.

Furthermore, to create a true exchange of data among participating states, those that contribute student records into a multi-state matchmaking process may reasonably expect to receive in return additional information concerning their own students than they themselves already have on hand. Specifically, state educational agencies are interested in using the exchange to fill in information on their own students that was missing due to individual mobility. As an example, a state may want to examine the workforce outcomes of students who attended or graduated from its public postsecondary institutions as a way of judging performance or improving instruction or student services. Without capturing information for those individuals who leave for jobs elsewhere, the state has an incomplete picture of the extent to which it is successfully preparing its residents for the workforce and, more narrowly, for jobs within its own borders. There exist states that have set up arrangements under existing rules and regulations to perform limited cross-border data integration to supplement the information they have about their own students, but doing so is time-consuming and inefficient. Existing programs like the Wage Record Interchange System (WRIS) that state labor market information directors have access to can provide national picture of individual mobility, but WRIS can only provide aggregate information back to the education agencies, leaving them unable to perform their own analytical work on a fuller dataset. While it does not appear as though anything in the proposed regulations would thwart the kind of data exchange done bilaterally (or in other limited ways) among states, it is unclear whether the proposed regulations would allow for PII on former students to flow back to the originating states in order to supplement the information that state has available for policy and practice-relevant analysis. That is particularly true if each state party to a multi-state data exchange has designated a single authorized representative for the task of coordinating the exchange and assuming the record linking duties. In such a scenario, would that authorized representative have the ability to redisclose PII assembled from the several participating states for a set of individuals originally submitted by one of their number? The extent to which the proposed regulations envision that PII be protected from redisclosure beyond the original disclosing entity may impose a chilling effect on multi-state partnerships for data exchange.

- *Loosen restrictions preventing the exchange of social security numbers as the key linking field for workforce information.* One of the most basic challenges facing states that are trying to link education and workforce data is the fact that, with few exceptions, the only piece of information that connects these records is an individual's social security number. The proposed regulations are largely silent on the use of SSNs, except to explicitly state that SSNs may not be designated as directory information. Nevertheless, if adopted the proposed regulations will ease the task of linking education and workforce data within a state. What is less clear is the extent to which a multi-state data exchange will be able to take advantage of that expanded authority to match data fields using the SSN. Given the sensitivity of the

SSN and the particular challenges of the multi-state approach articulated above, it would be helpful if the regulations specifically allowed for the use of SSNs to make the linkage between education and workforce data without requiring consent either from “eligible students” or from the schools, school districts, or institutions where they are (or were at one time) enrolled. Already we have extremely limited capacity to use administrative records to observe the workforce outcomes of student who do not go on to postsecondary education, since K-12 schools and school districts are moving away from collecting or storing the SSN in any way. The regulations could explicitly allow the use of the SSN for this exclusive purpose, which, once connected, should be stripped from the student record.

- *Clarify the extent to which data can be retained for the purpose of long-term analysis and offer guidance on how PII can be safeguarded for research that necessitates a lengthy time horizon.* Echoing other approaches to data security and privacy protection, one of the chief means by which the proposed regulations is to require that personally identifiable data be destroyed after a time period specified in a written agreement. Such a provision is of great help in preserving the security of PII, although the provision does not provide detail concerning a maximum time period for which PII may be kept. Yet limiting the time period over which data may be collected and stored may potentially constrain the scope of relevant research. As is evident in the design of longitudinal sample surveys managed by the Department, effective research on policy-relevant questions often requires many years of observations. For example, in order to obtain reasonable estimates of the workforce outcomes of former high school students, a research project would need PII for a minimum of six or seven years. Moreover, too narrow a focus on initial employment could be misleading since educational programs are not all alike in the degree to which they are tightly coupled to occupations in the labor market. Similarly, one of the most promising possibilities of interrogating the link between education and workforce is to examine how individuals already in the labor market return to formalized schooling for more skills or credentials and what their subsequent outcomes are. Neither the proposed regulations nor interpretations of them should limit research and evaluation by conveying an expectation that PII must be destroyed so quickly that insufficient time allows for the exploration of such questions. Similarly, the regulations should clarify that this requirement does not constrain research to one-off projects or to prohibit the collection (and storage) of observations in several stages over time. Subsequent guidance issued by the Department on this topic may also be helpful.
- *Strike an appropriate balance between the public’s legitimate interests and institutions’ reasonable expectation for autonomy in data submission for non-public institutions.* The proposed regulations are mainly silent concerning private schools and postsecondary institutions. Yet we note the fact that, by and large, the SLDS development activity in most states is relevant for public schools and public postsecondary institutions only. Typically, state data systems and other data

U.S. Department of Education

May 19, 2011

Page 5

collections like the National Student Clearinghouse include information from private institutions only if they voluntarily submit that information. Private institutions, both non-profit and for-profit, contribute substantially to the civic and economic life of a state. Therefore, language in the final regulations could recognize that the public has an interest in the extent to which private educational institutions are contributing to a state's or a region's human capital, and to offer encouragement to that sector to provide at least a limited set of individual-level data (including at least enrollment and degree information) that captures those contributions, and supplements public sector data, for policy-relevant research.

Thank you for the opportunity to weigh in on the proposed FERPA regulations. On balance, they will go far toward clearing up confusion and uncertainty around the use of longitudinal data for policy and practice relevance, and significantly improve the chilled climate for such work that has been the case in many states. Nevertheless, while they do not appear to us to preclude the collection and sharing of data across state lines that would be necessary for a multi-state approach to examining human capital development and its mobility, greater clarity around the above points may go a long way in forestalling interpretations that could be too restrictive for a multi-state data exchange to thrive. Please let us know if we can answer any additional questions. We look forward to seeing the proposed regulations, ideally with minor modifications addressing the changes we have outlined above, adopted.

Sincerely,

A handwritten signature in black ink, appearing to read "David A. Longanecker". The signature is written in a cursive, flowing style.

David A. Longanecker
President

PUBLIC SUBMISSION

As of: March 27, 2012 Received: May 19, 2011 Status: Posted Posted: May 20, 2011 Category: Four-Year Public Institution of Higher Education Tracking No. 80d91eea Comments Due: May 23, 2011 Submission Type: Web
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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-0002-0048
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

We are concerned about the very broad definition of education program being proposed. It appears that any program that has some sort of educational component could fall under the new definition.

The proposed language for authorized representative seems to imply that it could be any state employee, regardless of whether or not that person was under the direct control of the education authority. This seems overly broad, and could allow for potential accessing of data by those who don't really need it.

Allowing the re-disclosure of PII without permission of the originator of the data even if the originator disagrees with the disclosure seems heavy handed.

There could be an increase in data requests that are time consuming and people intensive if the regulations are implemented since lots of different agencies could be considered an education program who want to do research on their efficacy.

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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-0002-0049
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Van Overschelde, PhD
Address:
Wimberley,
Email: jim@jimvano.org

General Comment

See attached.

Attachments

Comment on FR Doc # 2011-08205

DEPARTMENT OF EDUCATION
34 CFR Part 99
RIN 1880-AA86
[Docket ID ED-2011-OM-0002]
Family Educational Rights and Privacy

Comments

§ 99.3 – Definition of *authorized representative*.

With educational budget shortfalls, more foundation-funded programs are being implemented in schools by LEAs. The current and proposed regulations (§ 99.35[a][2][i]) indicate that PII can only be released to “carry out an audit or evaluation of Federal or State supported education programs.” Given that the LEA/SEA may want to know whether this privately-funded program is effective the Secretary may want to clarify that authorized representatives of an LEA or an SEA can have access to PII to carry out an evaluation of educational programs regardless of funding source.

§ 99.3(c)(1) – Definition of *directory information*

The Secretary may want to clarify whether a unique student ID, which is not a derivative of the student’s SSN, can be public information if it is *used by an LEA or SEA* and the only way to use this number to get access to the student’s education record at the campus, district, or state level is when it is used in conjunction with a valid (password protected) login to the appropriate data system.

§ 99.31 – Re-disclosure of PII

Much research now requires longitudinal student records (assessment results, grade level, program participation), and when students move among LEAs, this research is currently hampered because SEAs are not permitted to re-disclose PII from prior LEAs to the current LEA. When states have hundreds or thousands of LEAs, contractual LEA-to-LEA relationships are not feasible. Therefore, the Secretary should to make explicit the authority of an SEA to re-disclose to the current LEA, or authorized representative of the current LEA, the historical PII obtained from prior LEAs even when a prior LEA was under the jurisdiction of a different SEA.

§ 99.31(a)(3) – Debarment for improper re-disclosure

If an SEA re-discloses a PII obtained from an LEA in violation of FERPA, the LEA is forbidden from sharing PII with the SEA for a minimum of 5 years. However, under other state and federal statutes the SEA is still required to collect student-level assessment, enrollment, and attendance (among many other) data for accountability purposes or for purposes of providing state and federal public funds to the LEA. The Secretary may want to clarify what would happen in a debarment situation like this.

§ 99.35(a)(2)(iii) – Data destruction

The Secretary may want to require a formal mechanism by which data destruction is documented (e.g., notarized letter) and by which both parties are protected.

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Category: Association/Organization
Tracking No. 80d914c3
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-0002-0050
Comment on FR Doc # 2011-08205

Submitter Information

Name: David Warren

Address:

Washington, DC,

Email: david@naicu.edu

Submitter's Representative: Susan Hattan

Organization: National Association of Independent Colleges and Universities

General Comment

Attached are comments submitted on behalf of the National Association of Independent Colleges and Universities (NAICU).

Attachments

Comment on FR Doc # 2011-08205



National Association
of Independent
Colleges and Universities

1025 Connecticut Ave. N.W.
Suite 700
Washington, DC 20036-5405

Tel: (202)785-8866
Fax: (202)835-0003
www.naicu.edu

May 19, 2011

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

Re: Docket ID ED-2011-OM-0002

Dear Ms. Miles:

I am writing on behalf of the National Association of Independent Colleges and Universities (NAICU) in response to the notice of proposed rulemaking dealing with the Family Educational Rights and Privacy Act (FERPA), published in the April 8, 2011, *Federal Register*.

NAICU believes it is essential that the privacy of student educational records be protected and has strongly supported FERPA since our founding. We are deeply troubled, therefore, to see that these proposed regulations turn the basic purpose of FERPA on its head. Rather than focusing on protection of privacy, the proposal instead opens new avenues for sharing personal information without the knowledge or consent of the individuals involved.

The justification given for these proposed changes is to facilitate the development and expansion of statewide longitudinal data systems with the capacity to follow individuals from pre-kindergarten through employment. We recognize these data systems are being promoted as an effort to improve educational outcomes. We can all agree this is a worthy and important objective. We do not agree, however, that it is necessary to sacrifice privacy to achieve our mutual goal of educational improvement.

Sampling, for example, can produce useful information for policymaking purposes without the need or the expense of compiling large dossiers of individual student information that follows the student throughout his or her schooling—and beyond. Moreover, within current FERPA protections, individuals with a clear and defined need for individual student information are able to obtain it.

We believe the proposed regulations would erode student privacy in several specific ways.

First, the proposal creates a situation where virtually any individual or entity could stake a claim to access to personally identifiable information without consent. This is accomplished by creating an expansive definition of “authorized representative” under what is known as the “audit and evaluation” exception. In essence, the few individuals currently identified as being authorized to obtain student records for a narrow set of purposes would now become the gateways to that information, with the ability to designate whomever they choose as their representatives.

Second, the proposal stretches the definition of “education program” far enough to permit the sharing of personally identifiable information about a student without consent at any point from the time he or she enters pre-school through his or her participation in the workforce. FERPA is designed to protect the privacy of a student’s educational records. As such, it is ironic that the proposed definition of “education program” is expanded not for the purpose of extending the reach of privacy protections, but rather to broaden the opportunities for sharing personally identifiable information without consent.

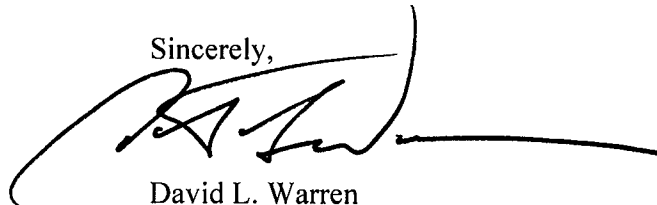
Third, it broadens the “research” exception to permit the redisclosure for research purposes of personally identifiable information without consent on the basis that the entity that received the data has “implied” authority to share it—even if the local educational agency or postsecondary institution that provided the information objects to its redisclosure. This notion of implied authority is also applied to expand the reach of the “audit and evaluation” exception.

Taken as a whole, these proposed changes open the door to broad use of student educational records to support “robust” data systems without making a commensurate effort to assure the “robust” protection of that data once it is shared. The preamble discussion goes on at length to establish a rationale for the broad sharing of personally identifiable information. However, it makes only a passing reference to the need for use of “reasonable methods” to assure the redisclosed data is used only for intended purposes, destroyed when no longer needed, and protected from further disclosure. As a practical matter, it will be difficult to track the use of this data once it is released. In addition, although the proposal calls for the use of written agreements, it does not present a clear notion of what penalties might be applied in the event an agreement is violated.

The language and intent of the statute simply do not support the expansive interpretations included in these proposed regulations. Wishing that the law said something different is simply not sufficient grounds for overturning it.

More detailed comments about the proposed changes are attached, but our basic concern is that student privacy is being lost in the drive for an education reform model that relies heavily on longitudinal data systems. As educators, we share the Department’s desire to assure excellence, and we recognize that data is one component of improvement efforts. However, there are other important values to protect and other, less invasive means to acquire the information that can inform better instruction.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Warren", with a long horizontal flourish extending to the right.

David L. Warren

COMMENTS – FAMILY EDUCATIONAL RIGHTS AND PRIVACY
NOTICE OF PROPOSED RULEMAKING – APRIL 8, 2011
NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES
(NAICU)

Definitions (§ 99.3) – “Authorized representative”

Proposal: The proposed regulations create a definition of “authorized representative” designed to increase the number of entities that qualify under the so-called “audit and evaluation” exception.

Background: This exception permits authorized representatives of the Comptroller General of the United States, the Secretary of Education, the Attorney General, or State educational authorities to have access to personal information necessary for the audit and evaluation of Federally supported education program or for enforcement of Federal requirements related to those programs. State and local educational officials are also permitted access to student records for the audit or evaluation of State supported education programs or for enforcement of Federal requirements related to those programs. [See 20 U.S.C. 1232g(b)(1)(C), (3), and (5).]

The regulations have not included a definition of “authorized representative” in the past because its clear and plain meaning was that such a representative should be affiliated with one of the entities responsible for audit, evaluation, or compliance/ enforcement activities. These entities are specifically identified in the law because Congress intended that access to personally identifiable information without consent be limited to a small number of individuals for very specific purposes.

Effect of the Proposed Change: By defining an “authorized representative” as literally any entity or individual “designated” by an entity named in the “audit and evaluation” exception, the proposed regulation undermines the intent of the statutory provision. It does so by fundamentally altering the functions of the officials named in the statute and by exponentially increasing the number of individuals that could have access to student records. In essence, the few individuals currently identified as being authorized to obtain student records for a narrow set of purposes would now become the gateways to that information, with the ability to designate whomever they choose as their representatives.

The preamble discussion states that it is “unnecessarily restrictive” to require that an authorized representative be under the “direct control” of agencies identified in the statute. This statement makes it crystal-clear that the Department does not intend that anyone be excluded as a possible representative. In fact, the preamble discussion goes on to say that the proposed change is explicitly intended to permit agencies such as State health and human services departments to become “authorized representatives,” noting—

. . . then 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. [*p. 19728*]

This interpretation has no foundation in either statute or past agency practice. It does not explain how this broad use of education record data is consistent with the statutory intent of FERPA, which is to limit disclosure to education records, and at the same time provide the student (or parents of K-12 students) with a right to inspect and review their education record. Both goals of FERPA are undercut by the proposed definition of "authorized representative."

The only reference to any authority at all for this expansive interpretation is a passing reference in the preamble to the American Recovery and Reinvestment Act (ARRA). Section 14005(d)(3) of ARRA refers to longitudinal data systems that includes the elements described in the American COMPETES Act. These elements include pre-school through grade 12 and postsecondary education information—but they do not address in any way the workforce, health, family services, or any other data that the proposed new regulatory interpretation anticipates throwing into the mix.

What the preamble discussion does not mention is that the data provisions of the American COMPETES Act also include explicit provisions related to privacy and access to data (*Section 6401(e)(2)(C)*). Among other things, it requires State to adopt measures to "limit the use of information in the state-wide P-16 education data system by institutions of higher education and State or local educational agencies or institutions to the activities set forth in paragraph (1)¹ or State law regarding education, consistent with the purposes of this subtitle;".

This expansion also raises the question of what schools should now include in the annual notification of rights required under §99.7 regarding the educational agency or institution's policy regarding the disclosure of education records. If the proposed definition of "authorized representative" is included in the final regulation, we suggest that the notification requirement be adjusted to include an explanation to students (or parents of K-12 students) of the expanded access to these records contemplated by the new definition.

¹ The activities described in Section 6401(e)(1) are related to grants for P-16 alignment and all explicitly refer to education activities.

Definitions (§ 99.3) – “Education program”

Proposal: The proposed regulations create a definition of “education program” to mean “any program that is principally engaged in the provision of education . . . regardless of whether the program is administered by an educational authority.” The definition includes an illustrative, but not exhaustive, list of the types of programs that might be included in this definition—ranging from early childhood education to job training.

The term “education program” appears in the statute at 20 USC §1232g(b)(3) and (5) and in the regulations at § 99.35(a)(1), (2)(i), and (3)(ii). In all of these references, the term is modified to specify that the reference is to Federal or State supported programs. Because the proposed definition does not include a reference to Federal or State support, it could cause confusion as to its reach. If included in the final regulation, the definition should be clarified to conform to the statutory and regulatory provisions.

Background: This proposed change is intended to facilitate the development and expansion of statewide longitudinal data systems that can follow a child’s progress from pre-school to employment.

Effect of the Proposed Change: The proposed change substantially increases the number of programs that could be audited or evaluated under the current FERPA exception. Federal and State support is provided to a wide range of education programs either directly or through grants. The Department of Education is not the sole source of this support, as every federal department supports some type of education program in areas ranging from disease management to sustainable agriculture. Likewise, State governments support education programs ranging from nutrition to motorcycle and boating safety. Numerous non-profit organizations receive federal and/or state grant support for physical education, arts education, drug-abuse prevention, and the like. Presumably, any one of these entities could request access to student educational records for the purpose of conducting an evaluation of its program.

The cost-benefit analysis included in the preamble explains the need for the change this way:

The 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. [page 19734]

FERPA is a statute that is designed to protect the privacy of a student’s educational records. As such, it is ironic that the proposed definition of “education program” is expanded not for the purpose of extending the reach of privacy protections, but rather to broaden the opportunities for sharing personally identifiable information without consent.

Research Studies (§99.31(a)(6))

Proposal: The proposed regulation would permit a State or local educational authority or an agency headed by the Comptroller General, Secretary of Education, or Attorney General to provide non-consensual personally identifiable information on behalf of local educational agencies (LEAs) or institutions to organizations conducting research studies.

Background: Currently, State authorities can make such agreements with research organizations only if they have explicit authority to enter into agreements on behalf of an LEA or postsecondary institution.

Effect of the Proposed Change: Having the explicit legal authority to act on behalf of LEAs or institutions would no longer be necessary under the proposed change. In fact, the State agency may redisclose the personally identifiable information provided by the LEA or postsecondary institution--even if the LEA or institution objects.

The proposed change is described in the preamble discussion as follows:

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. [emphasis added] [p. 19731]*

Essentially, then, this proposed change would permit a State authority to redisclose personally identifiable information without consent for research purposes—even if the LEA or postsecondary institution that provided the information objects to its redisclosure and even if the State entity has no explicit authority to do so.

Authority to Audit or Evaluate (§99.35)

Proposal: The proposed regulation removes language stating that a State or local educational authority or an agency headed by the Comptroller General, Secretary of Education, or Attorney General must establish its legal authority to conduct an audit, evaluation, or compliance/enforcement activity.

Background: The preamble discussion indicates there is “confusion” regarding whether or not the audit, evaluation, or compliance/enforcement activity must be related to a Federal legal requirement. The proposal is described as bringing “clarity” to this question by:

(1) indicating that the necessary legal authority may be “express or implied;” and

(2) by specifying that the audit, evaluation, or compliance/enforcement activity could relate to Federal or State supported education programs other than those of the LEA or postsecondary institution providing the information.

Effect of the Proposed Change: This is yet another example of applying expansive interpretations to otherwise well understood concepts in order to increase the amount of personally identifiable information that may be shared without consent. The concepts of “audit,” “evaluation,” and “enforcement” in connection with a program are generally regarded as activities directly related to that program. Until now, that has been the understanding related to the scope of the “audit and evaluation” exception under the law. That understanding has been reaffirmed by the regulatory requirement that Federal, State, or local legal authority must be established for such activities.

With this new interpretation, the use of personally identifiable information collected for the specific educational programs of an LEA or a postsecondary institution is no longer confined to the audit or evaluation of those particular programs. Rather, this information can be provided without consent to the State for the “evaluation” of any program that is “primarily educational” in nature that receives any Federal or State support.

Improper Rediscovery (§99.35(d))

Proposal: The proposed regulation adds language indicating that, if an improper rediscovery is made, then the educational agency or institution from which the personally identifiable information originated would be prohibited from giving access to such data to the party responsible for the improper disclosure for at least 5 years.

In other words, an educational agency or institution would be required to withhold personally identifiable information for up to 5 years from a State or local educational authority, an authorized representative, or an agency headed by the Comptroller General, Secretary of Education, or Attorney General if that entity has improperly rediscovered personally identifiable information obtained from the agency or institution.

Background: This provision is described in the preamble, but is not further explained.

Effect of the Proposed Change: It is difficult to determine how this provision would work. As described in the preamble, the Department would prohibit an educational agency or institution from providing personally identifiable information to a party responsible for its improper rediscovery. So, for example, there could be a situation in which the Department itself was responsible for the improper rediscovery. In such a case, an institution of higher education would be unable to offer federal financial aid to its students because it would be precluded from submitting the information required to process grants and loans. This is but one example of ways in which the proposed enforcement mechanism would miss its intended target. If this type of penalty is to be applied, it would need to be more carefully structured to avoid further harm to the institutions and students already adversely affected by the improper rediscovery.

Enforcement Procedures With Respect to Any Recipient of Department Funds That Students Do Not Attend (§99.60)

Proposal: The proposed change appears to include—for enforcement purposes only—any recipient of Department of Education funds in the definition of “educational agency or institution.”

Background: The preamble discussion indicates that, for purposes of FERPA enforcement, the Department has generally interpreted “educational agency or institution” as including entities which students attend. With the proposed change, the Department would be able to take enforcement action against any recipient of Department of Education funds.

Effect of the Proposed Change: It is not clear how this proposal would work. If there is an “educational agency or institution” for which the other portions of the FERPA regulations do not apply, then what is to be enforced with respect to that entity? It would seem that any entity included in the definition “solely for purposes of subpart E” would therefore not be required to abide by non-subpart E provisions.

The preamble discussion indicates that the Department has made judgments that “most FERPA provisions” do not apply to entities where students do not attend, but does not outline how distinctions are made between the provisions that would apply and those that would not. The discussion does not answer this question, but rather reinforces the impression that any enforcement action is likely to be arbitrary and haphazard. For example, the most that the preamble can offer is an indication that “we *anticipate* that most FERPA compliance issues involving these entities will concern whether they have complied with FERPA’s redisclosure provision in §99.33. . . . the FERPA requirements, in addition to those in §99.33, *that may be applicable to* entities that are not ‘educational agencies or institutions’ under FERPA include, but are not limited to . . .” §99.10(a)(2), §99.31(a)(6), and §99.35(b)(2). [page 19733, *emphases added*]

Another question raised by this proposed change is that of the Secretary’s authority over State agencies. The cost-benefit analysis discussion suggests that the primary benefit of the proposed change to §99.60 would be to permit the Department to take direct enforcement action against a State educational agency if the agency improperly redisclosed personally identifiable information from its statewide data system.

It is not completely clear which of the enforcement tools available to the Secretary would be applicable in an action against a State government agency. Presumably, the Secretary could withhold federal funds related to the administration or federal programs or, perhaps, recover funds provided to the State for the development of its statewide longitudinal data system. It would be helpful if the Department could clarify in the final regulations the specific enforcement procedures that could be exercised in this type of situation.

Likewise, it would be useful to have a clarification of the enforcement actions that might be taken with respect to the nonprofit organizations and other non-governmental entities that would be covered under this provision.

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Comment on FR Doc # 2011-08205

Submitter Information

Name: Emmett McGroarty
Address:
Washington, DC,
Email: emcgroarty@americanprinciplesproject.org
Submitter's Representative: Emmett McGroarty
Organization: American Principles in Action

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

**COMMENT BY AMERICAN PRINCIPLES IN ACTION TO DEPARTMENT OF EDUCATION'S
PROPOSED RULEMAKING UNDER FERPA**

APIA objects to the Department of Education's proposed amendments to the regulations implementing section 444 of the General Education Provisions Act, also known as the Family Educational Rights and Privacy Act of 1974 (FERPA). These amendments would gut FERPA's protection of student privacy by radically and impermissibly 1) expanding the universe of individuals and entities who have nonconsensual access to Personally Identifiable Information (PII); 2) broadening the programs that generate data subject to this access; and 3) removing the requirement that government agencies have express legal authority to engage in certain activities.

Under the proposed changes, students and parents would lose their right to prevent disclosure of personal information and, in most cases, would have no way of knowing that a disclosure has even been made. This result would obliterate parents' right to protect their children by ensuring that disclosure of their PII is restricted to limited, designated entities for limited, designated purposes. APIA also believes that the goals sought to be achieved by these amendments are not within the authority of the Department to accomplish, but rather lie within the purview of Congress. Specific objections are as follows:

- **Authorized Representative** – DOE proposes to allow state educational authorities (SEAs), local educational authorities (LEAs), and agencies headed by the Secretary of Education, the Comptroller General, and the Attorney General to designate other individuals or entities (even other government agencies or private entities) as “authorized representatives” eligible to receive nonconsensual disclosure of PII. This proposal constitutes a radical change to the longstanding interpretation of FERPA and would allow practically unlimited, nonconsensual disclosure of PII to anyone the government “designates.” FERPA does not allow this, and cannot be rewritten by regulation.
- **Education Program** – DOE proposes to define “education program” to include any program that could marginally be considered “educational,” even if not conducted by an educational authority. This change would allow nonconsensual access to PII compiled as part of practically any program, whether truly educational or otherwise. It was never contemplated that FERPA would allow such sweeping access to personal data, and a change of this order cannot be made by mere regulation.
- **Research Studies** – DOE proposes to greatly expand access to PII for use in “research studies.” This proposed change raises two concerns: first, that PII compiled by SEAs or LEAs may be disclosed by another agency without their knowledge or consent; and

second, that the agency that disclosed the data could do so without express legal consent. Removing the requirement that a government agency have express legal authority for its actions – particularly actions that obliterate the privacy of students – is simply unthinkable in a democratic republic. A change of this magnitude, if it can be made at all, certainly cannot be made by mere regulation.

- **Authority to Audit or Evaluate** – DOE proposes to allow SEAs, LEAs, or agencies headed by the Secretary of Education, Comptroller General, or Attorney General to conduct audits, evaluations, or compliance activity without express legal authority to do so. The longstanding interpretation of FERPA is that because that statute itself confers no authority on a government agency to conduct audits, evaluations, or compliance activity, an agency that wishes to do so must show express authority from another statute. Again, removing this requirement is incompatible with democratic governance, and cannot be accomplished by mere regulation (if at all).
- **Enforcement** – DOE proposes to extend its FERPA enforcement authority beyond “educational agencies or institutions,” as contemplated by the statute and provided by longstanding regulatory interpretation, to include “enforcement against [any] other recipient of Department funds that had allegedly disclosed the PII” If DOE succeeds in allowing sweeping nonconsensual disclosure of PII, well beyond what Congress contemplated in enacting FERPA, it is certainly true that enforcement authority must be expanded beyond current limits. But the fact remains that DOE cannot rewrite FERPA by regulation -- increased enforcement authority must come from Congress.

In summary, APIA objects to DOE’s proposed amendments to regulations under FERPA because they would gut the statute and imperil student privacy by removing practically all impediments to nonconsensual disclosure of personal data. If the law is to be changed in such a radical way, the change must first be debated and approved by the people’s representatives in Congress, not imposed by stealth regulation.

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Submitter Information

Name: Jennifer Short

Address:

Summit, NJ,

Email: jshort@njcolleges.org

Organization: Association of Independent Colleges and Universities in New Jersey

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

May 18, 2011

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

RE: Docket ID ED-2011-OM-0002

Dear Ms. Miles:

On behalf of the fourteen independent, not-for-profit institutions represented by the Association of Independent Colleges and Universities in New Jersey, I am writing to share our concerns regarding the proposed amendments to the Family Educational Rights and Privacy Act (FERPA) that were published in the April 8 *Federal Register*. We are cognizant of the fact that the Department of Education is striving to increase access to student unit record databases in order to study ways to improve the educational system. However, we are concerned that the proposed regulations broaden access to the point of undermining the intent of FERPA.

Specifically, we believe that the terms “authorized representative” and “education program” need much narrower definitions. We ask that the Department proceed very cautiously before finalizing a relaxed definition of “authorized representative,” as student privacy and safety are at stake. Under the proposed regulations, students’ personally identifiable information (PII) could be disclosed nonconsensually to an “authorized representative,” which would be broadly 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 legal requirements that relate to those programs.¹

Affording designees of educational authorities and agencies unfettered access to PII could easily compromise student privacy and safety.

Moreover, FERPA would be further weakened by the expansive definition of “education program,” 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, regardless of whether the program is administered by an educational authority.²

This wide definition of “education program” would open the floodgates to a myriad of questionable groups who might have an interest in obtaining student PII, under the guise of evaluating the groups’ educational offerings.

¹ Page 19728.

² Page 19729-30.

We request that the Department please consider tightening the definitions of “authorized representative” and “education program” in the proposed FERPA regulations to ensure that FERPA remains a tool with which to protect student privacy, rather than a means by which to invade student privacy. Please feel free to contact us at any point for additional information. Thank you in advance for your time and consideration.

Yours truly,

Jennifer Ann Short, Ph.D.
Director of Institutional Relations & Policy Analysis

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Family Educational Rights and Privacy

Document: ED-2011-OM-0002-0053
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

Attached are comments from the California Department of Education.

Attachments

Comment on FR Doc # 2011-08205



CALIFORNIA
DEPARTMENT OF
EDUCATION

TOM TORLAKSON

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

May 18, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue
Washington, D.C. 20202

Subject: Comments on Proposed FERPA Regulations

Dear Ms. Miles

The California Department of Education (CDE) appreciates the opportunity to provide input to the U.S. Department of Education's (ED) proposed guidelines for the Family Education Rights Privacy Act (FERPA) as posted in the Federal Register Volume 7, Number 68 on Friday, April 8, 2011.

GENERAL COMMENTS

In general, we are very pleased with the proposed changes to the FERPA regulations given they address obstacles that have hampered state education agencies in trying to meet various federal requirements such as those in the America COMPETES Act, and to use longitudinal data systems to improve public education.

Various Entities

The regulations use various terms to refer to entities and it is not clear whether this is intentional and if so, why. For example:

- §99.31(a)(6)(ii) uses: "State or local educational authority"
- §99.31(a)(6)(iii) uses: "educational agency or institution"
- §99.31(a)(6)(iv) uses "educational agency or institution or State or local educational authority or agency headed by an authority listed..."
- §99.37(c)(2) uses "educational agency or institution"

Recommendation: If there is a distinction between educational *agency*, *institution*, local educational *authority*, then we suggest adding definitions for these various entities in the definition section. It would be helpful to clarify whether other state agencies (e.g. Department of Social Services) is considered among these entities.

Ms. Regina Miles
May 18, 2011
Page 2

AREAS OF CONCERN OR IN NEED OF CLARIFICATION

Education Program (§§99.3, 99.35)

Although we agree the purpose for disclosing data should be related to education programs, the definition of an education program may be unclear and unbounded by the use of the phrase “but not limited to.” The proposed definition of “education program” includes any program that is *principally engaged* in the provision of education. The confusion arises, in part, by the fact that the preamble states that the ED is broadening the definition of authorized representative, stating “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 receive non-consensual disclosures of PII to link education, workforce, health, family services”...etc. But then, the regulations define educational programs more narrowly limiting them to those federal or state programs “principally engaged” in education.

Recommendation: We suggest a clarification of the phrase *principally engaged*. We also suggest providing attributes or examples of programs that are principally engaged or not principally engaged in the provision of education. For example, it would be helpful to clarify if the following programs would be or not be considered education programs:

1. a program administered by the Department of Health Services, that is intended to educate families on healthy eating styles;
2. a program that provides social services (i.e., counseling);
3. a program run by Employment Development Department that provides job training or placement guidance;

Recommendation: The regulations need to clarify whether institutions for incarcerated youth or state hospitals (where school-age students may be long-term) are to be considered “*principally engaged*” in education. Education is not the primary mission of these types of institutions, but may be the only provider of education for the student for the time the student is housed there.

Sections 99.31(a)(v) and 99.35(d)

Sections 99.31(a)(v) and 99.35(d) discuss debarring and both use the word “may.” The only difference seems to be the party involved; that is, 99.31(a)(v) uses “third party” and 99.35(d) uses “authorized representatives.” If a distinction was intended, we suggest clarification that helps us understand the distinction between third party and authorized representative.

Ms. Regina Miles
Mary 18, 2011
Page 3

Also, we suggest a clarification as to whether the “authorized representative” or “third party” refers to the organization, the individual within the organization or both. That is, if an individual working for an organization designated as the authorized representative inappropriately discloses PII data, is the individual debarred, the organization debarred or both? One concern we have is the potential for an individual who discloses data to change organizations and thereby avoid being debarred.

Preamble – Authority to Evaluate

We support the change made to “*allow the SEA to receive personally identifiable data from postsecondary institutions needed to evaluate its own programs and determine whether its schools are adequately preparing students for higher education.*” We agree that this approach may be less costly and provide more precise information which may produce better information for improving effectiveness of various programs such as improving the alignment of high school curriculum with postsecondary curriculum.

Reasonable Methods (§ 99.35 (a)(2))

The preamble invites comment regarding using reasonable methods to protect data privacy. From a data security standpoint, at a minimum, we would consider reasonable methods to include strong encryption of the data during electronic transmission of data and dual key login for data stores containing PII data. We are concerned about some of the methods proposed in the Privacy Technical Assistance Brief entitled *Statistical Methods of Protecting Privacy*. Some methods seem unreasonable given states have already established masking rules that the ED has approved in a state’s Accountability Workbook for adequate yearly progress (AYP) determinations. Some of the techniques to reveal PII data require analytical skills that are specialized and may not be considered reasonable if we are protecting PII from the general public; the state and federal government need to strike a careful balance between transparency and privacy.

Recommendation: Allow responsibility for determining what constitutes “reasonable methods” to remain with the State or local education authority or agency.

Recommendation: With regard to the technical brief on *Statistical Methods of Protecting Privacy*, recognize some of the methods as “best practice” rather than a minimum requirement to protect data privacy. Do not specify any technical methods, even the strong encryption as mentioned above, within the regulations in order to allow states flexibility and to allow states to adopt new methods as technology evolves.

Ms. Regina Miles
Mary 18, 2011
Page 4

Written Agreements (§99.35)

Section 99.35 requires written agreements when sharing PII data and those written agreements should reflect the purpose for which the PII is disclosed to the authorized representative and is only to carry out an audit or evaluation of Federal or State supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs.

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

Debarment (§99.33)

There is a conflict between language used in the preamble on section 99.35(d) and what the regulations actually state. The preamble states “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.” The regulations sections 99.31(a)(v) and 99.35(d) both discuss debarment and both sections use the word “may.”

The regulations do not address procedures for addressing improper disclosures – there does not appear to be an option for organizations to come into voluntary compliance prior to debarment. Specifically, we are concerned about the potential scenario where a 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 allowed to exempt themselves from that point on) from reporting PII data to the state education agency.

Recommendation: We prefer the use of the word “may” in the regulations and not “prohibited.”

Recommendation: In the spirit of transparency, it is important that the ED develop debarment procedures that include clarity around remedy and due process and penalties.

Broadening Enforcement Authority (§99.60)

Ms. Regina Miles
May 18, 2011
Page 5

The preamble speaks to addressing the limit on the Secretary's authority to take appropriate enforcement actions and expands it to more than just local educational authorities by broadening its interpretation of "education agency or institution" to include agencies that do not enroll students (e.g., an SEA). It states:

"Proposed section 99.60(a)(2), which would define an 'educational agency or institution' to include any state or local educational authority or other recipient that has received Department of Education funds, would allow the Department to pursue enforcement against a State agency or other recipient of Department funds that had allegedly disclosed the PII, rather than against the agency or institution that had provided the PII to the State agency or other recipient of Department funds."

First, we agree that LEAs should not be held responsible for the improper disclosure of PII data by State agencies or other recipients.

Recommendation: Add language to clarify enforcement for cases in which the U.S. Department of Education has not provided any funding to the "other recipient."

In summary, we heartily 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 Sonya Edwards, Manager, Education Data Office, at (916) 327-2104 or by e-mail at sedwards@cde.ca.gov.

Sincerely,

Keric Ashley,
Director, Data Management Division

Ka:se

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Family Educational Rights and Privacy

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Comment on FR Doc # 2011-08205

Submitter Information

General Comment

Response regarding specific proposed changes to Family Educational Rights and Privacy Act (FERPA) regulations:

1. Re: State and local education officials (without written parent consent) would be authorized to disclose identifiable student data to any designated entity or person for the purpose of evaluation, auditing, or enforcing federal compliance with state- or federal-supported education programs.

I do not agree with authorizing disclosure of identifiable student data without written parent and/or student consent (if the student is their own legal guardian).

2. Re: Postsecondary institutions or data systems can disclose student data back to K-12 data systems of school districts for the purpose of evaluation how well the district had prepared students for college.

I do not agree with postsecondary institutions or data systems disclosing student data back to K-12 data systems of school districts for the purpose of evaluating how well the district had prepared students for college if the disclosure is of identifiable student data and the student for which the data being disclosed has not given written consent, or if the student is not their own guardian their guardian has not given written consent.

3. Re: States will be able to disclose student-level data for research studies. This is the first time that the research provision in FERPA is applicable to student-level data from states.

I do not agree with States disclosing student-level data for research studies if the disclosure is of identifiable student data and the student for which the data being disclosed has not given written consent, or if the student is not their own guardian their guardian has not given written consent.

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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-0002-0055
Comment on FR Doc # 2011-08205

Submitter Information

Name: Janet Bray
Address:
Alexandria, VA,
Email: ahyslop@acteonline.org
Organization: Association for Career and Technical Education

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

Family Educational Rights and Privacy Act
Docket ID ED-2011-OM-0002

May 20, 2011

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

Dear Ms. Miles:

The national Association for Career and Technical Education submits the following comments in response to the *Federal Register* notice published on April 8, 2011, proposing amendments to the regulations implementing section 444 of the General Education Provisions Act, also known as the Family Educational Rights and Privacy Act (FERPA).

The Association for Career and Technical Education (ACTE) is the nation's largest not-for-profit education association dedicated to the advancement of education that prepares youth and adults for successful careers through career and technical education (CTE) programs. ACTE has more than 27,000 members including teachers, counselors and administrators at the middle school, high school and postsecondary levels.

ACTE supports the positive changes in the proposed regulations and the goal of protecting the privacy and security of education records, while at the same time allowing for the effective use of data in statewide longitudinal data systems in order to facilitate state and local ability to evaluate education programs and contribute to a culture of innovation and continuous improvement in education.

These goals are particularly important to the CTE community, which must be able to evaluate outcomes to ensure programs are preparing students for both further education and careers. This often involves the need to share data across agencies and levels of education. The proposed regulations would ease the ability of states, as well as local school districts and postsecondary institutions, to evaluate their CTE programs in order to better serve students, while at the same time placing critical emphasis on the necessity of data security and privacy. In particular, we would like to express strong support for the following changes:

Authorized Representative

We support the proposed definition of "authorized representative" that states that any entity or individual designated by a state or local educational authority or agency may conduct an audit, evaluation, or compliance or enforcement activity of a federal or state supported education program. We agree with the Department's rationale that FERPA should be interpreted to allow

states to link data across agencies or sectors, such as education and workforce. Such a definition would permit state departments of education to disclose data to state departments of labor or workforce that could be used to evaluate education programs such as those supported by the Carl D. Perkins Career and Technical Education Act (Perkins). Doing so would allow state departments of education to assess their CTE programs and meet federal accountability requirements outlined in the Perkins Act to report on students' placement in employment and further education.

Additionally, we believe that the requirement of a written agreement between a state or local education agency that includes the information to be disclosed, the purpose of disclosure, the return or destruction of data when finished, and the policies and procedures ensuring protection of data is a reasonable one and will ensure the confidentiality of student data.

Education Programs

We strongly support the Department's proposed regulation that would for the first time define "education program" in the regulations. This definition would have the effect of decreasing confusion and ensuring that data sharing is not limited in cases where it is unclear if a program is considered an education program under FERPA.

We are also pleased to see the inclusion of career and technical education, job training, and adult education as part of this proposed definition. This reinforces the notion that not all education programs are administered by a state education agency, but may be overseen by a state labor or workforce agency. For example, while CTE programs are administered by state departments of education in many places, in Kentucky the CTE programs are run by the Department of Workforce Investment. Under the current FERPA law, this could be interpreted to mean that CTE programs administered in Kentucky are not education programs. This is clearly not the case, and the proposed definition will ensure that there is no confusion.

It is vitally important that all education programs, regardless of which agencies administer them, benefit from the data shared through the statewide longitudinal system. Doing so will give the programs greater access to student data across the P-16 spectrum, allowing them to better evaluate their programs and better serve students.

Authority to Audit or Evaluate


We support the proposed regulation that would remove the requirement that a state or local educational authority or other agency must establish legal authority under other federal, state or local law to conduct an audit, evaluation, or compliance or enforcement activity. This change would promote greater sharing of data across agencies for the purposes of auditing or evaluating an education program in order to meet state and federal requirements and for program improvement.

The proposed regulation would, for example, allow postsecondary institutions to share student data with K-12 agencies so that secondary programs can determine whether they are successfully preparing students for postsecondary education. For CTE programs, which support both secondary and postsecondary education, this provision would allow states to better collect federally-mandated Perkins Act accountability data at both learner levels and to determine program effectiveness.

We agree with the goals of the proposed changes to the FERPA law and believe they will go a long way in ensuring greater sharing of data across learner levels and across agencies. These changes will help states better evaluate program effectiveness and meet state and federal accountability requirements. Thank you for the opportunity to make these comments.

If you have any questions or need additional information, please contact Alisha Hyslop, ACTE's assistant director of public policy, at 703-683-9331 or ahyslop@acteonline.org.

Sincerely,

A handwritten signature in cursive script that reads "Janet B. Bray". The signature is written in black ink and is positioned above the typed name and title.

Janet B. Bray
ACTE Executive Director

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 20, 2011
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Category: State agency
Tracking No. 80dc8ff7
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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-0002-0056
Comment on FR Doc # 2011-08205

Submitter Information

Name: Loretta E. HAddy

Address:

Charleston, WV,

Email: Loretta.E.Haddy@wv.gov

Organization: WV Bureau for Public Health

Government Agency Type: State

Government Agency: WV DHHR

General Comment

FERPA inhibits public health from doing what is expected in public health law. PH needs student immunization record information to help to protect and prevent students, teachers, and school staff from vaccine preventable disease outbreaks. PH has strict law that keeps such information confidential and is blocked from accessing it due to FERPA

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-0002-0057
Public Comment

Submitter Information

Name: Peter Ewell

Address:

Boulder, CO,

Submitter's Representative: Peter Ewell

Organization: National Center for Higher Education Management Systems

Government Agency Type: Local

General Comment

See attached

Attachments

Comment



NCHEMS

National Center for Higher Education Management Systems

3035 Center Green Drive, Suite 150
Boulder, Colorado 80301-2251
Phone 303-497-0301
Fax 303-497-0338
www.nchems.org

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

May 12, 2011

Dear Ms. Miles

The National Center for Higher Education Management Systems (NCHEMS) is pleased to provide comments in response to the Notice of Proposed Rule Making on new regulations governing the Family Educational Rights and Privacy Act (FERPA). FERPA plays a vital role in governing the extent to which information drawn from student records can be used to support research to improve educational policies and practices, even as it provides necessary safeguards on individual privacy.

NCHEMS is a research and development center that focuses on higher education policy—especially at the state level. As such, NCHEMS has been heavily involved in the development and use of state student unit record (SUR) databases, and completed several pioneering inventories of state SUR data resources. We conducted some of the first cross-state data-sharing demonstration projects using these resources and have since been major players in follow-on projects on this topic undertaken by the Western Interstate Commission on Higher Education (WICHE) and the State Higher Education Executive Officers (SHEEO). Through these and other contacts, we have become keenly aware of the decisive role that FERPA regulations (or the *perception* of FERPA regulations) play in whether or not a given research initiative goes forward, regardless of the merits of the initiative itself.

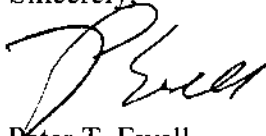
NCHEMS endorses and strongly supports the thoughtful and thorough observations and recommendations offered in the letter by David Longanecker, President of WICHE. In brief, this letter recommended the following:

- Specifically authorize the exchange of data among education agencies and “educational authorities” in different states for the purpose of examining human capital development and its mobility from a regional view.
- Loosen restrictions preventing the exchange of social security numbers as the key linking field for workforce information.

- Clarify the extent to which data can be retained for the purpose of long-term analysis and offer guidance on how personally identifiable information can be safeguarded for research (such as longitudinal studies) that necessitates a lengthy time horizon.

NCHEMS urges the Department to act on these recommendations and looks forward to conducting more and better research benefitting future students that these new regulations will enable.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Ewell", written in a cursive style.

Peter T. Ewell
Vice-President

PUBLIC SUBMISSION

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-0002-0058
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mark Schneiderman
Address:
Washington, DC,
Email: marks@siaa.net
Submitter's Representative: Mark Schneiderman
Organization: Software & Information Industry Association
Government Agency Type: Federal
Government Agency: ED

General Comment

On behalf of the Software & Information Industry Association (SIIA) and our member high-tech companies, we write to comment on the U.S. Department of Education's notice of proposed rulemaking to amend the regulations governing the Family Educational Rights and Privacy Act (FERPA) – Docket ID ED-2011-OM-0002. SIIA commends the Department for taking steps to update and clarify the regulations, and appreciates the opportunity to share our perspective on these and other suggested changes.

SIIA's comments will focus in three areas:

- SIIA generally supports the proposed changes to the regulations to facilitate states' ability to evaluate education programs, and to foster innovation and continuous improvement.
- SIIA encourages further clarification aimed at enhancing the public-private research partnerships necessary to improve education.
- SIIA encourages further clarifications aimed at avoiding unintended consequences that would provide barriers to the delivery by third party vendors of electronic educational products and services.

We look forward to the final regulations and to the positive impact we hope they will have on education, and on the ability of SIIA members to help meet education needs. If we can be of further assistance, please contact me at 202-789-4444 or marks@siaa.net.

Sincerely,

Mark Schneiderman
Senior Director of Education Policy

Attachments

Comment on FR Doc # 2011-08205

**Software & Information
Industry Association**

1090 Vermont Ave NW Sixth Floor
Washington, DC 20005-4095



May 20, 2011

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

RE: Docket ID ED-2011-OM-0002

Dear Ms Miles:

On behalf of the Software & Information Industry Association (SIIA) and our member high-tech companies, we write to comment on the U.S. Department of Education's notice of proposed rulemaking to amend the regulations governing the Family Educational Rights and Privacy Act (FERPA) – Docket ID ED-2011-OM-0002. SIIA commends the Department for taking steps to update and clarify the regulations, and appreciates the opportunity to share our perspective on these and other suggested changes.

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital content industry, representing more than 500 leading high-tech companies. Many SIIA members provide products and services to educational agencies and institutions, including in the areas of instruction, curriculum, assessment, data management, and enterprise management, among others. Many of these products and services are technology-based – e.g., software, web-based content, web-delivered services, data systems, etc. – and involve the collection, warehousing, and management of student data.

In most cases, personally identifiable information is either not collected, or if collected, is maintained in such a secure manner that the vendor may not access the data. For example, in some cases, a software application – e.g., assessment, gradebook, student information system, etc. – is licensed that enables schools to build their own files or databases and host them on local computers or servers. The vendor would have no means to access such data. In other cases, the vendor is merely providing a platform that the educational entity is solely able to utilize and that also has controls for data access, even increasingly as those applications, systems and data warehousing move to a service or cloud-computing model. In most instances, both a unique student identifier and student authentication is required to enable students to sign-on and access these systems, with similar security needed for other authorized individuals to access personally identifiable information. In nearly all these cases, SIIA members have a contract with the institution or agency through, for example, either a software license agreement, a web-based subscription services agreement, or some other services agreement that would govern data access protocols.

SIIA appreciates that the Department's proposed regulatory changes were motivated, in part, by the important need to enable the effective use of data in statewide longitudinal data systems (and therefore to respond to changes in the use of information technology), while also protecting the privacy of education records.

In general, SIIA members have found FERPA to be an appropriate regulation that facilitates the provision of their products and services, though there are limited cases where FERPA is, or is perceived to be, inappropriately a barrier to delivery of products and services. SIIA therefore provides below a number of comments on the proposed regulations, and on additional regulatory changes, intended to ensure that the regulations do not inappropriately increase barriers to agency or institution use of SIIA member products and services in a manner otherwise not intended.

Tel: +1.202.289.7442

Fax: +1.202.289.7097

www.sii.net

AR 0133

SIIA's comments will focus in three areas:

- SIIA generally supports the proposed changes to the regulations to facilitate states' ability to evaluate education programs, and to foster innovation and continuous improvement.
- SIIA encourages further clarification aimed at enhancing the public-private research partnerships necessary to improve education.
- SIIA encourages further clarifications aimed at avoiding unintended consequences that would provide barriers to the delivery by third party vendors of electronic educational products and services.

Research Studies (§99.31(a)(6))

Many SIIA members – providing instructional, curricular, testing, and data management products and services to educational institutions and agencies – also partner with these entities to evaluate such products and services. Through these partnerships, products and services are enhanced in order to serve the goal of better instruction. In many cases, FERPA is, or is perceived to be, a barrier to an education agency or institution otherwise willing to participate in such a study. Agencies and institutions are too often inappropriately interpreting these provisions too narrowly and excluding research simply because it involves third-party products and services, is initiated by third-party providers, or doesn't fit within a narrowly-defined interpretation of the authorized research purposes.

SIIA supports the proposed regulations to “clarify that nothing in FERPA or its implementing regulations prevents a State or local educational authority or agency headed by an official listed in §99.31(a)(3) from entering into agreements with organizations conducting studies under §99.31(a)(6)(i) and redisclosing PII on behalf of the educational agencies and institutions that provided the information in accordance with the requirements of §99.33(b)” and to “require written agreements between a State or local educational authority or agency headed by an official listed in §99.31(a)(3) and any organization conducting studies with redisclosed PII under this exception (see proposed §99.31(a)(6)(iii)(C)).” We especially believe that binding written agreements are appropriate for addressing many issues that arise with the use of student data, as is the best practice for SIIA members in entering service or license agreements with educational agencies and institutions.

In addition, SIIA recommends the following modifications to the proposed regulatory changes:

- In Section 99.31(a)(6)(i) and (a)(6)(i)(C): Clarify “on behalf of” to explicitly include a broader array of studies which the educational agency or institution certifies as in their interest and that of their students. SIIA asks that Section 99.31(a)(6) be further amended to read:

“(i) The disclosure is to organizations conducting studies for, on behalf of, *in partnership with, or in the interest of* educational agencies or institutions, *as determined by those agencies or institutions*, to:”

- In current Section 99.31(a)(6)(i)(A): Clarify this paragraph allowing studies for “predictive tests” to support research for a broader array of related assessment and instructional resources. In so doing, SIIA asks that the Department recognize the evolving purposes, designs and uses of tests, including their common integration within larger instructional programs. Research studies intended to “develop” or improve a variety of educational products and services – not just “predictive tests” – are in the interest of all of education, including the participating educational institution or agency. SIIA therefore asks that the regulations be amended so that Section 99.31(a)(6)(i)(A) reads as follows:

“(A) Develop, validate, or administer predictive, *formative and summative tests, and other instructional, curricular, and assessment resources and interventions;*”

- In Section 99.31(a)(6)(i)(C): Clarify “improve instruction” to explicitly include a broader array of studies which the educational agency or institution certifies as in their interest and that of their students. There is evidence that agencies and institutions are narrowly interpreting “improve instruction.” SIIA asks that Section 99.31(a)(6)(i)(C) be further amended to read:

(i) “(C) Improve *learning and instruction, either directly or indirectly such as improvement of instructional interventions, including studies that will improve educational agencies or institutions*”

- In current Section 99.31(a)(6)(iv): Amend this section to make clear that a third party who violates the conditions upon which it is provided access to personally identifiable information for research purposes shall be prohibited future access for only such purposes of “conducting studies” and not necessarily for other purposes related to the provision of products, services and other functions. Absence of such clarification could otherwise force an institution or agency to curtail a valued vendor relationship. SIIA therefore asks the regulation be amended so that Section 99.31(a)(6)(iv) reads at the end:

(iv) “. . . the educational agency or institution may not allow that third party access to personally identifiable information from education records *for conducting studies* for at least five years.”

Directory Information (§99.37)

SIIA supports the proposed regulation that “parents or eligible students may not use their right to opt out of directory information disclosures to prevent an educational agency or institution from requiring students to wear or otherwise disclose student ID cards or badges that display information that may be designated as directory information under §99.3 and that has been properly designated by the educational agency or institution as directory information under §99.37(a)(1).” SIIA views this proposed change as consistent with the goal of ensuring that educational agencies or institutions be able to use directory information for the provision of basic educational (including administrative) services, and that student opt-out can have very disruptive impact, including with regard to instructional and administrative technologies.

In addition, SIIA recommends the following modifications to the proposed regulations:

- Opt-Out. SIIA wants to ensure that other FERPA regulations are explicitly understood NOT to allow students and parents to opt out of participation in education activities just because they require sign-on access to products and services through electronic systems. SIIA proposes amending Section 99.37(c) to read as follows:

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to prevent an educational agency or institution 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, *including for access to communications, instruction, curriculum, courses or administrative functions provided online and through other technology as well as for research purposes.*

In light of the increasing use of electronic systems for both instructional and administrative activities, SIIA suggests that the Department can not and should not differentiate between these types of activities nor in the degree to which students may opt out. The allowances for students to opt out on this basis could have great unintended consequences by undermining the use of products and services accessed through electronic systems. SIIA, therefore, asks for these changes to ensure that

student's may NOT opt out of participation in all manner of classroom, institutional or agency activities simply because they employ sign-on access through electronic systems.

Directory Information (§99.3)

SIIA supports the proposed regulation to “modify the definition of directory information to clarify that an educational agency or institution may designate as directory information and nonconsensually disclose a student ID number or other unique personal identifier that is displayed on a student ID card or badge 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 PIN, password, or other factor known or possessed only by the authorized user.” SIIA views it as critical that barriers be minimized to the routine access to, communicating in, or use of increasingly mission critical electronic systems.

In addition, SIIA recommends the following modifications to the proposed regulations:

- Social Security Numbers. As agencies and institutions move increasingly to the use of unique student identifiers that are distinct from student Social Security Numbers (SSNs), SIIA encourages regulations and guidance that provide a path for ultimately limiting institutions and agencies from using a student's SSN as their student identifier and instead require assignment of, and exclusive use of, the student identifier. As vendors of instructional, student information, assessment and other electronic systems and applications, SIIA members recommend the absolute minimal use of SSNs as prudent practice, no matter how strong the data privacy and security measures taken.

Other Proposed Regulations

In addition to responses to the above responses to proposed regulations, SIIA recommends that the U.S. Department of Education consider the following additional regulatory changes:

- De-identified Records and Information. In Section 99.31(b): SIIA supports “de-identification” – i.e., the removal of personally identifiable information from education records – as a means for exempting such records from disclosure requirements. In addition, to ensure such “de-identification” can be leveraged within the context of research studies, SIIA believes further changes are needed.

The actual process of de-identification is often too resource intensive for educational institutions and agencies to conduct for certain research purposes, especially in cases where such studies require data to be assembled from multiple education records and sources. This is most often best done by the researcher, not the school. We therefore ask that the regulations be further amended to allow the entity conducting the research to “de-identify” the education records under terms of a written agreement. To achieve this objective, SIIA suggests that the regulations explicitly allow that the research entity may be treated as a “contractor” as described by the regulations in Section 99.31(a)(1)(i)(B).

In Section 99.31(b)(1), insert “, including an organization conducting a study under Section 99.31(a)(6) and acting for these purposes as a contractor as described under Section 99.31(a)(1)(i)(B),” after “or information from education records under this part”

SIIA believes that other protections included in current and proposed Section 99.31 in conjunction with both standard research protocols and security procedures are otherwise sufficient to ensure personally identifiable student information is adequately protected in the course of research studies. These procedures include use of binding agreements between the educational agency or institution and the entity conducting the study.

- Location of Data Hosting. In the case of electronic data, SIIA wants to ensure that the regulations make clear that FERPA does not discriminate based upon where data is hosted. In other words, it should not matter under the regulations whether the data is: (a) hosted in a vendors' offsite network and delivered over the Internet, or (b) hosted within the institution's local network servers or on its computers. SIIA appreciates that the NPRM states that: "FERPA does not constrain State administrative choices regarding the data system architecture, data strategy, or technology for SLDS as long as the required designation, purpose, and privacy protections are in place." However, that finding is not backed by the regulations.

SIIA therefore asks for the addition of explicit regulatory language regarding the neutral treatment regarding the physical location of student education records to counter the misperceptions among some education agencies and entities that: (a) such data may not be hosted offsite under FERPA; or (b) at least that this would automatically trigger FERPA disclosure and consent requirements. This is consistent with the Obama Administration's cybersecurity proposal: "Data Centers. The Federal Government has embraced cloud computing, where computer services and applications are run remotely over the Internet. Cloud computing can reduce costs, increase security, and help the government take advantage of the latest private-sector innovations. This new industry should not be crippled by protectionist measures, so the proposal prevents states from requiring companies to build their data centers in that state, except where expressly authorized by federal law." (See <http://www.whitehouse.gov/the-press-office/2011/05/12/fact-sheet-cybersecurity-legislative-proposal>)

SIIIA therefore suggests adding regulations that:

"Notwithstanding other regulatory provisions, a local educational agency, an educational institution, a state educational agency, or their authorized representative are not constrained regarding the data system architecture, data strategy, data hosting location, or technology as long as the required designation, purpose, and privacy protections are in place, and the storage of data in offsite or out-of-state data centers does not itself trigger FERPA requirements different than if the data were hosted within the institution or agency itself."

- Disclosure to Contractors without Consent. SIIA supports the allowance that education records may be disclosed without consent to agencies, contractors and other outside parties providing institutional services and functions that might otherwise be provided by "school officials" and other employees of the agency or institution already exempted from consent requirements. In SIIA's view, this should include the possibility that providers of electronic, computer-based, Internet-hosted and related products and services – including in the areas of instruction, curriculum, assessment, data management, and enterprise management – should be considered "contractors" and thus "school officials" for these purposes.

However, SIIA wants to ensure that the inclusion of such school vendors in this category of contractors does not introduce new, unintended challenges to current education-vendor relationships through which FERPA and student privacy models are well-established.

SIIA is also concerned with potential unintended consequences from two qualifying conditions required under Section 99.31(a)(1)(i)(B) and asks that the regulations be amended to explicitly address the following:

- First, SIIA asks that the Department further amend the condition that the contractor "performs an institutional service or function for which the agency or institution would otherwise use employees." It is our view that this test is inconsistent with the stated purpose. A test based solely on use of employees is likely to prove impractical. We would recommend, instead, the

test of performance based on whether the service or function would otherwise be performed by the agency or institution. The proposed test could otherwise exclude a contractor simply because their service or function had never been, or could not be, performed by a school employee, which could especially be a barrier for software and other new and innovative services of functions.

In Section 99.31(a)(1)(i)(B)(1), amend to read: “(1) Performs an institutional service or function *otherwise provided by the agency or institution;*”

- o Second, SIIA asks that the Department address the condition that the contractor be “under the direct control of the agency or institution.” Interpretation of “direct control” appears ambiguous, and likely assumes such contractor is an individual person, rather than an independent company. SIIA asks for clarification in the definition of direct control.

In Section 99.31(a)(1)(i)(B)(2), amend to read: “(2) Is *accessing and disclosing student education records in a manner that is* under the direct control of the agency or institution, *according to terms of the contract for goods or services, of the agency or institution.*”

Thank you for the opportunity to comment on the U.S. Department of Education’s proposed amendments to the regulations governing the Family Educational Rights and Privacy Act. SIIA again commends the Department for addressing changes to this important law as needed to keep pace with evolving circumstances and technologies. We look forward to the final regulations and to the positive impact we hope they will have on education, and on the ability of SIIA members to help meet education needs. If we can be of further assistance, please contact me at 202-789-4444 or marks@siia.net.

Sincerely,



Mark Schneiderman
Senior Director of Education Policy

PUBLIC SUBMISSION

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-0002-0059
Comment on FR Doc # 2011-08205

Submitter Information

Name: Yasmina Vinci
Address:
Alexandria, VA,
Email: ballen@nhsa.org
Submitter's Representative: Yasmina Vinci
Organization: National Head Start Association
Government Agency Type: Federal
Government Agency: ED

General Comment

The National Head Start Association welcomes this opportunity to submit analysis and comments on the U.S. Department of Education's ("DoEd's") Notice of Proposed Rulemaking ("NPRM"), 76 Fed. Reg. 19726 (April 8, 2011); RIN 1880-AA86; Docket Number (ED-2011-OM-0002). We believe that DoEd's request for public comments provides an opportunity for the Head Start and Early Head Start (collectively "Head Start") community to make comments and recommendations that will strengthen the proposed regulation and spur significant progress towards reforming our federal, state, and local early education systems by sharing and using student records appropriately. Our comments and legal analysis are contained in the two attached documents.

Attachments

Comment on FR Doc # 2011-08205

Comment on FR Doc # 2011-08205 (2)



**FELDESMAN
TUCKER
LEIFER
FIDELL LLP**

MEMORANDUM

To: Yasmina Vinci, Executive Director
National Head Start Association

From: Julianna Gonen, Esq.
J. Zoë Beckerman, Esq.
Feldesman Tucker Leifer Fidell LLP

Re: Notice of Proposed Rulemaking (76 Fed. Reg. 19726 (Apr. 8, 2011));
RIN 1880-AA86

Date: May 17, 2011

We appreciate the opportunity to develop analysis and comments for the National Head Start Association (“NHSA”) on the Department of Education’s (“DoEd”) Notice of Proposed Rulemaking (“NPRM”);(76 Fed. Reg. 19726 (Apr. 8, 2011)); RIN 1880-AA86, setting forth proposed changes to the Family Educational Rights and Privacy Act (“FERPA”) regulations (34 C.F.R. Part 99). This Memorandum sets forth an overview of key points, followed by discussion of various sections of the NPRM, as well as recommendations to strengthen the final rule. All comments were developed under the guiding principle that NHSA believes in balancing data sharing for longitudinal purposes with protecting the privacy of the nation’s most at-risk children and families.

Overview of Key Points

- While the DoEd intends this NPRM to adjust FERPA requirements to ensure that they allow for information flow in statewide longitudinal data systems, it overreaches its authority in attempting to apply FERPA directly to all Head Start and Early Head Start (collectively, “Head Start”) programs that are under the purview of the Department of Health and Human Services (“HHS”).
 - The Head Start Act (42 U.S.C. 9801 et seq.), which authorizes the Head Start program, expressly requires the Secretary of HHS to promulgate regulations that “ensure the confidentiality of any personally identifiable data, information, and records collected or maintained by... any Head Start agency. Such regulations shall provide the policies, protections, and rights equivalent to those provided to a parent, student, or educational agency or institution under section 1232g of Title 20 [FERPA].” 42 U.S.C.A. § 9836a(b)(4).
- Moreover, the COMPETES Act and the American Reinvestment and Recovery Act (“ARRA”) do not provide DoEd the express authority to supplant the authority of HHS as they relate to Head Start.

- Certain of the NPRM's proposed definitions and new interpretations of authority will improperly impede on HHS' oversight of Head Start agencies. Accordingly, we make a series of suggestions to NHSA to provide to DoEd on these issues.

Definition of Education Program (§§ 99.3, 99.35) and Definition of Authorized Representative (§§99.3, 99.35) as They Relate to Head Start and Early Head Start Programs

We have significant concerns about the legality of the proposed new definitions for "Education Program" and "Authorized Representative," at 76 Fed. Reg. 19729 and 19734, respectively, because their combined effect would be to give to state and local educational authorities the power to audit, evaluate, and conduct compliance and enforcement activity with respect to Head Start programs, a function that is squarely and exclusively vested in the Secretary of HHS.

As background, DoEd proposes to allow "education program[s]" to include any programs principally engaged in the provision of education, including early childhood education, "regardless of whether the program is administered by an educational authority." *See* 76 Fed. Reg. 19726 at 19729-30. It also proposes that "authorized representatives," which currently include "state or local educational authorities" (*see* 34 C.F.R. §99.31(a)(3)(iv)), would also include "any entity or individual designated by a State or local educational authority or agency...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. 19726 at 19728 (*italics added*).

Our reasons for concern are set forth below:

A) DoEd's Proposed Regulatory Activity is, as it Relates to Head Start, Already Expressly Committed to Another Department

By changing these definitions as proposed, DoEd would be overreaching its authority as it relates to Head Start agencies. Under the Administrative Procedure Act ("APA") that allows federal courts to hold unlawful and set aside federal agency actions that are "not in accordance with law," 5 U.S.C. § 706(2)(A), when the authority to regulate in an area is vested in one federal agency, it necessarily means that a sister agency may not issue regulations governing the same sphere of activity. In enacting the APA, Congress expressly stated that "no agency may undertake directly or indirectly to exercise the functions of some other agency." H.R. Rep. No. 79-1980 (1946), reprinted in U.S. Gov't. Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 211 (1946). *See also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962) ("Implicit in this analysis is a recognition that if either agency is not careful it may trench upon the other's jurisdiction, and, because of lack of expert competence, contravene the national policy as to transportation or labor relations."); *New York Shipping v. Federal Maritime Commission*, 854 F.2d 1338, 1370 (D.C. Cir.1988) ("[A]n agency, faced with alternative methods of effectuating the policies of the statute it administers, ... must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime.").

Here, the authority to issue separate privacy regulations for Head Start has been expressly granted to the Secretary of HHS through Head Start's authorizing legislation.¹ The exact language of the Head Start Act states that "*The Secretary* [of HHS], *through regulation, shall ensure* the confidentiality of any personally identifiable data, information, and records collected or maintained under this subchapter by the Secretary and any Head Start agency. Such regulations *shall provide* the policies, protections, and rights *equivalent to those* provided to a parent, student, or educational agency or institution under section 1232g of Title 20 [FERPA]." 42 U.S.C. §9836A(b)(4)(A)(italics added). Thus, Congress provided express authorization, clear on the face of the statute, for the Secretary of HHS, not DoEd, to issue privacy and confidentiality regulations under the Head Start Act. Further, HHS' regulations are intended to be separate and apart from the preexisting regulations implementing FERPA. *See id.* Through that statutory language, Congress specifically directed the HHS Secretary to draft regulations that would emulate the privacy protections of FERPA, but that would be designed for the unique structures and functions of Head Start agencies.

Therefore, under the APA, DoEd may not issue regulations governing the same sphere of activity as HHS. In addition, DoEd fails in the NPRM to explain why its proposed actions are minimizing its intrusion into HHS' sphere.

B) The Proposed Regulatory Activity by DoEd Exceeds That Agency's Statutory Authority

Even if the authority to issue privacy regulations for Head Start programs were not already expressly committed to another federal agency, the proposed expansion of DoEd's authority would still be improper as it exceeds that agency's legislative authority. Under the APA's Section 706(2)(C), federal agency actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," are found to be unlawful, and courts invalidate such actions. *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978) (Court has responsibility to determine whether agency practice is consistent with the agency's statutory authority); *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 801 (10th Cir. 2010) ("Because the APA empowers reviewing courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), an essential function of our review under the APA is determining whether an agency acted within the scope of its authority"); *Citizens Coal Council v. U.S. E.P.A.*, 385 F.3d 969, 979 (6th Cir. 2004) *on reh'g en banc*, 447 F.3d 879 (6th Cir. 2006) ("Generally, when an agency issues a rule that contradicts the enabling statute, the rule is 'in excess of statutory jurisdiction,' and therefore violates the APA"); *Transobio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) (it is not particularly controversial that a federal agency does

¹ It should be noted that Head Start is authorized within HHS, not DoEd. While health and education used to reside within the same federal department – the Department of Health, Education and Welfare – when DoEd was carved out, the Head Start program remained within the newly-titled HHS. "Nothing in the provisions of this section or in the provisions of this chapter [Transfers from Department of Health, Education, and Welfare] shall authorize the transfer of functions under part A of Title V of the Economic Opportunity Act of 1964 [42 U.S.C.A. § 2928 et seq.], relating to Project Head Start, from the Secretary of Health, Education, and Welfare to the Secretary [of Education]." 20 U.S.C. §3441(d). This has made sense over the years because Head Start encompasses far more than solely education. "It is the purpose of this subchapter to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development... (2) through the provision to low-income children and their families of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary." 42 U.S.C. § 9831.

not have the power to act unless Congress, by statute, has empowered it to do so, and agency actions beyond delegated authority are “*ultra vires*,” and courts must invalidate them).

Here, the proposed expansion of DoEd’s privacy regulations to cover Head Start programs is improper as it exceeds that agency’s statutory authority. Specifically, FERPA’s statute protects the privacy of student education records maintained by or for “educational agencies or institutions” that receive funds administered by DoEd. Educational agencies or institutions are defined in the statute as “any public or private agency or institution which is the recipient of funds under any applicable program.” 20 U.S.C.A. § 1232g(a)(3). In addition, statutes governing DoEd’s jurisdiction specifically cover applicable programs over which the department has “administrative responsibility” and allow for the issuance of rules “governing the applicable programs *administered by*” DoEd. *See* 20 U.S.C. §1221(c)(1); *see also* 20 U.S.C. 1221e-3. At most, this might allow for DoEd to apply FERPA’s provisions to certain school districts that run Head Start programs; however, on its face FERPA provides no basis for extending DoEd’s regulatory reach to the myriad Head Start agencies that do not receive direct funds from DoEd-administered programs. Nonetheless, the NPRM is rife with language explicitly describing the attempted improper expansion of authority by DoEd, *see* 76 Fed. Reg. 19726 at 19729-30, demonstrating that DoEd seeks to expand its reach to programs over which it clearly has no legislative authority.

Additionally, neither the language of ARRA, nor the COMPETES Act, direct DoEd to usurp HHS’ authority here. The State Fiscal Stabilization language of ARRA merely allows DoEd to use funds to support early childhood education, as appropriate. *See* P.L. 111-5, Title XIV, Section 14002(a)(1)(Feb. 17, 2009). The COMPETES Act that the NPRM implies gave rise to these proposed regulatory amendments references “P-16” education programs and provides for grants to establish longitudinal data collection. *See* 20 U.S.C. §9871. It does not provide a legislative basis for expanding the reach of the FERPA regulations to Head Start. Rather, it sets out the range of programs to which its grant funding provisions apply, requires states to follow FERPA in setting up data systems, and requires the Secretary of DoEd to promulgate regulations regarding unique identifiers. *See id.* at §9871 (e)(2)(C)(ii)(II). Thus, both statutes lack language giving DoEd the authority to apply its privacy regulations to Head Start programs.

Accordingly, were DoEd to regulate Head Start, it would be exceeding its authority.

c) The Proposed Regulatory Activity by DoEd Would Constitute a Purpose Violation in Violation of 31 U.S.C. §1301(a)

Further, DoEd would violate appropriations law if it included Head Start in its final regulation. 31 U.S.C. §1301(a) prohibits the use of appropriations for purposes other than those for which they were appropriated (known as a violation of “purpose availability”). 70 Comp. Gen. 592 (Comp.Gen.), 592, 1991 WL 135552 (Comp.Gen.); 63 Comp. Gen. 422 (Comp.Gen.), 422, 1984 WL 43540 (Comp.Gen.); B-95136, 1979 WL 12212 (Comp.Gen.). The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the “wrong” appropriation violates the purpose statute. *See* U.S. General Accounting Office, *Improper Accounting for Costs of Architect of the Capitol Projects*, PLRD-81-4 (Washington, D.C.: Apr. 13, 1981). Thus, DoEd’s appropriations are therefore only to be used for DoEd activities that are duly authorized. The department has no statutory authorization to promulgate privacy regulations for Head Start agencies, nor to audit or evaluate those agencies. Any use of DoEd funds for these purposes would be a violation of purpose availability under 31 U.S.C. §1301(a).

Recommendation: In sum, DoEd cannot overstep its bounds with these proposed definitions and attempt to regulate Head Start within the context of FERPA. We strongly suggest that NHSA clarify this for DoEd and suggest that if indeed the goal is to ensure more consistent communications between and among organizations for long-range data purposes, then DoEd should either jointly promulgate a rule with HHS, which is authorized to promulgate rules governing Head Start’s confidential information, or urge HHS to promulgate its own parallel rules, that would include definitions that apply specifically to Head Start programs.

New Interpretation of Authority to Audit or Evaluate (§99.35) as It Relates to Two-Way Information Flow

In tandem with promulgating regulations for Head Start, the Secretary of HHS also has express authority to audit and evaluate Head Start programs under 42 U.S.C. § 9842 and § 9844. Because Head Start is a federal to local program (unlike funding from DoEd which passes from federal to state to local), its authorizing language does not give power to state actors to have any oversight of Head Start grantees for federal purposes. Thus, as structured in the proposed regulation, any audits and evaluations of Head Start agencies by proposed designees of the DoEd Secretary would be an improper encroachment into the regulatory purview of the Secretary of HHS (set forth above and therefore not restated here). Importantly, these actions would also constitute an unlawful delegation of power.

Pursuant to the unlawful delegation doctrine, federal courts uniformly agree that, absent express authorization from Congress, federal agencies may not sub-delegate their statutory responsibilities to non-agency, outside entities, including state sovereigns. *See e.g., Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (8th Cir. 2008) (“absent statutory authorization, . . . [d]elegation of statutory responsibility by federal agencies and officers to outside parties” is impermissible); *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004) (“federal agency officials . . . may not subdelegate to outside entities-private or sovereign — absent affirmative evidence of authority to do so.”); *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (“an agency may not delegate its public duties to private entities.”); *High Country Citizens’ Alliance v. Norton*, 448 F.Supp. 2d 1235, 1246-47 (D. Co. 2006) (“The fact that the subdelegation is to state commissions rather than private organizations does not alter the [improper delegation doctrine] analysis”); *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999)(if Congress did not intend for a federal agency to delegate authority conferred to it by Congress, the agency may not “completely shift its responsibility to administer” a statute to another actor).

In this instance, DoEd would be improperly usurping HHS’ federal authority and then delegating authority to a state or locality to audit or evaluate Head Start programs. The NPRM proposes to “amend § 99.35(a)(2) by removing the provision that a State or local educational authority or other agency headed by an official listed in § 99.31(a)(3) must establish legal authority under other Federal, State or local law to conduct an audit, evaluation, or compliance or enforcement activity.” 76 Fed. Reg. 19726 at 19731. The NPRM goes on to explain that part of the purpose of the change is to 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.” *Id.* In other words, state or local educational authorities (“S/LEAs”) would be empowered to conduct audits,

evaluations, and compliance/enforcement activities not only of the programs they themselves administer, but of the broad range of programs in the proposed definition of “education programs,” which would include Head Start agencies.

Here, as above, if Congress had wanted DoEd to have authority over audit and evaluations of Head Start agencies, it would have provided for this in the recently reauthorized Head Start Act. Yet it did not. Instead, it left Head Start solely in the purview of HHS for these purposes. *See* 42 U.S.C. § 9842 (Records and Audits) and § 9844 (Research, Demonstrations and Evaluation). Section 9842 allows HHS, the Comptroller General, or their duly authorized representatives to audit and examine Head Start programs, and § 9844 allows the Secretary of HHS to carry out research and evaluation activities. There is one provision of the Head Start Act, 42 U.S.C. 9844(b)(2), that allows the Secretary of HHS, “to the extent appropriate, [to] undertake such [research and evaluation] activities in collaboration with other Federal agencies, and with non-Federal agencies, conducting similar activities.” However, we are doubtful that a court would construe this provision to mean that DoEd would have the authority to regulate audits and evaluations of Head Start programs. Rather, a plain reading of the provision is that HHS is to collaborate with other agencies.

Recommendation: This proposed framework does not comport with what the Head Start Act allows, and as such, we suggest that NHSA inform DoEd accordingly. NHSA might further propose that DoEd expressly address in the preamble to the final rule that it is not attempting to overstep its reach into HHS’s authority and will carve out Head Start from any audits or evaluations that DoEd is delegating to S/LEAs. We suggest that NHSA share these concerns with HHS so that HHS might work with DoEd to develop HHS’ own regulatory language allowing Head Start programs to share personally identifiable information with S/LEAs when appropriate, that would assist in two-way information flow leading to easier analysis of longitudinal data but that would not provide S/LEAs with additional authority to conduct audits or evaluations of Head Start programs beyond their (and DoEd’s) reach.

Cost to Programs

In addition to the issues raised above, we are mindful that any changes to how Head Start programs currently operate in terms of maintaining the privacy and confidentiality of personally identifiable data will require new systems, policies, and procedures. While we expect that NHSA and Head Start agencies want to be able to share information appropriately with states to be able to ascertain a more accurate picture of how children fare over time, we are also acutely aware of the financial pressures that these agencies face day-to-day. Any new systems required would add costs to Head Start agencies, including for training as well as documenting disclosures and authorizations.

Recommendation: We therefore suggest that NHSA request that DoEd and HHS take into account the financial burden the proposed rule (or its properly promulgated HHS equivalent) would have on Head Start agencies and do whatever they can to minimize expense and burden so that these agencies can focus on what they do best — providing comprehensive services to at-risk children and families.

Conclusion

Thank you for the opportunity to provide comments to NHSA on the NPRM. Please do not hesitate to contact us at (202) 466-8960 should you have any questions or require further explanation or comment.



May 20, 2011

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

Re: Notice of Proposed Rulemaking, 76 Fed. Reg. 19726 (April 8, 2011); RIN 1880-AA86; Docket Number (ED-2011-OM-0002)

Dear Ms. Miles:

We welcome this opportunity to submit analysis and comments on the U.S. Department of Education's ("DoEd's") Notice of Proposed Rulemaking ("NPRM"), 76 Fed. Reg. 19726 (April 8, 2011); RIN 1880-AA86; Docket Number (ED-2011-OM-0002). We believe that DoEd's request for public comments provides an opportunity for the Head Start and Early Head Start (collectively "Head Start") community to make comments and recommendations that will strengthen the proposed regulation and spur significant progress towards reforming our federal, state, and local early education systems by sharing and using student records appropriately.

As you know, the National Head Start Association ("NHSA") is a non-partisan, not-for-profit membership organization that believes that every child, regardless of circumstances at birth, has the ability to succeed in life if given the opportunity that Head Start offers to children and their families. It is the national voice for more than 1.1 million children, 225,000 staff and 2,800 Head Start/Early Head Start programs in the United States.

Our comments are based upon extensive input from the Head Start community and a comprehensive legal analysis performed by NHSA's attorneys (attached for DOE consideration). We incorporate by reference their comments in the attached memorandum, and seek to address how this proposed regulation would affect the lives of vulnerable children and families being served by Head Start providers.

Our General Concerns

We are pleased that DoEd has proposed a regulation to update FERPA and we support appropriate measures to foster data sharing among early childhood education and care providers and Local Educational Agencies ("LEAs") for the

1651 Prince Street, Alexandria, VA 22314
Tel: (703) 739-0875 - Fax: (703) 739-0878 - www.nhsa.org

The National Head Start Association, an independent membership organization, advocates on behalf of the entire Head Start community and provides training and resources to Head programs nationwide

purpose of building statewide longitudinal data systems and protecting the privacy of student records. However, we have strong legal concerns with how the proposed regulation would affect Head Start programs as described in the attached legal memorandum. These issues center around the question of which department has proper regulatory authority with respect to privacy, data sharing, monitoring, and evaluations, and on the proposed definitions of "Education Program" and "Authorized Representative."

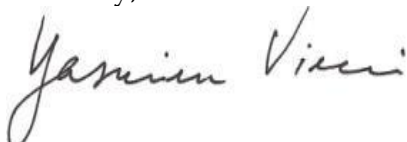
Our Recommendations

To address our concerns, we make recommendations to DOE regarding the proposed regulation:

- **Promulgate a Joint Regulation with the U.S. Department of Health and Human Services ("DHHS").** A joint DoEd-DHHS regulation would symbolically and substantially demonstrate how cooperative leadership on data privacy and usage can and should occur. This joint action would be a much more efficient use of governmental resources and facilitate the implementation of the final rule by relevant actors within each state. Such an action would enable the Office of Head Start to exercise its proper statutory authority on this issue with respect to Head Start programs.
- **Address Our Concerns about How the Proposed Regulation Would Affect Head Start Programs.** In case DoEd chooses against promulgating a joint regulation with DHHS, then DoEd should expressly address in its final rule that it is not usurping the authority of DHHS on privacy and data issues affecting Head Start programs and should exclude Head Start programs from any audits, evaluations, compliance and enforcement activity that DoEd would delegate to State or Local Educational Authorities ("S/LEAs").

In sum, we appreciate the opportunity to comment and make recommendations on this NPRM. Should you have any questions or comments regarding our comments and recommendations, please let me know by calling me at 703-649-4222 or emailing me via email at yvinci@nhsa.org.

Sincerely,



Yasmina Vinci
Executive Director

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-0002-0060
Comment on FR Doc # 2011-08205

Submitter Information

Name: Carol Comeau

Address:

Anchorage, AK,

Email: comeau_carol@asdk12.org

Submitter's Representative: Robin Olson

Organization: Anchorage School District

Government Agency Type: State

Government Agency: Alaska Department of Education and Early Development

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



May 20, 2011

Anchorage School District

5530 E. Northern Lights Blvd.
Anchorage, Alaska 99504-3135
(907) 742-4000

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

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Carol Comeau

Re: Request for Public Comment – Proposed Amendments to FERPA Regulations

Dear Ms. Miles:

In response to the request for public comment on the proposed amendments to the FERPA regulations, the Anchorage School District prepared the following response: ASD supports the proposed amendments to the FERPA regulations as set forth in the Notice of Proposed Rulemaking dated April 8, 2011.

As a local educational agency, ASD recognizes that statewide longitudinal data systems (SLDS), when utilized effectively, will benefit not only the entities involved in education but also the ultimate recipients of improved instruction, students. ASD has had concerns about providing personally identifiable educational data in support of SLDS since existing FERPA exceptions do not appear broad enough to permit nonconsensual disclosures to all entities who may seek data for purposes of longitudinal studies. When states are developing and implementing SLDSs that depend on accurate data from LEAs, it is important to maintain an appropriate balance that permits the effective use of data while still meeting our legal and ethical obligations to protect student privacy.

Even though these amendments bring us forward in the world of SLDS, we will continue to face challenges to protect student privacy as records are increasingly digitized and exchanged electronically. It will be important for USDOE to continuously review these issues because of the ever-changing data landscape. The establishment of the Privacy Technical Assistance Center (PTAC) is a great resource for SEAs and LEAs to use as we navigate this new territory.

ASD provides the following specific comments, set forth by relevant section of the proposed regulations:

99.3 *Education Program*. ASD supports the recognition by USDOE, as set forth in its comments and as effectuated in this new definition, that many entities in addition to SEAs and LEAs are direct contributors to the educational process for students, from pre-K through adulthood. ASD agrees with the proposed definition of “education program” and believes this change, combined with the added definition for “authorized representative,” will permit ASD to share personally identifiable information to entities that contribute to education and, like LEAs, depend upon data to evaluate the effectiveness of program outcomes.

99.31, Research Studies, and 99.35, Audit and Evaluation.

Both the research studies and the audit/evaluation exceptions have been broadened by virtue of the added definitions for education program and authorized representative. This expansion will serve as a tremendous asset once the SLDS is in place. It will allow us to look at factors that relate to school readiness in the early childhood years as well as receiving feedback from post-secondary institutions on whether we, as an LEA, are adequately preparing students to be successful with entry-level coursework. There was a great hesitancy from ASD to support SLDS without the accountability in place. Based on the proposed definition of an education program expanding beyond those administered by an educational authority—enforcement and accountability becomes even more critical.

The expansion of written agreements for the purpose of auditing or evaluating programs as well as the studies exception will assist districts in program evaluation when resources are extremely limited but only if there is clear agreement on the stipulations and authorized use of the data. A clear example is a grant evaluation. These evaluations are often extensive and carry over into multiple years; thus, these are utilized only when other types of reporting are not reasonable or feasible such as reporting data at the aggregate level or de-identifying data. Once the best practices for written agreements are established, ASD will work with their legal to develop a written agreement that covers the required areas similar to what has been done with the studies exception.

When entering into a written agreement, the responsibility remains with the SEA or LEA to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA. ASD believes this should not become an “easy out” and we look forward to the nonregulatory guidance that will provide LEAs with best practices for determining, through the use of reasonable methods, that the authorized representative complies with FERPA.

The proposed regulations will permit state or local education offices to disclose data to a workforce agency for the purpose of evaluating or auditing education programs. This is essential for LEAs to follow their graduates. This has been a barrier for several years for ASD as we have tried to determine whether any of our students who dropped out of the system continued on with their education through either a GED or work program. Our only option was through student contact and this has not been successful.

Finally, permitted disclosures from post-secondary institutions to LEAs for the purposes of evaluating the effectiveness of the K-12 system will be critical as we work to achieve the goal of leading the world in college completion by 2020.

99.37: Flexibility of implementing directory information. The proposed changes allow for an educational agency or institution to specify in its annual public notice to parents and eligible students that disclosures of directory information may be limited to specific parties, for specific purposes, or both. ASD has, in practice, utilized a similar process by judging requests for directory information under the regulatory standard of whether or not disclosure would be harmful or an invasion of privacy. In most instances, directory information is provided to authorized representatives of governmental agencies; elected officials; social service and educational agencies; and private businesses, individuals or other organizations that facilitate services to students. This regulatory change supports the protection measures that many LEAs are already engaged in to make certain that disclosures of directory information are for appropriate purposes that support students and/or education.

99.60, Enforcement. Since more agencies outside of educational agencies and institutions will be accessing information through SLDS, it is important to hold all agencies, including SEAs, accountable for improper re-disclosures. ASD strongly supports the Department’s expansion of enforcement actions against accountable entities for improper re-disclosure of student information.

My staff and I are available to answer any questions regarding our responses and will forward any additional remarks to the proposed changes, as you deem necessary.

Sincerely,

A handwritten signature in cursive script that reads "Carol Comeau".

Carol Comeau
Superintendent

Cc: Anchorage School Board
Ed Graff, Assistant Superintendent, Instruction
Laurel Vorachek, Director, Assessment & Evaluation

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-0002-0061
Comment on FR Doc # 2011-08205

Submitter Information

Name: jeff and april womack
Address:
st. charles, missouri,
Email: april.womack@sbcglobal.net

General Comment

I STRONGLY OBJECT TO ANY GOVERNMENTAL AGENCY MAKING INQUIRIES OF MY CHILDREN OR ANY CHILD TO OBTAIN PERSONAL INFORMATION CONCERNING FAMILY ISSUES. THIS IS NOTHING MORE THAN BIG BROTHER GATHERING INFORMATION WHICH GOVT. HAS NO NEED FOR, EXCEPT TO INVADE ON THE RIGHTS AND PRIVLEDGES OF AMERICAN CITIZENS! OUR FAMILY WILL BE INSTRUCTED TO NOT ANSWER ANY SUCH INQUIRIES. IF ANY INFORMATION IS TO BE PROVIDED, AND THAT WON'T BE HAPPENING, YOU NEED TO SPEAK WITH AN ADULT WHO IS ABLE TO DECIDE WHAT IS APPROPRIATE. THIS IS NOT THE BUSINESS OF THE EDUCATIONAL SYSTEM. THEIR JOB IS SOLELY TO EDUCATE CHILDREN. THIS GOVT. IS LOOKING MORE AND MORE LIKE THE COMMUNIST COUNTRIES, WANTING TO CONTROL ALL ASPECTS OF OUR LIVES. WE WILL NOT STAND FOR THIS, AND IT WILL BE STOPPED!

PUBLIC SUBMISSION

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Category: Teacher
Tracking No. 80dd7d2a
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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-0002-0062
Comment on FR Doc # 2011-08205

Submitter Information

Name: Marcia Behr
Address:
Augusta, MO,
Email: marciabehr@hotmail.com

General Comment

I am OPPOSED to changes in FERPA proposed by the Department of Education for the following reasons:

- 1) DOE is weakening longstanding student privacy protections by greatly expanding the universe of individuals and entities who have access to PII, by broadening the definition of programs that might generate data subject to this access, and by eliminating the requirement of express legal authority for certain governmental activities.
- 2) DOE's proposed interconnected data systems could be accessed by other departments, such as Labor and Health and Human Services, to facilitate social engineering such as development of the type of "workforce" deemed necessary by the government.
- 3) DOE is attempting to evade Congress by pushing through these radical policy changes by regulation rather than legislation.

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-0002-0063
Comment on FR Doc # 2011-08205

Submitter Information

Name: Louis Fabrizio
Address:
Raleigh, NC,
Email: lfabrizio@dpi.state.nc.us
Submitter's Representative: Louis Fabrizio
Organization: NC Department of Public Instruction
Government Agency Type: State
Government Agency: NC Department of Public Instruction

General Comment

Attached are the comments from the Dr. June Atkinson, State Superintendent

Attachments

Comment on FR Doc # 2011-08205



PUBLIC SCHOOLS OF NORTH CAROLINA

DEPARTMENT OF PUBLIC INSTRUCTION | June St. Clair Atkinson, Ed.D., *State Superintendent*

WWW.NCPUBLICSCHOOLS.ORG

May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-4537

Re: Family Educational Rights and Privacy Act of 1974 - 34 CFR Part 99 Docket ID ED-2011-OM-0002

Dear Ms. Miles:

The North Carolina Department of Public Instruction (NCDPI) has prepared this letter in response to the Notice of Proposed Rulemaking for the General Education Provisions Act, also known as the Family Educational Rights and Privacy Act of 1974 (34 CFR Part 99, Docket ID ED-2011-OM-0002).

Thank you for the opportunity to provide comments and recommendations in response to the notice published in the Federal Register Vol. 76, No. 68 on April 8, 2011, regarding the amendment of the regulations implementing the General Education Provisions Act.

Overall, we feel the changes are very positive and that this guidance will produce a workable yet stronger directive.

The following are our responses to the proposed changes to the General Education Provisions Act:

- ***National School Lunch Program Act***

North Carolina requests clarification as to the authority of the National School Lunch Program Act or the Family Educational Rights and Privacy Act regarding the disclosure of children's names and eligibility status (for free or reduced price meals or free milk) without parental consent so that nothing is left to interpretation. We ask that this guidance be clear and concise as to when, where, how and by whom this data can be accessed and used.

OFFICE OF THE STATE SUPERINTENDENT

June St. Clair Atkinson, Ed.D., *State Superintendent* | jatkinson@dpi.state.nc.us
6301 Mail Service Center, Raleigh, North Carolina 27699-6301 | (919) 807-3430 | Fax (919) 807-3445

AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

AR 0157

NC Response to FERPA Changes

May 20, 2011

Page 2

- ***Return of Data***

Because of the ease with which electronic data can be copied, it is difficult for the state to enforce the return of all copies of the data at the end of the project. Therefore, North Carolina requests that it be mandated that the recipient be required to attest to the protection of the Personally Identifiable Information (PII) in a notarized statement to the SEA or LEA, and the provider of the data be held harmless.

- ***Definition of Education Program***

North Carolina requests clarification in the expanded definition of “education program” such that programs in a state Department of Corrections, state Department of Health and Human Services, and Bureau of Indian Affairs Education are included.

- ***Expanded Enforcement***

North Carolina would request further discussion regarding sanctions and disciplinary actions taken against the individuals and entities in violation of FERPA. Specifically, a range of penalties commensurate with the varying degrees of misconduct should be considered, including whether the misconduct was intentional. In addition, we recommend discussion about development of an appeals process for those seeking reinstatement.

Please contact Karl Pond, Enterprise Data Manager, at 919-807-3241 or kpond@dpi.state.nc.us with any response or questions pertaining to this communication. Thank you again for the opportunity to comment on this very important guidance.

Sincerely,



June St. Clair Atkinson

JSA:KP:mw

c: Dr. Louis M. Fabrizio, Director, Accountability Policy & Communications
Mr. Karl Pond, Enterprise Data Manager, Policy and Strategic Planning

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-0002-0064
Comment on FR Doc # 2011-08205

Submitter Information

Name: Ben Kuhner
Address:
Brmemrton, WA,
Email: brkuhner@comcast.net
Submitter's Representative: none
Organization: none

General Comment

This is another government overreach. The potential for misuse is tremendous. It is a total waste of time and tax payer money. It is another reason to abolish the DOE.
Ben Kuhner

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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-0002-0065
Comment on FR Doc # 2011-08205

Submitter Information

Name: Robin York
Address:
Scottsdale, AZ,
Email: tsgreen@aol.com

General Comment

The proposed changes are anathema to privacy and the forty decades of FERPA protections. I oppose the distribution of PII on implied authority to entities not previously permitted (authorized representatives proposed Sec. 99.35(a)(2)), the expanded definition of education program beyond anything traditionally considered subject to FERPA controls (proposed Sec. 99.3), the violation of the statutory grant of DOE jurisdiction by the extension of DOE enforcement jurisdiction to authorized representatives (proposed Sec. 99.60(a)(2), 99.35(d), the redisclosure for research purposes on implied authority, the removal of the requirement to establish legal authority (Sec. 99.35(a)(2), the expansion of requirements for written agreements (Sec. 99.35) and the DOE's enforcement mechanisms as not reasonably expected to protect student privacy, and the overall violation of the proposed changes to the purpose of FERPA. Cost savings and benefits can both be achieved by NOT amending FERPA because accommodating SLDS does not preserve privacy, the reason for FERPA. SLDS will violate FERPA through purposeful disclosure and accidental breaches. Further, supposed benefits do not accrue to the people for whose benefit FERPA was enacted (students), but rather to those who would benefit from the violation of privacy.

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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-0002-0066
Comment on FR Doc # 2011-08205

Submitter Information

Name: Maria Shanle

Address:

Oakland, CA,

Email: maria.shanle@ucop.edu

Organization: University of California, Office of the President

General Comment

This comment regards the amendment to 34 CFR 99.31(a)(6) to permit state and local educational authorities to enter into research agreements to disclose personally identifiable information from education records.

The discussion in the NPRM states that: "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 implies that state and local educational authorities (and possibly their authorized representatives, that is not clear in the regulation) could disclose an institution's data for research purposes, without any consultation with the institution that originally disclosed the data, presumably for purposes of an SLDS.

We believe that state local educational authorities should only be able to enter into a research agreement whereby personally identifiable student information is disclosed, if the educational institution from which the data was obtained agrees to the research proposal. There is no reason to assume that an institution of higher education would automatically want to share data for research purposes, just because they have shared information for SLDS purposes. This would be particularly true if the educational institution affirmatively voiced an objection to the disclosure.

Thank you for your consideration of this comment.

Maria Shanle
Senior Counsel
University of California, Office of the General Counsel

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-0002-0067
Comment on FR Doc # 2011-08205

Submitter Information

Name: Laurie Rogers
Address:
Spokane, WA,
Email: wlroge@comcast.net
Organization: Focus on the Square

General Comment

I am opposed to this proposed rule on Family Educational Rights and Privacy. This is a serious breach of the individual's rights to privacy, stolen before a child is even out of kindergarten, taken forever, AND taken without the parents' consent.

This is wrong, really wrong.

I believe that if this rule passes, there will be a lawsuit, which will turn into a class action lawsuit. And I, as a child advocate and education advocate, will encourage all parents to engage.

Laurie H. Rogers
Author of "Betrayed: How the Education Establishment Has Betrayed America and What You Can Do about it"
and "Betrayed" - a blog on education
<http://betrayed-whyeducationisfailing.blogspot.com>
wlroge@comcast.net

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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-0002-0068
Comment on FR Doc # 2011-08205

Submitter Information

Name: William Loyd
Address:
Massillon,

General Comment

The United States Government or The United States Department of Education has no business what-so-ever collecting information on students family income range, hair color, blood type or health care history. This information should be left up the individual families and their family doctors.

I for one will not allow my grandson's information to be submitted to a bunch of government bureaucrats for their enjoyment or use. The government needs to get out of people's lives and stick to securing this nation against it's enemies as it is supposed to.

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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-0002-0069
Comment on FR Doc # 2011-08205

Submitter Information

Name: Laurie Rogers
Address:
Spokane, WA,
Email: wlroge@comcast.net
Organization: Focus on the Square

General Comment

Docket: ED-2011-OM-0002

I am opposed to this proposed rule on Family Education Rights and Privacy (Document ID ED-2011-OM-0002-0001). This is a serious breach of the individual right to privacy, taken before a child is out of kindergarten, taken without parents' knowledge or consent.

If this rule passes, I believe there will be a lawsuit, which will turn into a class action lawsuit, and I will encourage all parents to engage.

Laurie H. Rogers
Author of "Betrayed: How the Education Establishment Has Betrayed America and What You Can Do about it"
and "Betrayed" - a blog on education
<http://betrayed-whyeducationisfailing.blogspot.com>
wlroge@comcast.net

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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-0002-0070
Comment on FR Doc # 2011-08205

Submitter Information

Name: Daniele Rodamar
Address:
Washington, DC,
Email: rodamar@american.edu
Submitter's Representative: Self
Organization: American University (Washington, DC)
Government Agency Type: Federal
Government Agency: ED

General Comment

See attached file(s)
Please see attached file which provides comments on the proposed changes to FERPA regulations.
Note in particular issues regarding effective deterrence of inappropriate disclosure of student records and related misuse.

Attachments

Comment on FR Doc # 2011-08205

Comments on: Docket ID ED-2011-OM-0002, Family Educational Rights and Privacy

Submitted by: Daniele Rodamar¹

American University

Washington, D.C. 20016

The FERPA notice of proposed rulemaking would adopt this regulation to better meet major changes in data access and use in education and beyond. It is part of a broader change in education, health care and other fields to better use administrative records as a low-cost, low-burden data source to improve policy and practice.

The scope of student record data sets has changed in important ways and is continuing to rapidly evolve. Student record data sets that were once paper-based, with use largely limited to schools or districts where students attended are growing to include data that can span from pre-school to post doc, that can link to health information, criminal records, employment records etc., and that include every student in a state—and potentially across many states or the nation, with international links for cross border students, etc. Private firms, many of them global in scope, with supply chains of subcontractors and servers that span the planet, increasingly manage and analyze these records. This fundamentally shifts the potential benefits and risks in the access and use of student records.

“Student records” are broadly defined by FERPA. The records may include not only standardized test scores and school attendance but also sensitive information about behaviors, pregnancy, disabilities, substance abuse, family relations, school-maintained health records, and so on. Geo-spatial data, digital photos and biometric data are likely to be increasingly common in such data.

This means that data breaches that would have once involved a single student or the school football team can now involve life-spanning data for every student in Texas, or across many states. This raises incentives for intruders to breach FERPA data sets for their own purposes. And, once the data is disclosed, usually confidentially can never be restored.

The risks of reidentification in these data sets are large. Student record data typically include many indirect identifiers even after direct identifiers are removed. For example, data confidentiality researchers have demonstrated that with just three variables—birthday, sex, and five digit zip code eighty-five percent of the US population can be uniquely identified in a “deidentified” data set. Moreover, the statewide longitudinal data sets of student record data are required by Congress to include numerous variables that are commonly used in reidentifying individuals in such data.

¹ These comments are the professional views of the author and do not necessarily represent the views of American University.

A major concern is that while changes in the student record data structures greatly increase incentives to breach such data sets, reasonable protections for the confidentiality of such data, and penalties for disclosure of such data have not kept pace. For example, there are no individual sanctions for FERPA record disclosure. This means that the sanctions for a video rental clerk who discloses the video rental records of a grandmother who lives down the block are greater under the Video Privacy Protection Act than the sanctions for a hacker who intentionally discloses the student records for every student in Texas.

This mismatch among Federal privacy statutes creates perverse incentives for breach of FERPA covered data sets. For example, if student records and health care providers' records both include the same sensitive private information, weak FERPA sanctions create strong incentives to breach FERPA records rather than HIPAA-covered records even though those disclosures may pose identical risks for the students/patients involved.

Moreover, under Family Policy Compliance Office procedures, only students, parents or guardians can file actionable reports of noncompliance--and such reports must be posted within days after the data breach is discovered. The agency enforcement history for FERPA suggests that in practice even when actionable violations are reported they rarely result in significant penalties.

Some are tempted to think that disclosure of student records doesn't really matter because there are no significant risks in disclosure of student records beyond momentary embarrassment of a student and her/his family. While much of the information in student records is not sensitive, some is sensitive and disclosure can pose serious risks to students or others. As the scope of student records grows, the cost of storing and using them falls, and the feasibility of linking them to other data sets grows, the risk of significant harms resulting from nonconsensual disclosure is likely to grow.

Fundamentally, the FERPA regulation has failed to keep up with technological changes that change the risks and benefits of student record use beyond traditional instructional uses. The NPRM proposes major steps to improve data access, but fails to take adequate corresponding measures to effectively prevent misuse of these records.

Exhibit 1

Statute/regulation	Covers	Penalty for disclosure of covered confidential information
<u>FERPA</u> Family Education Rights and Privacy Act	Student records (broadly defined)	FERPA is enforced by the Secretary of Education and any school or institution that violates it may lose its federal funding. A student may file a complaint with the Secretary for a violation. FERPA does not create an independent right for a student to sue a school that has unlawfully disclosed personal information. Individuals cannot be penalized for FERPA violations. (In over four decades the penalty has been rarely used.)
<u>ESRA</u> Education Sciences Reform Act (PL 107-279)	Confidentiality provisions cover certain ED data sets collected directly or by contractors	ESRA 2002 requires that no person may: <ul style="list-style-type: none"> ● Use any individually identifiable information furnished under the provisions of this section for any purpose other than statistical purposes for which it is supplied; ● Make any publication whereby the data furnished by any particular person under this section can be identified; or ● Permit anyone other than the individuals authorized by the Commissioner to examine the individual reports. Employees, including temporary employees, or other persons who have sworn to observe the limitations imposed by this law, who knowingly publish or communicate any individually identifiable information will be subject to fines of up to \$250,000, or up to 5 years in prison, or both (Class E felony).
<u>CIPSEA</u> Confidentiality Information Protection and Statistical Efficiency Act	Statistical data collections collected under a CIPSEA confidentiality provision	E-Government Act of 2002, Title V, Subtitle A, Confidential Information Protection (CIP 2002) which requires that all individually identifiable information supplied by individuals or institutions to a federal agency for statistical purposes under the pledge of confidentiality must be kept confidential and may only be used for statistical purposes. Any willful disclosure of such information for nonstatistical purposes, without the informed consent of the respondent, is a class E felony.
<u>HIPAA</u> (As modified by the HITECH Act)	Private health information (unless it is covered by FERPA)	Privacy regulations and security standards. The fines of \$100 per violation with total penalty not to exceed \$25,000 is not a major threat to enforce the privacy and security regulations for many health care officials as compared to the penalties involved for wrongful disclosure of individually identifiable health information. These penalties include a health care official can be fined up to \$5,000 and imprisoned up to one year and if the wrongful disclosure is committed under false pretenses the potential fines are \$100,000 and imprisonment of up to five years. The new law gives patients the right to: receive written notice of information practices from health plans, request amendment or correction of protected health information that is inaccurate, receive an accounting of the instances where protected health information has been disclosed by a covered entity. Example: \$4.3 million imposed on February 22, 2011, against Cignet Health of Prince George's County, Maryland.
<u>GLB</u> (Gramm-Leach-Bliley Act)	Financial records	Violation of GLBA may result in a civil action brought by the U.S. Attorney General. The penalties include those for the financial institution of up to \$100,000 for each violation. In addition, "the officers and directors of the financial institution shall be subject to, and shall be personally liable for, a civil penalty of not more than \$10,000 for each such violation". Criminal penalties may include up to 5 years in prison.

<p><u>FISMA</u></p> <p>Federal Information Security Management Act (FISMA) of 2002</p>	<p>FISMA provides a comprehensive framework for establishing and ensuring the effectiveness of controls over information technology (IT) resources that support federal operations and assets and a mechanism for improved oversight of federal agency information security programs. Applies to PII.</p>	<p>Penalties for non-compliance: All users who do not comply with the IT General Rules of Behavior may incur disciplinary action and/or criminal action</p>
<p><u>Video Privacy Protection Act (VPPA)</u></p> <p>(PL 100-618)</p>	<p>"video tape rentals" (and arguably by extension to digital "rentals" etc.)</p>	<p>It makes any "video tape service provider" that discloses rental information outside the ordinary course of business liable for up to \$2500 to the aggrieved person in actual damages.</p>
<p><u>Common Rule for the Protection of Human Subjects in Research</u></p> <p>(34 CFR 97, etc.)</p>	<p>Data involving nonexempt research with human subjects (which includes use of directly or indirectly identifiable private information about living individuals.</p>	<p>Federal funding agency can take corrective actions including termination of grant or contract and eliminate eligibility for future grants/contracts from the agency. Other corrective actions can include a ban on any use of data collected while out of compliance.</p> <p>IRBs can take corrective actions for studies they review which can include removal of the principal investigator(s), termination of the study, a ban on use of data collected could out of compliance, etc.</p>
<p><u>EU Privacy Directive</u></p> <p>(implemented via laws of EU member states)</p>		<p>The Directive grants individual rights of enforcement. The Directive requires that individuals be granted the right to seek a judicial remedy for any breach of a Member State's national law regarding information privacy, as well as a right to recover compensatory damages. Dissuasive penalties for breach of national laws, akin to punitive damages, are also a required right for individuals, if applicable and appropriate. In the European Union's opinion, the United States does not meet the Directive's standards for the protection of privacy</p> <p>Data subjects" (such as European employees) have a private right of action to sue for data law violations. Separately, each European country has a dedicated data agency that enforces data law. Spain's data agency, which is said to be self-funded from fines, can impose penalties up to €600,000 and has recently imposed a number of illegal data transfer fines for €300,506. Outside Spain, though, European data agencies have been slower to assess big penalties, but enforcement may be toughening. German data law fines can reach €250,000 and France's cap is €150,000 for a first offense — plus five years in prison. UK fines are unlimited and UK data authorities are taking steps to add a criminal penalty, with prison time, for unauthorized data disclosures</p>

Exhibit 2

Consequences and Penalties for Non-Compliance						
	<u>Gramm Leach Bliley</u>	<u>Sarbanes Oxley</u>	<u>FACT Act</u>	<u>HIPAA</u>	<u>FISMA</u>	<u>FERPA</u>
Directors and Officers Penalty Per Violation	\$10,000	\$1,000,000			Termination	NA
Institution Penalty Per Violation	\$100,000	\$5,000,000	\$11,000	\$50,000 to \$250,000	Agency Budget Reduction	May include termination of current ED funding; under NPRM, proposal may involve loss of data access for at least 5 years for violations by authorized representatives
Years in Prison	5 to 12 years	20 years		1 to 10 years		NA
FDIC Insurance	Terminated					NA
Impact on Operations	Cease and Desist				Congressional Review	May result in loss of current and/or future ED funding and may result in loss of data access for at least 5 years.
Individual Civil Fines	\$1,000,000		Civil Action	\$25,000		NA
Institution Civil Fines	1% of Assets				*Varies Per Record	NA

The fines above are all per violation. Thousands of potential violations may exist on a single hard drive.

*U.S. Department of Veteran Affairs breach resulted in fines of \$1,000 per violation and amounted to \$26.5 billion.

Exhibit 2 is from <http://www.deadondemand.com/products/digitalshredder/>, with the addition of a FERPA column. The fines above are all per violation. Thousands of potential violations may exist on a single hard drive. *U.S. Department of Veteran Affairs breach resulted in fines of \$1,000 per violation and amounted to \$26.5 billion.

Specific proposed changes to the FERPA regulation follow. In some instances the changes, such as disincentives for misuse of these data resources, may require Congressional action. While such changes are beyond the scope of this NPRM, such harmonization of FERPA with other confidentiality statutes could be included in the coming reauthorization of the Elementary and Secondary Education Act.

1. **Scope.** Many of the concerns about the ability to protect confidentiality and prevent misuse of the SLDS and other large-scale student record data sets arise from the fact that there is no limit to the number and nature of data elements that can be included, nor on how long the data can be retained, or on potential linkages. “Reasonable methods” provisions for protection of data confidentiality in FERPA (§99.35?) should deal seriously with these data structure issues. Potentially these data sets include records with life-long coverage for every public school student in the nation—and are potentially fully linkable to any other data system. This unlimited scope and duration is not consistent with the principles of fair information practices and in the longer run may pose serious widespread risks.

2. **Accountability, scientific method, and “Destroy the data”:** (§99.31?) (4) *“Requires the organization to destroy or return to the educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed”.* These are helpful steps in managing disclosure risk. However, they can be seriously misguided in the context of educational research and other scientific research. For example in landmark studies that have had sweeping impact on policy and practice such as the Framingham “Heart” Study and the Panel Study of Income Dynamics (PSID) many of the most important findings have emerged from findings and uses that were never imagined when the studies were first designed and that go well beyond intended topics in the initial study. In addition, access to original data sets is often important for detecting research misconduct, for replicating important findings, and for exploratory or confirmatory analysis that were not foreseen when the study was initially designed.

For uses of student records that involve scientific research, there should be a flexible alternative to record destruction that involves placing the data in secure data archives with access to identified data limited to licensed users. Precedents include the licensed access to identified data permitted under the Education Sciences Reform Act and under CIPSEA, as well as the restricted access procedures used by the ICPSR (Inter-University Consortium for Social and Political Research). ICPSR is probably the largest and oldest social science data archive, and it includes major data sets from the US Department of Education, the US Department of Justice, and so on.

At least in the context of scientific research, depositing such research data in secure data archives that use reasonable methods to protect confidentiality is fully consistent with the purposes for which access was initially provided.

3. **Enforcement.** FERPA is a privacy state, like the Education Sciences Reform Act (ESRA), CIPSEA, HIPAA, etc. The NPRM would establish a penalty of cutting off access to FERPA covered data for at least 5 years when violations by an “authorized representative” are determined to have occurred. As listed in Exhibits 1 and 2 (above) this raises serious concerns about the effectiveness of current and proposed FERPA sanctions to deter misuse. Disclosure of confidential data for every student in a state or in many states by an employee or by an “authorized representative” (e.g. a subcontractor that can reestablish itself as a new corporation in a matter of days, perhaps “off shore”) in effect has no serious deterrent. This poses several problems.

3.1 Proportionality. At least is presented in the NPRM, disclosure of records for one student or for millions of students has the same penalty. Harmonization among the privacy statutes, particularly when they may cover the same data or same data sets is needed. For example, disclosure of private health information under FERPA should entail penalties consistent with those for HIPAA covered data. Some of this can be achieved in the final regulation; additional harmonization can be part of broader education legislation such as reauthorization of the Elementary and Secondary Education Act.

3.2 Coverage (agents of agents, etc.). Commonly, and increasingly, student record data sets are operated not by local or state education agencies but by private firms and their subcontractors. In many cases these are global firms. Coverage of such entities, including subcontractors, is not adequately clear in the NPRM. These are important issues. For example, HIPAA was recently modified to more clearly extend HIPAA protections to data handled by subcontractors, etc.

3.3 Triggers. Enforcement of FERPA penalties has been rare since enactment decades ago. When violations involve entire states and/or global firms, agency staff may be particularly hesitant to enforce FERPA even in cases of significant harmful disclosures. The regulation, and potentially the underlying statute, should allow appropriate flexibility but include clear triggers to require action in instances of serious violation.

3.4 Standing: As data systems cover more students and are increasingly operated far from local schools, students and parents are often not well positioned to learn of violations. Current FPCO procedures, grounded in the statute, require that reports of violations be received from an affected student or parent within a few days of

when the violation becomes known. In the case of SLDS and other large student record data sets parents and students, in many cases, will neither know the source of the violation nor be aware of its scope and impact. Contrast this with standards under ESRA, CIPSEA and HIPAA. FERPA procedures should allow anyone with awareness of the violation, including whistleblowers, to have standing to report violations that FPCO follows up on in a timely and appropriate manner.

3.5 “The cloud”, extraterritoriality, etc.: Data systems are increasingly stored and operated on servers not owned or controlled by an education agency. The provider’s terms of services commonly hold that any information stored on that server is the property of the service provider. The data may be stored on servers outside the United States and be covered by local privacy laws wherever “the cloud touches the earth”. For example, if a contractor placed data for every student in Texas on servers in India and the European Union, the laws of those locations would apply to the data stored in those nations no matter how restrictive or loose those local laws and their enforcement may be.

The final regulation should address how the regulation is to be applied and enforced in this increasingly common scenario, including issues of extraterritoriality.

3.6 FERPA and the Business of Education. Increasingly schools are run and educational interventions are designed and implemented by private firms. In some cases these business models are protected by patents, copyrights, trademarks etc. Increasingly these involve what may be the firm’s proprietary information involving test scores, attendance, teacher performance, and so on. Indeed, such information may be at the heart of a firm’s competitive advantage. The final regulation should clarify at what point, if any, students’ records become a firm’s proprietary information (which may be protected by patents, etc.) and how this is handled under FERPA.

3.7 Penalties for disclosure resulting from failure to use reasonable methods to protect confidentiality, or from intentional disclosure. Other privacy statutes commonly create an individual legal penalty, often including substantial fines and legal sanctions for violations. FERPA only creates a penalty of elimination of access to FERPA covered student records for [at least five years], apparently applicable to the individual or entity. Hence if the “authorized representative” violation is identified and enforced, the rascal can simply set up another shell corporation and continue to violation the privacy of FERPA covered student records. That is, FERPA is in effect almost toothless when such violations are encountered. FERPA should, like other major federal privacy standards, have serious legal penalties for individuals as well as legal entities that violate. This may require amendment of the FERPA statute. This could be done in various contexts, including the coming reauthorization of the Elementary and Secondary Education Act.

§99.3 definition of “Authorized representative as “any entity or individual designated by a state or local educational agency” appears to permit individuals or entities with serious criminal records or repeated violations of privacy to become authorized representatives.

3.8 Breach notification. Disclosure of student information may create serious risks, such as identify theft. Like several other major privacy statutes, FERPA should require timely notice when disclosure occurs, including identification of what individual or entity has occasioned the breach, if known. Parent and student notification is feasible and appropriate in educational settings. For example, the Protection of Pupil Rights Amendment (PPRA) requires parent notice when covered student surveys are to be conducted.

In sum, the proposed changes in the FERPA regulation would take important steps to modernize these regulations to better address important and rapidly growing legitimate uses of student records to improve teaching and learning and for other important purposes. However, it is essential that this be done in ways that realistically manage disclosure related risks, and that to the extent feasible are harmonized with other federal laws and regulations that govern the uses of these data.

Sincerely,

--Daniele Rodamar

Daniele Rodamar
Associate Professor
American University
Washington, DC 20016

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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-0002-0071
Comment on FR Doc # 2011-08205

Submitter Information

Name: amy locheed
Address:
ellisville, MO,
Email: amy@locheed.net

General Comment

First of all, the Federal Government should not be involved in education at all. It is unconstitutional and a burden on the taxpayers. That, being said I am against the proposed rule because of the following reasons:

1) DOE is weakening longstanding student privacy protections by greatly expanding the universe of individuals and entities who have access to PII, by broadening the definition of programs that might generate data subject to this access, and by eliminating the requirement of express legal authority for certain governmental activities; 2) DOE's proposed interconnected data systems could be accessed by other departments, such as Labor and Health and Human Services, to facilitate social engineering such as development of the type of "workforce" deemed necessary by the government; and 3) DOE is attempting to evade Congress by pushing through these radical policy changes by regulation rather than legislation

What a huge invasion of our privacy and breach of parental rights.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 21, 2011
Status: Posted
Posted: May 23, 2011
Category: Community Organization
Tracking No. 80e028e4
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-0002-0072
Comment on FR Doc # 2011-08205

Submitter Information

Name: Doris Carender
Address:
Bremerton, WA,
Email: dorarmcar@gmail.com
Submitter's Representative: Norm Dicks
Organization: Kitsap Patriots Tea Party
Government Agency Type: Federal
Government Agency: ED

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 (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 is not a legitimate use of authority for the Department of Education. At its most benign, this rule uses the educational system as an instrument through which people can be sifted out by their demographic traits and guided toward predetermined workforce outcomes. At its most malignant future use, it can become a tool for complete government control over individuals.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 21, 2011
Status: Posted
Posted: May 23, 2011
Category: Education Consultant
Tracking No. 80e028f5
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-0002-0073
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sharon Peaslee
Address:
Seattle, WA,
Email: sharpeas@comcast.net

General Comment

I oppose changes to FERPA that give access to student information without knowledge or consent to any agency. This is prohibited in health care to protect individual privacy. It should be prohibited in education for all the same reasons. In an age of diminishing privacy and easy access to personal information it is urgent that we have legislation that limits access without knowledge and consent.

PUBLIC SUBMISSION

As of: March 27, 2012
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Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e028e7
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-0002-0074
Comment on FR Doc # 2011-08205

Submitter Information

Name: John Gornet
Address:
OFallon,

General Comment

I would like to voice my opposition to the proposed changes to FERPA. There is no legitimate reason for the government to collect this type of personal information about my children or myself.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 21, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e18d0e
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-0002-0075
Comment on FR Doc # 2011-08205

Submitter Information

Name: Tyler Green
Address:
Scottsdale, AZ,
Email: lovethedevils@aol.com

General Comment

The proposed regulatory changes to FERPA so radically diminish the act's privacy protections that they require Congressional deliberation and approval. Further, the DOE has no statutory authority to regulate additional enforcement jurisdiction powers to itself. The purpose of the proposed changes, to facilitate statewide longitudinal data systems, is in opposition to the very purpose of FERPA - protection of student privacy. I oppose the changes and request Congressional review.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 21, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e1ce24
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-0002-0076
Comment on FR Doc # 2011-08205

Submitter Information

Name: Violet Corey
Address:
Port Orchard, WA,
Email: david.corey@juno.com

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

As of: March 27, 2012
Received: May 21, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e1ce5b
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-0002-0077
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sherry
Address:
FL,

General Comment

This is an invasion of privacy and should not be tolerated. The blatant use of "regulation" to circumvent the American system must stop. Do Not Allow This Intrusion!

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 21, 2011
Status: Posted
Posted: May 23, 2011
Category: Community Organization
Tracking No. 80e1ce7c
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-0002-0078
Comment on FR Doc # 2011-08205

Submitter Information

Name: Frieda Keough
Address:
St.Louis, MO,
Email: frieda39@swbell.net
Submitter's Representative: Russ Carnahan
Organization: Organizing for America
Government Agency Type: Local
Government Agency: n/a

General Comment

I believe the various rules and regulations you are proposing are written in such non-sensical language that we would all to be lawyers to understand this totally incoherent garbage. I am opposed to all of it. The Department of Education and the various educational organization from the local level all the way to the federal level are parasites that suck up our tax dollars and have absolutely no intention to educate our children.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 21, 2011
Status: Posted
Posted: May 23, 2011
Category: Education Consultant
Tracking No. 80e2e937
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-0002-0079
Comment on FR Doc # 2011-08205

Submitter Information

Name: Joe small

Address:

Anoka, MN,

Government Agency Type: Federal

Government Agency: ED

General Comment

Government and government education has no business in the personal affairs of private individuals. Get out of people privates lives.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Teacher
Tracking No. 80e2f675
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-0002-0080
Comment on FR Doc # 2011-08205

Submitter Information

Address: United States,

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 FERPA changes are unconstitutional.

Authorized Representative-Section 99.35

The group of agencies and individuals who may see PII is expanded such that the privacy of the information is seriously compromised.

Educational Program - Section 99.35

The definition of "educational program" is broadened so much that even programs not run by education authorities are included. Even preschools and adult education classes are included. This is an overreach of government.

Research studies - Section 99.31 (a) (6)

It is unreasonable to permit private information to be shared between individuals or bureaucracies through IMPLIED authority. That is too broad a method to insure privacy.

Also, private institutions should not have to provide private information without consent, for government audit and research purposes--or any purposes for that matter. The private institutions' independence and the student's privacy should be respected.

Enforcement - Section 99.60

Enforcement and other legislative aspects should be enacted by the Congress. Legislation should not be done by statute.

The entire data collection plan is an invasion of privacy, and is un-American. None of these measures would improve any student's academic skills. Instead they would infringe on citizens' privacy and freedom. Compiling a data base on citizens is akin to practices done under dictatorships.

Please reject these FERPA changes.

Please reject the entire educational data-collection plan.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e2f6ac
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-0002-0081
Comment on FR Doc # 2011-08205

Submitter Information

Name: Dana Cruz
Address:
Indianola, WA,
Email: dado17@centurytel.net

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

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e2f7cc
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-0002-0082
Comment on FR Doc # 2011-08205

Submitter Information

Name: Stuart McHardy
Address:
Colorado Springs, CO,
Email: stuart.c.mchardy@afghan.swa.army.mil
Organization: American Private Citizen

General Comment

This is a typical end-run by the Obama moronistration in an effort to centralize power and control, and invasive reach into the private homes of American citizens.

There is no need for social workers to have information on students. Nor is there any need for corrupt Labor Unions to have information on students, collectively or individually.

Stop this invasive plan. What the lame and dumbed-down citizens of Illinois allow to happen in their state is a sell-out, but does not pertain or hold any interest or protections for the rest of us.

If it can't pass after discussion and debate by our elected representatives in Congress, then you don't need to be messing around with it. The Dept of Education should have been abolished decades ago. Dept of Education lackeys are up to no good and serve no greater purpose. Step away. Drop it.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Community Organization
Tracking No.: 80e2f810
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-0002-0083
Comment on FR Doc # 2011-08205

Submitter Information

Name: Robert Brandt
Address:
Sammamish, WA,
Email: rbrandt109@aol.com
Organization: Wheres The Math

General Comment

The proposed rule has some disturbing implications. First, it is an unprecedented invasion of privacy. The collection of the proposed type of data would provide opportunities for abuse throughout an individual's life. The potential for expanding "authorized" access to this data is seemingly limitless.

The potential for unauthorized access is another concern. Look at the yearly number of security breaches in supposedly secure data bases. As this student data grows, it will increasingly become a target of hackers.

This represents a vast overreach of government power and authority. It is an attempt to establish monitoring of individuals outside of normal legislative control and oversight. This is an abuse of power and authority that is unconscionable.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e2f88a
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-0002-0084
Comment on FR Doc # 2011-08205

Submitter Information

Name: Beth Flynn
Address:
Olympia, WA,

General Comment

I am commenting on the FERPA proposed revisions. First of all, I admit to not reading the entire document outlining the changes. I just found out about these proposed changes and only have a few minutes today to read about the changes and submit my comments.

That being said, I do have concerns that may or may not be addressed in the overview document.

1. I read that testing data will be released. One of my daughters opted out of state assessments in 7th and 8th grades. My concern is that what if potential employers are able to get my daughter's testing data when they are considering her for employment? Will the fact that she (and I) objected to a state assessment decrease her chance to get the job because she uses her brain and questions the status quo? Most likely those are not qualities most employers are looking for.

2. I read that states will be responsible for policing the outside agencies that they release data to. I don't know about other states but the state of Washington cannot afford to spend any more education money OUTSIDE the classrooms. This will suck funding from the classroom and put it into the pockets of state or district administrators or, even worse, no one will be monitoring how the data is being handled. Will the feds pay for this monitoring? If not it is an unfunded mandate.

3. I'm concerned about the information that is being collected. I don't have a problem with school information being gathered or kept but I do object to any non-school related information being gathered (health, family income, etc.).

4. I'm concerned with how the information will be distributed. I don't have a problem with SCHOOL information being released in bulk but I do have a problem with data being released that is student-specific. I don't see a need to have it student-specific for research purposes.

5. Will these rules no longer allow public records requests for group testing information? If so, I do not agree with that either.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e2f8b2
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-0002-0085
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

The purpose of the Department of Education is to EDUCATE our children so that they can become productive happy adults. The DOE has no business collecting any information on our children. My name and other information should not be needed or provided. We are slowly giving up our privacy without knowing what information collected will be use for.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e2f8bd
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-0002-0086
Comment on FR Doc # 2011-08205

Submitter Information

Name: Scott Allen
Address:
Bellevue, WA,
Email: scott_allen@mail.com

General Comment

I'm concerned that these changes will gut the primary federal student-privacy statute, the Family Educational Rights and Privacy Act (FERPA) by exposing Personally Identifiable Information (PII) collected on students by schools or government education agencies. It is my understanding that 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 them even through his entry into the workforce, the possibilities of breach of privacy and unwarranted use of data are almost limitless.

I object because this would allow various government agencies – and even private entities, perhaps including employers – to access students' personal information without the knowledge or consent of the students or their parents. SLDS structures in some states, such as Illinois, already contemplate the sharing of PII for purposes far beyond effective education of children – for example, to create “a network of federal, state, and local offices that . . . facilitate the development of the United States workforce.” In fact, DOE itself argues that “there is no reason why a State health and human services or labor department, for example, should be precluded from . . . receiving non-consensual disclosures of PII to link education, workforce, health, family services, and other data” for the purpose of “evaluating” education programs. These proposed changes to the FERPA regulations are a blatant attempt to bypass Congress, and therefore the American people, by weakening this important privacy law.

PUBLIC SUBMISSION

As of: March 27, 2012
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Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e2f8bf
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-0002-0087
Comment on FR Doc # 2011-08205

Submitter Information

Name: June McLaughlin
Address:
OK,

General Comment

STOP the ever increasing government involvement, usurpation of civil rights, and privacy invasion into the lives of the citizens of the United States of America.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Teacher
Tracking No. 80e30510
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-0002-0088
Comment on FR Doc # 2011-08205

Submitter Information

Name: shirley wood
Address:
lithia, FL,
Email: red0409@live.com

General Comment

Family Education Rights and Privacy is a bad idea and should not be implemented. A students information has always been private and protected and only released with the consent of parents. this is how it should remain.

PUBLIC SUBMISSION

As of: March 27, 2012 Received: May 22, 2011 Status: Posted Posted: May 23, 2011 Category: Charter School or Charter School Organization Tracking No. 80e30511 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-0002-0089
Comment on FR Doc # 2011-08205

Submitter Information

Name: Reed Downey Jr.

Address:

Oklahoma City, OK,

Email: reed3@cox.net

General Comment

The proposed changes are a huge invasion of privacy. All the government needs to know is how a child is progressing in school as he or she moves from pre-k through college. Scores in reading, math, english, social studies are useful for helping educators to determine the effectiveness of teaching. Learning what works and what does not. Identifying those schools and educators who are effective in the classroom. Beyond this the Federal Government needs to keep its nose out of its citizens' business.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 22, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e30540
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-0002-0090
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

As a parent I am strongly opposed to anything that weakens FERPA. I do not support the idea of sharing information about my children among state agencies and private companies without my consent.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e3056c
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-0002-0091
Comment on FR Doc # 2011-08205

Submitter Information

Name: Martha Garuccio
Address:
Choctaw, OK,
Email: mgaruccio@cox.net
Organization: Concerned Citizens of the USA
Government Agency Type: State

General Comment

To whom it may concern (though I suspect you are not concerned by my comments, only irritated.)

I do NOT want my child's nor my privacy to be invaded for any reason you might cite. I am disgusted by this state's education system, which has churned and turned the delightful mind of my son into ground brains, ready for scrambling with eggs. I voted for Baresi, believing she had the guts to resist the Feds. Obviously, by supporting this information database to track and tag our children for the Collective purpose, she shows herself to be just another accomodater, no more conservative than any other rat in the race. At the State Convention, I witnessed Governor Fallin concede the need to recognize true conservative values; I suspect those were also words, just as Baresi's much applauded speech that now appears to have been without conviction.

I also resent there being NO category for concerned citizen.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Education Consultant
Tracking No. 80e3059d
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-0002-0092
Comment on FR Doc # 2011-08205

Submitter Information

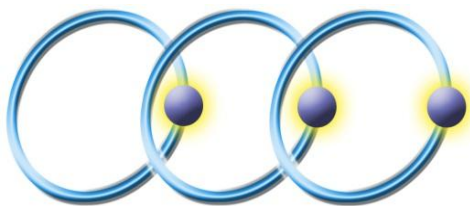
Name: Donald Houde
Address:
Fountain Hills, AZ,
Email: donald@houde.com
Organization: Houde Consulting Group, LLC

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Houde Consulting Group, LLC

Executive Leadership & Information Technology Consulting

May 22, 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,

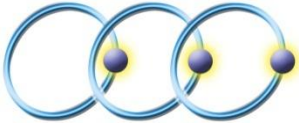
Thank you for the opportunity to provide comments and recommendations in response to the notice of proposed rulemaking (NPRM) published in the Federal Register on Friday, April 8, 2011 regarding amendments to the regulations for the Family Educational Rights and Privacy Act (FERPA). As a result of my years of service as a local education district consultant, as a state education agency CITO, as former chair of EIMAC and my current work as a consultant with public education focused entities and private service and solutions providers, this communiqué summarizes of my thoughts on the proposed FERPA amendments.

I will start my comments by emphasizing I enthusiastically support the tone and direction of the proposed regulations. They enable our education data providers, information managers and data consumers to leverage the value of education focused data in support of the generation of maturing education policies, best practices, quality solutions and the realization of measurable continual improvement. In years past, if these proposed regulations had been common practice, many existing strategic, architectural and tactical information management approaches would certainly have taken a different course.

Whether education focused organizations, other governmental institutions or private sector entities are dealing with the balance between the utility of education related data versus protecting data from misuse, there are risk management attributes that require definition in order to maximize the power of data without compromising its security.

One of the many opportunities resulting from these proposed regulations is the increased utility of these data as an evaluative instrument for education programs, educators, learners' progress and all entities that support the development of learner's into fulfilled, productive adults. But in this age of increased need for transparency and accountability, coupled with an increased sensitivity to the importance of providing a quality education experience to all of our children, the enhanced utility and insight gleaned from these data comes with an increased probable risk of data misuse and/or data compromise. In my mind there are two major groupings of data management risks. One surrounds the misuse of data through reporting, bad training, insufficient data governance and lack of controls. The second relates to infrastructure risks associated with unwelcome data compromise and exploitation requiring a formalized security governance program.

In my contributions to other organizations preparing similar responses, I am aware of requests to provide more clarity to education's securitization "reasonable methods" and to add definition to education programs, and I agree with the spirit of these requests but hesitate to request a prescriptive approach to dealing with the broad spectrum of situations that may occur in managing learner's privacy and data security.



Houde Consulting Group, LLC

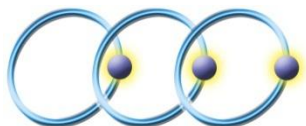
The cornerstone to constructing a “reasonable methods” framework for education data securitization is to provide a definition of what is mean by education data. When I was directing an organization that was accountable for managing wide range of daily data requests, as we were developing our policies we were faced with deciding when specific individual data attributes of a learner, that by themselves would generally not be perceived as an education related data element, are protected by FERPA. Some of these examples may fall under Health Insurance Portability and Accountability Act (HIPAA) protection, but there are instances of financially related data, citizenship related data, census related data, etc. that may expose privacy concerns when linked to personally identifiable information (PII), etc. Additionally, in managing a student longitudinal data system (SLDS), when these attributes or elements are linked to traditional learner education data, these data are transformed into records. How does this affect their protection status? When does data become a record and how does that relate to other data acquisition methods like FOIA? Once again, I do not believe the proposed regulations should be so prescriptive that these questions are directly answered in the regulations, but I do believe the subsequent guidance and best practices should include some of these conversations.

As noted earlier, another area needing clarification result from these data’s increased utility. A great example is when leveraging learner data as a critical element of an educator’s evaluative process. Since many of the proposed quantifiable methods of evaluating our educators is based upon learners’ future assessments, then should the evaluated educator be provisioned PII data on their previous learners as a critical part of their acknowledgement process or improvement plan? Another example is the incorporation of growth modeling data into the stream of elements incorporated into an education entity, program or educator’s evaluative methodology. Since growth data by definition longitudinal, who or what has the authority to provision these data and/or who or what has the right to have these data provisioned?

When discussing many of these issues with our privacy advocate colleagues, there is a general premise that there are no set of policies, procedures or best practices that, when put into practice, can insure our learners’ information is secure from compromise and protected from misuse. I agree that mitigating these real risks and looking beyond the often discussed data governance structures toward the differing complex security governance structures, is an aggressive and challenging process. When we learn from the implementation strategies of regulations like the HIPAA and Gramm-Leach-Bliley Act, which also have non-specific requirements related to the “how” piece of data securitization and privacy, mitigating these risks and valid privacy concerns is doable. It is doable if the Privacy Technology Assistance Center (PTAC) can assist our education data owners and stewards, our education data providers, managers and consumers, that may not currently have the time, resources, and/or prioritization to design, document, implement, manage, sustain, socialize, and train a rigorous security governance strategy, in adopting these practices and to remove the environment for the expansion of these risks.

These proposed regulations’ suggested follow-up guidelines also needs to address the risks and realities of ever increasing ways of exposing data, especially through mobile devices (e.g. smart phones, thumb drives, etc.), social media and increased demand. A part of the complexity of mitigating these risks, is that these challenges vary widely for the differing data managing entities (e.g. LEAs, SEAs, researchers, policy makers, vendors, etc.).

The guidelines need to have components that address the real risks of compromise associated with both data-in-flight (transmitted data) and data-at-rest (stored data). In addition, with the welcome maturation of education focused vendors and outsourcing solutions, and the advent of powerful cloud based solutions and other extensible architectures, guidance should be provided in constructing vendor contracts that include the potential risks of networks that extend beyond our borders and how to construct contracts that delegate the responsibilities associated with data privacy and securitization best practices. Whether data management is outsourced or internally managed, questions surrounding data ownership, data retention periods, data destruction methods, auditability, logging, oversight, data management, training, documentation and reporting requirements need to be included in subsequent guidance.



Houde Consulting Group, LLC

Throughout my comments, I have laid out several elements of a quality security governance plan, but at the highest level, for both outsourced and internally managed approaches, outside of the proposed regulations, guidance should be provided to include recommendations for:

- **Security Awareness Communications and Training Plan** - Since it is a common understanding that much of a risk of data misuse and compromise comes from within an organization, I cannot over-stress the need for guidance on formalized security awareness communications and training strategies.
- **Create an Information Security Office and designate an Information Security Officer (ISO)**
- **Governance Plan includes all Education Data Stakeholders** including executive team, ISO, Policy team, data providers/managers/consumers.
- **Communications Plan** (formalized) that includes communicating expectations of the plan.
- **Published Security Guidelines**
- **Incident Consistent Response Program** (formalized)
- **Change and Configuration Management Integration**
- **Password and Account Management Transparency and Management**
- **Security Assessments and Security Audits** including potential collaboration with state audit agencies.
- **Risk Assessments** (formalized)
- **Security Event Monitoring** including logging requisite for auditability and transparency.
- **Physical Security Integration** including what people keep on their desks/printers and who has physical access to those artifacts.
- **Bring Your Own Technology Management (BYOT)** (formalized) including how to securely manage and leverage the capability of the personals electronics investments.
- **Media and Data Disposal** (formalized) including methods.
- **Vendor Contract and Data Consumer Agreement Frameworks and/or Checklists**

As a result of these proposed regulations, I am encouraged and optimistic about the resulting opportunities. They define the next chapter in our community's ability to leverage the tremendous latent value in our rich education data repositories in a way that results in measurable continuous improvement for every learner while balancing their right to privacy and the protections of those data. I will finish where I began, by emphasizing I applaud ED for making these progressive long-awaited modifications and enthusiastically support the tone and direction of the proposed regulations.

Thank you for the opportunity to comment.

Sincerely,

Donald J. Houde,
President, Houde Consulting Group, LLC
Former CITO of The Arizona Department Of Education

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e305c2
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-0002-0093
Comment on FR Doc # 2011-08205

Submitter Information

Name: Richard Harris
Address:
Guthrie, OK,
Email: restlessroamer@aol.com

General Comment

The change in FERPA is not needed. The additional information the Department of Education is seeking is beyond the perview of the DOE. Nowhere in the realm or organizational set up of DOE is there any reference for the need to know the job or homeownership of a student. This is another power grab by the Obama administration.

PUBLIC SUBMISSION

As of: March 27, 2012
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Category: Other
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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-0002-0094
Comment on FR Doc # 2011-08205

Submitter Information

Name: Pam Dixon

Address:

Cardiff by the Sea, California,

Organization: World Privacy Forum

General Comment

Attached please find the comments of the World Privacy Forum regarding the FERPA NPRM, ED-2011-OM-002-00. If there are any difficulties with the file, please contact Pam Dixon at info2009@worldprivacyforum.org.

PUBLIC SUBMISSION

As of: March 27, 2012
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Category: State educational agency
Tracking No. 80e305e5
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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-0002-0095
Comment on FR Doc # 2011-08205

Submitter Information

Name: Amy Whitehorne

Address:

Montpelier, VT,

Email: amy.whitehorne@state.vt.us

Organization: Vermont Department of Education

Government Agency Type: State

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



State of Vermont
Vermont Department of Education
 120 State Street
 Montpelier, VT 05620-2501

May 23, 2011

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

Dear Ms. Miles,

The Vermont 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. Use of Terminology: The proposed regulations are inconsistent with regard to the use of the terms "educational agency" and "educational authority," which we find confusing:
 - § 99.3: "*Authorized Representative* means any entity...designated by a State or local educational authority..."
 - § 99.31(a)(6)(ii): "State or local educational authority..."
 - § 99.31(a)(6)(iii): "an educational agency or institution...and a State or local educational authority..."
 - § 99.31(a)(6)(iii)(C): "The educational agency or institution or the State or local educational authority..."
 - § 99.31(a)(6)(iv): "An educational agency or institution or the State or local educational authority..."
 - § 99.35(a)(2) and (3): "The State or local educational authority..."
 - § 99.37(c)(1) and (2): "educational agency or institution"
 - § 99.60(a)(2): "an 'educational agency or institution' includes...as well as any State or local educational authority..."

The term "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.

2. 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 (PII) 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 the PII.

3. 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 PII 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). In addition, we offer the following “reasonable methods” as examples of those with which we believe authorized representatives and their employees should be expected to comply and therefore, should be incorporated into authorized representative agreements:
 - Participate in training on FERPA and state privacy and security laws;
 - Comply with applicable state privacy and security laws;
 - Maintain discipline policies, up to and including termination of employment for individuals who violate the terms of the written agreement or take actions resulting in an unauthorized disclosure of PII; and
 - Provide access to the SEA or LEA to enable review and monitoring of the authorized representative’s administrative and electronic processes, to ensure compliance with the written agreement and the basis for the designation of the authorized representative.
4. Education Program: The proposed amendments define “education program” as “any program that is principally engaged in the provision of education...” With regard to students who are incarcerated, being held in detention, or treated in state hospitals, the regulations should clarify whether these facilities may be considered education programs. Students may reside in these facilities for extended periods of time, and while education is not the primary mission of such institutions, they often provide the only access to education for the students housed in them. We ask that the ED provide clarification for these situations in the “education program” definition.
5. Directory Information: We had hoped that the proposed amendments to FERPA would include more significant changes to the definition and rules regarding directory information (DI) (i.e., what information is/is not DI, and restrictions on disclosure of a student ID number as DI), and are disappointed to see that the following have not been excluded from DI: date and place of birth, and student ID number. On these points, we provide the following comments and suggestions:
 - Date and Place of Birth: As is acknowledged on the ED’s own Office of Inspector General website (<http://www2.ed.gov/about/offices/list/oig/misused/idtheft.html>), identity theft is one of the fastest growing crimes in our country. Information such as an individual’s date and place of birth are very personal pieces of information that, in combination with other DI (i.e., name, address, telephone listing, photograph [disclosing sex or gender], and e-mail address), can be used to steal an individual’s identity. While date and place of birth may be available publicly through vital records searches, this information is sensitive enough that we recommend that it be removed from the FERPA DI definition, or alternatively, that it be included as DI only on an opt-in basis, not an opt-out basis, as currently exists under § 99.37.
 - Disclosure of a student ID number as DI: The current regulations state that a student ID number is only considered DI if a PIN or password is required in conjunction with the ID number to gain access to education records; the proposed amendment clarifies that an

education agency or institution may issue, and require a student to wear, a badge bearing the student's photo, name, and ID number (if it is considered DI) without being in violation of FERPA. Based on inquiries we receive regularly from parents and LEAs, we are concerned about broad misunderstanding and inconsistent application of the current regulation, and the potential for nonconsensual disclosure of PII, should the amendment be finalized as proposed.

Student ID numbers appear in countless school environments and communications – in public and private locations (e.g., attendance lists, grade postings, assessment score notices, report cards, cafeteria accounts, health cards, library cards) – appearing with and without student names. As a result, a student's ID number is practically synonymous with his or her name and with both pieces of information (name and ID number), PII may be obtained relatively easily without a personal identification number (PIN) or password. For example, a person could pass a student wearing his/her badge (displaying the above-detailed information), take note of it, compare the information to a posted grade sheet (listing grades solely by student ID number), and immediately determine the student's grade – information that would otherwise be FERPA-protected.

Because of this, we strongly urge the ED to give serious consideration to the potential for nonconsensual disclosures of PII raised by this particular section of FERPA, and suggest that the exception in § 99.3 *Directory information* (c) be repealed, and (b)(2) be amended to remove the exception language, so that a student ID number would not be considered DI at all.

6. Improper Redisclosure of PII: We are very concerned that language in proposed § 99.35(d) may have serious unintended consequences. If adopted as proposed, this amendment could prohibit an LEA from permitting the SEA access to the LEA's education records for at least five years, if the Family Policy Compliance Office (FPCO) determines that the SEA was responsible for an improper redisclosure of personally identifiable information from that LEA's student data. The proposed consequence – barring the SEA's access to an LEA's education records for at least five years – appears mandatory regardless of circumstances. If imposed, such a bar would effectively prevent the SEA (and LEA) from carrying out responsibilities required under both federal and state laws.

We urge the ED to drop this proposed regulation, or alternatively, amend the regulation to allow the FPCO to impose it in limited instances, such as where there is gross negligence or repeated instances of improper disclosure.

Thank you again for the opportunity to comment on the proposed regulations. Should you have questions or like additional information, please contact me at (802) 828-5100, or by e-mail: amy.whitehorne@state.vt.us.

Sincerely,

/s/ Amy L. Whitehorne
Staff Attorney and Records Officer

PUBLIC SUBMISSION

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Received: May 23, 2011
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Posted: May 23, 2011
Category: Other
Tracking No. 80e305c9
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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-0002-0096
Comment on FR Doc # 2011-08205

Submitter Information

Name: Joe Tanner

General Comment

The NEA needs to be defunded and abolished!!There is no mandate in the United States Constitution for a central control lof educatoion!

Less government means more freedom.

Education levels have decreased since it's creation and that is a fact!

Get the elites out of our kids classrooms.

PUBLIC SUBMISSION

As of: March 27, 2012
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Posted: May 23, 2011
Category: Civil Rights
Tracking No. 80e305eb
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-0002-0097
Comment on FR Doc # 2011-08205

Submitter Information

Name: Donna Ahart
Address:
Orlando, FL,
Email: Donnaahart@yahoo.com

General Comment

Have you lost your mind? At what point are you just going to ask us to hand over our children to you.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Child advocate
Tracking No. 80e305ed
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-0002-0098
Comment on FR Doc # 2011-08205

Submitter Information

Address: United States,

General Comment

NO! Do not pass this regulation!

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Teacher
Tracking No. 80e30654
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-0002-0099
Comment on FR Doc # 2011-08205

Submitter Information

Name: Pamela Cross

Address:

Osseo, MI,

Email: pcross@hillsdale-isd.org

Organization: Hillsdale County I.S.D.

Government Agency Type: State

General Comment

I am in support of the proposed rule making for Family Educational Rights and Privacy with some comments.

1. do not add a picture of the student i.d.
2. do not add social security number to a student i.d.
3. I support the right of the parent or child to opt out.

And, how does this apply to students enrolled on online classes only and homeschoolers?

Thank you.

PUBLIC SUBMISSION

As of: March 27, 2012
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Category: PO
Tracking No. 80e30647
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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-0002-0100
Comment on FR Doc # 2011-08205

Submitter Information

Name: Tom McMillin
Address:
Rochester Hills, MI,
Email: tom_mcmillin@sbcglobal.net
Submitter's Representative: self
Organization: self
Government Agency Type: State
Government Agency: state representative

General Comment

I oppose this proposed rule and any expansion of access of student information by the Federal government or outside entities, that could lead to a loss of privacy. The attack on the freedoms of Americans must stop.

PUBLIC SUBMISSION

As of: March 27, 2012
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Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e30656
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-0002-0101
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

This legislation would violate students' privacy and I ask that it not be voted for. This would also extend the federal government's reach into the states, via the education system.

PUBLIC SUBMISSION

As of: March 27, 2012
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Posted: May 23, 2011
Category: Child advocate
Tracking No. 80e30649
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-0002-0102
Comment on FR Doc # 2011-08205

Submitter Information

Name: Adelaide Leitzel
Address:
Liberty Twp, OH,
Email: lleitzel@yahoo.com

General Comment

The proposed rule changes require extensive documentation and tracking of individual students and teachers from preschool years through college. The cost of implementing these regulations such as the mandated annual testing and reporting of annual scores present an unreasonable cost burden on already strained public school budgets and resources. The compliance costs for private schools or home schools would also be excessive. Pre-schools, often small businesses, would bear an unnecessary burden in complying with this regulation. Further, adequate data security measures are not available.

PUBLIC SUBMISSION

As of: March 27, 2012
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Posted: May 23, 2011
Category: Association/Organization
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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-0002-0103
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mark & Donna Kirkpatrick
Address:
Ada, OK,
Email: dkirkpatrick4@aol.com
Submitter's Representative: Jenni White
Organization: R.O.P.E.
Government Agency Type: State
Government Agency: Representative

General Comment

We strongly object to the invasion of privacy with these new proposed regulations and the ensuing infringement on our constitutional ly afforded parental and civil rights, via the outrageous "pumping for information" and usurping of parental autonomy of our nations children as you collect, disseminate and disperse our nations childrens' personal and private information.

PUBLIC SUBMISSION

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Posted: May 23, 2011
Category: Academic/Think Tank
Tracking No. 80e3064b
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-0002-0104
Comment on FR Doc # 2011-08205

Submitter Information

Name: David Stevens

Address:

Baltimore, MD,

Email: dstevens@ubalt.edu

Organization: Jacob France Institute, University of Baltimore

Government Agency Type: State

Government Agency: University of Baltimore

General Comment

I support the definition of an authorized representative in 99.3. I oppose adding examples of reasonable methods and urge caution in issuance of non-regulatory guidance because examples are interpreted as exclusionary by litigation-fearing organizations and individuals--examples become the list of approved methods, while all other methods are avoided. I strongly support the definition of education program. Risk of PII disclosure is not a function of the number of organizations/individuals authorized to have access to the confidential data; instead, it is a function of user awareness of the laws/regulations and shared commitment to comply with same. When the Final Rule is published the burden will fall to the ED Privacy Technical Assistance Center staff to promote awareness, and particularly the statistical practices necessary to ensure nondisclosure. I think it will be important to clarify the difference between privacy (the right or privilege not to disclose) and confidentiality (a commitment to maintain and use already obtained data in a secure manner). Those that allege higher risk from broader access have not made their case, and no one has been a strong advocate for avoidance of foregone benefits that will flow from prudent handling of confidential education program data. I encourage allowing responsible authorities in more permissive state and local cultures of information use to proceed with their research, evaluations and policy responses to the findings from these studies. The Nation will benefit from lessons learned from these state and local examples. Fear of litigation will be a strong counterforce chilling the initiatives of law-abiding education authorities and researchers that seek to advance individual and social returns on investment in education programs. Some that allege support for expenditure accountability are simultaneously seeking to prohibit collection and use of the very data needed to promote serious accountability.

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-0002-0105
Comment on FR Doc # 2011-08205

Submitter Information

Name: James Kress
Address:
Northville, MI,
Email: jimkress_35@kressworks.com
Submitter's Representative: Timothy L. 'Tim' Walberg
Organization: Concerned Private Citizen
Government Agency Type: Local
Government Agency: Concerned Private Citizen

General Comment

Changes of this magnitude should be presented to Congress – a move the Department has avoided

PUBLIC SUBMISSION

As of: March 27, 2012
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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-0002-0106
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

This amendment would be too general. This essentially allows the government to release student data to anyone it would like, and the information it extremely private. The more hands that have access to this private information, the more there is a possibility for error and violation of privacy rights of children and their parents.

I highly oppose this amendment, and am distressed, as a parent, to contemplate the ramifications if this amendment is adopted.

PUBLIC SUBMISSION

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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-0002-0107
Comment on FR Doc # 2011-08205

Submitter Information

Name: James Melvin
Address:
Bellingham, MA,

General Comment

Stupid ideas get you stupid results...just look at the American School System.....Inch by inch the nanny state cometh!!! We should abolish the Department of Education and put control back into the State and local School Districts as well as parents.

PUBLIC SUBMISSION

As of: March 27, 2012
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Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e30679
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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-0002-0108
Comment on FR Doc # 2011-08205

Submitter Information

Name: Tom Howe
Address:
Augusta, KS,
Email: tmhowe@earthlink.net
Submitter's Representative: self
Organization: self

General Comment

STOP this "government control by regulation"!! This is a gross unconstitutional overreach by this administration as it is attempting in so many other agencies. STOP IT NOW!!

PUBLIC SUBMISSION

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Category: Parent/Relative
Tracking No. 80e3067a
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-0002-0109
Comment on FR Doc # 2011-08205

Submitter Information

Name: Gregory Pfister
Address:
Dinwiddie, VA,
Email: gpfister@att.net

General Comment

No

The teachers and educators do not "own" the data as it is the ownership of the person or parents. No such abusive power should be allowed to any Government agency in a free society as man will always abuse (see court documents and history for proof).

Another reason to home school.

The Department of Education should not even exist (see US Constitution) much less have access to a persons data over their life.

PUBLIC SUBMISSION

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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-0002-0110
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

It is crystal clear that, since FERPA is statutory, the proposed sweeping changes must be codified in bills passed by Congress.

This system (laws passed by Congress, including representatives elected in votes I can participate in) is, in fact,
[MY] VOICE IN FEDERAL DECISION-MAKING.

This website does NOT constitute "my voice in Federal Decision Making."

Do not attempt an end-around Congress on these proposed fundamental changes in FERPA.

If Arne Duncan doesn't do this in the right way, how can he talk in a trustworthy way about "Data should only be shared with the right people for the right reasons?"

PUBLIC SUBMISSION

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Tracking No. 80e307a3
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-0002-0111
Comment on FR Doc # 2011-08205

Submitter Information

Name: Josh Rubin

Address:

Glenwood Springs, CO,

Email: joshua1eight@gmail.com

General Comment

Keep your federal fingers off of student records. I don't care what you intend to do with the records. You are the Federal Govt and you WILL misuse these private records and you WILL abuse it. Your intentions are always good but you ALWAYS make a huge mess out of everything. STOP.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e3067c
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-0002-0112
Comment on FR Doc # 2011-08205

Submitter Information

Name: Edward Fry
Address:
Silverdale, WA,

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

As of: March 27, 2012
Received: May 23, 2011
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Tracking No. 80e305c8
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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-0002-0113
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

This is a law/rule that needs to be approved by congress. Its hard enough for children to maintain privacy on their personal information.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Civil Rights
Tracking No. 80e307af
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-0002-0114
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

Just another power grab by the government. You folks need to stop!

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Civil Rights
Tracking No. 80e307c9
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-0002-0115
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

The premise that the federal or state governments have a right to manipulate the educational system or the work force in this country is both unconstitutional and morally outside the inherent values of our nation. The fact that these lines have already been crossed in no way justifies further abuse of the rights of individuals in the name of some vague public good measurable by predetermined statistics. Furthermore, more bureaucratic interference in education cannot possibly improve the quality of education that could otherwise be provided. Simply manipulating education in some generic way to produce desired statistical outcomes is at best self-serving, and at its worst the very antithesis of the freedoms guaranteed by our constitution. These proposed regulations are vague enough to allow any government agency with any self-determined interest access to information that parents of children attending these schools have been previously denied in the interest of personal privacy rights. I would be more impressed if I witnessed success on any level within the ill-conceived Dept. of Education, itself a travesty of human invention inflicted upon the nation in the name of centralized control. Let there be a separation between the federal government and educational mandates for the sake of us all, and for future generations. Perhaps these tactics are hailed in China. I can see why.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e307ca
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-0002-0116
Comment on FR Doc # 2011-08205

Submitter Information

Name: L Martin
Address:
Greencastle, PA,
Email: martinfam@gmail.com

General Comment

To Whom It May Concern:

I believe that the proposed changes to FERPA are too broad, allowing students' private information to be released to "any entity or individual designated by a State or local educational authority or agency". Students' information currently cannot be released without the parents' written consent to any but a few parties. This proposed change would allow the judgment to pass from the parents to bureaucrats in educational agencies. I oppose this change and believe that privacy of student records should remain in the hands of those to whom it is most important.

Sincerely,
L. Martin

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e307e7
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-0002-0117
Comment on FR Doc # 2011-08205

Submitter Information

Name: Deborah Gonzalez
Address:
Jacksonville, FL,
Email: mandrinjulingtoncreek@yahoo.com
Submitter's Representative: Ander Crenshaw
Organization: We The Moms

General Comment

As a parent and grandmother, this code modification is an egregious attempt to innocuously subjugate parental/child privacy rights. The comprehensive and tentacle like control through the Department of Labor, SCANS, and the Department of Education currently have sufficient access to data. To extend or increase the latitude of access to this data will also increase the vulnerability of the privacy of the individual. Access to student data should remain limited through authorization from either the student or parent.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e307cd
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-0002-0118
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jeanne Fries
Address:
Alta Vista, KS,

General Comment

If the purpose of these amendments is to make sure Congress' intentions as put into law with FERFA are met - then AT LEAST ASK CONGRESS if their intentions have not been met with FERPA!!!

Bring this to Congress to amend!

I DO NOT APPROVE of my children's records being accessed by ANY MORE PEOPLE! Nor do I approve of my children's records being merged with other records to determine an average! My children's records may NOT be shared without my specific written permission!

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: National Advocacy Organization
Tracking No. 80e307f3
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-0002-0119
Comment on FR Doc # 2011-08205

Submitter Information

Name: Barbara Duffield

Address:

Washington, DC,

Email: bduffield@naehcy.org

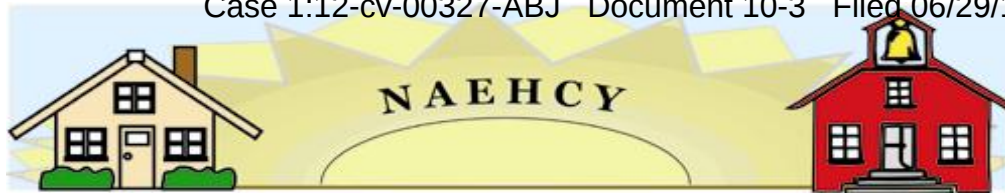
Organization: National Association for the Education of Homeless Children and Youth

General Comment

Please see attached file on behalf of the National Association for the Education of Homeless Children and Youth.

Attachments

Comment on FR Doc # 2011-08205



NATIONAL ASSOCIATION
FOR THE EDUCATION OF
HOMELESS CHILDREN
AND YOUTH

Building Futures Through Education

May 23, 2011

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

RE: Notice of Proposed Rulemaking
Family Educational Rights and Privacy Act
Docket ID: ED-2011-OM-0002

To Whom It May Concern:

Pursuant to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on April 8, 2011 (76 FR 19726; RIN 1880-AA86), the National Association for the Education of Homeless Children and Youth (NAEHCY) hereby submits comments and recommendations on proposed amendments to regulations issued under the Family Educational Rights and Privacy Act (FERPA).

Founded in 1989, NAEHCY is a national grassroots membership association serving as the voice and the social conscience for the education of children and youth in homeless situations. Tragically, homelessness among families is on the rise. In the 2008-2009 school year, 956,914 homeless children and youth were identified by public schools.¹ This represents a 41 percent increase over the previous two school years.²

Subtitle VII-B of the McKinney-Vento Homeless Assistance Act seeks to support the educational success of homeless children and youth.³ The McKinney-Vento Act requires that every local education agency (LEA) must designate a homeless liaison to meet the needs of homeless students and implement the McKinney-Vento Act within the school district.⁴ The liaison's duties include ensuring that "homeless children and youths are identified by school

¹ National Center for Homeless Education (2010). *Education for Homeless Children and Youth Program, Data Collection Summary*. Washington, DC: U.S. Department of Education.

² National Center for Homeless Education, *supra*, note 1. It is important to note that this number is not an estimate of the prevalence of child and youth homelessness. It is an underestimate, since not all school districts reported data, and the data collected represents only those children identified and enrolled in school. Finally, the number does not include preschool children.

³ 42 U.S.C. §§11431-11435; Title X, Part C of the No Child Left Behind Act. In addition, the Individuals with Disabilities Education Act, the Higher Education Act, and the Head Start Act each contain provisions to align their requirements with the McKinney-Vento Act and to meet the specific needs of children and youth experiencing homelessness. For summaries of these provisions, see: IDEA: <http://www.serve.org/nche/downloads/briefs/idea.pdf>; HEA: <http://www.naehcy.org/dl/fafsabrief.pdf>; Head Start Act: <http://www.naehcy.org/dl/headstartsum.pdf>.

⁴ 42 U.S.C. §11432(g)(1)(J)(ii).

NAEHCY offers comments and recommendations regarding the proposed amendments to the
definition of directory information in 34 CFR §99.3. In the event that the Department does not
agree with our recommendations on the definition of directory information, we offer comments
and recommendations regarding 34 CFR §99.37.

Comments and Recommendations on the Definition of Directory Information (§99.3)

FERPA permits educational agencies and institutions nonconsensually to disclose information
defined as directory information, provided that specified public notice and opt out conditions
have been met. Current regulations define directory information as information contained in an
education record of a student that would not generally be considered harmful or an invasion of
privacy if disclosed. The regulation goes on to list information encompassed by this definition,
including a student's name and address.

Unlike most students, the disclosure of a homeless student’s address generally is both harmful
and an invasion of privacy. Homeless students’ addresses generally are not known and do not
appear in public directories; in fact, most families and youth experiencing homelessness
desperately wish for their temporary address and homelessness to remain private. In the case of
homeless students, disclosing the student’s address has produced extremely harmful results:

1. Many homeless students are survivors of domestic violence. Disclosing their address to a
third party who may pass it on to an abusive adult can result in physical injury. For example, the
McKinney-Vento State Coordinator from Indiana addressed a tragic situation involving a mother
and children who had fled their abusive home. The children’s school released the family’s new
address to an aunt, who informed the abuser. The abuser went to the new home and abducted one
of the children.
2. Children have been forced from temporary housing when schools have disclosed their address
to third parties. For example, a New York family lost their housing and moved in temporarily
with relatives.⁶ When the children enrolled in school, the school district contacted the relatives’
landlord to share the address the homeless family had provided. Based on this contact, the
landlord evicted both the renters and the homeless family, creating more homeless students in the
school district. This kind of disclosure has taken place in many other school districts, resulting in
the eviction of many families.
3. Disclosure of address information has resulted in stigmatization of homeless students. For
example, an elementary school sent home a directory of all students’ names and addresses,
including homeless students. Everyone knew the address of the shelter in town, and the homeless
students were ridiculed when their peers realized they were living in the shelter.
4. Disclosure of homeless students’ address can put the family’s well-being at risk. If it becomes
known in the community that a child is living in a shelter, motel, campground, car or other
homeless situation, the family may be subjected to harassment by law enforcement, child welfare
or social services due to their homelessness. A parent may be put at risk of losing a job or
custody of his or her children.

⁵ 42 U.S.C. §11432(g)(6)(A)(i).

⁶ Nationally, 66.3% of the students identified as homeless by public schools in the 2008-2009 school year were
staying temporarily with friends or relatives. National Center for Homeless Education, *supra*, note 1.

Each of these results is disastrous for homeless children and families. FERPA's facially neutral policy on directory information has a disparate, negative impact on homeless children and youth. Further, the inappropriate release of directory information directly conflicts with the McKinney-Vento Act's requirements that SEAs and LEAs: (1) "adopt policies and practices to ensure that homeless children and youths are not stigmatized... on the basis of their status as homeless"; and (2) "remove barriers to the enrollment and retention of homeless children and youths in schools."⁷ We have received countless reports of families and youth not approaching schools for fear of violations of their privacy and the negative consequences.

Thus, in many cases disclosure of directory information under FERPA puts homeless children and families at risk and directly conflicts with schools' obligations under the McKinney-Vento Act. This conflict creates a difficult and confusing situation for school officials attempting to comply with both statutes.

To address these grave concerns for students' safety, welfare and access to school, as well as overall confidentiality, NAEHCY recommends adding a subsection (b)(3) to the definition of directory information, as follows:

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

... (b) Directory information does not include a student's—

... **(3) Address or status of homelessness, for students who meet the definition of "homeless child or youth" under section 725(2) of subtitle VII-B of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434A(2)).**

This addition would clarify that for homeless parents and eligible students, disclosing their address and homeless status should be considered harmful and an invasion of privacy. It would eliminate conflicts with the McKinney-Vento Act and clarify the implementation of both laws for schools. It would keep homeless students safe and respect their privacy. Further, since every LEA must designate a homeless liaison, whose duties include identifying homeless children and youths, all LEAs should be aware of the homeless students in its schools and tracking this data. It would not be burdensome for schools to mark homeless students in the LEA database to ensure addresses are not released.

While this addition is the clearest and surest way to protect homeless parents and students, NAEHCY offers the following comments in the alternative.

Comments and Recommendations on Directory Information Policy (§99.37)

FERPA permits an educational agency or institution to disclose directory information without meeting FERPA's written consent requirements. Current regulations require that prior to such a disclosure, the educational agency or institution provide public notice to parents and eligible students of the types of directory information that may be disclosed and the parent's or eligible student's right to opt out.

Proposed regulation §99.37(d) would clarify that an educational agency or institution may specify in the public notice it provides that disclosure of directory information will be limited to specific parties, for specific purposes, or both. It also clarifies that an educational agency or

⁷ 42 U.S.C. §11432(g)(1)(J)(i); 42 U.S.C. §11432(g)(1)(I).

institution that adopts a limited directory information policy must limit its directory information disclosures only to those parties and purposes specified in the public notice.

We support the amendment clarifying that an educational agency or institution that adopts a limited directory information policy must limit its disclosures to those parties and purposes specified in the public notice. This would help ensure that LEAs and schools do not contact landlords, employers, or other third parties to discuss a child's homeless situation. It would allow the parents of homeless students and eligible homeless students to rest assured that their privacy and safety would be protected. As noted in the NPRM, this proposed change also would provide a regulatory authority for FPCO to investigate and enforce a violation of a limited directory information policy by an educational agency or institution.

We also suggest one additional amendment to require that public notice be provided to parents of homeless students and eligible homeless students when students are identified as homeless by the LEA liaison. Although FERPA requires that parents be provided the opportunity to opt out of the release of directory information once a year, this provision is not sufficient for homeless parents. Most schools notify parents and eligible students of their rights annually, through a school handbook or other notice provided. The notice forms part of a large packet of enrollment information which a parent or student facing the extreme physical and mental stress of homelessness is very unlikely to read carefully. In addition, many homeless families do not even receive FERPA information when enrolling in school midyear. 41% of homeless children attend two different schools in a single school year, and 28% attend three or more different schools.⁸ Therefore, in the vast majority of cases, homeless parents and eligible students will not receive or simply will not read FERPA notices or reflect upon the potentially disastrous consequences of the disclosure of directory information.

To address this problem, we suggest the addition of a subsection (e) to §99.37, as follows:

§ 99.37 What conditions apply to disclosing directory information? ...

(e) An educational agency or institution may not disclose or confirm directory information regarding a student who meets the definition of "homeless child or youth" under section 725(2) of subtitle VII-B of the McKinney-Vento Homelessness Assistance Act (42 U.S.C. 11434A(2)), unless the parent of the student or the eligible student has received the public notice in paragraph (a) of this section after being identified as homeless, has had the potential consequences of the disclosure of directory information explained to him or her, and has indicated in writing his or her decision not to opt out of the disclosure.

This amendment would ensure that homeless parents and eligible students have the opportunity to make an informed decision to opt out of the disclosure of their addresses, regardless of what time of year they enroll in school and despite the stress of homelessness. While simply clarifying that homeless students' addresses and homeless status are not directory information would be much easier for schools and better for homeless parents and students, this amendment would at least go a long way toward protecting homeless students' safety and privacy.

For more information, please contact Barbara Duffield, Policy Director, National Association for the Education of Homeless Children and Youth, 202.364.7392, or bduffield@naehcy.org.

⁸ National Center on Family Homelessness (1999). *Homeless Children: America's New Outcasts*. Newton, MA: Author.

PUBLIC SUBMISSION

As of: March 27, 2012
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Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e307ed
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-0002-0120
Comment on FR Doc # 2011-08205

Submitter Information

Name: B. H.
Address:
O'Fallon, IL,
Email: jnk2011@charter.net
Government Agency Type: Federal

General Comment

The collection of computer data on students in order to categorize the American people infringes on individual freedoms of US citizens at a shocking and inappropriate level. That it is completely counter to the established free republic our Founders put forth and puts us at risk of falling into a deep and Marxists pit of despair. The abuses of this information can create destruction of imaginable horrors. Stop this. The categorizing of human beings has historically led to one group subjugating another and Marxism has been the biggest human life destroyer in all of human history.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Child advocate
Tracking No. 80e307ef
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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-0002-0121
Comment on FR Doc # 2011-08205

Submitter Information

Name: john frazier
Address:
calera, OK,
Email: fraziersr@yahoo.com
Submitter's Representative: john frazier
Organization: parent
Government Agency Type: Local
Government Agency: citizen voter

General Comment

I THINK THE GOVERNMENT ALREADY GAINS ENOUGH INFORMATION ABOUT SCHOOL STUDENTS THIS WOULD NOT BE A GOOD RULE.

PUBLIC SUBMISSION

As of: March 27, 2012
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Status: Posted
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Tracking No. 80e30800
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-0002-0122
Comment on FR Doc # 2011-08205

Submitter Information

Address: United States,
Submitter's Representative: self
Government Agency: ED

General Comment

I am opposed to this legislation. Too many people already have access to this information. The increased security risks do not warrant this bill. Proof of real need have not been shown by the DOE. This proposal must be rejected.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
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Posted: May 23, 2011
Category: Other
Tracking No. 80e30801
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-0002-0123
Comment on FR Doc # 2011-08205

Submitter Information

Name: Wayne Camara

Address:

New York, NY,

Email: wcamara@collegeboard.org

Organization: The College Board

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

May 23, 2011

Regina Miles
Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-5920

Comments re Docket ID ED-2011-OM-0002

Dear Ms. Miles:

The Research & Development department of the College Board values the spirit of the U.S. Department of Education's proposed revisions to the FERPA regulations which continue to promote the protection of sensitive student data while facilitating the robust educational research and evaluation needed to improve opportunities and outcomes for all students along the P-16 continuum.

In particular, we believe that we can work in more harmonious partnership with SEAs and LEAs to develop SLDSs and also to continue to validate our tests, assessments, and educational programs due to § 99.31 new paragraph (a)(6)(ii) in the Research Studies section which clarifies, "...that nothing in FERPA or its implementing regulations prevents a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) from entering into agreements with organizations conducting studies under § 99.31(a)(6)(i) and redisclosing PII on behalf of the educational agencies and institutions that provided the information in accordance with the requirements of § 99.33(b)." (p.26)

We would greatly value explicit clarification of the permissibility for a state education authority in one state to designate a state education authority in another state as its authorized representative to allow student data to be disclosed from one to the other. This is what we think should occur. This would be particularly valuable in the case of tracking student college attendance and performance in SLDs across states in order to improve college and career readiness initiatives for all.

We also agree that "...Congress' intent in the ARRA was to have states link data across sectors." Furthermore, the sentiment "...the potential to benefit the Nation by improving capacity to conduct analyses that will provide information needed to improve education" is also echoed by The College Board. Finally, we are in accord with Secretary Duncan that "we do not believe that the staff in the additional agencies who will have access to the data are any more likely to violate FERPA than existing users..."

Thank you for the opportunity to comment.

Respectfully submitted,



Wayne J. Camara
Vice President, Research & Development

PUBLIC SUBMISSION

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Posted: May 23, 2011
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Tracking No. 80e30804
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-0002-0124
Comment on FR Doc # 2011-08205

Submitter Information

Name: STEVEN JACKSON
Address:
BREMERTON, WA,
Email: combatoptician55@msn.com
Submitter's Representative: Representative Norm Dicks
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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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-0002-0125
Comment on FR Doc # 2011-08205

Submitter Information

Name: greg poupard
Address:
conyers, GA,
Email: poupard@earthlink.net
Submitter's Representative: n/a
Organization: n/a
Government Agency Type: Federal

General Comment

Stay away from our private information!

PUBLIC SUBMISSION

As of: March 27, 2012
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Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e30806
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-0002-0126
Comment on FR Doc # 2011-08205

Submitter Information

Name: Taylor Allred
Address:
Bountiful, UT,
Email: alldta@gmail.com

General Comment

Maintaining the privacy of student information is the primary purpose of the FERPA. Any expansion of the number of individuals and / or organizations with access to this information reduces the student's right to privacy. A student's information should be kept private with no access allowed outside the school without prior consent by the student. There is no purpose for other individuals and organizations to have access to this information.

The proposed changes result in an invasion of the individuals privacy without that individuals knowledge. If such actions were taken by a private organization they would be shut down by government agencies and open themselves up to lawsuits for allowing such an invasion. The federal and state governments should not be allowed greater latitude to invade one's privacy. This proposed increase in access to private information will inevitably result in increased abuse.

PUBLIC SUBMISSION

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Category: Parent/Relative
Tracking No. 80e30822
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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-0002-0127
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sharon Taylor

Address:

Cooper City, FL,

Email: justcamchar@netzero.net

General Comment

I strongly oppose the proposed change to FERPA. Privacy rights are non-negotiable and belong solely to the parents discretion. I encourage you to think about the children and not policy.

Respectfully,
Sharon Taylor

PUBLIC SUBMISSION

As of: March 27, 2012
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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-0002-0128
Comment on FR Doc # 2011-08205

Submitter Information

Address:

New York, NY,

Email: jreidenberg@law.fordham.edu

Submitter's Representative: Joel R. Reidenberg

Organization: The Center on Law & Information Policy, Fordham University School of Law

General Comment

The Center on Law and Information Policy of the Fordham University School of Law is 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). Our comments are provided in the attached document.

Attachments

Comment on FR Doc # 2011-08205



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

The Center on Law and Information Policy of the Fordham University School of Law (“CLIP”) is grateful for the opportunity to comment on the proposed amendments to the regulations of the Department of Education (the “Department”) implementing the Family Educational Rights and Privacy Act as published at 76 Federal Register 19726 (April 8, 2011).

About CLIP and its Research on Longitudinal Databases of Educational Records

CLIP was founded at Fordham in 2005 as an academic research center to address the emerging field of information law. Among its activities, CLIP seeks to advance solutions to legal and policy problems in the field, including information privacy law and policy, through independent, scholarly research. CLIP is staffed by an academic director, Professor Joel R. Reidenberg, an executive director, Jamela Debelak, and student research fellows.

Of particular relevance to this docket, CLIP has researched publicly available information regarding state longitudinal databases of children’s educational records from all 50 states and assessed the privacy protections for those databases. CLIP published the findings of this research in an extensive report: “Children’s Educational Records and Privacy: A Study of Elementary and Secondary School State Reporting Systems” (October 2009) available at <http://law.fordham.edu/childrensprivacy> (hereinafter “Fordham CLIP Study”).

While the Fordham CLIP Study does not challenge the desirability or policy need to create longitudinal databases of educational records, the study demonstrates that the privacy implications of these databases have not been properly addressed. The Fordham CLIP Study found that the majority of states failed to adopt and implement basic privacy protections for longitudinal databases of K-12 children. CLIP found that that the majority of longitudinal databases hold detailed information about each child that is identifiable to the individual children. The study found that most states collect excessive and intrusive information about children such the birth weight of a teen mother’s baby (e.g. Florida), social security numbers (e.g. Tennessee) lead test results (e.g. New Jersey) and the use of foul language in school (Louisiana). CLIP further found that the state databases generally did not have clear access and use rules and that a majority of the states failed to have data retention policies. Most troubling, CLIP discovered that the flow of information from local educational agencies to the respective state department of education was often not in compliance with the legal requirements of FERPA.

These privacy deficiencies are profoundly troubling and the amendments to the regulations proposed by the Department would exacerbate many of the critical deficiencies in the protection of children’s privacy that the Fordham CLIP Study identified.

The Proposed Amendments to the FERPA Regulations contradict Congressional Mandates

As demonstrated through the legislative history of FERPA, Congress has long valued the educational privacy rights of students and FERPA was designed explicitly to restrict when students' personal information could be shared. More recently, the privacy provisions of the newly passed education statutes, particularly the America Creating Opportunities in Technology, Education, and Science Act (the "COMPETES Act"), explicitly require longitudinal databases to comply fully with FERPA.¹ Statements by members of Congress further underscore that Congress seeks strong protection of educational record privacy. Indeed, in 2010, at a hearing before the House Committee on Education and Labor considering the renewal of Elementary and Secondary Education Act, Representative John Kline, then the ranking member and now chair of the Committee, stated that "[n]o conversation about educational data systems would be complete without a discussion of student privacy [and] research indicates not nearly enough is being done to safeguard our students' records."²

It is, thus, very surprising and disturbing that the Department is proposing changes to the FERPA regulations that dramatically expand the disclosure exceptions thereby authorizing the increased sharing of personally identifiable students' data without addressing significant privacy safeguards and the Congressional policy and specific legislative mandates to protect students' privacy. In essence, the changes significantly weaken privacy protection for children's educational records and contravene Congress' stated intent in FERPA, the COMPETES Act and the American Recovery and Reinvestment Act of 2009 (the "ARRA").

Impermissible expansion of "Authorized representative" proposed in §99.3

The Department proposes to redefine the term "authorized representative" to allow disclosure of educational records to individuals or entities who are not under the direct control of control of state, local or federal educational agencies and who are not performing educational audits or evaluations on behalf of state, local or federal education agencies. This new overbroad definition, in connection with the Department's proposed definition for "education program" (which is discussed below), will expand the disclosures under the audit and evaluation exception far beyond the intent and mandate of Congress and allow promiscuous data sharing that undermines accountability for privacy violations.

As the Department has made clear on several occasions, its previous definition of the term "authorized representative" was dictated by the text and legislative history of FERPA. In the 2003 Memorandum from the Deputy Secretary of Education, the Department found that "[t]he multiple references to 'officials' in paragraph (b)(3) reflect a Congressional concern that the authorized representatives of a State educational authority be under the direct control of that authority."³ In the legislative history introducing early amendments to FERPA, the bill's sponsors explained

¹ 20 U.S.C. § 9871(e)(2)

² Hearing on *How Data Can be Used to Inform Educational Outcomes* before the House Committee on Education and Labor, 111th Cong. 2nd Sess. (April 14, 2010).

³ Memorandum from William D. Hansen, Deputy Sec'y of Educ. to the Chief State Sch. Officials (Jan. 30, 2003), available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>

specifically that “[s]ection...(b)(1) of existing law restricts transfer, without the consent of parents or students, of personally identifiable information concerning a student to ... auditors from the General Accounting Office and the Department of Health, Education, and Welfare.”⁴ While these early amendments provided many of the disclosure exceptions we know today, including the audit and evaluation exception, this explanation from the legislative history demonstrates that Congress intended to prevent disclosures to other non-educational agencies. The Department recognized the “plain” meaning of this history, stating in the 2003 Memorandum that “the sponsors of FERPA did not view the concept of ‘authorized representatives’ in an expansive manner; rather, their vision was closely tied to employees and officials of, for example, the Comptroller General and the Secretary.”⁵ Until now, the Department has long followed this mandate to exclude other federal or state agencies because such agencies are not under the direct control of state educational agencies.⁶

Analogously, the Department was clear in all of its previous guidance that outside parties could be treated as “officials” for purposes of another exception only when they are performing “institutional services or functions for which the official or agency would otherwise use its own employees.”⁷ The Department previously found strong support for this position in the statutory text and history.⁸ This conformed to the clear Congressional intent for the disclosure exceptions to remain closely tied to needs of local, state and federal educational agencies. As the Department has previously noted, the requirement of a formal outsourcing relationship for purposes of the school official exception would “ensure that the...exception does not expand into a general exception to the consent requirement in FERPA that would allow disclosure any time a vendor or other outside party wants access to education records.”⁹

This new proposed definition is, thus, a significant and impermissible departure from the Congressional mandate as well as the Department’s previous position that non-educational individuals and entities must be contractors or consultants of a state educational agency in order to qualify as “authorized representatives.” Further, as a policy matter, by expanding the entities and individuals who will gain access to educational records and by allowing educational authority officials to deputize others as “authorized representatives,” the proposal undermines accountability for privacy. As the Fordham CLIP Study found, many states already fail to define clearly the access

⁴ 120 S. Con. Rec. 39862, 39863 (1974).

⁵ Memorandum from William D. Hansen, Deputy Sec’y of Educ. to the Chief State Sch. Officials (Jan. 30, 2003), available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>

⁶ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74828 (Dec. 9, 2008); Memorandum from William D. Hansen, Deputy Sec’y of Educ. to the Chief State Sch. Officials (Jan. 30, 2003), available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>

⁷ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74825 (Dec. 9, 2008).

⁸ *Id.*

⁹ *Id.*

and use authority of recipients of student data.¹⁰ This proposal, if adopted, would significantly exacerbate the problem.

The Department's explanation that the passage of the COMPETES Act and the ARRA reflects a new Congressional intent that justifies creating ever more attenuated responsibility for educational record privacy is patently wrong. As previously discussed, the COMPETES Act explicitly requires compliance with FERPA. If Congress had intended for different privacy and disclosure standards to apply to the new databases, it would have provided new authority. The Department even confirmed that Congress did not intend the COMPETES Act to change FERPA's requirements. In the Department's 2008 rulemaking (one year after the enactment of the Act), the Department found no support for the changes it now proposes, specifically stating:

"there is no other legislative history to indicate that Congress intended that FERPA be interpreted to permit education agencies and institutions, or State and local educational authorities or Federal officials and agencies listed in 99.31(a)(3), to share students' education records with non-educational State officials,"¹¹ and

"[w]e believe that any further expansion of the list of officials and entities in FERPA that may receive education records without consent of the parent or eligible student must be authorized by legislation enacted by Congress."¹²

With respect to the ARRA, the stimulus law provides additional funding for the databases encouraged by the COMPETES Act, but does not suggest any shift in Congressional intent regarding information sharing or the disclosure of student educational records. Congress' choice to rely on the pre-existing FERPA rules when enacting both the COMPETES Act and the ARRA indicate that Congress understood the term "authorized representative" as the Department had previously interpreted the term.

Finally, the Department's new interpretation of "authorized representative" stretches the meaning of the term "representative" beyond its standard use. The re-interpretation alongside the Department's new definition of the term "education program," demonstrates that authorized representatives will now be external agencies or institutions conducting independent reviews and evaluations of programs unrelated to the Department and school based education. This construction of a "representative" is a significant departure from the ordinary usage of the term. A representative is typically considered one who stands in the shoes of another or operates on behalf of another. The new representatives that the Department proposes will not be acting on behalf of or under the direction of anyone. They will be independent actors with independent concerns and interests. If Congress had intended to permit disclosures to independent entities, it would have selected a term other than "representative" to reflect that intent.

¹⁰ Fordham Center on Law and Information Policy, *Children's Educational Records and Privacy: A Study of Elementary and Secondary School State Reporting Systems* (October 2009), p. 39 available at <http://law.fordham.edu/childrensprivacy>

¹¹ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74828 (Dec. 9, 2008).

¹² *Id.*

Problematic expansion of “directory information” proposed in §99.3

The Department proposes to add student ID numbers to the list of items defined as “directory information.” While this change helps facilitate safety requirements at schools where students must wear ID badges to gain access to school facilities, the Department does not seem to have considered some of the risks associated with the public disclosure of student ID numbers.

The Fordham CLIP Study found that many states did a poor job implementing basic access and use restrictions on personally identifiable information. Some states, however, used technical architectures for their databases to anonymize student records so that the risk of disclosure of personally identifiable information would be minimized. These systems used unique IDs at the local level that were decoupled from the ID numbers used in the state longitudinal databases and state officials were barred from linking the ID number used in the database back to an individual student. Such a system allows school officials to have access to all personally identifiable information needed for instruction but would restrict the state’s access to personally identifiable information.

By seeking to include in the definition of directory information any “student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems,” the Department undermines the ability of states and local schools to preserve the anonymity of student ID numbers used in the state databases. This new, expanded definition of “directory information” would include an otherwise anonymous ID number used in a longitudinal database. The disclosure of such a number as directory information would negate the steps taken by states to protect the anonymity of the student in the state database.

Impermissible redefinition of “Education program” proposed in §99.35

The Department proposes to redefine the term “education program” to include programs run by non-educational agencies such as “early childhood education...job training, career and technical education, and adult education.” The Department states as a goal the desire to have a broad definition in order to permit local educational agencies to share personally identifiable education records with non-educational agencies and entities. The Department would, in effect, be including private college test tutoring services, workforce training programs such as courses on bartending and flooring installation, and adventure playground programs within the definition of “educational program” and thus make them eligible to receive detailed educational records from kindergarten onward without student or parental consent. This redefinition of “educational program” contradicts the Department’s enabling mandate in FERPA and would indeed result in the sharing of educational records to organizations not covered by FERPA at all.

When Congress included the term “education program” in the original statute, the meaning was quite narrow. The legislative history explicitly rejected the proposed broad definition now made by the Department, stating: “there has been some question as to whether the Amendment’s provisions should be applied to other HEW education-related programs such as Headstart or the educational research programs of the National Institute of Education. As rewritten, the limited nature of the Act’s coverage should be clear.”¹³ HEW education-related programs and NIE programs were excluded from the definition of “education program.” The Department has also previously

¹³ *Id.*

confirmed the Congressional mandate for a restricted definition and has stated that the term refers to agencies subject to FERPA and has defined the agencies as those:

to which funds have been made available under any program administered by the Secretary, if—

- (1) The educational institution provides educational services or instruction, or both, to students; or
- (2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.¹⁴

Elsewhere in FERPA, Congress explicitly tied terms relating to education to traditional elementary and secondary education programs under the authority of the Secretary. In particular, “education records” and “educational agency or institution” are both defined to refer to traditional school based education funded by the Department. The term “education records,” for example, is defined as “records...which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution.”¹⁵ Likewise, “educational agency or institution” is defined as “any public or private agency or institution which is the recipient of funds under any applicable program.”¹⁶ The legislative history for this definition provides that “by explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration.”¹⁷ Congress could not have intended to use the term “education” narrowly when referring to records or agencies and then broadly to refer to programs.

The broad expansion of “education program” would undermine the Congressional goal of limiting access to educational records to those programs directly supervised by state and federal educational agencies. FERPA was very carefully crafted to preserve confidentiality of student records and allow through exceptions the use of students’ personal information for the provision and improvement of the educational programs provided by traditional local education agencies. For example, the exceptions set forth in sections (b)(1)(A-H) of FERPA generally permit disclosures that will help in the execution, review or improvement of Department funded educational programs, such as (a) disclosures to “other schools officials” with “legitimate educational interests,”¹⁸ (b) disclosures to organizations performing studies on educational programs at the specific request of a local educational agency,¹⁹ or (c) disclosures to State agencies or the Department for the purposes of evaluating an educational program funded by the Department.²⁰

¹⁴ 34 C.F.R. § 99.1 (2008).

¹⁵ 20 U.S.C. § 1232g(a)(4)(A).

¹⁶ 20 U.S.C. § 1232g(a)(3).

¹⁷ 120 S. Con. Rec. 39862 (1974).

¹⁸ 20 U.S.C. § 1232g(b)(1)(A).

¹⁹ 20 U.S.C. § 1232g(b)(1)(F).

²⁰ 20 U.S.C. § 1232g(b)(1)(C).

The Department should be guided by this narrow focus in the legislation when it defines the term “education program.”

Furthermore, the legislative history also indicates that Congress did not intend the audit and evaluation exception to include disclosures to non-educational agencies and entities. The proponents of the bill introducing FERPA stated that “Section...(b)(1) of existing law restricts transfer, without the consent of parents or students, of personally identifiable information concerning a student to ... auditors from the General Accounting Office and the Department of Health, Education, and Welfare.”²¹ If Congress wanted educational records to be used in the audit and evaluation of non-educational agency programs it would not have sought to restrict the disclosures to those other agencies. Thus, the adoption of the proposed definition covering entities other than traditional educational agencies would contradict Congress.

Impermissible expansion of the “audit and evaluation” provision proposed in § 99.35(a)(2)

The proposed regulations would expand the “audit and evaluation” exception to allow local educational agencies to share personally identifiable information without parental consent to non-educational agencies and institutions for the evaluation of programs which are not under the authority of Department. The audit and evaluation exception provides that “[n]othing in this section shall preclude authorized representatives of (A) the Comptroller General of the United States (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs.”²² Since the passage of FERPA in 1974, this exception has been commonly understood to allow local educational agencies to share educational records with State and federal educational agencies in order to allow those agencies to evaluate Department funded and authorized educational programs. The Department now seeks to expand the exception to allow broad sharing of personally identifiable information with unlimited third parties so long as those parties can identify some type of educational services they provide.

While the Department claims that it may expand the disclosure exceptions set forth in FERPA because the COMPETES Act and the ARRA encourage the development of and provide funding for statewide P-16 educational data systems, this claim misstates the legal requirements of the statutes. The Department has failed to account for Congress’ declaration in the COMPETES Act that statewide educational data systems must comply with FERPA.²³

In the COMPETES Act, Congress authorized the award of grants to states “to establish or improve a statewide P-16 education data system,”²⁴ but it expressly conditioned those awards on, among other things, (a) compliance with FERPA and other privacy protections and (b) use of the longitudinal databases for evaluation and improvement of Department funded educational

²¹ 120 S. Con. Rec. 39862 (1974).

²² 20 U.S.C. § 1232g(b)(3).

²³ 20 U.S.C. § 9871(e)(2)

²⁴ 20 U.S.C. § 9871(c)(2).

programming.²⁵ The first condition is significant because it demonstrates that Congress considers privacy a priority in the development of longitudinal databases. In fact, the majority of the text in the COMPETES Act devoted to state databases is focused on the privacy protections and access restrictions required of the systems. In two places Congress specifically states that the databases must comply with FERPA and the statute also provides for additional privacy requirements. This focus on privacy demonstrates that Congress thought disclosures associated with the longitudinal databases should be limited and monitored carefully, not expanded.

The second condition in the COMPETES Act is also significant because it provides that the information in the longitudinal databases should be used for specific limited educational purposes. The use restriction in the statute provides that recipients of grants “limit the use of information in the statewide P-16 education data system by institutions of higher education and State or local educational agencies or institutions to the activities set forth in paragraph (1).”²⁶ The paragraph referenced provides a list of ways states can use federal funds to improve elementary and secondary education. The list includes adjusting school curricula so that students are better prepared for the future, implementing new activities to ensure coursework is rigorous and convening with various stakeholders to determine how education can be improved.²⁷ These activities demonstrate a focus on state run elementary and secondary education programs and noticeably absent are any activities or programs organized by other State agencies. Outside parties may, of course, be consulted in order to help improve educational programming, but the programs contemplated are not outside programs run by other agencies. Sharing with non-educational agencies was not authorized by Congress. In addition, the provisions in the COMPETES Act focus solely on local, state and federal educational agencies and officials. Congress never mentions use of the information by other agencies. It is clear from the text of the statute that the databases promoted in the COMPETES Act are educational databases used by educational officials for internal audits and the sharing of student records with other agencies is not expressly authorized.

In terms of the ARRA, this statute provides additional funding for statewide longitudinal databases, but does not remove or limit any of the requirements previously provided in the COMPETES Act. The ARRA is simply an allocation of funds to further support the development of the databases. Nothing in the ARRA suggests that the applicable privacy protections from FERPA as incorporated by reference in the COMPETES Act are supplanted for the databases funded by the appropriation. Similarly, nothing in the ARRA suggests that Congress intended a new set of privacy protections to apply to the longitudinal databases. If new protections were desired, Congress would have been the proper legal entity to articulate the new standards.

Under FERPA, the “audit and evaluation” exception is narrowly drawn and its expansion exceeds the Department’s legal authority. FERPA is a privacy statute that has the primary purpose of protecting the privacy and confidentiality of children’s education records. Some disclosure exceptions are built into the statute’s general prohibition on sharing, but these exceptions are narrowly tailored. An examination of language, structure and legislative history of FERPA demonstrates that the proposed changes exceed the Department’s authority.

²⁵ 20 U.S.C. § 9871(e)(2).

²⁶ 20 U.S.C § 9871(e)(2)(c)(i)(II).

²⁷ 20 U.S.C § 9871(e)(1).

FERPA starts with the fundamental rule that student educational records should not be disclosed from a school or local educational agency without parental consent. It was the intent of Congress that “the moral and legal rights of parents shall not be usurped.”²⁸ Congress began with a basic rule that parents should have the initial authority to determine when identifiable information about their children may be disclosed. Therefore, when promulgating regulations, the Department should start with the presumption that parental consent for disclosure is the preferred method and exceptions to that rule should be narrowly constructed and closely track clearly articulated Congressional intent.

Congress then built in a few carefully crafted exceptions to this blanket rule to allow some limited sharing for delivering and improving federally funded school-based education programs and for ensuring safety and security. A first category of exceptions is tied directly to the provision and improvement of the educational programs provided by traditional local education agencies. For example, the exceptions set forth in sections (b)(1)(A-H) of FERPA generally permit disclosures that will help in the execution, review or improvement of Department funded educational programs, such as (a) disclosures to “other schools officials” with “legitimate educational interests,”²⁹ (b) disclosures to organizations performing studies on educational programs at the specific request of a local educational agency,³⁰ or (c) disclosures to State agencies or the Department for the purposes of evaluating an educational program funded by the Department.³¹ Each of these is tied specifically to the provision of education services by a traditional elementary or secondary school. The second category of disclosure exceptions focuses on ensuring safety and security. These exceptions, for example, permit disclosure if it “is necessary to protect the health or safety of students or other persons”³² or permit disclosure for certain types of legal proceedings.³³

The exceptions provided in the statute reflect Congressional intent to allow some sharing when it will aid or improve federally funded elementary and secondary educational programs, but deny non-consensual sharing to other state agencies for non-traditional educational programs, social services programs or other non-educational purposes. The legislative history makes clear, for example, that the act was intended “to [apply] only to Office of Education programs and those programs delegated to the Commissioner of Education for administration.”³⁴ In addition, in crafting the exception for the audit and evaluation of education programs, Congress was “very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them.”³⁵ An expansion of the audit and evaluation exception to include disclosures to non-educational agencies

²⁸ S. CONF. REP. 93-1026, at 47 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4206, 4250.

²⁹ 20 U.S.C. § 1232g(b)(1)(A).

³⁰ 20 U.S.C. § 1232g(b)(1)(F).

³¹ 20 U.S.C. § 1232g(b)(1)(C).

³² 20 U.S.C. § 1232g(b)(1)(I).

³³ 20 U.S.C. § 1232g(b)(1)(J).

³⁴ 120 S. Con. Rec. 39862 (1974).

³⁵ S. CONF. REP. 93-1026, at 48 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4206, 4251.

for evaluations of programs that are unrelated to the provision of elementary and secondary education poses a threat to student privacy and does not reflect the intentions of Congress.

The Congressional intent to protect educational records from disclosure to external non-educational entities and agencies is also strongly reflected in each of the more recent statutes that the Department mischaracterizes to support its proposed changes.

Notwithstanding the proposed changes, the Department has acknowledged and clearly stated that “there is no provision in FERPA that allows disclosure or re-disclosure of education records, without consent, for the specific purpose of establishing and operating consolidated databases and data sharing systems, and, therefore, we are without authority to establish one in these regulations.”³⁶ The Department also commented specifically on whether disclosures could be made to non-educational agencies, stating that “there is no other legislative history to indicate that Congress intended that FERPA be interpreted to permit education agencies and institutions, or State and local educational authorities or Federal officials and agencies listed in 99.31(a)(3), to share students’ education records with non-educational State officials.”³⁷ In addition, the Department has previously recognized that it did not have the authority to enact the regulations it now proposes, stating: “We believe that any further expansion of the list of officials and entities in FERPA that may receive education records without consent of the parent or eligible student must be authorized by legislation enacted by Congress.”³⁸

Lastly, the expansion would also allow disclosures where the recipient had no explicitly authorized “audit and evaluation” purpose.³⁹ As demonstrated in the Fordham CLIP Study, the rampant failure by states to articulate the purposes for disclosure violates privacy principles. This approach, weakening the controls on “audit and evaluation” purposes, contradicts basic principles of privacy and Congressional intent.

By contrast, the Department has proposed the requirement for a written agreement that designates any authorized representative (third party) and the specified purpose for the disclosure of student information along with data deletion obligations. This is a step in the right direction. However, the proposed changes relieve data recipients of responsibility for actually implementing protections as the agreements would only have to “establish policies and procedures” to avoid unauthorized disclosures and use. Agreements for third party processing must be comprehensive and must not relieve any of the parties from strict privacy obligations.

Questionable Enforcement proposed in §99.35

The Department’s proposed changes to §99.35 create a number of risks that information may be disclosed unlawfully without providing an adequate remedy for such privacy violations. In conjunction with the proposed authorization for disclosures of personally identifiable information

³⁶ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74822 (Dec. 9, 2008).

³⁷ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74828 (Dec. 9, 2008).

³⁸ *Id.*

³⁹ 76 Fed. Reg. 19726, 19731 (Apr. 8, 2011)

to non-educational agencies and institutions for the audit and evaluation of external programs, the Department is trying to extend enforcement authority beyond its statutory mandate.

The remedies available for a violation of FERPA are significantly limited. In *Doe v. Gonzaga*, the Supreme Court made clear that there is no private right of action under FERPA.⁴⁰ The sole remedy available for a violation, therefore, is the withholding of Federal funds by the Department.⁴¹ If the Department finds there has been a violation of FERPA by a State or local educational agency, it may withhold funds from the State. This penalty is severe and, as a result, has never in the history of FERPA been used by the Department.

The Department's proposed regulation expands the sharing of personally identifiable information in a way that is risky considering the limited remedy available under FERPA. The new regulation permits outside sharing and limits penalties for improper disclosures as long as a local educational agency uses "reasonable methods" to prevent the disclosure. The "reasonable methods" requirement is vague and, without a proper enforcement mechanism, it does not adequately protect the privacy interests of students. The new regulations would allow State and local educational agencies to share personally identifiable information with external non-educational third parties as long as they use "reasonable methods" to ensure the information is protected from further disclosure. Under this proposal, there would be no FERPA violation if information was disclosed by the third party as long as the state educational agency used "reasonable methods" to limit the disclosure. The Department does not define reasonable methods and plans only to issue non-regulatory guidelines about what steps agencies should take to ensure additional disclosure is restricted. This vague standard will make violations difficult to judge. Arguably, as long as the agency takes some measures, even if they are not effective, there will be no FERPA violation and no remedy for the parties harmed by a disclosure. A poorly defined standard without an effective method of enforcement provides little incentive for local educational agencies to take privacy seriously.

The proposed regulation also creates a penalty provision for improper re-disclosures of information by third-party recipients. Agencies and organizations found to have improperly disclosed personally identifiable information will be restricted from receiving information for at least five years after the violation. This debarment remedy is not found in FERPA and the Supreme Court held in *Doe v. Gonzaga* that withholding of federal funds is the sole remedy available under FERPA.⁴² Since the Family Policy Compliance Office ("FPCO") does not have authority over the non-educational third party agencies or institutions, the FPCO has no direct way to penalize the outside parties and additionally no authority to enforce a ruling that an educational agency may not disclose information to third party who has been penalized.

Although FERPA only contains a limited enforcement remedy, the expansion of sharing as contemplated by the proposed regulations will be likely to result in significant litigation at the state level under various state rights. Security breaches and improper use of the data increase in likelihood with the centralization of educational records in longitudinal databases and wider sharing. These events will take place at the local and state levels and will be likely to involve large

⁴⁰ 563 U.S. 273 (2002).

⁴¹ 20 U.S.C. § 1232g(a)(1)(A).

⁴² 563 U.S. 273 (2002).

numbers of families like the exposure of the educational records of all the students in the Nashville, Tennessee public schools during 2009. State tort doctrines and, in some states, state constitutional rights of privacy will be available for aggrieved families to initiate litigation against schools, state agencies and those responsible for the processing of student data. The permissiveness encouraged by the proposed regulations is, thus, likely to lead to extensive litigation and privacy liability for states and their partners.

Conclusion

While the Department's initiative to address privacy in longitudinal educational databases is critically important and laudable, the issues with FERPA cannot be resolved through regulation as they go to the heart of the statutes mandate. The trade-offs between privacy and the sharing of educational records for data analysis are policy decisions that belong to Congress. The Department should be seeking legislative reform to address:

- 1) any new statutorily authorized recipients of educational records;
- 2) any new statutorily permitted purposes for disclosures; and
- 3) the creation of effective enforcement rights, powers and remedies.