

From: [Steve Winnick](#)
To: [Rose, Charlie](#); [Phillips, Nia](#); [Rosenfelt, Phil](#)
Subject: FW: FERPA NPRM April 30-2009.doc
Date: Wednesday, June 24, 2009 10:19:05 AM
Attachments: [FERPA NPRM April 30-2009.doc](#)

Charlie,

I very much enjoyed meeting with you yesterday. And Nia, it was good to meet you as well. As we discussed, attached is the draft on FERPA that I sent to Kate Ahlgren at her request. Please feel free to contact me if you have any questions on this or other issues.

Steve

From: Steve Winnick
Sent: Thursday, April 30, 2009 3:40 PM
To: Ahlgren, Kate
Cc: Aimee Guidera
Subject: FERPA NPRM April 30-2009.doc

Hi, Kate,

As requested, attached is a draft Federal Register notice proposing a small number of revised interpretations of FERPA. As I mentioned to you at the DQC Partners' meeting, I believe several of these issues might be handled through informal guidance (although OGC attorneys responsible for rule making law should be consulted on that issue). I drafted these changes as proposed amendments to the FERPA regulations for two reasons: (1) the provision on studies to improve instruction would, I think, require a regulatory change; and (2) amendments to the regulations would likely be more effective than guidance in dispelling the chilling effect that FERPA continues to have on states in developing robust state longitudinal data systems. I should also note that while I drafted this generally in Federal Register format, some formatting changes would be required, apart from any substantive and editorial changes that the Department decides to make.

The DQC Partnership reviewed this draft document and supports its substance.

Please feel free to contact me if you have any questions or otherwise would like to discuss this document. Thank you for considering these issues.

Steve Winnick

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DEPARTMENT OF EDUCATION

34 CFR Part 99

Family Educational Rights and Privacy

AGENCY: Office of Planning, Evaluation, and Policy Development, Department of Education

ACTION: Notice of proposed rulemaking

SUMMARY: The Secretary proposes a small number of revisions to regulations implementing the Family Educational Rights and Privacy Act (FERPA) under Section 444 of the General Education Provisions Act. These proposed revisions are based on a review of final amendments to FERPA regulations published December 9, 2008 ("December 9 regulation amendments"). Our review focused specifically on whether the regulation amendments properly interpreted FERPA in a manner consistent both with privacy protections for education records and with recent federal laws requiring the creation and strengthening of state longitudinal data systems to make effective use of education records in order to enhance student achievement.

DATES: We must receive your comments on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: Submit your comments . . .

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION:

Invitation to Comment: [Boilerplate language]

Background:

FERPA, which was enacted in 1974, provides parents access to the education records of their children maintained by educational agencies and institutions funded by the U.S. Department of Education and provides generally that personally identifiable information in the education records of students may not be disclosed without written parental consent. When students reach the age of 18 or enroll in postsecondary education, the rights of parents transfer to the student. The law provides a list of authorized disclosures of education records that may be made without consent,

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including disclosures for education evaluation and research studies to improve instruction.

Multiple states and education associations have indicated to the Department that FERPA over time has had a chilling effect on the development of robust state longitudinal data systems, based on overly restrictive interpretations or a lack of guidance that would seek to harmonize privacy protections for education records with legitimate educational uses of those records. The regulation amendments issued December 9, 2008, were anticipated as an opportunity to address these concerns and harmonize FERPA's privacy protections with the need to develop state longitudinal data systems to use and facilitate use of students' education records for research and evaluation needed to raise student achievement.

Subsequent to issuance of the regulation amendments, Congress enacted the American Recovery and Reinvestment Act of 2009 (ARRA), which includes significant provisions relating to state longitudinal data systems. As a condition for receiving funding under the State Fiscal Stabilization Fund enacted in Title XIV of that law, Governors must provide assurances regarding education reform efforts in their states, including an assurance that they will establish a state longitudinal data system that includes the elements required by section 6401(e)(2)(D) of the America Competes Act. These elements include a statewide system that links student-level data from pre-school through college (grade 16); a teacher identification system with the ability to match teachers to students; student-level college readiness test scores; data on student transitions from secondary education to postsecondary education, including whether students enroll in remedial coursework; and other information to address alignment and adequate preparation for success in postsecondary education. Separate provisions in Title VIII of the ARRA appropriate \$250 million for grants to support state longitudinal data systems that include postsecondary and workforce information.

Enactment of these ARRA provisions underscores the need to review FERPA regulations to ensure that they appropriately implement FERPA protections for students' education records while also enabling legitimate use of those records for research and evaluation in federally mandated data systems in order to effect education reforms and increase student achievement.

Based on our review, we believe that the December 9 regulation amendments include a number of provisions that should help to address concerns about the disconnect between FERPA interpretations and federal policies on the need for robust state data systems by providing fuller guidance on these issues and constructive answers to several FERPA issues that implicate state data systems, including:

- Permitting state education authorities to further disclose education records that they receive from educational agencies or institutions for purposes and to recipients authorized in FERPA;

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- Facilitating such redisclosures by providing that state education authorities may record these redisclosures at the time they are made; may record them by groups; and are required to send these recordations to the educational agencies or institutions from which the records were previously obtained only upon request;
- Reinterpreting FERPA-authorized disclosures for studies to improve instruction to permit disclosures for such studies initiated by research organizations, not just studies initiated by the educational agency or institution.
- Interpreting FERPA provisions authorizing disclosures to state education officials for evaluation, audit, and compliance purposes generally to permit sharing of education records between separate K-12 or P-12 and postsecondary data systems in states that maintain separate data systems for those levels of education.

However, our review indicates that there are a small number of provisions in the December 9 regulation amendments or in the preamble to those amendments that reflect an overly restrictive interpretation of FERPA and would, if not revised, continue to have a chilling effect on the development and implementation of state data systems consistent with the ARRA. Most importantly, we do not believe these provisions are needed to assure privacy protections for students' education records. Accordingly, this notice proposes to make changes in these provisions, as described below.

PROPOSED REGULATIONS

Issue: Disclosures to a Former School/LEA for Evaluation/Accountability FERPA authorizes disclosure of education records to a new school that the student seeks or intends to attend. It does not generally authorize disclosures of education records to a student's former school. Thus, for example, it has been unclear whether a postsecondary institution or data system may disclose personally identifiable information on student postsecondary performance (such as the need for remedial courses and a student's academic persistence) back to the student's former high school or school district for evaluation or accountability purposes.

The ARRA requires all states, as a condition to receiving funds under the State Fiscal Stabilization Fund, to take steps to develop and implement college and career ready standards for their secondary schools and local educational agencies. Many states were moving to adopt such standards, even prior to enactment of the ARRA. The provision of postsecondary education records to high schools and local educational agencies may be vital in measuring school and district performance under these standards and in evaluating specific programs and supports in preparing students for postsecondary education. While some of these data can be usefully provided in aggregate or de-identified form, disclosures of personally identifiable data to the high school or local educational agency are needed in order to link the data to the high school's or local educational agency's own education records in order to evaluate

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particular programs and supports and to measure the effectiveness of different levels of and approaches to college preparation. There may be similar needs to disclose education records to a student's former school for evaluation purposes at other levels of education, including disclosures to a student's former pre-school program or elementary school (in those cases where a student may no longer be enrolled in the same educational agency).

December 9 Regulation Amendments: The preamble to the regulation amendments includes language that purports to rule out such disclosures. It includes some ambiguous language that may be read to suggest that state law may be revised to confer evaluation authority on a student's former district or school, but it strongly discourages this option.

Proposed Regulations: The Secretary proposes to revise §99.31(a)(3) of the regulations to clarify that the authority in FERPA to disclose education records to local educational officials for the purpose of evaluating state and federally-supported education programs includes disclosures to a student's former public educational agency or institution for the purpose of evaluating the educational agency or institution or holding it accountable based on the performance of its former students. This change would apply to disclosures for these specified purposes by postsecondary institutions or postsecondary data systems to a student's former public secondary school or local educational agency, and it would also apply to disclosures by an elementary school to a public pre-school program formerly attended by the student, as well as to disclosures by an elementary or secondary school to a public elementary or secondary school in a separate local educational agency previously attended by the student. It would not apply to disclosures to private educational institutions for purposes of their evaluation, given the statutory limit regarding recipients of these disclosures to "local educational officials," which we interpret to refer to public officials. The Secretary believes that these disclosures are authorized under a reasonable interpretation of the subject FERPA provisions that permit disclosures to state and local educational officials for evaluation purposes.

Issue: Research Studies: Subsection (b)(1)(F) of FERPA permits disclosures of education records to organizations conducting studies to improve instruction "for, or on behalf of," educational agencies or institutions. In the past, the Department informally interpreted this authorized disclosure narrowly to refer only to studies initiated by an educational agency or institution, not to studies initiated by the research organization, and also took the position that a state educational agency, in any event, could not use this provision to disclose data to a research organization.

December 9 Regulation Amendments: The regulation amendments interpret the statutory language that a study be "for or on behalf of" an educational agency or institution to be met if the educational agency or institution enters a written agreement with the research organization with specified provisions that limit use of the records to authorized purposes specified in the agreement and provide for return

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or destruction of the record when no longer needed for the study. This is a step forward in authorizing use of education records for studies to raise achievement levels.

The problem is that current FERPA regulations separately define "educational agency or institution" to refer to a school, postsecondary institution, or local educational agency, not a state educational agency. The preamble to the December 9 regulation amendments indicates that a state may enter such an agreement if it has authority under state law to enter agreements for local educational agencies or postsecondary institutions. This interpretation may present a barrier in many states and is much narrower than a literal reading of the statute to mean simply that the study must be for the benefit of schools, institutions of higher education, or local educational agencies. Indeed, the statutory language refers to studies for or on behalf of educational agencies or institutions in the plural, which may be read to suggest that the study may be for the benefit of multiple schools and educational agencies, not simply the particular educational agency or institution that discloses the education record. State educational agencies and state higher education agencies typically have as part of their role and authority performing and supporting research and evaluation for the benefit of multiple educational agencies and institutions in their state. We believe accommodating that role, by permitting state education authorities to enter agreements for studies to improve instruction for the benefit of educational agencies or institutions in their state - and disclosing state-level education records for use in those studies - falls squarely within the authorized disclosure in FERPA.

The preamble to the December 9 regulation amendments further encouraged states, in lieu of using the studies disclosure provision, to rely on the separate state evaluation provisions, which permit disclosure of education records to state education officials or their authorized representatives. However, the evaluation provisions contemplate direct contractual control of the outside organization and of the evaluation by the state, which greatly narrows circumstances where the state may disclose education records to a research organization.

Proposed Regulations: The Secretary proposes to amend §99.31(a)(6) of the regulations to permit state education agencies to enter agreements with research organizations for studies to improve instruction (and disclose education records under the agreement) for the benefit of educational agencies and institutions in their state, subject to safeguards in the agreement to protect the confidentiality of the records. This revision is consistent with the statute and with the role of state education agencies to support research and evaluation for the benefit of schools and LEAs in their states. State commitment and capacity to ensure and monitor proper use of education records for research studies, including the execution and monitoring of agreements for studies, should be no less than that of local educational agencies, schools, and institutions of higher education. Therefore, the proposed change should not diminish privacy protections for education records.

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Issue: General Authority of State Longitudinal Data Systems to Rediscover Education Records: Sharing Data Between P- (or K-)12 and Postsecondary Data Systems. Although prior FERPA regulations authorized a recipient of an authorized disclosure of education records to make further disclosures to other recipients (if the purpose and recipient of the further disclosure came within an authorized disclosure in the law), those provisions did not apply to further disclosures by a state education agency. In effect, a state longitudinal data system could disclose education records only to its own employees or contractors. Disclosures between separate P- (or K-)12 and postsecondary state data systems would not be permitted.

December 9 Regulation Amendments: The December 9 regulation amendments clearly permit state education agencies to further disclose education records that they receive from educational agencies or institutions to other authorized recipients, including separate state data systems at different levels of education. The problem is that the preamble to the regulation amendments includes language suggesting that with regard to disclosures between separate P-12 and postsecondary data systems for evaluation or audit purposes, the postsecondary data system may disclose education records to the P-12 system only if the P-12 system has authority to evaluate or audit postsecondary programs (and vice versa). That view is not supported by FERPA or the terms of the FERPA regulations. There is nothing in the law or regulations that limits disclosures of education records to state education authorities for evaluation purposes to evaluations of the specific level of education from which the records are derived.

Further, the subject statement in the preamble to the regulation amendments would frustrate a principal evaluation purpose for disclosing education records from a postsecondary institution or data system to a P-12 data system; namely, to determine if high schools and local educational agencies effectively prepared their graduates to enroll, persist, and succeed in postsecondary education. As explained above, the provision of postsecondary student data to P-12 data systems may be vital in evaluating whether P-12 schools effectively prepared students for college, consistent with standards in the ARRA.

Proposed Regulations: The Secretary proposes to amend §99.35(a)(2) of the regulations to clarify that nothing in the law or these regulations requires that an education agency or official that receives an education record for an audit, evaluation, compliance, or enforcement activity must have authority to conduct that activity at the specific level of education of the educational agency or institution or data system from which the record was obtained or at the specific level of education that is the subject of the education record. Rather, the education agency or official simply must have authority to conduct the evaluation, audit, or compliance activity, consistent with its purposes, at whatever educational level it is designed to provide analysis. This clarification has no negative effects on privacy protections for education records.

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Issue: Disclosures to Workforce and Social Service Agencies FERPA does not generally authorize disclosures of education records to non-education state agencies, such as workforce and social service agencies, for purposes served by those agencies; for example, to evaluate or strengthen outcomes of workforce or social services. A statutory amendment to FERPA would be required to permit disclosures for these purposes. In addition, the Department's position since 2003 has been that state education agencies cannot, for the purpose of evaluating, auditing, or conducting compliance activities related to education programs, disclose education records to state labor departments (or presumably to other non-education state agencies) because they do not have direct control of these other agencies and therefore cannot regard them as their representatives. (Memorandum from William D. Hansen, Deputy Secretary of Education, to state officials, January 30, 2003) To comply with this interpretation, states that wanted to link education and employment data for the purpose of evaluating education programs or informing education policy-making have had to do so by providing personally identifiable workforce or social services data to the state education agency.

December 9 Regulation Amendments: In response to public comments on this issue, the preamble to the regulation amendments expressly declined to revise the Department's position that FERPA does not authorize disclosures of education records to non-education state agencies for the purpose of evaluating education programs.

Particularly in light of statutory provisions in the ARRA that appropriate significant federal funds to link education and workforce data, it is important that the Department revisit its interpretation of FERPA to proscribe disclosures of education records by state education authorities to state agencies responsible for workforce data in order to link those data for the purpose of evaluating education programs. Based on our review, we do not believe that the Department's current position is mandated by FERPA. Nor do we do believe that state education agencies may never have the same level of control over another state agency in using and analyzing data for education evaluation purposes that they have over private contractors. Just as the regulation amendments and consistent informal interpretation by the Department have permitted state education authorities to use private contractors as their authorized representatives to review and analyze education records for evaluation, audit, and compliance purposes, other state agencies may perform these services for the state education agency.

FERPA does not prescribe which agencies or organizations may serve as an authorized representative of the state education agency, or whether that representative is a public or private agency or official. Rather, the pertinent FERPA questions are for what purpose the education record is used, and whether it is protected from further disclosure or non-authorized use. Those questions need to be determined on a case by case basis, not as a uniform, irrebuttable presumption that non-education state agencies may not perform this function. In order for a state workforce or labor department to receive disclosures to link education and workforce data for the

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purpose of evaluating, auditing, or ensuring compliance for education programs, just as is the case for private contractors, there need to be controls to ensure that the information is used only for this purpose and is not further disclosed. Those safeguards may be embodied in state laws or regulations or in agreements or MOUs between the education and workforce or other agency.

It is equally important that states have flexibility to lodge state data functions across multiple functions in a common state data system, such as a data warehouse administered in the Governor's office or in state legislative unit, as has been done or is being studied in a number of states. There is nothing in FERPA that constrains these kinds of state administrative choices as to how to manage their data functions, so long as there are firewalls that protect education records and ensure they are used and disclosed only as permitted in FERPA.

The Secretary recognizes that many states have effectively met this challenge by disclosing workforce or other data from other agencies to the education agency to make appropriate links and then providing de-identified, aggregate data needed by non-education agencies to evaluate or strengthen their non-education programs. We support this approach, but we believe FERPA also permits alternative approaches that do not undermine privacy protections for the records. Given the importance of data as a foundation for education reform and the costs and practical challenges of devising effective data systems in each state, it is important that states have some flexibility, consistent with privacy protections, in how data are stored and linked. Subject to the prescribed safeguards, the proposed change does not affect privacy protections for education records.

Proposed Regulations: The Secretary proposes to revise §99.35(a) of the regulations to clarify that non-education state agencies may serve as authorized representatives of state education agencies in receiving disclosures of education records for the purposes of evaluating, auditing, and compliance activities under state and federally-supported education programs, provided that state laws or regulations or agreements between the agencies protect the data from further disclosures or other uses and maintain oversight in the state education agency of the use of the education records by other state agencies.

Executive Order 12866

Summary of Costs and Benefits:

Regulatory Flexibility Act Certification:

Federalism:

Paperwork Reduction Act of 1995:

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Intergovernmental Review:

Assessment of Educational Impact:

Electronic Access to this Document:

List of Subjects in 34 CFR Part 99:

Dated:

Arne Duncan
Secretary of Education

For the reasons discussed in the preamble, the Secretary proposes to amend part 99 of Title 34 of the Code of Federal Regulations as follows:

PART 99 - FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. Section 99.31(a)(3) is amended by—

--redesignating clauses (i), (ii), (iii), and (iv) as clause (i) (A), (B), (C), and (D), respectively, and

--by adding a new clause (ii), reading as follows:

(ii) As used in this subparagraph, "local educational authorities" include officials and employees of public educational agencies and institutions to whom education records of their former students may be disclosed for the purpose of evaluating the educational agency or institution or holding it accountable based on the performance of their former students.

2. Section 99.31(a)(6) is amended by adding a new clause (iv), reading as follows:

A state education agency may enter an agreement under this subparagraph for a study or studies for the benefit of educational agencies and institutions in its state and disclose education records under the agreement, subject to the provisions of this subparagraph.

3. Section 99.35(a)(2) is amended by redesignating subparagraph (2) as subparagraph (2)(i) and by adding a new subparagraph (2)(ii), reading as follows:

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(2)(ii) An agency's authority to conduct an audit, evaluation, or compliance activity under this section is determined with reference to the purpose and scope of that activity, not according to the specific level of education of the educational agency or institution or data system from which the record was obtained or the specific level of education that is the subject of the education record.

4. Section 99.35 is amended by adding a new paragraph (a)(3), reading as follows:

(a)(3) For purposes of this section, "authorized representatives" may include officials or employees, as well as private contractors, of non-education state agencies, provided that state laws or regulations or agreements between the education and non-education agencies require the education records to be used only for evaluation, audit, or compliance activities related to federal or state supported education programs; protect the data from further disclosures or other uses, except as authorized by paragraph (b)(1); and maintain oversight in the state education agency of the use of the education records by the non-education state agency or contractor.