

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State Agency (Other)
Tracking No. 80e3085d
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-0002-0129
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mari Presley

Address:

Tallahassee,

Email: mari.presley@fldoe.org

Submitter's Representative: Mari M. Presley, Assistant General Counsel

Organization: Florida Department of Education

Government Agency Type: State

Government Agency: Florida Department of Education

General Comment

Please see attachment.

Attachments

Comment on FR Doc # 2011-08205

FLORIDA DEPARTMENT OF EDUCATION



STATE BOARD OF EDUCATION

KATHLEEN SHANAHAN, Chair
ROBERTO MARTÍNEZ, Vice Chair

Members

GARY CHARTRAND
DR. AKSHAY DESAI
MARK KAPLAN
JOHN R. PADGET

Dr. Eric J. Smith
Commissioner of Education



May 23, 2011

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

Re: Comments on Proposed FERPA Regulations

Dear Ms. Miles:

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

In general, we are supportive of the proposed changes to the FERPA regulations given that they address obstacles to state agencies in the effective use of longitudinal data systems to improve public education. The Florida Department of Education does have two specific comments with recommendations, as follows.

s. 99.3 Definitions

Under s. 99.31(a)(3) disclosure of student records is authorized without consent to "authorized representatives" of "state and local educational authorities." The proposed rules define "authorized representatives," but still do not define "state and local educational authorities." It would be helpful if "state and local educational authorities" was defined, and the Florida Department of Education recommends that a definition be added.

OFFICE OF THE GENERAL COUNSEL

325 W. GAINES STREET • SUITE 1244 • TALLAHASSEE, FL 32399-0400 • (850) 245-0442 • www.fldoe.org

AR 0260

Ms. Regina Miles
U.S. Department of Education
May 23, 2011
Page 2

s. 99.35(a)(2) Disclosures to authorized representatives

The proposed rules revise s. 99.35(a)(2) to specify that a state agency is required to ensure that its authorized representatives only use disclosed student information for authorized purposes. The proposed language appears to unintentionally limit those authorized purposes. The current language relating to authorized purposes is found in s. 99.35(a)(1), as follows, "[the authorized representative]...may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs." There are no proposed changes to s. 99.35(a)(1). In contrast to the language of (a)(1), according to the proposed language in (a)(2), the SEA must ensure that its authorized representative uses the records "only to carry out an audit, evaluation, or an activity for the purpose of enforcement of, or ensuring compliance with, Federal legal requirements related to Federal or State supported education programs." Under this language, it would appear that the audit or evaluation must relate to Federal legal requirements. The Florida Department of Education recommends that the language of (a)(2) track the language of (a)(1).

Thank you for this opportunity to provide comments on the proposed regulations.

Sincerely,



Mari M. Presley
Assistant General Counsel

As of: March 27, 2012 Received: May 23, 2011 Status: Posted Posted: May 23, 2011 Category: Institution of Higher Education Tracking No. 80e30876 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-0002-0130
Comment on FR Doc # 2011-08205

Submitter Information

Name: Celeste Alexander
Address:
Austin, TX,
Email: ceeleste.alexander@austin.utexas.edu
Government Agency Type: State

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, SW.
Washington, DC 20202
Family Educational Rights and Privacy Act
Docket ID ED-2011-OM-0002



Dear Ms. Miles,

The Texas Education Research Center (TERC) would like to thank the Department of Education for this opportunity to comment on the proposed regulations implementing changes in the Family Educational Rights and Privacy Act (FERPA) published in the Notice of Proposed Rulemaking in the April 8, 2011 Federal Register. In 2006, the 79th Texas Legislature, 3rd Called Session, authorized the creation of three ERCs. The purpose of the three state-sponsored ERCs is to conduct research that benefits education in Texas.

After receiving guidance in 2008 from the Department of Education Family Policy Compliance Office, Director, LeRoy Rooker, the ERCs were launched. *Interagency Cooperation Contracts* were written and signed by two State agencies, the Texas Education Agency (TEA) and Texas Higher Education Coordinating Board (THECB), and each institution of Texas public higher education where the three ERCs reside. The ERCs have received and maintain de-identified data that connects three main State longitudinal data bases from PK-12 education, higher education, and workforce.

The ERCs are governed by the Joint Advisory Board (JAB), which is co-chaired by the Commissioner of Education from the TEA and the Commissioner of the THECB. The JAB makes policy decisions regarding the operation of the ERCs and reviews all applications for the use of ERC resources for research.

Upon submission and approval of a research project by the JAB, researchers are granted access to data located on secure servers at each of the ERCs. Research is conducted for a designated period of time during which interim and final research results are reviewed to ensure the protection of personally identifiable information. Procedures to protect personally identifiable information include the recommended practices such as suppression, top and bottom coding of values at the ends of distribution, and limiting the amount of detail reported for the underlying counts. All research products (papers, PowerPoint presentations, proposals, etc.) that use ERC data must be compliant with FERPA requirements. When a research project terminates, researcher access to the ERC data is rescinded. All pertinent data in the project's workspace is retained for three months and then destroyed.

Overall, the directors of the TERCs believe the proposed changes are beneficial the effective use of statewide longitudinal data systems (SLDS) as envisioned in the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act (COMPETES Act). We have specific comments regarding some proposals that would affect the way the ERCs conduct research.

The new § 99.31 (a)(6) is a good addition because agencies and institutions tend to interpret these provisions too narrowly.

In § 99.31 (a)(6)(i), the “on behalf of” to include a broader array of studies which the educational agency or institution certifies as in their interest.

In § 99.31 (a)(6)(i)(C), the term “improve instruction” should be broadened to “improve learning and instruction, either directly or indirectly.”

In § 99.35 (a)(1), the term “audit or evaluation” could limit use of data for studies related to the educational learning, instruction, and programs.

In § 99.35 (a)(2), the term “audit, evaluation, or compliance or enforcement” could limit use of data for studies related to the educational learning, instruction, and programs.

The term “to use reasonable methods” is too vague. Some guidance such as requiring an annual security audit, written compliance reporting, and/or site visits could help clarify the amount of oversight thought to be appropriate.

We understand the intent of the term *redisclosure* of PII, however, with the approval of the JAB, the ERCs technically *rediscloses* data that resides on the secure server of each ERC to each new researcher or evaluator for approved projects.

Reference is made several times to destruction of data. In our situation we maintain a set of de-identified longitudinal data, so it is technically not destroyed after each project. The individual researcher or evaluator created files are destroyed, but not the longitudinal database residing at each ERC. This could be alleviated by additions to the rules discuss that the location of the hosted data. In other words, as long as security of PII is in place, than the location of the data is not an issue under FERPA. We would add § 99.35 (b)(3) “May be maintained at a location that is not the State or local educational authority.”

Thank you for the opportunity to comment on the U.S. Department of Education’s proposed amendments to the regulations governing the FERPA. If I can be of further assistance please feel free to contact me.

Sincerely,



Celeste Alexander, Ph.D.
Associate Director, Education Research Center
The University of Texas at Austin
Department of Educational Administration, SZB 310
Austin, TX 78712

celeste.alexander@austin.utexas.edu

W) 512-471-4528

Fax) 512-471-5975

www.utaustinerc.org

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e30862
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-0002-0131
Comment on FR Doc # 2011-08205

Submitter Information

Name: John Perkowski
Address:
Parkville, MO,
Email: johnwperkowski@rocketmail.com

General Comment

With the rules proposed,

- 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

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State Agency (Other)
Tracking No. 80e30863
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-0002-0132
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Schmidt

Address:

Olympia, WA,

Email: jim.schmidt@ofm.wa.gov

Submitter's Representative: Melissa Beard

Government Agency Type: State

Government Agency: Office of Financial Management-Education Research and Data Center

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

To: Department of Education

From: Education Research and Data Center, Washington State

Re: NPRM for FERPA regulations; ED-2011-OM-0002-0001

Thank you for this opportunity to comment on your proposed changes to the Family Educational Rights and Privacy Act (FERPA). In Washington State, the Education Research and Data Center (ERDC) was established by the Legislature (RCW 43.41.400) to conduct collaborative analyses of education issues across the entire education system. Our partners in this endeavor include early learning, K-12, higher education, and employment agencies. As a recognized education authority in the state, we receive and link student data from our partner agencies for analysis and research purposes. In addition, in 2010, ERDC was awarded an American Recovery and Reinvestment Act (ARRA) Statewide Longitudinal Data System (SLDS) grant to build a data warehouse that will assist in education analyses and research that can inform education improvement for students in Washington.

It is ERDC's position that personally identifiable information should be shared only in rare cases.

The proposed changes assist ERDC in doing P-20/workforce work, however; ERDC intends to make it clear that people who request personally identifiable information (PII) need to present a compelling reason. PII is only required for matching purposes. In the majority of cases, a de-identified or anonymized data set is sufficient for research or analyses.

Disclosure to education authorities in other states needs clarification.

ERDC participates in the Western Interstate Commission for Higher Education (WICHE) project, funded by the Bill and Melinda Gates Foundation; that is exploring how a multi-state longitudinal education and workforce data exchange can work. FERPA is clear that education authorities can share data with each other; however, it would be helpful to know if the same can be said for sharing with education authorities in other states. Clarification on this point would assist us greatly in creating processes to enable analysis of education and workforce patterns between states.

Thank you again for this opportunity to comment on proposed changes to FERPA. We appreciate your efforts in protecting the privacy of students and making this data available to those who need it to improve programs.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Other
Tracking No. 80e30885
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-0002-0133
Comment on FR Doc # 2011-08205

Submitter Information

Name: Greg Nadeau
Address:
Boston, MA,
Email: gnadeau@pcgus.com
Organization: Public Consulting Group

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

May 23, 2011

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

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

Dear Ms. Miles,

This letter is submitted to comment on the U.S. Department of Education’s (ED) proposed regulations applicable to the Family Educational Rights and Privacy Act (FERPA), as published in the April 8, 2011.

We applaud the general direction of the proposed regulations and enthusiastically support the regulation’s leveraging the value of education focused data to support the generation of maturing policies, best practices and quality solutions. One of the tremendous opportunities resulting from these proposed regulations is the increased utility of data as an evaluative instrument for education programs, educators, learner’s progress and all entities that support the development of learner’s into fulfilled, productive adults. In that light, with respect to using student performance data as a key element of evaluating educators we urge ED to further clarify the obligation and restrictions of education agencies related to use of student growth scores to calculate ‘teacher effect’ as part of staff evaluations.

In short, because educator evaluative instruments need to include the information necessary to understand the effect of an educator’s work with each learner, and these data needs to be available to bring clarity to acknowledgement and improvement strategies, we believe that a teacher evaluated using growth scores will need to be able to access student-level data for students no longer enrolled in classes in which the teacher leads. Growth calculations require some time delay such that growth measured on a spring administered exam are typically not available until a subsequent year. When this data is used as part of a teacher evaluation system, teachers the proposed regulations should make clear that such access is consistent with FERPA.


As an example:

1. A teacher named Kerri is teaching 7th grade English Language Arts in a Massachusetts public school. Her students take the Massachusetts Comprehensive Assessment System (MCAS) exam each May.
2. Student growth scores comparing these scaled scores with statewide scaled scores from the same cohort the previous year in 6th grade and up to two additional prior years are calculated over the summer and would be made available early in the Fall when Kerri’s students have already progressed to 8th grade.
3. If Kerri is to be evaluated based at least in part on these aggregate scores, she would reasonably have an expectation to see the individual student scores that make up the distribution of the aggregate value.

While accessing student growth data from current 8th graders is essential to using this data for staff evaluation, this access does not necessarily extend to new data accumulated on these same students as part of their 8th grade and future education. Data systems and staff evaluation processes will need to navigate this complex environment. We are recommending that ED's final regulations provide clear guidance on this matter.

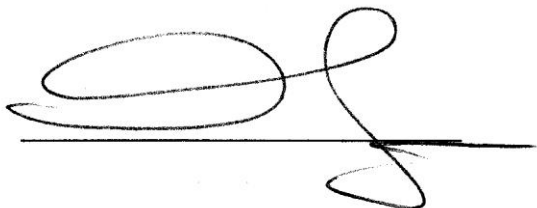
Thank you for your consideration.

Sincerely,



Greg Nadeau

Manager, Public Consulting Group
Former CTO, Massachusetts Department of Education



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

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e3087a
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-0002-0134
Comment on FR Doc # 2011-08205

Submitter Information

Name: Thomas Van Pelt
Address:
Stuarts Draft, VA,

General Comment

I strenuously object to this change in FERPA. This smacks of big brother and is nothing more than another power grab by the Federal Government to control its populace. Leave FERPA alone and let us keep our privacy. We have a President who wants information about citizens but won't reveal his college records. Why? Stop this nonsense.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Association/Organization
Tracking No. 80e3087b
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-0002-0135
Comment on FR Doc # 2011-08205

Submitter Information

Name: Bruce Nicholson

Address:

Washington, DC, DC,

Email: bruce.nicholson@american.bar.org

Submitter's Representative: Bruce Nicholson, Legislative Counsel

Organization: American Bar Association

Government Agency Type: Federal

Government Agency: ED

General Comment

Please accept the uploaded comments submitted on behalf of the American Bar Association for consideration regarding the Proposed Rule under the Family Educational Rights and Privacy Act (Document ID ED-2011-0002-0001). Thank you, Bruce Nicholson, Legislative Counsel

Attachments

Comment on FR Doc # 2011-08205

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Potomac Center Plaza, room 5126
Washington, D.C. 20202-2641

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

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

Submitted By

American Bar Association

May 2011

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

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

The ABA has adopted specific policy with regard to the education needs and outcomes for children in out-of-home care. In August 2004, the ABA House of Delegates approved a policy resolution supporting federal legislative and administrative action to assure uninterrupted educational access for children and youth in foster care, to increase school

continuity, and to ensure appropriate education services are provided for both children in general and special education. A comprehensive resolution was approved in August 2005 related to implementation of the 2004 Pew Commission Report on Children in Foster Care. It urges support for improvements in data collection and sharing among child welfare and education agencies, among others. In 2007, the ABA approved policy related to youth transitioning out of care including recommendations to: 1) mandate the maintenance, appropriate sharing, and timely transfer of all necessary education records relating to school progress, attendance and placement by all agencies, including providing a copy of records to transitioning youth; and 2) clarifying the Family Educational Rights and Privacy Act as it pertains to sharing health and education information among agencies, judges and advocates involved with the care and education of and legal proceedings involving foster youth.

OVERVIEW

The Achievement Gap

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

We know some of the specific barriers facing youth in care – high rates of school mobility; delays in school enrollment; inappropriate school placements; lack of remedial support; failure to transfer full course credits; and difficulties accessing special education services.⁴ We also know that some of these particular challenges are exacerbated and sometimes created by the inability of child welfare agencies and local educational agencies to access and share education records and data at a state or local level as well as the inability of foster parents, unaccompanied youth, surrogate parents and caseworkers to access education records at an individual level. For example, delays in school

¹National Working Group on Foster Care and Education statistics factsheet at http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National_EdFactSheet_2008.pdf.

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

³Burley, M. (2009). *Foster Care to College Partnership: Evaluation of education outcomes for foster youth*. Washington State Institute for Public Policy. Retrieved December 13, 2010 from <http://www.wsipp.wa.gov/rptfiles/09-12-3901.pdf>.

⁴National Working Group on Foster Care and Education statistics factsheet at http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National_EdFactSheet_2008.pdf.

enrollment for this highly mobile population often occur when a child's initial entry into foster care or a subsequent placement change involves changing schools.⁵

These delays are often caused by the failure to transfer records in a timely manner⁶ - which often results from confusion about, or barriers created by FERPA. Delays in school enrollment negatively impact students in many significant ways such as causing children to fall behind academically, forcing students to repeat courses previously taken and undermining future attendance. A caseworker's inability to access education records also contributes to inappropriate classroom placements, and makes it more difficult to evaluate school stability issues or identify and address special education needs.⁷

A Unique Situation

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

It is also important to recognize that these children most often enter foster care abruptly. They are placed with an agency that lacks prior knowledge of the child's background or educational needs. And yet, it is the caseworker who is charged with the responsibility of determining a child's new living placement and, as part of that undertaking, is specifically obligated to consider the appropriateness of the child's current educational setting, decide whether it is in the best interest of the child to remain in the same school, and whether or not to seek to immediately enroll a child in a new school with all of his or her school records. In the absence of any prior knowledge of the child which a parent would possess, the inability of a caseworker to promptly access a child's education records renders that caseworker unable to effectively make decisions in the child's best interests.

⁵ See, e.g., Smithgall, C., Jarpe-Ratner, E. & Walker, L. (2010). *Looking back, moving forward: Using integrated assessments to examine the educational experiences of children entering foster care*. Retrieved December 13, 2010 from <http://www.chapinhall.org/research/report/looking-back-moving-forward-using-integrated-assessments-examine-educational-experie> and Choice, P., D'Andrade, A., & Gunther, K. (2001). *Education for foster children: Removing barriers to academic success*. Berkeley, CA: University of California, Berkeley. School of Social Welfare. Bay Area Social Services Consortium.

⁶ See, e.g., Advocates for Children of New York, Inc. (2000). *Educational neglect: The delivery of educational services to children in New York City's foster care system*. New York: Advocates for Children and Parrish, T.C., Graczewski, C., Stewart-Teitelbaum, A., & Van Dyke, N. (2001). Policies, procedures, and practices affecting the education of children residing in group home: Final report. Sacramento, CA: American Institutes for Research.

⁷ Zetlin, A.G., Weinberg, L.A. & Shea, N.M. (2006). Seeing the whole picture: Views from diverse participants on barriers to educating foster youth. *Children and Schools*, 28(3), 165-74.

Expanding Role of Child Welfare in Addressing Educational Needs

To improve the education outcomes of children in foster care, federal law has historically placed a number of requirements on child welfare agencies related to education. Title IV-E of the Social Security Act has for a long time required child welfare agencies to maintain the child's "educational reports and records" in the family case plan.⁸ The Child and Family Service Reviews (CFSRs), federal reviews that measure how states are meeting the needs of children in the foster care system, have always included a well-being benchmark focused on meeting the educational needs of children in care as part of that review. Specifically, child welfare agencies are evaluated on whether a child's education record is included in the case plan.

However, the most significant changes to child welfare law and marked expansion of the responsibility of child welfare in addressing education issues occurred with the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections). Fostering Connections now requires significant responsibilities of child welfare agencies related to education. Child welfare agencies are mandated to, among other things: 1) ensure school stability for children in care (including immediate transfer of records when a child changes school), 2) ensure children are enrolled and attending school, and 3) consider the proximity and appropriateness of the school when making living placement decisions.⁹ Additionally, most state laws mandate that a child welfare agency to whom legal custody of a child has been given by the court has the "right and duty" to provide for the education of the child.¹⁰

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

Expanding Interagency Data Exchange and Interoperability

Additionally, states across the country have undertaken system wide efforts to share data and information to assess and improve educational outcomes for children in care through cost effective and streamlined interagency data systems. The benefits of such interoperability are well known within the Department, particularly for highly mobile students as it permits schools to better exchange data about students who move from one place to another. Interagency systems can be used to streamline, simplify, and reduce costs for federal and state data reporting requirements, easing the technical and administrative burden on reporting agencies. These efforts have been strongly supported by the Department. See <http://www.ed.gov/open/plan/digital-systems-interoperability>. However, these important efforts are often impeded by an inability to access any

⁸ 42 U.S.C.A. § 675(1)(C).

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

¹⁰ See e.g., 42 Pa. Cons. Stat. § 6357.

education data. Overall, information sharing between child welfare and education agencies is essential to ensuring each agency meets its federal and state legal obligations, and meets the educational needs of these children.

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

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

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

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

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

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

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

Specifically, the Fostering Connections Act requires child welfare agencies to provide assurances that all children eligible under Title IV-E are enrolled in and attending school.

In addition, this law requires child welfare agencies to ensure school stability for children in out of home placements by coordinating with local education agencies unless school stability is not in a child's best interest. Of course, ensuring that child welfare professionals are assessing a child's best interest, and ensuring school enrollment and attendance requires child welfare agencies to obtain information and records from education agencies.

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

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

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

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

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

evaluation, audit, or legal enforcement or compliance purposes of federal or state supported education programs.

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

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

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

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

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

We strongly support this expanded definition. This change will enable the state education agency to identify, for example, a state health and human services agency that

administers early childhood education programs, as the “authorized representative” in order to conduct an audit or evaluation of any federal or state supported early education program, such as the Head Start program.

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

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

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

COMMENT: To comply with federal and state legal requirements, and to ensure that the educational needs of children in their care are met, child welfare agencies and dependency courts must have prompt and continuing access to the education records of children in foster care. As described above, federal law currently places a number of education related requirements on child welfare agencies that require access to education records and information. Specifically, child welfare agencies must: 1) maintain the child’s educational records in the case plan;¹¹ 2) ensure school stability for children in care (including immediate transfer of records when a child changes school); 3) ensure children are enrolled and attending school, and 4) consider the proximity and appropriateness of the school when making living placement decisions.¹² Unfortunately, in many jurisdictions, child welfare agencies are denied access to the educational records of the youth they serve – limiting their ability to comply with child welfare legal requirements and address educational issues on behalf of their clients.

RECOMMENDATIONS: The goal of these two recommendations is to ensure that child welfare agencies have necessary access to education records to meet their federal and state legal responsibilities. For children under the care and responsibility of the child welfare agency, there is a clear duty to provide for their educational needs. Furthermore, because of the sensitivity of the information around child welfare cases, child welfare agencies are already bound by stringent federal and state confidentiality laws and safeguards that strictly prohibit redisclosure of information relating to a child in their care. To meet obligations imposed on child welfare agencies who are acting *in loco parentis*, they must have timely access to education records.

¹¹ 42 U.S.C.A. § 675(1)(C).

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

To meet this critical need, we suggest two recommendations. The first recommendation creates an exception so that when a child is in the custody of a child welfare agency, information relevant to the child's education can be shared with that custodial agency. The second recommendation clarifies that, for purposes of the court order exception, additional notice is not necessary for parents who are parties to a dependency case. Both of these changes are necessary to give jurisdictions flexibility as to how to permit records to be shared with child welfare agencies. In some communities, obtaining a court order to share these records with the custodial child welfare agency (as well as with other relevant parties including children's attorneys and advocates) will be a direct and efficient process. In other communities, where courts have not, will not, or cannot in a timely manner, issue such orders, the new exception to allow access to custodial child welfare agencies will be more advantageous. Each allows states and communities flexibility to determine the most appropriate option to allow child welfare agencies access to needed education records.

a) Create a new exception in regulations to allow child welfare agencies access to records:

A variety of other exceptions to parental consent already exist, including an exception for the juvenile justice system. This new regulatory exception would permit schools to allow access to educational records to child welfare agencies in those cases where the child welfare agency has care and responsibility for a student.

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests...

(17) the state or local child welfare agency with custody of a student. Redisclosure by child welfare agency shall be permitted in compliance with federal and state child welfare confidentiality laws and policies.

b) Clarify in regulations that additional notice of disclosure is not required under the existing court order exception for dependency cases because parents already have been provided notice through the court case (34 C.F.R. § 99.31(a)):

FERPA currently allows for release of education records without parental consent under a court order, as long as parents are provided advance notice of the release, and an opportunity to object. However, in child welfare cases, the parent is already a party to the case where the court order is being issued, and therefore already has the opportunity to challenge the release of school records if they so desire. To require schools to "re-notify" parents who are already on notice of the court order is redundant and serves as an unnecessary barrier. Therefore, the following clarification would prevent the need for additional notification for parents who are parties to the dependency case.

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.
(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with--

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An ex parte court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(D) A court order issued in a dependency case.

3) OBJECTIVE 3: Ensure that the special education needs of children in care are met.

COMMENT: The current regulatory definition of parent under FERPA is as follows: “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” It is estimated that between one third and one half of children in foster care need special education services compared with eleven percent of all school age children.¹³ Under the Individuals with Disabilities Education Act (“IDEA”) a child who receives special education services is represented by an “IDEA parent” throughout the special education process.¹⁴ The duties of an IDEA parent include: consenting to an evaluation to determine eligibility; participating in decisions regarding the special education services a student receives; and challenging a school district’s decision through a hearing and appeal process. In many cases, youth who are in the child welfare system are represented by “surrogate parents” who may be appointed by a school district or by a judge to serve in this capacity.¹⁵ These surrogate parents, like all other IDEA parents, must be able to obtain prompt and continued access to education records of the children and youth they represent.¹⁶

¹³ Terry L. Jackson & Eve Müller, *Foster Care and Children with Disabilities* (National Association of State Directors of Special Education, Inc., Forum, February 2005), available at http://www.nasdse.org/publications/foster_care.pdf.

¹⁴ 20 U.S.C. §1401(23).

¹⁵ 20 U.S.C. §1415.

¹⁶ Amy Levine, *Foster Youth: Dismantling Educational Challenges*, Human Rights, Fall 2005, Vol. 32, No. 4, p.5. Available at <http://www.abanet.org/irr/hr/Fall05/fosteryouth.html>.

Frequently the foster parent is the IDEA parent. Without these IDEA parents to advocate for them, they often cannot gain access to the special education services they require or the IDEA parents is forced to act as a rubber stamp for school district's proposal.¹⁷ In addition, an IDEA parent is closely involved in the student's educational life and is well-positioned to determine whether and under what circumstances disclosure of the student's education records should be permitted.

RECOMMENDATION: In light of the critical role of IDEA parents in advocating on behalf of children in care, we strongly urge that the definition of parent set forth in the FERPA regulations be amended to make explicitly clear that this includes IDEA parents. Expanding the definition of parent in this way will ensure that all IDEA parents are able to obtain prompt and continued access to the education records of the students with disabilities they represent.

a) Clarify in regulations that definition of "Parent" includes a child's IDEA parent (34 C.F.R. §99.3)

We propose that the current definition of parent be expanded to include a specific reference to an "IDEA parent" as defined under 34 C.F.R. § 300.300(a).¹⁸

"§99.3...

'Parent' means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian, or an IDEA parent as defined by 34 C.F.R. § 300.300(a) who is acting on behalf of the student."

Thank you for this opportunity to present comments to these important regulations. For further information please contact: Kathleen M. McNaught, Assistant Staff Director, Center on Children and the Law, American Bar Association, 740 15th Street, NW, Washington, DC; Phone 202.662.1966; E-mail Kathleen.McNaught@AmericanBar.org.

¹⁷ *Id.*

¹⁸ **34 C.F.R. 300.300** – [Definition of "parent" in conjunction with IDEA regulations]

"(a) Parent means--

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act."

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State agency
Tracking No. 80e3088a
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-0002-0136
Comment on FR Doc # 2011-08205

Submitter Information

Name: Tiffany Kostelec
Address:
Lansing, MI,
Email: Kostelect@michigan.gov
Organization: Michigan Department of Community Health
Government Agency Type: State

General Comment

We would like to stress the importance of linking education to the rest of the world and sharing with other entities whose work contributes to laying the foundation for school success, such as public health.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State educational agency
Tracking No. 80e3089a
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-0002-0137
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sharon Enright
Address:
Columbus, OH,
Email: sharon.enright@ode.state.oh.us
Organization: Ohio Department of Education
Government Agency Type: State
Government Agency: Ohio Department of Education

General Comment

The proposed FERPA regulations will allow greater sharing of data across sectors, such as education and workforce. This is important for career and technical education (CTE), for both accountability and program improvement purposes. Following CTE students, via data systems, from high school to postsecondary and the workforce, both in-state and out-of-state, will provide more complete data on CTE students than most states have been able to obtain.

At the same time, stringent rules on student privacy are absolutely essential.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e308a6
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-0002-0138
Comment on FR Doc # 2011-08205

Submitter Information

Name: Cramer Kenneth
Address:
Colorado Springs, CO,

General Comment

School decisions are to be made by school boards, accountable to the electorate, and responsible to the needs of the community. These proposed changes are an unwelcome intrusion into the privacy of the individual (minors at that), which exceeds the authority granted in the initial intent of FERPA.

The decisions purporting the need to access this data may already be made using currently available metrics, through currently required reporting and standardized test results.

Additional access to, and requirements to collect 'longitudinal data' exceeds the scope and mandate of the mission of public education.

Please deny this increase in authority.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e308a9
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-0002-0139
Comment on FR Doc # 2011-08205

Submitter Information

Name: Milo Jackson
Address:
UT,

General Comment

The federal government has no legitimate need for access to the private records of our children. The only purposes of such private information on a federal scale is to oppress and control us. This country is supposed to be free. Government is supposed to protect and defend our freedoms, not erode them or strip them away. Stay out of our private business and start protecting our liberty. We will not tolerate this kind of overreaching.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e308a1
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-0002-0140
Comment on FR Doc # 2011-08205

Submitter Information

Address:
Charleston, SC,

General Comment

In a time when identity theft is prevalent and young children are at a high risk of having their identities stolen the rules of the FERPA should not be changed to allow more people access to student data. The punishment for leaking the data is pretty small considering it could ruin someone's life for many years down the road. I as a parent, until my child is 18, should be the only one allowed to grant access to the private information that this act protects.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e308ac
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-0002-0141
Comment on FR Doc # 2011-08205

Submitter Information

Name: Gene Griglak
Address:
Pueblo, CO,
Email: Gene.Griglak@Atmel.com
Submitter's Representative: Scott Tipton

General Comment

There is no reason for this data to have to be passed on to the department of education. Student assesment is already well provide for. Sending data to Wahington to be manipulated is totally unneceary.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Education Consultant
Tracking No. 80e308a4
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-0002-0142
Comment on FR Doc # 2011-08205

Submitter Information

Name: Evelyn Baker
Address:
Poulsbo, WA,
Email: mydaystar@earthlink.net
Organization: Daystar Assoc.

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

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e308b9
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-0002-0143
Comment on FR Doc # 2011-08205

Submitter Information

Name: MIKE BYRNE
Address:
NEW BRAUNFELS, TX,
Email: mike_byrne@att.net

General Comment

This smacks of Cass Sunstein 'nudging' and pushing for more control and regulation. Stop govt. interference in people's lives. This proposal means less Educational Rights & Privacy. Please don't do this.

Mike Byrne

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Academic/Think Tank
Tracking No. 80e308ad
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-0002-0144
Comment on FR Doc # 2011-08205

Submitter Information

Name: Paul Sullivan
Address:
NYC,
Email: plsllvn5@gmail.com
Submitter's Representative: n/a
Organization: none
Government Agency Type: Federal
Government Agency: ED

General Comment

Strongly suggest FERPA rules for college students be changed to help detect mental illness conditions and protect against significant loss of money.

Daughter attended Pratt Institute for three semesters - grades we (her parents) saw reflected 3.5 + GPA - apparently we saw fraudulent documents as school "finally" indicated only 3 credits were achieved over three semesters. As daughter was national honor student in high school we assumed she was doing well in college. During school she did visit school nurse who prescribed various RX's for whatever it was that was bothering our daughter.

After failing out and attending local community college she continued same pattern. Finally thru joint meetings with community college advisors and visits to psychiatrists she has been diagnosed with bi-polar conditions.

Believe we would have been able to discover mental illness much sooner had the school been able to notify us rather than sit behind these privacy rules - and save us thousands of dollars.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Tribal organization
Tracking No. 80e308d1
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-0002-0145
Comment on FR Doc # 2011-08205

Submitter Information

Name: Tim Benally
Address:
Window Rock, AZ,
Email: timbenally@nndode.org
Organization: Department of Dine Education
Government Agency Type: Tribal
Government Agency: Navajo Nation

General Comment

See attached file(s)

Attachments

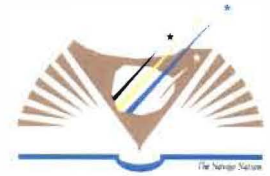
Comment on FR Doc # 2011-08205



DEPARTMENT OF DINÉ EDUCATION

THE NAVAJO NATION

P.O. Box 670 • Window Rock, Arizona 86515
PHONE: 928.871.7475 • FAX: 928.871.7474



Ben Shelly
President

Rex Lee Jim
Vice-President

May 20, 2011

Ellen Campbell
U.S. Department of Education
400 Maryland Avenue, SW.
Washington, DC 20202

Dear Mrs. Campbell,

The Navajo Nation Department of Diné Education submits the following amendment to FERPA open for public comment until May 23, 2011. In particular, we are recommending amendments to the definition of Education Agency or Institution.

Statute: The statute does not include Tribal Education Departments (TED) under 34 CFR 99.31.

Current Regulation: The current statute explains under what conditions prior consent is not required to disclose information. Under the statute, it describes (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions: (1)(i)(A) The disclosure is to others school officials, including teachers, within the agency the agency or institution whom the agency or institution has determined to have legitimate educational interests. (B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside part— (1) Performs an institutional service or function for which the agency or institution would otherwise use employees; (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and (3) Is subject to the requirements of §99.33(a) governing the use and redisclosure of personally identifiable information from education records. (ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section. (2) The disclosure is, subject to the requirements of §99.34, to officials of another school, school system, or institution of postsecondary education where the students seeks or intends to enroll, or where the student is already enrolled so long as disclosure is for purposes related to the student's enrollment or transfer. (3) The disclosure is, subject to the requirements of §99.35, to authorized representatives of— (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.

Proposed Regulation: We propose §99.31 be amended to include Tribal Education Departments such as the Navajo Nation Department of Diné Education. Sections 99.31(a)(3) and 99.35 of the FERPA regulations allow disclosure of education records to "State and local educational authorities" for audit and evaluation of State and Federal funded education programs, or for the enforcement of or compliance with Federal legal requirements that

BOARD OF EDUCATION

Jimmie C. Begay, President • Timothy Bitsilly, Vice-President • Dolly C. Begay, Secretary
Members: *Rebecca M. Benally • Juanita K. Benally • Katherine D. Arviso*
Rose J. Yazzie • Virgil Kirk, Jr • Vee F. Browne
Andrew Tah, Superintendent of Schools

AR 0295

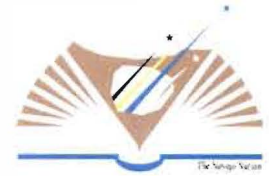


DEPARTMENT OF DINÉ EDUCATION

THE NAVAJO NATION

P.O. Box 670 • Window Rock, Arizona 86515

PHONE: 928.871.7475 • FAX: 928.871.7474



Ben Shelly
President

Rex Lee Jim
Vice-President

relate to those programs. The Navajo Nation's request for sharing student identifiable fits within this legal framework, with the exception that DoDe is not a state educational agency yet but is a tribal education agency. DoDE currently is seeking State Education Agency (SEA) status and currently has submitted an accountability workbook being reviewed by the US Department of Education and the Bureau of Indian Education (BIE).

Thank you for your consideration in this matter.

Cordially,

A handwritten signature in black ink, appearing to read "Tim Benally", written over a horizontal line.

Tim Benally, Assistant Superintendent of Schools
Navajo Nation

BOARD OF EDUCATION

Jimmie C. Begay, President • Timothy Bitsilly, Vice-President • Dolly C. Begay, Secretary

Members: *Rebecca M. Benally • Juanita K. Benally • Katherine D. Arviso*

Rose J. Yazzie • Virgil Kirk, Jr • Vee F. Browne

Andrew Tah, Superintendent of Schools

AR 0296

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: National Advocacy Organization
Tracking No. 80e308fc
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-0002-0146
Comment on FR Doc # 2011-08205

Submitter Information

Name: Kati Haycock
Organization: The Education Trust

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



The Education Trust

Closing the gaps in opportunity and achievement, pre-k through college.

May 23, 2011

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

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

Dear Ms. Miles,

We support the Administration's efforts to clarify how the terms of the Family Education Rights and Privacy Act (FERPA) should be applied to educational data in state longitudinal data systems when those data are used for critical evaluation, research, and accountability purposes.

In particular, we support the proposed clarification regarding authority to audit or evaluate in section 99.35. Current confusion about these provisions has prevented some states from taking the critical step of connecting their K-12 and postsecondary data systems; others have done so in inefficient ways. But these data, if made available to both sets of institutions, can drive important improvement efforts in K-12 schools and systems.

This clarification will allow for the sharing of actionable data that can tell states, school districts, and schools whether their graduates are succeeding in college, helping them to understand whether their policies and practices have prepared those students adequately. The more they know, the more effectively they can target improvements: If high schools know that their qualified graduates are not enrolling in postsecondary, they can take more aggressive steps to support students through the college application process. If they discover that many graduates need post-secondary remediation in math, schools can provide more rigorous high school math instruction.

Other improvements can be made if schools and school systems know whether their graduates are persisting beyond the first year of postsecondary study and whether they are successful in earning credits. These questions and others like them can be answered if postsecondary institutions are allowed to share their data with K-12 systems for evaluation purposes.

The Department, by making it clear that FERPA permits disclosures from postsecondary institutions/data systems to K-12 officials/data systems for the purpose of evaluating or auditing K-12 programs, will prompt important progress toward the national goal of ensuring that all students graduate from high school prepared for the demands of college. The proposed clarifications pave the way for all states, districts, and schools to access and act on this critical information.

Cordially,

A handwritten signature in black ink, appearing to read "K. Haycock". The signature is fluid and cursive.

Kati Haycock
The Education Trust

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e308fb
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-0002-0147
Comment on FR Doc # 2011-08205

Submitter Information

Name: Shanna Koehn
Address:
Broken Arrow, OK,
Email: shannakoehn1@cox.net

General Comment

Please be reminded that legislation was passed in the Health Care industry to protect patient privacy and rights. What you are attempting to pass here is contradictory in the other areas of legislation already in affect. Additionally, providing information about minors should be at the discretion of their parent/guardian, not a mandatory legislation by the government. You could be setting children up to ease people in finding someone in a protective custody situation or pedophiles.

There are numerous things that could be done to help educators assist children. Taking money that could be put to use helping children by not closing their schools, laying off teachers, eliminating programs such as music, sports, art, etc. is wasteful and shows that you lack a true concern for success in the education system as opposed to your true concern for reporting information and numbers.

Please put the money to better use and think about the negative effect this legislation will have. You are going to force schools that barely have the money to stay open to take on systems they can't support.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e308d6
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-0002-0148
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

This is nothing more than a violation of our constitutional rights to be secure in our persons and papers. Adopting this rule does tremendous damage to personal privacy. It exposes private information to unlimited persons/institutions/gov agencies without consent. Please scrap this proposed rule.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e3082e
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-0002-0149
Comment on FR Doc # 2011-08205

Submitter Information

Name: Brian Peterson
Address: Alpine,
Email: bpeterson@alpine-securities.com

General Comment

I believe strongly in the rights and privileges of personal freedom and protections from increasing government intrusion into our personal lives. I strongly disagree with this proposal that will increase the federal governments intrusion into my families educational system. I do not believe the federal government should be involved in education at all; this is a right that should be reserved for the state as a one size fits all programs stagnate education systems. I do not want to see this proposal implemented. T

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: National Advocacy Organization
Tracking No. 80e309f1
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-0002-0150
Comment on FR Doc # 2011-08205

Submitter Information

Name: Harriet Dichter
Address:
Washington, DC,
Email: hdichter@ffyf.org
Organization: The First Five Years Fund

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

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

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

Dear Ms. Miles:

Thank you for the opportunity to provide comments and recommendations in response to the notice of proposed rulemaking published in the Federal Register on Friday, April 8, 2011, regarding amendments to the regulations for the Family Educational Rights and Privacy Act (FERPA). This letter represents comments on the proposed amendments from the Birth to Five Policy Alliance, the Center for American Progress, the Council of Chief State School Officers, the Data Quality Campaign, the First Five Years Fund, the National Association of Early Childhood Specialists in State Departments of Education, Pre-K Now, and leaders of local early childhood and public education agencies, based on our work to improve the quality, linkages and use of data on young children (birth through age 5), early childhood programs and the early childhood workforce.

Building and using coordinated state level early care and education (ECE) data systems will help policy makers make more informed decisions about how to improve the quality of both ECE programs and the ECE workforce, increase access to high-quality ECE programs, and ultimately improve child outcomes. The ability to link and share child-level data on young children with state and local K-12 systems, research partners, and other key agencies who serve the same children allows policymakers to track the progress of children over time, as well as better understand the dynamic relationships among early childhood, elementary, secondary, postsecondary education programs and other child development programs and investments. There is clear interest among state policymakers and practitioners in the field for making such data linkages to inform continuous improvement and policy decisions.

At the same time, all of our education data systems must be designed and implemented to protect the privacy, security, and confidentiality of children's personally identifiable information; such policies and practices are one of the Early Childhood Data Collaborative's *10 Fundamentals of Coordinated State ECE Data Systems*, <http://www.ecedata.org/files/DQC%20ECDC%20brochure%202011%20Mar21.pdf>.

Regina Miles, FERPA comments and recommendations
May 23, 2011
page 2

State efforts to design early childhood data systems are also focusing on linkages that will include not only education and care programs, but also related services including health, mental health, and nutrition, among others. State policymakers need clear guidance on the application of federal privacy policy to these efforts, particularly related to linking and sharing child-level education data with ECE and other key data systems.

Overall, the proposed regulations strike a reasonable balance between clarifications that support the use of data for improving education practice, outcomes and decision-making, and provisions that will provide privacy protection of education records.

Please consider the following comments and recommendations on the notice of proposed rulemaking.

Education Program (§§99.3, 99.35)

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

We applaud the Department’s proposed broad definition of “education program,” provisions allowing for data disclosures to non-education agencies for the purpose of evaluating publicly funded education programs; and the interpretation of the evaluation authority in FERPA to cover evaluations of programs administered by the receiving agency as well as those administered by the disclosing agency. This definition and flexibility will enable early childhood programs and elementary schools and agencies to share data for the purpose of studying the effects of early childhood learning programs on kindergarten readiness and on student performance in elementary and secondary education. It will also help policymakers and practitioners better understand how to improve and adapt elementary and secondary education to better sustain and build on the impact of ECE services provided prior to kindergarten. Finally, since ECE programs are typically administered by multiple agencies, including education, the proposed regulations will give states and communities access to a more complete array of ECE data to use in efforts to improve program quality and foster children’s development and learning from birth to age five.

That said, we would recommend further clarification of the definition of “education programs.” Clarification is needed because early childhood programs involve a mix of education, care and health purposes, all of which contribute to school readiness. Parents and administrators of these programs need clarity on which programs come within the FERPA provisions. Based on the mixed purposes of these programs and the need to evaluate how well they prepare students for school, we recommend the clarification below.

Regina Miles, FERPA comments and recommendations
May 23, 2011
page 3

We recommend that the NPRM provide further clarity in the definition of “publicly-funded early childhood education programs” by including the following language:

“Publicly-funded early childhood education programs” include but are not limited to those programs and services that are, in whole or in part, designed to advance the overall development and school readiness of children from birth through the age at which a child may start kindergarten in a given state, such as Head Start; Early Head Start; child care (licensed or regulated by the state or funded by the Child Care and Development Block Grant); home visiting; preschool and pre-kindergarten; infant-toddler; and early intervention for infants, toddlers and preschoolers funded through the IDEA programs.

Thank you again for your attention to these comments. We would welcome any opportunity to clarify or discuss our recommendations.

Sincerely,

Dr. Lisa Klein, Executive Director
Birth to Five Policy Alliance

Harriet Dichter, National Director
First Five Years Fund

Cynthia G. Brown, Vice President
for Education Policy
Center for American Progress

Tom Schultz, Project Director, Early Childhood
Initiatives
Council of Chief State School Officers

Aimee Guidera, Executive Director
Data Quality Campaign

Jana Martella, Executive Director
National Association of Early Childhood Specialists
in State Departments of Education

Marci Young, Project Director
Pre-K Now, a campaign of the Pew
Center on the States

Charlotte Brantley, President and CEO
Clayton Early Learning and Educare of Denver CO

Caren Calhoun, Executive Director
Educare of Tulsa

Billie Enz, Executive Director
Educare of Arizona

Theresa Hawley, Project Director
Educare of West DuPage, IL

Gladys Hanes, Executive Director
Educare of Omaha, NE

Carol Howard, Executive Director
Educare of Washington, D.C.

Carol Keintz, Executive Director
Educare of Milwaukee

Ed Leman, Superintendent of Schools
West Chicago Elementary District 33, IL

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e309d8
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-0002-0151
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

"With respect to public preschool through grade 12 education, COMPETES requires that the SLDS include: (a) Yearly test records of individual students with respect to assessments under section 1111(b) of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6311(b)); (b) information on students not tested by grade and subject; (c) a teacher identifier system with the ability to match teachers to students; (d) student-level transcript information, including information on courses completed and grades earned; and (e) student-level college readiness test scores. With respect to postsecondary education, COMPETES requires that the SLDS include: (a) Information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework; and (b) other information determined necessary to address alignment and adequate preparation for success in postsecondary education."

Comment: Individual teacher's information linked to individual students, linked to individual student's test scores (for life) or lack thereof, linked to student demographic data, linked to courses taken/completed/remediated & grades, linked to SAT/ACT scores, linked to collegiate courses taken/completed/remediated & grades, linked to post-graduate studies or workforce information. The only thing not showing up in this database so far is the amount of public funding the individual student received both directly and indirectly broken down by federal, state and local governments, what extracurricular activities the student participates in and whether he commits a crime as a juvenile. The law makes no provision for students that are not in the public educational system (home or private school) unless you intend on being able to track and provide government oversight on private or home schools, their teachers or parents (in a home-school environment), or tutors. Fed oversight on religious teaching?

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e309c7
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-0002-0152
Comment on FR Doc # 2011-08205

Submitter Information

Name: Devon Murphey

General Comment

Do not implement these changes - the Govt has no right to desiminate my children's information to anyone.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e309bb
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-0002-0153
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jane Doe
Address:
Coventry, RI,

General Comment

"State and local educational authorities that receive PII without consent from the parent or eligible student under the "audit or evaluation" exception may not make further disclosures of the PII on behalf of the educational agency or institution unless prior written consent from the parent or eligible student is obtained, Federal law specifically authorized the collection of the PII, or a statutory exception applies and the redisclosure and recordation requirements are met (see 20 U.S.C. 1232g(b)(3) and (b)(4) and Sec. 99.32(b)(2), 99.33(b)(1), and 99.35(c))."

CommentL: This law, if enacted with this clause in-tact, will essentially grant full disclosure of any student's PII to anybody who wants/needs to see it without the parent/student's consent because of the statement "Federal law specifically authorized the collection of the PII" which this proposed law becomes that federal authorization. In other words, this law first mandates the collection of PII into a central database, then transfers the release authority for all information in the database to any state or local educational authority instead of the parent and without the need for his/her consent; which nullifies FERPA.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e309b4
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-0002-0154
Comment on FR Doc # 2011-08205

Submitter Information

Name: Tracy Martin
Address:
Broken Arrow, OK,
Email: xeptam@yahoo.com
Submitter's Representative: self
Organization: home
Government Agency Type: Federal
Government Agency: ED

General Comment

I, as a former public & private school teacher and current parent, do not want any changes to Federal Educational Rights and Privacy Act (FERPA).

I do not want the government to collect and share data on my students without my permission. Keep my student's info private-- DO NOT approve the proposed changes to Federal Educational Rights and Privacy Act (FERPA).

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Private elementary/secondary school
Tracking No. 80e3098f
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-0002-0155
Comment on FR Doc # 2011-08205

Submitter Information

Name: Kathleen Lay
Address:
Broken Arrow, OK,
Email: kathleenlay@yahoo.com
Government Agency Type: State

General Comment

STOP This nonsense!!!!:

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.

QUIT MESSING WITH OUR PRIVACY. I strongly object to the invasion of Student privacy.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Association/Organization
Tracking No. 80e3098d
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-0002-0156
Comment on FR Doc # 2011-08205

Submitter Information

Name: Gregory Jackson
Address:
Washington, D.C.,
Submitter's Representative: Rodney J. Petersen
Organization: EDUCAUSE

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

EDUCAUSE

23 May 2011

Ms. Regina Miles
US Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

Re: Docket ID ED-2011-OM-002

Dear Ms. Miles:

This letter is submitted in response to your *Notice of Proposed Rulemaking to amend the Family Educational Rights and Privacy Act* dated April 8, 2011. EDUCAUSE is an association of over 2,400 colleges, universities, and related entities who promote the intelligent use of information technology in higher education. Accordingly, our constituents are acutely aware of and influenced by laws and regulations that govern the collection, storage, use, and sharing of data held in institutional information systems – and, by extension, the systems that are administered by third party service providers.

The proposed rules seek to address a critical government policy that supports the effective use of data in statewide longitudinal data systems. The use of data in this manner comes with a corresponding set of privacy and security challenges contemplated by the changes in the rules. We recognize that the use of FERPA protected data in this manner is not without controversy and that respect for student privacy is of utmost concern.

However, we are also advocates for the use of effective analytics that can help our institutions to improve student learning outcomes and measure institutional effectiveness. Therefore, we choose to address some of the information-security elements of the proposed rules that are most likely to affect our campus IT leaders as they continue to respond to the data needs of the educational and policy community.

The focal point for higher education's cybersecurity activities is the Higher Education Information Security Council (HEISC) hosted by EDUCAUSE and Internet2 (<http://educause.edu/security>). HEISC has existed since 2002 and has been a critical partner in critical infrastructure protection along with both the government and the private sector. The core set of activities addressed by HEISC includes ongoing organization of the higher education community to improve cybersecurity, professional development for security professionals, and the development and promotion of effective practices and solutions across the areas of people, process, and technology.

The *Higher Education Information Security Guide* (<http://educause.edu/security/guide>), created under the leadership of HEISC, establishes a framework for information security in higher education that is modeled after the ISO 27002 standard with cross-references to other commonly used frameworks (e.g., NIST 800-53, PCI-DSS, and COBIT). The content is reinforced by case studies that come from institutions of higher education whose implementation of various practices could be a model for other institutions of similar size and type. The *Guide* is augmented by a series of toolkits designed to provide more detailed, focused treatment of some of the most critical information security practices that are necessary today.

Gregory A Jackson	1150 18 th Street NW, Suite 900
Vice President for Policy & Analysis	Washington DC 20036
(direct) +1-202-331-5351	+1-202-872-4200 (main)
gjackson@educause.edu	www.educause.edu

AR 0312

There has been a significant trend recently towards outsourcing campus IT services, especially with the advent of cloud computing. The increasing reliance upon third parties to administer services and the transfer of custodianship of sensitive institutional data to them has spurred the development of policies and processes to help ensure that adequate safeguards are in place.

Consequently, our members have significant experience and expertise with the types of “reasonable methods” that we expect third parties to use when they are entrusted with our digital assets. Based on that experience and expertise, below are a few examples that respond to some of the areas of concern outlined in the proposed rule.

Destroys or returns PII when no longer needed for those purposes

One of the hallmark messages of the Federal Trade Commission’s information security campaign for businesses is to “Pitch it: Properly dispose of what you no longer need” (<http://www.ftc.gov/bcp/edu/microsites/infosecurity/>). Similarly, the National Institute of Standards and Technology published NIST 800-88, *Guidelines for Media Sanitization* (http://csrc.nist.gov/publications/nistpubs/800-88/NISTSP800-88_rev1.pdf), in September 2006, that presents a rational approach for protecting and eliminating sensitive data stored on no longer needed IT assets and media. Institutions of higher education will find *Practical Information Media Sanitization Guidelines for Higher Education* at <http://educause.edu/security/mediasanitization>.

Protects PII from redisclosure (and use by any other third party), except as permitted

Redisclosure of PII anticipates at least two scenarios: uses permitted by the data custodian (whether authorized or permissible under FERPA) and unauthorized access or uses as a result of a data security incident. The latter is a security concern of growing importance given the large numbers and types of data security breaches experienced by educational institutions, government, and industry these past few years.

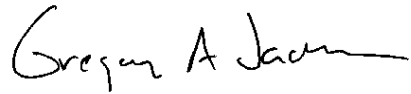
A rigorous standards process, such as the Shared Assessments model (<http://www.sharedassessments.org>) used in the financial services sector and increasingly supported in higher education, helps institutions of higher education manage risk and respond to evolving regulatory requirements through a process that carefully evaluates the security of the controls their service provider partners have in place. Proactive approaches to preventing data security incidents are essential for both educational institutions and service providers. Institutions of higher education will find a *Confidential Data Handling Blueprint* at <http://educause.edu/security/datahandling>. Additionally, a *Data Incident Notification Toolkit* is available at <http://educause.edu/security/incidentnotification>.

Use of written agreements

All of the privacy protections and security safeguards anticipated by the use of data for state longitudinal data systems not only require good practice but must be covered in the written agreements between the educational institution and the third party service provider. Institutions of higher education will find *Data Protection Contractual Language: Common Themes and Examples* at <http://educause.edu/security/datacontracts>.

We are pleased that the Department continues to reexamine FERPA in light of the changes presented by technology and seeks to maximize the privacy and security of student education records. We especially commend the Department's recent actions to create and appoint a chief privacy officer, to develop a new Privacy Technical Assistance Center, and the launch of a new series of technical briefs on the best practices of data security and privacy protections. We look forward to continuing to work with the Department as a partner in these endeavors.

Sincerely,

A handwritten signature in black ink that reads "Gregory A. Jacob". The signature is written in a cursive style with a long horizontal flourish at the end.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State agency
Tracking No. 80e3097b
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-0002-0157
Comment on FR Doc # 2011-08205

Submitter Information

Address:
Sacramento, CA,
Email: kevin.gaines@dss.ca.gov
Organization: Department of Social Services
Government Agency Type: State

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



CDSS

WILL LIGHTBOURNE
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES

744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov



EDMUND G. BROWN JR.
GOVERNOR

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Potomac Center Plaza, room 5126
Washington, DC 20202-2641

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

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

Submitted By

California Department of Social Services (CDSS)

May 2011

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

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

Ms. Regina Miles
Page Two

[PLEASE INSERT CDSS SPECIFIC BACKGROUND INFORMATION]

OVERVIEW

The Achievement Gap

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

We know some of the specific barriers facing youth in care – high rates of school mobility; delays in school enrollment; inappropriate school placements; lack of remedial support; failure to transfer full course credits; and difficulties accessing special education services.⁴ We also know that some of these particular challenges are exacerbated and sometimes created by the inability of child welfare agencies and local educational agencies to access and share education records and data at a state- or local-level as well as the inability of foster parents, unaccompanied youth, surrogate parents and caseworkers to access education records at an individual-level. For example, delays in school enrollment for this highly mobile population often occur when a child's initial entry into foster care or a subsequent placement change involves changing schools.^{5,6}

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

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

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

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

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

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

Ms. Regina Miles
Page Three

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

A Unique Situation

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

These children most often enter foster care abruptly. They are placed with an agency that lacks prior knowledge of the child's background or educational needs. And yet, it is the caseworker who is charged with the responsibility of determining a child's new living placement and, as part of that undertaking, is specifically obligated to consider the appropriateness of the child's current educational setting, decide whether it is in the best interest of the child to remain in the same school, or seek to immediately enroll a child in a new school with all of his or her school records. Without knowing the child, as a parent would, a caseworker who can't promptly access a child's educational records cannot effectively make decisions in the child's best interests.

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

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

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

Ms. Regina Miles
Page Four

Expanding Role of Child Welfare in Addressing Educational Needs

To improve the educational outcomes of children in foster care, federal law has historically placed a number of requirements on child welfare agencies related to education. Title IV-E of the Social Security Act has for a long time required child welfare agencies to maintain the child's "educational reports and records" in the family case plan.¹⁰ The Child and Family Service Reviews (CFSRs), federal reviews that measure how states are meeting the needs of children in the foster care system, have always included a well-being benchmark focused on meeting the educational needs of children in care as part of that review. Specifically, child welfare agencies are evaluated on whether a child's education record is included in the case plan.

However, the most significant changes to child welfare law and a marked expansion of the responsibility of child welfare in addressing education issues occurred with the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections). Fostering Connections now requires significant responsibilities of child welfare agencies related to education. Child welfare agencies are mandated to, among other things: 1) ensure school stability for children in care (including immediate transfer of records when a child changes school); 2) ensure children are enrolled and attending school; and 3) consider the proximity and appropriateness of the school when making living placement decisions.¹¹ Additionally, most state laws mandate that a child welfare agency to whom legal custody of a child has been given by the court has the "right and duty" to provide for the education of the child.¹² [CDSS may want to insert an alternative sentence reflecting the social worker's role/responsibility in California. If so, we can change to the appropriate citation.]

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

Expanding Interagency Data Exchange and Interoperability

Additionally, states across the country have undertaken systemwide efforts to share data and information to assess and improve educational outcomes for children in care through cost-effective and streamlined interagency data systems. The benefits of such interoperability are well known within the Department, particularly for highly mobile

¹⁰ 42 U.S.C.A. § 675(1)(C).

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

¹² See e.g., 42 P.a.C.S.A. § 6357.

Ms. Regina Miles
Page Five

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

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

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

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

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

Ms. Regina Miles
Page Six

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

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

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

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

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

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

Ms. Regina Miles
Page Seven

described by the proposed amendments, we can significantly improve educational outcomes for children in care.

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

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

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

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

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

Ms. Regina Miles
Page Eight

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

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

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

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

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

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

Ms. Regina Miles
Page Nine

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

COMMENT: To comply with federal and state legal requirements, and to ensure that the educational needs of children in their care are met, child welfare agencies and dependency courts must have prompt and continuing access to the education records of children in foster care. As described above, federal law currently places a number of education-related requirements on child welfare agencies that necessitate access to education records and information. Specifically, child welfare agencies must: 1) maintain the child's educational records in the case plan;¹³ 2) ensure school stability for children in care (including immediate transfer of records when a child changes school); 3) ensure children are enrolled and attending school, and 4) consider the proximity and appropriateness of the school when making living placement decisions.¹⁴ Unfortunately, in many jurisdictions, child welfare agencies are denied access to the educational records of the youth they serve – limiting their ability to comply with child welfare legal requirements and address educational issues on behalf of their clients.

[IF DESIRED, INSERT CDSS SPECIFIC EXAMPLES OR COMMENTS HERE]

RECOMMENDATIONS: The goal of these two recommendations is to ensure that child welfare agencies have necessary access to education records to meet their federal and state legal responsibilities. For children under the care and responsibility of the child welfare agency, there is a clear duty to provide for their educational needs. Furthermore, because of the sensitivity of the information around child welfare cases, child welfare agencies are already bound by stringent federal and state confidentiality laws and safeguards that strictly prohibit re-disclosure of information relating to a child in their care. To meet obligations imposed on child welfare agencies who are acting *in loco parentis*, they must have timely access to education records.

To meet this critical need, we suggest two recommendations. The first recommendation creates an exception so that when a child is in the custody of a child welfare agency, information relevant to the child's education can be shared with that custodial agency. The second recommendation clarifies that, for purposes of the court order exception, additional notice is not necessary for parents who are parties to a dependency case. Both of these changes are necessary to give jurisdictions flexibility as to how to permit records to be shared with child welfare agencies. In some communities, obtaining a court order to share these records with the custodial child welfare agency (as well as with other relevant parties including children's attorneys and advocates) will be a direct and efficient process. In other communities, where courts have not, will not, or cannot

¹³ 42 U.S.C.A. § 675(1)(C).

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

Ms. Regina Miles
Page Ten

in a timely manner issue such orders, the new exception to allow access to custodial child welfare agencies will be more advantageous. Each allows states and communities flexibility to determine the most appropriate option to allow child welfare agencies access to needed education records.

a) Create a new exception to allow child welfare agencies access to records:

A variety of other exceptions to parental consent already exist, including an exception for the juvenile justice system. This new exception would permit schools to allow access to education records to child welfare agencies in those cases where the child welfare agency has care and responsibility for a student.

- (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests...

(17) The disclosure is to the state or local child welfare agency with custody of a student. Re-disclosure by child welfare agency shall be permitted in compliance with federal and state child welfare confidentiality laws and policies.

b) Clarify in regulations that additional notice of disclosure is not required under the existing court order exception for dependency cases because parents already have been provided notice through the court case (34 C.F.R. § 99.31(a)):

The FERPA currently allows for release of education records without parental consent under a court order, as long as parents are provided advance notice of the release, and an opportunity to object. However, in child welfare cases, the parent is already a party to the case where the court order is being issued and therefore already has the opportunity to challenge the release of school records if they so desire. To require schools to “re-notify” parents who are already on notice of the court order is redundant and serves as an unnecessary barrier. Therefore, the following clarification would prevent the need for additional notification for parents who are parties to the dependency case.

- (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

Ms. Regina Miles
Page Eleven

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with:

(A) A federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An ex parte court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(D) A court order issued in a dependency case.

3) OBJECTIVE 3: Ensure that the special education needs of children in care are met.

COMMENT: The current definition of parent under FERPA is as follows: “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” It is estimated that between one-third and one-half of children in foster care need special education services compared with eleven percent of all school-age children.¹⁵ Under the Individuals with Disabilities Education Act (“IDEA”) a child who receives special education services is represented by an “IDEA parent” throughout the special education process.¹⁶ The duties of an IDEA parent include: 1) consenting to an evaluation to determine eligibility; 2) participating in decisions regarding the special education services a student receives; and 3) challenging a school district’s decision through a hearing and appeal process. In many cases, youth who are in the child welfare system are represented by “surrogate parents” who may be appointed by a school district or by a judge to serve in this

¹⁵ Terry L. Jackson & Eve Müller, *Foster Care and Children with Disabilities* (National Association of State Directors of Special Education, Inc., Forum, February 2005), available at http://www.dredf.org/programs/clearinghouse/Forum-Project_Foster-Care-and-Children-with-Disabilities-overview_Feb05.pdf.

¹⁶ 20 U.S.C. §1401(23).

Ms. Regina Miles
Page Twelve

capacity.¹⁷ These surrogate parents, like all other IDEA parents, must be able to obtain prompt and continued access to education records of the children and youth they represent.¹⁸ Frequently the foster parent is the IDEA parent. Without these IDEA parents to advocate for them, children in care often cannot gain access to the special education services they require, or the IDEA parents is forced to act as a rubber stamp for school district's proposal.¹⁹ In addition, an IDEA parent is closely involved in the student's educational life and is well-positioned to determine whether and under what circumstances disclosure of the student's education records should be permitted.

[IF DESIRED, INSERT CDSS SPECIFIC EXAMPLES OR COMMENTS HERE]

RECOMMENDATION: In light of the critical role of IDEA parents in advocating on behalf of children in care, we strongly urge that the definition of parent set forth in the FERPA regulations be amended to make explicitly clear that this includes IDEA parents. Expanding the definition of parent in this way will ensure that all IDEA parents are able to obtain prompt and continued access to the education records of the students with disabilities they represent.

a) Clarify in regulations that definition of "Parent" includes a child's IDEA parent (34 C.F.R. §99.3)

We propose that the current definition of parent be expanded to include a specific reference to an "IDEA parent" as defined under 34 C.F.R. § 300.30(a).²⁰

"§99.3...

¹⁷ 20 U.S.C. §1415.

¹⁸ Amy Levine, *Foster Youth: Dismantling Educational Challenges*, Human Rights, Fall 2005, Vol. 32, No. 4, p.5. Available at <http://www.abanet.org/irr/hr/Fall05/fosteryouth.html>.

¹⁹ *Id.*

²⁰ **34 C.F.R. 300.30** – [Definition of "parent" in conjunction with IDEA regulations]

"(a) Parent means:

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless state law, regulations, or contractual obligations with a state or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the state if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act."

Ms. Regina Miles
Page Thirteen

“Parent” means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian, or an IDEA parent as defined by 34 C.F.R. § 300.30(a) who is acting on behalf of the student.”

Conclusion

We greatly appreciate your consideration of these comments. We believe that addressing the current obstacles to information-sharing and data collection between education and child welfare is critical to closing the achievement gap for children in foster care.

By creating a FERPA exception to authorize child welfare agencies to access education records of children in their custody, state and local agencies can effectively address the educational needs of children in care and ensure full compliance with new federal and state mandates. The proposed changes will also greatly facilitate and support the growing collaboration between education and child welfare to collect and analyze data and develop reforms to improve educational outcomes for this educationally at-risk population. **[CONSIDER EDITING/ADDING ANY CDSS SPECIFIC SUMMARY AS NEEDED]**

Thank you for this opportunity to present comments to these important regulations. For further information please contact:

Sincerely,

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e30986
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-0002-0158
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Koelle

Address:

Broken Arrow, OK,

Email: beemer-man@hotmail.com

General Comment

I am completely against this proposal. the government has no right building such a database on american citizens. the government continues to whittle away at our privacy and rights. The only success the government has is increasing the number of government employees and the national debt.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e30985
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-0002-0159
Comment on FR Doc # 2011-08205

Submitter Information

Name: george barr
Address:
Manteo, nc,
Email: sailcamaraderie@yahoo.com
Submitter's Representative: none
Organization: none

General Comment

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.
This regulation is a gross breach of traditional family privacy and should not be enacted.

As of: March 27, 2012 Received: May 23, 2011 Status: Posted Posted: May 23, 2011 Category: State Higher Education Office Tracking No. 80e30981 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-0002-0160
Comment on FR Doc # 2011-08205

Submitter Information

Name: Camille Preus

Address:

Salem, OR,

Submitter's Representative: Elizabeth Cox

Organization: Department of Community Colleges and Workforce Development

Government Agency Type: State

Government Agency: Department of Community Colleges and Workforce Development

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



May 23, 2011

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

Re: Comments on Proposed FERPA Regulations

Dear Ms. Miles

The Oregon Department of Community Colleges and Workforce Development (CCWD) appreciates the opportunity to provide input to the U.S. Department of Education's 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. Overall, CCWD is pleased with the direction of the proposed changes to FERPA regulations and the efforts to remove barriers hampering the exchange of data. Like all public, educational agencies, CCWD utilizes data for decision making, federal and state reporting, and for enhancing education across Oregon. The expanded use of quality data from our partner agencies, including those across state borders, will allow us to more accurately measure and report the outcomes of Oregon's students.

CCWD is currently engaged with the Oregon Department of Education (ODE) and the Oregon Employment Department (OED) to collaborate on a longitudinal data system to represent the educational continuum from Pre-K to employment. Oregon is also a participant in the Western Interstate Commission for Higher Education (WICHE) multi-state longitudinal data exchange project. It is primarily within the context of those two initiatives that we offer our comments regarding the proposed guidelines.

The proposed regulations address research among state educational agencies and educational institutions but it is for "the benefit of multiple educational agencies and institutions in their state." Given that our students are quite mobile, especially in urban border cities such as Portland and Vancouver, WA, they may find employment or postsecondary education opportunities in neighboring states. However, without clear guidance from the proposed regulations, states may be restricted from exchanging data, especially that which includes personally identifiable information (PII) such as social security numbers (SSN). Therefore, it is important that the Department explicitly state that the sharing of data including PII across state lines for the purpose of conducting educational research or evaluation be allowed. We also encourage the Department to provide guidance indicating that multi-state data exchanges may include disaggregated data, which is not specifically addressed in the proposed regulations.

Public Service Building

255 Capitol Street NE

Salem, Oregon 97310

Phone (503) 378-8648

Fax (503) 378-3365

www.oregon.gov/CCWD



The proposed regulations are also unclear as to whether PII would be allowed to come back from partner states with whom exchanges would be made and whether or not the single 'authorized representative' for the originating state may disclose the data with PII to partner institutions within the state. Departmental clarity on this point is critical such that Oregon institutions may individually have the opportunity to analyze data received from partnering states for the purposes of improving educational programs, policies, and practices on their campuses.

The proposed regulations are also unclear regarding consent for the use of multi-state data exchanges using data with SSN. This is particularly important in the realm of matching educational data with workforce information. As currently stated, the proposed regulations leave room for individual states to interpret policy regarding a consent requirement. We encourage the Department to specify the allowance for the use of SSNs to make the linkage between education and workforce data without a recurring need to get consent for the use of SSNs when matching education and workforce data from "eligible students", schools, school districts or institutions where students have enrolled.

Finally, the proposed regulations contain language regarding the time period that data with PII may be kept before needing to be destroyed. We do not have a set timeframe that we would advise the Department adopt. However, we do recommend that the proposed regulations include clear guidance such that interpretations will not be so stringent that research and evaluation are limited due to insufficient time for processing data.

In closing, CCWD is glad to see that the Department is making strides in altering FERPA policies to assist in data collection and exchange. Nevertheless, we would like to see further clarification as detailed in this letter.

If you have any questions regarding these comments, please contact me at 503-947-2433 or Camille.preus@state.or.us.

Sincerely,



Dr. Camille Preus
Commissioner
Oregon Department of Community Colleges and Workforce Development

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e3096b
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-0002-0161
Comment on FR Doc # 2011-08205

Submitter Information

Name: ROBIN HART-TAYLOR
Address:
EL CAJON, CA,
Email: ROBINHARTTAYLOR@YAHOO.COM

General Comment

PUT AN END TO THIS IMMEDIATELY. LEAVE MY CHILDREN/FAMILY ALONE. MY CHILDREN DO NOT NEED TO BE TRACKED FOR ANY REASON. YOU WILL NOT HAE THAT MUCH CONTROL OVER THEIR LIVES. YOU WILL FIND THAT MANY FAMILIES WILL OPT OUT OF YOUR PROGRAM. YOU HAVE GONE TOO FAR!

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State Higher Education Office
Tracking No. 80e30969
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-0002-0162
Comment on FR Doc # 2011-08205

Submitter Information

Name: Michael Meotti

Address:

Hartford, CT,

Submitter's Representative: Braden J. Hosch

Organization: Connecticut Department of Higher Education

Government Agency Type: State

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



State of Connecticut
Department of Higher Education

May 23, 2011

Regina Miles
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, D.C. 20202

Dear Ms. Miles:

The Connecticut Department of Higher Education serves as the administrative arm for the Board of Governors for Higher Education, which is the central policy-making authority for public higher education in the state. I am writing to express our support for the proposed regulations regarding the Family Education Rights and Privacy Act (FERPA). There are several items of particular note that we believe will be productive and helpful in advancing educational reform and student attainment.

Authorized Representative (§§ 99.3, 99.35)

We are specifically pleased to see the proposed definition of the term “authorized representative” (§§99.3); this clarification will facilitate and enhance the capacity for educational research and assessment.

Written Agreements (§ 99.35(a))

We also support the emendation of this section about written agreements. The clarifications offered in this change will assist in interagency collaboration and collaborations among educational entities while maintaining student privacy.

Education Program (§§ 99.3, 99.35)

We strongly support the proposed definition of the term “education program” (§§99.35(a)(1)). Current interpretations of FERPA have constrained the ability to understand and improve the many educational activities which are administered outside of the state education authority.

Authority to Audit or Evaluate (§ 99.35(a)(2))

We also support removal of the provision that a State or local educational authority must establish specific legal authority to conduct an audit or evaluation (§§99.35(a)(2)). We maintain that conducting such evaluations is a foundational responsibility for state agencies that oversee educational activities, whether such authority is express or implied.

In addition, we would like the U.S. Department of Education to know that we appreciate the time and resources that they have invested in proposing these revisions that are so critical to enabling states and agencies to understand student experiences and make meaningful policy changes.

Sincerely,

A handwritten signature in black ink that reads "Michael P. Meotti".

Michael P. Meotti
Commissioner

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Other
Tracking No. 80e3094d
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-0002-0163
Comment on FR Doc # 2011-08205

Submitter Information

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
Status: Posted
Posted: May 23, 2011
Category: Other
Tracking No. 80e30944
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-0002-0164
Comment on FR Doc # 2011-08205

Submitter Information

Name: Linda Ackerman
Address:
San Francisco, CA,
Email: lga@privacyactivism.org
Submitter's Representative: Linda Ackerman
Organization: Privacy Activism

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

Privacy Activism
P.O. Box 210376
San Francisco, CA 94121
www.privacyactivism.org

Privacy Activism Comments on Proposed Rule Changes to the Family Educational Rights and Privacy Act, Published on April 8, 2011 at 76 Federal Register 19726

Privacy Activism welcomes the opportunity to comment on the Department of Education's (ED) proposed rule change to the Family Educational Rights and Privacy Act at 76 Federal Register 19726 (April 8, 2011), <http://www.federalregister.gov/articles/2011/04/08/2011-8205/family-educational-rights-and-privacy>. Privacy Activism is a non-profit public consumer education organization. Our focus is on educating the public about the collection and uses of personal information by government and private businesses, and presenting this information in a visual format as much as possible. More information about Privacy Activism is available at <http://www.privacyactivism.org>.

FERPA's NPRM proposes to remove some of the current privacy restrictions on access to and use of students' personal data in order to facilitate the development and expansion of statewide longitudinal data systems (SLDS), which were implemented to help schools make data-driven decisions about educational needs and priorities. We find the ED's proposed changes to FERPA that will impact the privacy of students' personally identifiable information problematic for several reasons:

1. We are skeptical of the Education Department's legal authority to make all the changes to FERPA's privacy requirements that it proposes in these regulations.
2. We believe that the increased sharing of information proposed will seriously reduce not only the privacy of students but also their families.

On the plus side of the proposed regulations, they will restrict the classification of certain student information as "directory information." Privacy Activism supports this change.

1. Authority to make proposed changes.

The American Recovery and Reinvestment Act of 2009 (ARRA) does not amend the America COMPETES Act that requires states developing statewide longitudinal data systems (SLDS) to comply with FERPA. In fact ARRA appears to do the opposite:

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

(I) ensure that the statewide P-16 education data system meets the requirements of section 1232g of this title (commonly known as the Family Educational Rights and Privacy Act of 1974) (20 U.S.C. 9871(e)(2)(C)(i))

Since the ED is not directed by ARRA to change the FERPA regulations, we believe it is exceeding its authority in doing so. Rather, we believe that Congress wanted the new SDLS data systems to meet existing FERPA standards. We are puzzled by the ED's assumption of the authority to make rules now that it said it lacked the authority to make in response to its 2008 NPRM. That is, the ED said it was "without authority" to exempt data sharing, which many 2008 commenters had requested.

2. Privacy Impact of Increased Sharing of Student Information

a. New definitions of "authorized representative" and "education programs"

The NPRM proposes significant changes to the definition of the term "authorized representative," which are likely to allow the unhindered spread of student information beyond the boundaries that FERPA intends. Currently, educational authorities may only disclose educational records only to entities over which they have "direct control." ED affirmed and clarified this position in January 30, 2003, in the "Hansen Memorandum." The proposed rule changes the definition of "authorized representative" to include any individual or entity designated by an educational agency to carry out audits, evaluations, or enforcement or compliance activities relating to "education programs."

The crucial difference lies in what the proposed rules consider an "education program: they would allow it to include a program administered by a non-educational agency. This in turn would allow data sharing among agencies generally, not just ED programs, so long as they are principally engaged in the provision of education. We believe that the term "education program" and the language "principally engaged in the provision of education" are extremely vague and will lead to widespread dissemination of student information in ways that are perhaps unintended.

For example, what percentage of an agency's time must be spent in providing education to qualify, and who decides? What is an educational program, and who decides that? Is on-line job-training an educational program? Where might data flow that was given to such a program? Do direct marketers who sell great books or great lectures qualify as operating "educational programs" and as being "principally engaged in the provision of education?"

Together, the changes to the terms "authorized representative" and "education program" would increase data sharing among agencies that are "principally engaged in the provision of education." While this could make SLDS more useful, it could also lead to the use of student information for purposes far beyond those for which it was collected and well beyond ED's authority to control.

3. Changes concerning "directory information"

Another significant proposed change is a "clarification" of the notice that school districts must provide to parents concerning their child's "directory information." "Directory information" is defined as "information contained in an education record of a student that would not generally be

considered harmful or an invasion of privacy if disclosed.” It may include whatever a school district designates as directory information; typically name, address, telephone number, e-mail address, and other data points. The idea of a directory is to facilitate easier communication among parents, officials, students, and others. FERPA currently requires an educational agency or institution to provide public notice to parents of the types of directory information that it would disclose and the right of the parents or eligible student to opt out.

The proposed rule would allow an educational agency or institution to limit what it includes as “directory information” and, more importantly, how the information can be used and distributed. Thus, school districts and schools could, for example, restrict the release of directory information for specific purposes, to specific parties, as they see fit. Providing this additional level of security to “directory information” should limit the ability of third parties, such as vendors, to access the information without parental consent.

4. Further suggestions

With the development of SLDSs the ED is creating an immense reservoir of valuable personal information. It has a great responsibility to ensure that this data is used for its intended educational purposes, and that it does not leak out into secondary and potentially privacy invasive uses. The ED should consider making specific recommendations to Congress to pass legislation that will protect student data from secondary uses

Respectfully submitted,

Linda G. Ackerman
Staff Counsel

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Civil Rights
Tracking No. 80e30940
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-0002-0165
Comment on FR Doc # 2011-08205

Submitter Information

Name: Charla Torres
Address:
Bremerton, WA,
Email: torrestrees@msn.com
Government Agency Type: Federal
Government Agency: CRC

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

As of: March 27, 2012 Received: May 23, 2011 Status: Posted Posted: May 23, 2011 Category: Minority-Serving Institutions Tracking No. 80e30948 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-0002-0166
Comment on FR Doc # 2011-08205

Submitter Information

Name: Amy Bpwers
Address:
Boulder, CO,
Email: amyb@narf.org
Organization: Tribal Education Departments National Assembly

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Tribal Education Departments National Assembly
Comments on the Proposed Rule Making for the
Family Educational Rights and Privacy Act
(FERPA)

May 23, 2011

This document includes the comments of the Tribal Education Departments National Assembly (TEDNA) on the proposed rulemaking for the Family Educational Rights and Privacy Act (FERPA) dated April 8, 2011.

Over 200 of the over 560 federally-recognized tribal governments today have education agencies. Known as "Tribal Education Departments" (TEDs) or "Tribal Education Agencies" (TEAs), these tribal governmental agencies can help the non-tribal federal and state governments serve tribal students. TEDs / TEAs can assist with the most fundamental education improvement and accountability functions like data collection, reporting, and analysis. In particular, TEDs / TEAs are in a unique position to coordinate data on Native American students that is generated by various and sometimes multiple sources, including federal education programs, public school systems, states, and BIE-funded schools.

For the data roles of TEDs / TEAs to reach their full potential, FERPA needs to be clarified by an amendment that includes TEDs / TEAs as being among the education agencies, authorities, and officials to which protected student records and personally identifiable information (PII) can be released without the consent of parents or students. Such an amendment to FERPA would be consistent with the TED / TEA programs authorized by Congress since the ESEA Reauthorizations of 1988 and 1994 and thus would bring FERPA up to date and in accord with the ESEA.

While we strongly urge the Department to consider making this amendment, we also recognize that such an amendment is not at issue in the current proposed rulemaking for FERPA. Below we offer comments on the proposed amendments. Also, attached is a copy of TEDNA's 2011 report on TEDs / TEAs that describe some of the data needs of tribal governments. The report highlights the lack of data available on Native American students and demonstrates the need for tribal governments to collect and analyze such data.

Definition of Authorized Representative, Amendment to § 99.3, § 99.35, § 99.35(b).

Generally, TEDNA agrees with the Department's proposed amendments to §99.3, §99.35, and §99.35(b). TEDNA is particularly interested in the proposed amendment to the definition of authorized representative, §99.3. The proposed definition would allow States and local educational authorities (LEAs) to authorize representatives, which are not under the States or LEAs direct control, to receive PII without consent for purposes of



any evaluation and audit. TEDNA interprets this section to allow TEDs/TEAs to be authorized representatives of States and LEAs to receive PII without consent.

This interpretation is consistent with the Department’s statement in the notice of the proposed rulemaking that “these proposed regulations also would expressly permit State and local educational authorities...to designate other individuals and *entities, including other governmental agencies*, as their authorized representatives.” This interpretation is also supported by the Department’s statement in the notice, “nothing in FERPA prescribes which agencies, organizations or individuals may serve as an authorized representative of a State or LEA...or whether an authorized representative must be a public or private entity or official.”

Assuming TEDNA’s interpretation of the proposed definition in 99.3 is correct, this new interpretation has potential to increase the data roles of TEDs/TEAs. This amendment could encourage tribal-state-local partnerships to share data for purposes of any program evaluation or audit. This is important because Native American students’ academic records are not tracked as well as they should be in public schools, where 92% of Native American students attend school. Tribes across the Country want to track the performance of their students to help them through school. FERPA has prevented tribes from tracking student progress by denying Indian tribes access to such records and TEDs / TEAs battle with the States and LEAs for access. This amendment has potential to change this by empowering the States and LEAs to authorize TEDs / TEAs to access the information and perform an evaluation or audit of programs serving Native American children. Based on the results, the TED / TEA could work with the State and LEA to improve programing and services. Potentially, the TED / TEA could offer tribal services and programing to improve the academic performance of all students served by the program.

TEDNA also supports the proposed amendments to require written agreements between any State or LEA and authorized representative, and for the authorized representative to comply with privacy protections.

Education Programs, Amendment to 99.3, 99.35

Most of the 563 federally recognized Indian tribes have a combination of education and social services such as early head start, head start, k-12 education support programs, higher education, adult vocational and technical training, child and family social services, health programs, and juvenile court systems. Assuming the proposed definition of “education program” is interpreted broadly enough to include these types of programs and services, and assuming that tribal governments and TEDs / TEAs are “authorized representatives,” (pursuant to the proposed amendment to 99.3), this amendment would provide Indian tribes with access to PII to track the impact of the tribal programs on the academic performance of program participants.



Access to these records would resolve a long-term consistent concern of tribal education leaders: the inability of Indian tribes to track student progress between federal, state, and tribal education entities. The proposed amendment would enable Indian tribes to track program success and improve programs that aren't working. Several tribes have expressed a desire to track how these pre-k programs have improved the performance of kindergarten students. Tribes will track student progress while in the program. They would like to see how their students perform in kindergarten but are prohibited from accessing student records from public schools without parental consent. This amendment has the potential to provide the Indian tribes with the records to finally begin tracking student progress between pre-k and kindergarten. See the attached report on Tribal Education Departments and Agencies for specific examples.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e30947
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-0002-0167
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

This is a complete and utter outrage! In no way shape or form should the school systems be able to "track" my child throughout their life, by an assigned number. This is a bad bill and will destroy any privacy of my children.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Education Consultant
Tracking No. 80e30938
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-0002-0168
Comment on FR Doc # 2011-08205

Submitter Information

Name: Barbara Canzonetti

Address:

Hartford, CT,

Email: barbara.canzonetti@ct.gov

Submitter's Representative: Sarah S. Ellsworth, Ph.D. - Bureau Chief

Organization: Connecticut State Department of Education

Government Agency Type: State

Government Agency: Connecticut State Department of Education

General Comment

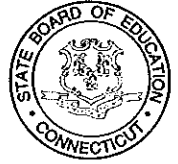
See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION



May 23, 2011

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

Dear Ms. Miles:

On behalf of my colleagues at the Connecticut State Department of Education (CSDE), I would like to thank you for this opportunity to comment about the proposed changes to the Family Educational Rights and Privacy Act (FERPA) guidelines that were posted in the Federal Register Volume 7, Number 68, on Friday, April 8, 2011. While we generally support the proposed changes, we do have concerns that we have documented below.

Sec. 99.35(d)

"... proposed Sec. 99.35(d) would clarify that if the Department's Family Policy Compliance Office (FPCO) finds that a State or local educational authority, an agency headed by an official listed in Sec. 99.31(a)(3), or an authorized representative of a State or local educational authority or agency headed by an official listed in Sec. 99.31(a)(3) improperly rediscloses PII in violation of FERPA, the educational agency or institution from which the PII originated would be prohibited from permitting the entity responsible for the improper redisclosure (i.e., the authorized representative, or the State or local educational authority or the agency headed by an officials listed in Sec. 99.31(a)(3), or both) access to the PII for at least five years (see 20 U.S.C. 1232g(b)(4)(B) and Sec. 99.33(e))."

COMMENTS

- We would like further clarification regarding debarment as we feel that this proposed change seems arbitrary and does not allow for the level of redisclosure to be taken into account. For example, the proposed regulation would treat a redisclosure that requires a person to use multiple sources to get Personally Identifiable Information (PII) on one student the same as a single source redisclosure of thousands of students' PII. While any improper redisclosure is a violation, the magnitude, ease of determination and manner of redisclosure (i.e.,

Letter to Regina Miles

May 23, 2011

Page 2

- the redisclosure data was posted on a public Web site, or released to an individual) can all be different and should be taken into account when a penalty is determined.
- Clarify if the “party responsible for the improper redisclosure” is the entity or the individual. How would FPCO make that determination?
- The provision does not differentiate between improper redisclosures that are due to organization level policies or the act of a single employee of the organization. This lack of differentiation can lead to a large research university losing access to data when a single teaching assistant makes a mistake, is sloppy, or acts maliciously.
- The provision does not allow for an organization to take remedial steps to ensure that future redisclosures do not occur. In the example of the teaching assistant above, the assistant could be terminated or reassigned to other projects that do not bring him/her into contact with PII.
- What would be the timeline for implementation of this regulation? How would prior infractions be treated? This information has to be detailed.
- Before any enforcement action under this proposed regulation can be undertaken, we believe that the United States Department of Education (USDOE) must be required to do a complete assessment of all of the reporting requirements they place on State Education Agencies/Local Education Agencies (SEAs/LEAs) to ensure that the USDOE is not requiring SEAs/LEAs to violate FERPA. In any place where they find requirements that may force SEAs/LEAs to violate FERPA (e.g., when meeting Individuals with Disabilities Education Act (IDEA) requirements), FPCO and the USDOE program office must publish joint guidance on how SEAs/LEAs should deal with the conflict.
- Overall, while we applaud the USDOE’s desire to add enforcement powers to FPCO, the regulations need to provide flexibility when it comes to penalties. Just as violent acts are judged on a scale from simple assault to premeditated murder, the penalties for improper redisclosure of PII need to be on a scale. Furthermore, certain entities such as SEAs or even the USDOE need to be exempt from certain penalties when said penalties would impair their ability to perform their statutorily required duties.

Letter to Regina Miles

May 23, 2011

Page 3

Sec. 99.35(b)(2)

“... the requirement in Sec. 99.35(b)(2) that personally identifiable information from education records that is collected by a State or local educational authority or agency headed by an official listed in Sec. 99.31(a)(3) in connection with an audit or evaluation of Federal or State supported education programs, or to enforce Federal legal requirements related to Federal or State supported education programs, must be destroyed when no longer needed for these purposes.”

COMMENTS

- Our concern is how to enforce the destruction of PII when it is no longer needed. How does the USDOE envision such enforcement? Please provide non-regulatory guidance about the destruction of PII.

Sec. 99.3

“We propose to amend Sec. 99.3 to add a definition of the term authorized representative. Under the proposed definition, an authorized representative would mean any entity or individual designated by a State or local educational authority or agency headed by an official listed in Sec. 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.”

COMMENTS

- Currently, under FERPA, SEAs and LEAs are allowed to give “authorized representatives” access to personally identifiable information (PII) for the purposes of evaluation and audit, but the USDOE does not define “authorized representatives.” In this regulation, the USDOE seeks to define that term and further detail the expectations of the relationship between an SEA/LEA and an “authorized representative”. In this vein, the USDOE states that SEAs and LEAs should use “reasonable methods” to ensure that an “authorized representative” adheres to FERPA, but does not define “reasonable methods.” Instead it says it will give non-regulatory guidance on this in the future.

Letter to Regina Miles

May 23, 2011

Page 4

- Further clarification of the definition of “authorized representative” is welcomed.
- The addition of the “reasonable methods” language needs further explanation and detail.
 - For example, what would the penalty be, if any, for an LEA/SEA that does not use what FPCO deems to be “reasonable methods”?
 - Would the lack of utilization of “reasonable methods” by an LEA/SEA nullify the applicability of the enforcement actions detailed in the Notice of Proposed Rule Making (NPRM)?

Sec. 99.35(a)(2)

“The Secretary proposes to amend Sec. 99.35(a)(2) by removing the provision that a State or local educational authority or other agency headed by an official listed in Sec. 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.”

COMMENTS

- In this section, the USDOE uses an example of a private higher education institution non-consensually sharing PII about its former students with an LEA for the purpose of program evaluation. While this is a good example, greater clarification about this transfer would be appreciated. For example, can non-consensual redisclosure of PII be made from one school in a district to another in the same district for this purpose; from one teacher to another?

Sec. 99.60(a)(2)

“Proposed Sec. 99.60(a)(2) would provide that, solely for purposes of subpart E of the FERPA regulations, which addresses enforcement procedures, an “educational agency or institution” includes any public or private agency or institution to which FERPA applies under Sec. 99.1(a)(2), as well as any State educational authority (e.g., SEAs or postsecondary agency) or local educational authority or any other recipient to which funds have been made available under any program administered by the Secretary (e.g., a nonprofit organization, student loan guaranty agency, or a student loan lender), including funds provided by grant, cooperative agreement, contract, subgrant, or subcontract.”

Letter to Regina Miles

May 23, 2011

Page 5

COMMENTS

- Enforcement procedures with respect to any recipient of Department funds that students do not attend (sec. 99.60) – In this section the Federal government seeks to expand the organizations that it may investigate and fine for improper redisclosures. The USDOE's current interpretation is that it cannot take enforcement action against places that students do not attend (like the CSDE). The proposed regulation would add a section to the regulation that allowed USDOE to consider all entities that receive USDOE funds as "educational agencies or institutions" under FERPA, and, therefore, be subject to fines for violations of FERPA.
- This proposed regulatory change seems to be repetitive with the five-year ban. Both changes seem to be seeking powers over secondary data receivers.
- We believe that matters would be clearer if the USDOE created a new class of FERPA entities instead of using this approach.
- As with the five-year ban above, the timeline for implementation of this enforcement action needs to be made specific.

While again we support the FPCO expansion of their oversight, we cannot support the addition of Sec. 99.60(a)(2). The new powers seem repetitive with the five-year rule proposed in the same NPRM and it is not clear how the two interact. Furthermore, the attempt to include the secondary receivers of data (like SEAs) under the "educational agencies or institutions" heading is ill-conceived and will lead to problems. It would be better for the USDOE to create a new class of entities for the secondary organizations.

Sec. 99.31

COMMENTS

Throughout this section, reference is made to various authorities:

- 99.31(a)(6)(ii) – "State or local educational authority";
- 99.31(a)(6)(iii) – "educational agency or institution"; and
- 99.31(a)(6)(iv) – "educational agency or institution or State or local educational authority or agency headed by an authority."

Letter to Regina Miles

May 23, 2011

Page 6

Please provide either clarification about what is meant by each of these terms, or use the same term in all of the sections of the proposed changes to the guidelines.

Sec. 99.3, 99.31(a)(6), and 99.35

"Federalism implications" means substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations in Sec. 99.3, 99.31(a)(6), and 99.35 may have federalism implications, as defined in Executive Order 13132, in that they will have some effect on the States and the operation of educational agencies and institutions subject to FERPA."

COMMENTS

- We believe that some of the proposed changes will increase burdens on SEAs, especially with respect to enforcing the destruction of PII once a research study or audit has ended.

Once again, thank you for the opportunity to comment about the proposed changes to the FERPA guidelines. We are hopeful that our comments and concerns, as well as those provided by all the other states, will help the USDOE move forward with this process.

Respectfully,



Sarah S. Ellsworth, Ph.D., Chief
Bureau of Data Collection, Research and Evaluation
Connecticut State Department of Education

SSE:bc

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e3091f
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-0002-0169
Comment on FR Doc # 2011-08205

Submitter Information

Name: Ronda Vuillemont-Smith
Address:
Broken Arrow, OK,
Email: rvuillemont-smith@sbcglobal.net

General Comment

I am OPPOSED to 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 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.

This is an invasion of my privacy as well as the privacy of my family. Please OPPOSE this.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e30927
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-0002-0170
Comment on FR Doc # 2011-08205

Submitter Information

Name: Heather Hale
Address:
Omaha, NE,
Email: hexxuss@yahoo.com

General Comment

Any changes to the current privacy laws for students that enable more people to view VERY private information means an easier ability to hack that information, including Social Security numbers. The definition provided for who can view that information is so broad that virtually anyone the government sees fit could have it. This invasion of privacy needs to come to a screeching halt.

As a parent, if this goes through, I will NO LONGER be providing birth certificate information or social security information to people who will not guarantee it's security. I owe my child that much. I will demand that the current information be REMOVED from his records as well, and take steps to provide nothing but home schooling. I will also encourage everyone else to do the same.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Community Organization
Tracking No. 80e30925
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-0002-0171
Comment on FR Doc # 2011-08205

Submitter Information

Name: Lindsay Torrico
Address:
Alexandria, VA,
Email: lindsay.torrigo@uww.unitedway.org
Organization: United Way Worldwide

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

United Way Worldwide

701 North Fairfax Street
Alexandria, Virginia 22314-2045
tel 703.836.7100



May 23, 2011

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

Attention: Comments for proposed changes to Family Educational Rights and Privacy Act (FERPA) regulations

Dear Secretary Duncan:

We appreciate the opportunity to submit comments on the U.S. Department of Education's Federal Register Notice regarding the proposed priorities, requirements, and definitions for FERPA.

We applaud and support the Department's recognition of the importance of protecting student records, as evidenced by language throughout the proposal, and we submit, for careful consideration, recommendations to more clearly articulate how schools can work in collaboration with organizations and other child serving public agencies to make certain that all students receive the support they need to be successful in school, prepared for college, career and citizenship.

Research shows that community engagement in education leads to better student achievement. In fact, a recent study from the Education Testing Service outlined 16 factors influencing achievement; over half of which occur outside the classroom. Schools need community-based organizations to help identify and address the barriers students face in their lives so they can meet the rigorous standards in the classroom and reach their full potential. In order for nonprofit organizations to help meet the academic and nonacademic needs of students, we often need to access student school performance, health, poverty, foster care and criminal data to target interventions for groups and individual students and measure program effectiveness. In some places, community-based organizations and agencies meet resistance in trying to access data—resistance that in some cases may be based on a lack of clarity about the requirements of the law.

While the goal of protecting student privacy is essential, we believe the Department must ensure that school districts understand the importance of data sharing with nonprofit entities and other governmental agencies in meeting federal, state and local education goals. To that end, we ask that the Department make efforts to share FAQs and lessons learned across states about how to share data in ways that preserves privacy and meets the spirit and letter of FERPA's intent. While the proposed regulations allow schools to share student data with organizations that meet certain exemptions, many schools and organizations do not have a clear understanding of what is allowable currently under the law.

United Way Worldwide

701 North Fairfax Street
Alexandria, Virginia 22314-2045
tel 703.836.7100



We respectfully urge the Department of Education to more proactively provide clarity on what constitutes appropriate data sharing in compliance with FERPA amongst education and youth development entities to improve student achievement and overall well-being. We believe FERPA to be a key opportunity to strengthen public-private partnerships and leverage community efforts to improve educational outcomes in our nation's most underserved communities and schools. Please feel free to contact Lindsay Torrico at Lindsay.torrico@unitedway.org or (703) 836-7112 ext. 491, if further clarification on the comment is needed.

Sincerely,

First Focus Campaign for Children
Forum for Youth Investment
National Collaboration for Youth
National Human Services Assembly
Public Education Network
United Way Association of South Carolina
United Way of Central Massachusetts
United Ways of Tennessee
United Way Worldwide

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Other
Tracking No. 80e30901
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-0002-0172
Comment on FR Doc # 2011-08205

Submitter Information

Name: Nancy Segal
Address:
Washington, DC,
Email: nsegal@ets.org
Organization: Educational Testing Service

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Listening. Learning. Leading.

Educational Testing Service
Communications and Public Affairs
1800 K Street, NW, Suite 900
Washington, DC 20006

Nancy Segal
Director
Phone: (202) 457-8689
Fax: (202) 457-8687
E-mail: nsegal@ets.org

May 23, 2011

Educational Testing Service (ETS)

Comments on Notice of Proposed Rulemaking
Family Educational Rights and Privacy Act
Docket ID ED-2011-OM-0002

Educational Testing Service (ETS), a non-profit organization with experts in research and assessment conducts rigorous educational research, analysis and policy studies to advance education and learning worldwide. We serve individual students, their parents, educational institutions and government agencies to help teachers teach, students learn, and parents measure the educational and intellectual progress of their children. Based on our considerable experience using education data to conduct research, ETS submits the following comments in response to the above-referenced notice of proposed rulemaking with a request for consideration of developing guidelines for using/sharing video data for research purposes.

Video Data

ETS recognizes the development of effective teacher evaluation systems is one of the most important challenges facing American education. The Race to the Top program by the US Department of Education (USED) has initiated activity among states and school districts to create these systems, spurring a number of studies looking at the measures that are used as part of such systems to ensure the standards address issues of data quality, reliability, and validity.

Classroom observation is a key component to measuring teacher effectiveness. One of the only viable ways to conduct large scale teacher observations is through video. The video data can be reviewed by multiple, trained professionals who can rate the same evidence, reducing subjectivity. Video data also allows teachers to conduct self-reflection.

ETS is involved in the Measures of Effective Teaching (MET) project. Funded by the Bill and Melinda Gates Foundation, MET seeks to develop and test multiple measures of teacher effectiveness. The MET project uses video to evaluate more than 3,000 participating teachers across six urban school districts in CO, FL, NY, NC, TN, and TX.

ETS strongly supports protecting student privacy under the Family Educational Rights and Privacy Act (FERPA). However, video is an emerging and important source of data to those conducting research in measures of effective teaching and seeking to improve teacher evaluation. Guidelines for the use or sharing of such video data do not exist, making it difficult for researchers to access or share the data for evaluation purposes. ETS requests that USED consider developing guidelines for using/sharing video data for research purposes. We understand that this process will involve a careful balancing of privacy and research interests, and we would welcome an opportunity to inform that process as guidelines are developed.

Thank you again for affording us with the opportunity to comment on the notice of proposed rulemaking on FERPA. Please do not hesitate to contact me at 202-659-8076 or at nsegal@ets.org if you have any questions or comments.

Kind regards,

Nancy Segal
Director, Government Relations

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e30916
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-0002-0173
Comment on FR Doc # 2011-08205

Submitter Information

Address: United States,

General Comment

I am writing in opposition of the proposed amendments. Our education system presently has more information than before and the results from this information are not necessarily positive. The results from our tax dollars, information gathered, and multiple agencies to provide support for numerous programs are a failure. This is the results of agencies making regulations instead of Congress making legislation.

Entities or individuals allowed to access student information is described as an authorized representative. This policy is vastly too vague. It leaves too much information to be given to too many individuals undoubtedly leading to more individual errors which will be all the more difficult to track which individual made the actual error. The student and parent(s) are going to suffer the consequence of the DoE's need to gather and share students private information. Furthermore, this initiative will be federally mandated but once again states will have the burden of training, implementing, and maintaining this federal mandate implemented by regulation not legislation. Undoubtedly this proposal will ultimately be implented because federal agencies make propals for amendments to laws and the American public never know it until "X" regulation is enforced.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e308f7
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-0002-0174
Comment on FR Doc # 2011-08205

Submitter Information

Name: Kimberly Cooper

Address:

Alexandria,

Email: kimcooper815@gmail.com

General Comment

As a parent I do not wish the government, either state or federal to have more access to my children's educational records. Sharing this information with "researchers", etc. goes against FERPA, and puts everyone at risk. At a time when hackers and outside entities are all too interested in information about us, we don't need another database, because errors happen, and that information should be used solely by the particular school the child is enrolled in and the parents/guardians. We don't want more government...we want LESS.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e30a18
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-0002-0175
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jay Dahlquist

General Comment

The regulation explanation would appear to be interested in protecting privacy, however, the revisions appear to do just the opposite. My main evaluation follows:

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

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Business
Tracking No. 80e309f8
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-0002-0176
Comment on FR Doc # 2011-08205

Submitter Information

Name: Phil Day
Address:
Issaquah, WA,
Email: scottbrownsong@gmail.com
Organization: Tea Party

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

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Congress
Tracking No. 80e309f7
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-0002-0177
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jewel Wilkins
Address:
Washougal, WA,
Email: jewelawilkins@yahoo.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 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State educational agency
Tracking No. 80e309f5
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-0002-0178
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mick Zais

Address:

Columbia, SC,

Submitter's Representative: Karla Hawkins

Organization: S.C. Department of Education

Government Agency Type: State

Government Agency: S.C. Department of Education

General Comment

Please see attached

Attachments

Comment on FR Doc # 2011-08205



STATE OF SOUTH CAROLINA
DEPARTMENT OF EDUCATION

Mick Zais
Superintendent

1429 Senate Street
Columbia, South Carolina 29201

May 23, 2011

VIA ELECTRONIC SUBMISSION

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

Re: Proposed Amendments to the Family Educational Rights and Privacy Act

Dear Ms. Miles:

The South Carolina Department of Education (SCDE) reviewed the United States Department of Education's notice of proposed rulemaking regarding amendments to the Family Education Rights and Privacy Act of 1974 (FERPA). Overall, the proposed FERPA regulations will greatly assist in building longitudinal data warehouses, as well as give a stronger basis for collecting data from local education agencies and storing it at the state level. In addition, the proposed regulations would provide more flexibility in entering agreements with researchers to provide personally identifiable information in student education records (PII). The SCDE appreciates the opportunity to provide comments, which are specifically in regard to the definition of "authorized representative" and set forth more fully below.

The SCDE recommends clarification of the definition of authorized representative in § 99.3 of the proposed regulation (76 Fed. Reg. 19727-19729) as it is unclear as to whether this section would allow a state educational agency or a local educational agency to share educational data, in particular PII, with other state agencies that are not specifically deemed to be authorized representatives. The proposed changes to § 99.3 appears to allow state agencies, such as social services and workforce agencies, to be recipients of PII from a statewide longitudinal data system as long as there is a written agreement between an authorized representative and the non-education state agency; therefore, clarification is warranted to specify what entities are permitted to receive PII.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in blue ink that reads "Mick Zais".

Mick Zais, Ph.D.
State Superintendent of Education

MZ/kmh

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Individual
Tracking No. 80e30a02
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-0002-0179
Comment on FR Doc # 2011-08205

Submitter Information

Name: Brooke Henderson
Address:
Oklahoma City,

General Comment

There are three key points to be made regarding these proposed changes:

- 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.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Other
Tracking No. 80e309e3
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-0002-0180
Comment on FR Doc # 2011-08205

Submitter Information

General Comment

The attached letter is submitted to comment on the U.S. Department of Education's proposed regulations applicable to the Family Educational Rights and Privacy Act (FERPA), as published in the April 8, 2011, Federal Register. Each of the signatories to this letter is committed to both the strategic and appropriate use of education data to inform policy, management and instructional decisions and the necessary protections for student data. We believe that the proposed regulations strike the appropriate balance between these goals.

Attachments

Comment on FR Doc # 2011-08205

May 23, 2011

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

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

Dear Ms. Miles,

This letter is submitted to comment on the U.S. Department of Education's (ED) above-captioned proposed regulations applicable to the Family Educational Rights and Privacy Act (FERPA), as published in the April 8, 2011, Federal Register. Each of the signatories to this letter is committed to both the strategic and appropriate use of education data to inform policy, management and instructional decisions and the necessary protections for student data. We believe that the proposed regulations strike the appropriate balance between these goals.

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

As the preamble to the proposed regulations acknowledges, broader disclosure of student records for legitimate purposes at the state, system and local levels may increase the risk of unauthorized disclosures. However, the response to this challenge is not to sacrifice the legitimate use of data to inform education decisionmaking, but rather to require stronger protections relating to how the data are maintained, accessed and used. We can and must support privacy and security protections for student education records without undermining the legitimate and necessary use of data to improve student achievement.

The undersigned organizations support the proposed regulations, which, when finalized, would serve to:

- Provide states with much-needed clarity around the application of FERPA to state longitudinal data systems;
- Provide for stronger privacy and security protections for student data;
- Clarify prior interpretations of FERPA that were perceived to prevent the legitimate use of education data for critical evaluation, research and accountability purposes; and
- Clearly permit the limited sharing of appropriate data that would inform critical decisionmaking.

The undersigned support the following positive changes in the proposed regulations:

- Interpreting FERPA's provisions that authorize disclosures of student data from a statewide longitudinal data system without written parent or eligible student consent for evaluation, audit and compliance activities related to federally and state-supported education programs —

- To encompass evaluations (and audits) of federally and state-supported education programs administered by the agency or institution receiving the disclosures, as well as programs of the disclosing agency,
- To relate to federally and state-supported education programs administered by noneducational agencies, and
- To provide more flexibility to state and local education authorities in designating authorized representatives to conduct evaluations and audits;
- Interpreting FERPA's provision on research studies aimed at improving instruction to permit state agencies to enter into agreements for studies on behalf of educational agencies and institutions in their state;
- Requiring written agreements with authorized representatives that perform education evaluations or audits and requiring "reasonable methods" designed to protect the data against improper disclosures; and
- Adding and expanding authorities to enforce against FERPA violations through debarments from receiving further disclosures or withholding of funds.

The undersigned provide the following specific comments regarding the proposed regulations relating to the use of and disclosure of student data:

1. **Further define "education program":** Although we support the definition of "education program" in the proposed rules, we recommend that the definition be further clarified and made more specific, perhaps by providing more examples. First, we assume that the determination of a program as an education program for these purposes turns on the purpose and nature of the overall program, not on a specific incidental educational or training activity within a broader noneducation program (for example, if patients in a health program are provided instruction on better eating habits). That point should be clarified. Second, especially at the early childhood level, distinguishing which early childhood programs are education programs and which are not may be difficult. Other commenters will likely provide recommendations on this definition. Any clarity that can be brought to that context would be helpful.
2. **Clarify the meaning of "reasonable methods":** While we generally agree that state and local education authorities should be provided flexibility to impose reasonable methods to ensure FERPA compliance by their authorized representatives, we recommend that the final regulations include more specificity. The following specific "reasonable methods" with which authorized representatives should be expected to comply should be incorporated into agreements:
 - ◆ Comply with applicable state data security laws and policies;
 - ◆ Ensure all employees who will have access to personally identifiable student data participate in training on FERPA and state data privacy and security laws
 - ◆ Maintain discipline policies, including possible termination of employment, for employees who violate the policies or take actions that result in an unauthorized disclosure of student data; and
 - ◆ Provide appropriate access to the state or local education authority to review and monitor the authorized representative's administrative and electronic processes for protecting student data from further disclosures.

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

3. **Clarify process for debarment from further disclosures:** The proposed regulations should address what procedures will be used to ensure accurate and fair determinations in the case of a proposed debarment from receiving further disclosures for a period of at least five years. As written, the proposed provisions appear to mandate at least a five-year debarment in the case of any unauthorized redisclosure with no room to make a judgment as to whether that sanction is appropriate.

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

4. **Clarify authority to share data across state lines:** There is increasing demand to share data across state lines as states seek to make comparative evaluations or connect data on students who may participate in education in multiple states. For example, a state education authority in state A may want to conduct a comparative evaluation of student performance with state B. Or a K–12 student in state C may have attended college in state D, and state C would like to include that student’s postsecondary outcome data in a postsecondary feedback report to its high schools. Another example of the issue is that multiple states in the region may want to establish a regional data warehouse to house data as the authorized representative for the states’ education authorities. Several stakeholders have raised questions about whether the proposed regulations would permit disclosures for the purpose of evaluating federally or state-supported education programs across state lines. In such cases, the question is whether FERPA would permit the state education authority in one state to designate a state education authority in another state as its authorized representative to permit student data to be disclosed from one authority to the other. We note that in many such instances, the states may be able to accomplish the purposes of such a study without disclosing personally identifiable student data. While we read nothing in the FERPA statute or in either the current or proposed regulations to bar these arrangements, provided the prescribed safeguards are applied, we request that this interpretation be affirmed in the final regulations or in their preamble.

We commend ED for these proposed regulations and strongly recommend that ED continue to assert positions that balance the use of data to improve student achievement and outcomes with protections for those data. We also support ED’s efforts to elevate and strengthen its focus on privacy, security and

confidentiality issues, including the initiative to take a more proactive role in providing technical assistance and guidance to states, local educational agencies and educational institutions on these issues.

Thank you for the opportunity to comment.

Sincerely,

(in alphabetical order)

Alliance for Excellent Education
American Institutes for Research
Association for Career and Technical Education
College Summit
Council of Chief State School Officers
Data Quality Campaign
Houde Consulting Group, LLC
Education Trust
International Association for K-12 Online Learning
Knowledge Alliance
NASSP
National Association of State Boards of Education
National Association of State Directors of Career Technical Education Consortium
National Association of System Heads
National Center for Higher Education Management Systems
National Council on Teacher Quality
National Math & Science Initiative
National Skills Coalition
State Higher Education Executive Officers
Western Interstate Commission for Higher Education

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Other
Tracking No. 80e30a1d
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-0002-0181
Comment on FR Doc # 2011-08205

Submitter Information

Name: Charles Weaver
Address:
Poulsbo, WA,
Email: cawscw@comcast.net
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.

Chuck

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: State educational agency
Tracking No. 80e30a1b
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-0002-0182
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mitchell Chester

Address:

Malden, MA,

Email: mchester@doe.ma.edu

Submitter's Representative: Dianne Curran

Organization: MA Department of Elementary and Secondary Education

Government Agency Type: State

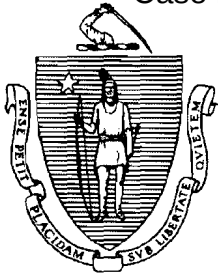
Government Agency: MA Department of Elementary and Secondary Education

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



Massachusetts Department of Elementary and Secondary Education

75 Pleasant Street, Malden, Massachusetts 02148-4906

Telephone: (781) 338-3000
TTY: N.E.T. Relay 1-800-439-2370

Mitchell D. Chester, Ed.D.
Commissioner

May 23, 2011

The Honorable Arne Duncan
Secretary of Education
U.S. Department of Education
Washington, D.C.

RE: Proposed Rulemaking – Family Educational Rights and Privacy Act, 34 CFR Part 99
Docket ID ED02011-OM-0002

Dear Secretary Duncan:

The Massachusetts Department of Elementary and Secondary Education (MADESE) supports the U.S. Department of Education's goal of balancing the need to safeguard the privacy rights of students with the need to use available student data to improve education programs and student outcomes. Except as noted below, we believe the proposed regulations strike the right balance. We are particularly pleased with the proposed regulations defining "authorized representative" and "education program," and the commentary and proposed regulations governing research studies by State educational authorities and "authority to audit or evaluate." The proposed regulations will assist State and local educational authorities to carry out important education reform initiatives consistent with Race to the Top.

We strongly recommend, however, that you eliminate the proposed regulation that would prohibit a local educational authority (LEA) from allowing the State educational authority (SEA) access to its education records for at least five years in the event of an improper redisclosure of personally identifiable information (PII) by the SEA. This debarment provision would impede both SEAs and LEAs from carrying out their statutory duties and is unnecessary in light of existing safeguards and enforcement provisions.

Our comments, including a request for clarification and questions, on selected proposed regulations follow.

A. Authorized Representative (§§99.3 and 99.35)

MADESE generally supports the proposed definition of "authorized representative" and is pleased with the proposal to rescind the policy established in the January 30, 2003 *Hansen*

memorandum that other state or federal agencies cannot be authorized representatives because they are not under the direct control of a State educational authority (SEA). We appreciate that the U.S. Department of Education recognizes States' needs for flexibility and discretion in designating our authorized representative for audit and evaluation purposes.

We recommend clarification so that the proposed definition aligns with §99.35(a) (1), in which no change is proposed. Current §99.35(a) (1) states:

Authorized representatives...may have access ...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. (Emphasis added.)

The proposed definition of "authorized representative" states in relevant part:

...any entity or individual designated by a State or local educational authority or an agency headed by an official listed in §99.31(a) 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." (Emphasis added.)

If the regulation is adopted as proposed, an authorized representative could be interpreted to mean an individual or entity who is engaged only in activities connected to Federal legal requirements related to Federal or State supported education programs. However, §99.35(a)(1) addresses both audit and evaluation activities associated with a Federal or State supported education program, and activities associated with enforcement of, or compliance with, Federal legal requirements that relate to those programs. We recommend that you clarify the definition of "authorized representative" as follows, to align with §99.35(a)(1):

... any entity or individual designated by a State or local educational authority or an agency headed by an official listed in §99.31(a) to conduct – with respect to Federal or State supported education programs – any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to those programs." (Suggested revision italicized.)

B. *Debarment* (§99.35(d))

MADESE is very concerned by proposed §99.35(d), which addresses improper redisclosure of PII from education records, to the extent it would prohibit an LEA from permitting SEA access to the LEA's education records for at least five (5) years. We urge you to reject this extreme consequence as it relates to an SEA, or in the alternative, impose the prohibition only where there is evidence of repeated instances of improper redisclosure, or gross negligence in complying with FERPA requirements by the SEA. The proposed consequence, which appears mandatory regardless of circumstances, would effectively prevent the SEA from carrying out its state and

federal responsibilities, including audit, evaluation, compliance and enforcement activities, with respect to that LEA. For example, it would inhibit the SEA's ability to require an LEA to produce multiple education records in connection with a complaint filed pursuant to 34 CFR 300.151 *et seq.*, alleging that the rights of students with disabilities were being violated, and undermine our ability to work effectively under state law to identify and assist underperforming and chronically underperforming schools. Similarly, the SEA would not be able to conduct a thorough coordinated program review of an LEA, which includes a review of education records, among other things, to make findings on whether the program is operating in accordance with applicable federal and state laws. This proposed regulation would not produce good outcomes for students or education programs.

C. Education Program (§§99.3, 99.35)

We support the proposed definition of "education program." It is a sensible approach that addresses the different manner in which States have opted to structure their education programs. It will assist Massachusetts because some of our education programs, such as the early intervention program authorized under Part C of the Individuals with Disabilities Education Act, are not housed in an education agency.

D. Authority to Audit or Evaluate (§99.35)

We strongly support the proposed regulation that would make it possible for the SEA to use data from postsecondary agencies and institutions to evaluate K-12 programs by permitting higher education agencies and institutions to disclose data in connection with an audit or evaluation of a Federal- or state-supported K-12 program.

Please address the following question in the final commentary and regulations: If a higher education authority provides PII to the SEA in connection with the evaluation of K-12 programs, are there any circumstances under which the SEA would be permitted to redisclose the post-secondary PII to the respective students' LEAs so the LEAs would be able to use the individual student results for their own evaluation purposes, e.g., to evaluate the effectiveness of their high school program?

Thank you for your consideration of our comments and for your support of education reform.

Sincerely,



Mitchell D. Chester, Ed.D.
Commissioner of Elementary and Secondary Education

Copy: Paul Reville, Secretary of Education
Rhoda E. Schneider, General Counsel

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 23, 2011
Category: Parent/Relative
Tracking No. 80e30a13
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-0002-0183
Comment on FR Doc # 2011-08205

Submitter Information

Name: Patricia Lutz
Address:
Tulsa, OK,
Email: patricia.lutz@earthlink.net

General Comment

I strongly oppose the proposed changes to the FERPA regulations.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Association/Organization
Tracking No. 80e30afb
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-0002-0184
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jerome H. Sullivan

Address:

Washington, DC,

Email: Sullivanj@aacrao.org

Submitter's Representative: Barmak Nassirian

Organization: American Association of Collegiate Registrars and Admissions Officers (AACRAO)

General Comment

Enclosed please find comments on the FERPA NPRM of April 8, 2011 from AACRAO.

Attachments

Comment on FR Doc # 2011-08205



One Dupont Circle, NW, Suite 520 / Washington, DC 20036-1135
(202) 293-9161 Main / (202) 872-8857 Fax
www.aacrao.org

May 23, 2011

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

**Re: April 8, 2011 Notice of Proposed Rulemaking
Family Education Rights and Privacy Act of 1974, as amended
Docket ID ED-2011-OM-0002**

Dear Ms. Miles:

On behalf of the American Association of Collegiate Registrars and Admissions Officers (AACRAO), I write to respectfully submit our comments on the Notice of Proposed Rulemaking (NPRM) published in the April 8, 2010 *Federal Register*.

AACRAO is a nonprofit association of more than 2,600 institutions of higher education and more than 10,000 campus enrollment officials. By far the vast majority of our individual members are campus officials with direct responsibility for admissions, recruiting, academic records, and registration functions.

Because they serve as custodians of educational records for current and former students, our members are particularly knowledgeable about privacy issues in general, and about information security and privacy requirements of Federal and State laws. Compliance with the Family Educational Rights and Privacy Act of 1974, as amended (FERPA), has long been a primary area of professional jurisdiction for AACRAO members, who are often the leading FERPA experts on their campuses. Because they are so central to the interests and priorities of our members, data security, privacy, and FERPA have also been top priorities for AACRAO, and we devote considerable attention and resources to them as primary policy issues of concern.

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

where to strike that balance are ever evolving, and we have always been open to discussions about changes to FERPA. Examples of our receptivity to change include past modifications to FERPA necessitated by campus security concerns, the needs of military recruiters, and governmental access to records for anti-terrorism purposes. In keeping with that tradition of accommodating reasonable evolutionary changes to FERPA, we remain open to any regulatory or legislative modifications that might be needed to accommodate legitimate and well-articulated policy goals.

In reviewing the regulatory changes proposed by the Department, we are alarmed by several striking facts.

First, the proposed changes represent a wholesale repudiation of fair information practices. Well-settled principles of notice, consent, access, participation, data minimization, and data retention are all undermined by the new paradigm promoted by this proposal.

Second, the substantive goals that the Department cites as motivating these changes could be just as effectively achieved through much more artfully crafted modifications that would avoid the proposed regulations' *de facto* nullification of individual privacy rights.

Third, we believe that the Department has shortsightedly avoided a sufficiently inclusive policy development process, and that the proposed regulations have been overwhelmingly influenced by the single-issue lobbying of a well-financed campaign to promote a data free-for-all in the name of educational reform. Lost in the frenzied rush to do good with other people's education data is FERPA's underlying purpose. We sincerely believe that reasonable compromises can be made to accommodate legitimate policy goals, but the Department has instead chosen to facilitate an unconditional surrender of educational privacy rights of American families and students.

Finally, most of the radical changes proposed by the Department require legislative amendments to FERPA, and the Department lacks legal authority to implement them through regulatory action. As our section-by-section analysis and commentary below indicates, the Department seems to grasp at straws and appears to be manufacturing statutory authority out of thin air to justify these changes, several of which clearly conflict with congressional intent.

We offer comments on each section of the proposed regulations, in the order issues are presented in the NPRM.

I. Definitions

A. Authorized Representative (§§99.3, 99.35)

Section (b)(1) of FERPA conditions receipt of any Department funds to any educational agency or institution having a policy or practice of permitting the release of education

records (or personally identifiable information (PII) other than directory information) of students without first obtaining written consent, except under very specific circumstances. One exception to this requirement is for release of education records to “authorized representatives” of the Comptroller General of the United States, the Secretary, State educational authorities, or (for law enforcement purposes) the Attorney General. 20 U.S.C. 1232g (b)(1)(C). Redisclosure of information obtained by “authorized representatives” of State educational agencies may only occur under the conditions set forth in Section (b)(3):

Provided, that except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials....

20 U.S.C. 1232g (b)(3). The statutory language makes clear that Congress intended to restrict redisclosures by such official recipients of personally identifiable information from student education records. In addition, the use of the word “officials” twice to signify who was collecting the data and releasing such data on behalf of the State educational agencies demonstrates that Congress envisioned “authorized representatives” to be employees of the State educational agencies or agents under the direct control of such employees. This legal position is supported in the Joint Statement included in the Congressional Record in 1974 when Congress amended FERPA. 120 Cong. Rec. at 39863 (December 13, 1974) (stating that existing law at Section (b)(1) “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”).

In direct conflict with that longstanding and well-settled interpretation of the law, the NPRM rescinds the guidance issued by U.S. Deputy Secretary of Education William D. Hansen, dated January 30, 2003, which clarified that for purposes of FERPA, an “authorized representative” of a State educational authority must be under the direct control of that authority (in other words, either an employee or contractor). Instead, the proposed regulation advances a novel and counterintuitive definition of “authorized representative,” which would allow “*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 these program.” (Emphasis added.) The State or local education authority or agency headed by an official listed in §99.31(a)(3) would be required “to use reasonable methods” to ensure that any entity designated as its authorized representative remains compliant with FERPA. Future non-regulatory guidance may be issued on what would be considered “reasonable” methods by the Department.

The effect of this extraordinarily overbroad definition is to expand the scope of who can be designated as an “authorized representative” of a State or local educational agency to entities and individuals well outside its direct control. Virtually any State or local employee could be designated an authorized representative under the proposed regulations, no matter how remote or dubious their actual standing as an educational functionary. What’s worse, nongovernmental entities, including non-profits, religious organizations, foundations, independent researchers, and for-profit companies, as well as individuals, could be granted access to personally identifiable information without notice or consent. While this information free-for-all may be conducive to the Department’s policy goal of simplifying State compliance with the requirements of the American Recovery and Reinvestment Act of 2009 (ARRA) and the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act (America COMPETES Act), it is unnecessarily and unjustifiably overbroad.

In addition, the Department lacks the legal authority for abandoning its longstanding interpretation that an authorized representative must be under the direct control of the State or local agency. In so narrowly enumerating, by title, the officials who may access personally identifiable records without the student’s consent, Congress surely meant “authorized representative” to be tightly linked to those positions. The Department, however, would eviscerate that intent by allowing literally *anyone* (presumably even including representatives of foreign governments) to exercise that authority, if they are so designated. In justifying this radical shift, the Department merely asserts that the current interpretation is “restrictive” given “Congress’ intent in the ARRA to have States link data across sectors.” Nothing in the ARRA explicitly amended FERPA, however. In fact, ARRA did not amend a preexisting statutory requirement in the America COMPETES Act that explicitly requires States developing state longitudinal data systems (SLDS) to comply with FERPA. Congress could easily have provided a different standard for release and protection of data by States linking education records across sectors, but it did not do so. The Department’s reference to ARRA, therefore, can hardly justify the dangerous experiment with the sensitive information contained in Americans’ education records that this proposal would promote.

Under the proposed definition, a chief state school officer or higher education authority could authorize as its representatives nonprofit organizations, independent researchers, or other state agencies, which would enter into a written agreement with the State or local educational authority to make sure that student records and personally identifiable information would be protected. Such agreements, however, will be virtually useless in stopping an authorized representative who is not under the direct control of the State or local agency from misusing the data for other purposes or redisclosing the data to others. Under the proposed regulations, the written agreements may be required to spell out how nonconsensually redisclosed data should be used and released, but without the element of direct control, the State or local educational agencies will have no ability to enforce them. A chief state school officer could call over to her colleague heading the State labor or health department and beg the colleague to crack down on a rogue authorized representative working under the colleague’s direct control, but there would be no regulatory assurance that the improper activity would stop, or could be stopped.

Similarly, a researcher conducting an independent higher education evaluation could not easily be stopped from using student records for purposes other than those envisioned when she was made an authorized representative for a legitimate evaluation.

Without retaining the element of meaningful direct control, the proposed definition of an authorized representative invites mischief and creates predictable data disclosure problems that Congress was clearly seeking to prevent by enacting FERPA in the first place. This novel definition of authorized representative, as proposed, would take control of education records away from parents and students, and hand it over to entities and individuals over whom State and local authorities would have no control.

B. Directory Information (§§99.3)

The NPRM would modify the definition of “directory information,” as defined in current 34 CFR 99.3, 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....

76 Fed. Reg. 19729 (Apr. 8, 2001). AACRAO supports the clarification that institutions may require students to carry ID cards or display badges. See additional discussion below at IV.A., analyzing proposed regulations at Section 99.37(c) (Student ID Cards and ID Badges).

C. Education Program (§§99.3, 99.35)

For the first time, the Department proposes a definition for the term “education program,” which is used in current 34 CFR 99.35(a)(1). That subsection provides that authorized representatives of the officials or agencies headed by officials listed in §99.31(a)(3) may have nonconsensual 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 relating to those programs. The proposed definition defines “education program” as

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

(Emphasis added.) 76 Fed. Reg. 19729-19730 (Apr. 8, 2001). The Department’s rationale for including programs not administered by an education agency include: (1)

education may begin before kindergarten and may involve learning outside of postsecondary institutions, and not all of these programs are administered by State or local educational agencies; (2) agencies other than State educational agencies may administer career and technical education or adult education programs; (3) the Department believes all these programs could benefit from the type of rigorous data-driven evaluation that SLDS will facilitate; and (4) greater access to information on students before entering or exiting the P-16 programs could be used to evaluate these education programs and provide increased opportunities to build upon successful ones and improve less successful ones.

The rationale articulated by the Department in support of this astonishing definition strains credulity. First, Congress never intended such a broad sweep in terms of the kinds of audits or evaluations for which nonconsensual access to personally identifiable information from education records may be provided. Second, even accepting, *arguendo*, that the policy purposes articulated in the preamble are sufficiently compelling, the proposed definition is unnecessarily overbroad and recklessly imprecise. Finally, completely missing in the rationale is any shred of legal authority for such a wholesale weakening of the legal protections of personally identifiable information provided under the statute. The proposed definition, when combined with the proposed definition of “authorized representative,” could permit every federal or state-supported county recreation program to be considered an education program eligible for evaluation using personally identifiable information from education records, without the evaluator needing to obtain consent from the parents or student. The proposed definition would provide virtually unlimited access to education records in the name of evaluating program outcomes to any program evaluators that can convince an authorized representative that they are reviewing an education program, as loosely defined by the proposed definition.

II. Research Studies (§99.31(a)(6))

Section (b)(1)(F) of FERPA permits educational agencies and institutions nonconsensually to disclose personally identifiable information to organizations conducting studies “for, or on behalf of” educational agencies and institutions to improve instruction, administer student aid programs, or develop, validate, or administer predictive tests. 20 U.S.C. 1232g (b)(1)(F). Current regulations in 34 C.F.R. 99.31(a)(6)(ii)(C) require that an educational agency or institution enter into a written agreement with the organization conducting the study that specifies the purpose, scope, and duration of the study and the information to be disclosed and meets certain other requirements. The proposed regulations would circumvent the statutory requirement that any disclosures of personally identifiable information under the studies exception be done “for, or on behalf of” educational agencies or institutions by allowing State or local educational authorities (or agencies headed by an official listed in 34 CFR 99.31(a)(3)) to enter into agreements with organizations conducting studies under 34 C.F.R. 99.31(a)(6)(i) and to redisclose personally identifiable information on behalf of educational agencies and institutions that provided the information in accordance with other FERPA regulatory requirements. The proposed regulations would also make the written agreement requirements and other provisions in 34 CFR 99.31(a)(6) apply to

State and local educational authorities or agencies headed by an official listed in 34 CFR 99.31(a)(3), as well as educational agencies and institutions.

The Department claims that these changes to existing regulations

are necessary to clarify that while FERPA does not confer legal authority on State and Federal agencies to enter into agreements and act on behalf of or in place of LEAs and postsecondary institutions, nothing in FERPA prevents them from entering into these agreements and redisclosing PII on behalf of LEAs and postsecondary institutions to organizations conducting studies under §99.31(a)(6)....

76 Fed. Reg. 19730 (Apr. 8, 2001). The Department notes that State educational authorities, and State higher educational agencies in particular, typically have the role and responsibility to perform and support research and evaluation of publicly funded education programs for the benefit of multiple educational agencies and institutions in their States.

While deferring to the Department's policy goals of enhancing the ability of State educational authorities to enter into research agreements with institutions of higher education and then redisclose the information they gather, AACRAO is very concerned that the Department is expansively broadening the scope of both access to and redisclosures of personally identifiable information without statutory authority to do so. In particular, in the event that an educational agency or institution objects to the redisclosure of personally identifiable information it has provided to the State educational authority for other purposes, under the proposed regulations, the State educational authority need only play its new trump card—that it has *implied* authority to do whatever it wants with the personally identifiable information in the name of supporting research and evaluation efforts.

This represents a disturbing erosion of educational privacy rights and a renunciation of the Department's historic role as the protector of educational privacy rights of American students and families. Particularly because the Department fails to mandate compliance with the most basic fair information practices by such recipients of personally identifiable information, students and families would not even be aware that various and sundry data repositories of education records may have redisclosed their information to other third parties.

This ill-advised proposal also makes FERPA compliance a nightmarishly impossible task for institutions. Educational institutions would be unable to verify the extent to which and the parties to whom personally identifiable information they have previously disclosed has been redisclosed. Institutions would be realistically unable to provide students who request records of what items of their personally identifiable information have been released and to whom with complete records under FERPA's regulatory recordation requirements. Currently, an institution of higher education has control over disclosures of student education records and personally identifiable information. Under the proposed

regulations, the State educational authority will be required to record redisclosures, but need not send those recordations back to the institution, or, for that matter, to the students and families. Only on specific request to the State educational authority would an institution or student be able to determine what redisclosures have been made of a student's education records and personally identifiable information and to whom. At a minimum, the State educational authority considering the redisclosure of student education records and personally identifiable information should be required to notify the student and institution of the redisclosure and provide an avenue for the student to opt out of the redisclosure. As written, the proposed regulations are unnecessarily overbroad and do great violence to the underlying privacy tenets of FERPA.

III. Authority to Audit or Evaluate (§99.35)

Current regulations in 34 CFR 99.35(a)(2) provide that in order for a State or local educational authority or other agency headed by an official listed in §99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity, its authority to do so must be established under other Federal, State, or local authority because that authority is not conferred by FERPA. The proposed regulations seek to remove the requirement to establish legal authority under other Federal, State, or local law to conduct an audit, evaluation, or compliance or enforcement activity. The Department's stated purposes are (1) to clarify that the authority for a State or local educational authority or Federal agency headed by an official listed in 34 CFR 99.31(a)(3) to conduct an audit, evaluation, enforcement or compliance activity may be express or implied, and (2) to promote Federal initiatives to support the robust use of data by State and local education authorities to evaluate the effectiveness of Federal or State-supported education programs, in particular by providing postsecondary student data to P-12 data systems in order to permit the evaluation of whether P-12 schools are effectively preparing students for college.

The proposed change, therefore, would substitute the mere invocation of an audit or evaluation for actual authority. This extraordinary proposal thus turns another narrow consent exception into a magic incantation by which entities with no legal authority and no intention of actually conducting audits or studies can circumvent congressional intent, violate the privacy rights of students and families, and obtain unfettered access to personally identifiable information.

This breathtaking new approach, which would make the Department an accomplice in facilitating false, evasive, or dubious assertions of audit or evaluation authority, is not only ill-advised, it is unnecessary. Third parties with real legal authority to engage in auditing or evaluating programs have always had access to data. Once again, in attempting to facilitate somewhat broader access, the Department is proposing an overbroad remedy that would result in predictably unfortunate outcomes that we doubt it truly intends to enable.

In addition, the amorphous expansion of this exception to entities that the Department suggests may have "implied authority" to conduct audits will result in confusion and

noncompliance as institutions struggle to separate real claims of authority from frivolous ones. Finally, the Department does not have legal authority to eviscerate the clear statutory limitations imposed by Congress through linguistic equivocations and euphemistic redefinitions.

IV. Directory Information (§99.37)

A. Section 99.37(c) (Student ID Cards and ID Badges)

The proposed regulations for 34 CFR 99.3(c) clarify that the right to opt out of directory information disclosures is not a mechanism for students, when in school or at school functions, to refuse to wear student badges or to display student ID cards that display information that may be designated as directory information under 34 CFR 99.3 and that has been properly designated by the educational agency or institution as directory information under 34 CFR 99.37(a)(1). This proposed regulation responds to the need for school and college campuses to implement measures to ensure the safety and security of students and is intended to ensure that FERPA is not used as an impediment to achieving school safety.

AACRAO supports and welcomes the additional flexibility offered by the proposed regulation on this topic.

B. Section 99.37(d) (Limited Directory Information Policy)

The proposed regulations would clarify that an educational agency or institution may specify in the public notice it provides to parents and eligible students in attendance provided under 34 CFR 99.37(a) that disclosure of directory information will be limited to specific parties, for specific purposes, or both. The proposed regulations also clarify that an educational agency or institution that adopts a limited directory information policy must limit its directory information disclosures only to those parties and purposes that were specified in the public notice provided under 34 CFR 99.37(a). The purpose of these regulations is to give educational agencies and institutions greater discretion in protecting student privacy by permitting them to limit the release of directory information for specific purposes, to specific parties, or both, and to provide a regulatory authority for the Department to investigate and enforce a violation of a limited directory information policy by an educational agency or institution.

We note that the ability to limit directory information to specific parties or purposes currently exists under FERPA. The proposed regulations require an institution that includes such restrictions in its notice of directory information to abide by the policy specified in its public notice.

The Department does not propose changes to the recordkeeping requirement in 34 CFR 99.32(d)(4) or the redisclosure provisions in 34 CFR 99.33(c), instead recommending that educational agencies and institutions that choose to adopt a limited directory information policy assess the need to protect the directory information from further disclosure by the

third parties to which they disclose directory information. When a need to protect the information from further disclosure is identified, the Department recommends that educational agencies and institutions should enter into non-disclosure agreements with the third parties.

AACRAO supports this proposed regulation.

V. Enforcement Procedures with Respect to Any Recipient of Department Funds that Students Do Not Attend (§99.60)

Current regulations in 34 CFR 99.60 designate the Family Policy Compliance Office (FPCO) as the office within the Department responsible for investigating, processing, and reviewing alleged violations of FERPA. Current FERPA regulations addressing enforcement procedures (subpart E, at 34 CFR 99.60 through 99.67) only address alleged violations of FERPA committed by an educational agency or institution. The proposed regulations would provide that, solely for purposes of subpart E of the FERPA regulations, an “educational agency or institution” includes any public or private agency or institution to which FERPA applies under 34 CFR 99.1(a)(2), as well as any State educational authority or local educational authority or any other recipient (for example, a nonprofit organization, student loan guaranty agency, or a student loan lender) to which funds have been made available under any program administered by the Secretary. The proposed regulations update the Department’s authority to investigate and enforce alleged violations of FERPA by the expanded range of State and local educational authorities and other recipients of Department funds that may come into possession of student records and PII. The proposed regulations also clearly authorize FPCO to investigate, review, and process an alleged violation committed by recipients of Department funds under a program administered by the Secretary in which students do not attend. The Department states that it believes that these enhanced enforcement procedures are especially important given the disclosure of personally identifiable information needed to implement SLDS.

Given the vast expansion of entities that would gain access to and maintain education records, AACRAO would certainly understand and support greater enforcement authority for the Department should the proposed regulations be adopted. Desirable and necessary as such expanded authority would be, it cannot be unilaterally manufactured by the Secretary. Nothing in the underlying statute even remotely hints at the Secretary having any authority to treat entities enumerated in the preamble discussion of this section as educational agencies or institutions. This lack of statutory enforcement authority, in fact, should give the Department some pause with regard to its expansive approach to the sharing of personally identifiable information with entities with remote or questionable educational interest in the records they would access under the new regulations. We note, in addition, that it is not clear which enforcement tools legally available to the Secretary would be utilized in actions against State education authorities and other entities.

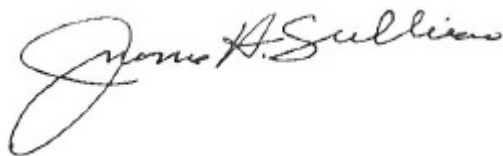
It is also quite puzzling that the Secretary is not using this putative authority to subject these entities to other critical FERPA compliance requirements such as the right to inspect or the right to correct or amend education records. We strongly believe that extending these requirements to the new actors would be just as legally justifiable as what has been proposed, and that it would provide an important tool for parents and students to at least have awareness and minimal access *to their own records*.

Indeed, we believe that the Department is confounding privacy and security in this proposal. The dire need to manufacture new enforcement authority out of whole cloth is the direct consequence of the overbroad and ill-thought-through access and disclosures that would be permitted under the proposed regulations. A much wiser approach would be to limit nonconsensual data disclosures to compelling cases where a specific and articulable need can be demonstrated, and focus enforcement attention on the much smaller universe of entities maintaining these data. The Department is, instead, proposing a rule under which data are released to the custody of a vastly expanded number of entities, which the Department lacks legal authority and resources to adequately police.

While each of the changes discussed above might, by itself, do limited damage to privacy rights, we are all the more alarmed at the interactive effects of so many ill-conceived and legally unsupportable changes. The Department is arbitrarily expanding the number of entities that can gain access to personally identifiable information from education records, the reasons why they get access, and what they may do with the information they collect, even over the objections of the custodians of those records. We are dismayed by the Department's disregard for privacy rights, as well as its failure to consider the impossible compliance environment these proposed regulations would create. In addition, given the radical abandonment of historical interpretation, we find the short comment period quite insufficient and inadequate for purposes of eliciting broad community input.

We thank you for your consideration of our views and stand ready to work with you in addressing changes to the Family Educational Rights and Privacy Act within the framework of the statute.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jerome H. Sullivan". The signature is written in dark ink and is positioned above the typed name and title.

Jerome H. Sullivan
Executive Director

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Other
Tracking No.: 80e30cfc
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-0002-0185
Comment on FR Doc # 2011-08205

Submitter Information

Name: Claire Hannan
Address:
Rockville, MD,
Organization: Association of Immunization Managers
Government Agency Type: Federal

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

Docket ID ED-2011-OM-0002

May 23, 2011

LeRoy S. Rooker
U.S. Department of Education
400 Maryland Avenue, SW
Room 6W243
Washington, D.C. 20202-5920

Dear Mr. Rooker:

The Association of Immunization Managers (AIM) is a membership organization representing the sixty-four state, territorial and urban area immunization programs that are federally funded to ensure age-appropriate immunization in the population. We are writing to comment on the Family Educational Rights and Privacy Act (FERPA) and its relationship to public health immunization efforts. Publication of proposed rule changes to FERPA in the Federal Register allow for public comment on the Act.

We request that FERPA regulations be changed to allow state and local public health agencies access to student immunization records, and to allow the sharing of immunization data from schools to public health immunization information systems.

Public health agencies are required to conduct audits of student immunization records to ensure compliance with age-appropriate immunizations and school immunization requirements. This routine activity is critical to protect the health of students and faculty.

The current FERPA regulations place an undue burden on public health agencies and inhibit their ability to conduct audits. FERPA protects the privacy of a student's education record by requiring parental consent for the sharing of identifiable education records, except in times of emergency when necessary to protect the health and safety of the student or other individuals.

The public health agency should not have to wait until an emergency outbreak of disease and/or a special mandate to access immunization records. Assuring age-appropriate immunization through routine access to immunization records will improve preparation for and response to an emergency situation or disease outbreak. Again, these are critical activities to protect the health and safety of students and personnel.

Additionally, FERPA prevents the sharing of up-to-date immunization information collected by schools into public health immunization information system (IIS). Incomplete IIS records can result in over-immunization as students with incomplete records are more likely to receive unnecessary, duplicate immunizations. The lack of ability to populate immunization registries with immunization information from schools is costly and places an unnecessary burden on physicians, health care providers and parents.

Immunization data sharing from schools to IIS should be governed by public health laws, not education laws. A student's immunization history is a public health concern and should not be considered a part of his/her education record. We urge you to change the FERPA regulations to allow the transfer of immunization data from schools to public health agencies.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Claire Hannan".

Claire Hannan, MPH
Executive Director

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Parent/Relative
Tracking No. 80e30cba
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-0002-0186
Comment on FR Doc # 2011-08205

Submitter Information

Name: Marsha Devine
Address:
Sacramento, CA,

General Comment

Thank you 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).

My comments as a parent and student are attached.

Attachments

Comment on FR Doc # 2011-08205

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

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

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

Collection Limitation Principle:

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

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

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

Data Quality Principle:

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

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

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

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

Purpose Specification Principle:

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

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

Security Safeguards Principle:

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

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

Openness Principle:

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

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

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

Individual Participation Principle:

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

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

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

Accountability Principle:

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

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

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

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

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

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

Sincerely,

Marsha L. Devine

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Union
Tracking No. 80e30caa
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-0002-0187
Comment on FR Doc # 2011-08205

Submitter Information

Name: Donna Harris-Aikens
Address:
Washington, DC,
Email: mfinucane@nea.org
Submitter's Representative: Matthew Finucane
Organization: National Education Association

General Comment

Attached please find the comments of the National Education Association.

Attachments

Comment on FR Doc # 2011-08205



1201 16th St., N.W. | Washington, DC 20036 | Phone: (202) 833-4000

Dennis Van Roekel
President

Lily Eskelsen
Vice President

Rebecca S. Pringle
Secretary-Treasurer

John I. Wilson
Executive Director

May 23, 2011

Regina Miles
Office of Management
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Docket ID ED-2011-OM-0002

Dear Ms. Miles:

Thank you for this opportunity to comment on the proposed revisions to the Department of Education's regulations implementing the Family Educational Rights and Privacy Act of 1974, as amended (FERPA). We would like to comment on the overall balance between disclosure and privacy outlined in the Department's proposal.

Looking first at disclosure, it seems almost a truism that, with proper protection of privacy, the increased acquisition and sharing of certain appropriate data related to students and their success in state and local data systems can assist instruction¹ and play an important role in informing and evaluating education policy and programs. In support of greater data collection and sharing, the Department of Education has devoted hundreds of millions of stimulus dollars in support of state longitudinal data systems (SLDS), expanding in part on data acquisition and sharing promoted by the America COMPETES Act.

Although students and their parents may not be fully aware, state P-20 systems funded by the Department must include at least a dozen elements, including a unique identifier for each student designed to hide their identity except as permitted by law; the enrollment history, demographic characteristics, and program participation record of every student; information on when a student enrolls, transfers, drops out, or graduates; student tests scores required by the ESEA; student test scores measuring college readiness; a link between student and teachers²; student transcript data and grades; data on students' success in college, including whether they enrolled in remedial courses; and data on whether K-12 students are prepared to succeed in college.

¹ A teacher, for example, can benefit from having certain specific information about the past academic performance of his or her students.

² Though not the subject of this notice per se, NEA has expressed concern about educator privacy separately in its comments on other ARRA programs.

May 23, 2011

Docket ID ED-2011-OM-0002

Page 2

The proposed amendments to the FERPA regulations accelerate even further the acquisition and sharing of student data by, among other things: expanding the categories of individuals/entities that can receive personally identifiable student data for evaluation and audit purposes; allowing for housing of personally identifiable data in non-education agencies; authorizing disclosure of personally identifiable data between postsecondary institutions and K-12 agencies, and between K-12 and early childhood programs; broadening the definition of “education program”; and guaranteeing the right of states to share data with researchers, a right currently associated with local education agencies (LEAs).

Looking at privacy, the Department proposes to require states and LEAs to use “reasonable methods” to ensure compliance with FERPA by entities authorized to receive data and seeks comments on what would constitute reasonable methods. It also requires written agreements defining the use of data by authorized agents, and proposes certain penalties for misuse of data, including a five year bar on access to personally identifiable data for those who improperly release it and possible withholding of funds in certain cases.

Comparing the significant increase in data sharing envisioned by the proposal, and some of the uncertainties around the privacy proposal, we are concerned that the Department may have overemphasized disclosure relative to privacy in this proposal.

In evaluating any proposal to increase disclosure, it is important to keep in mind that Congress by definition expressed a strong concern for student privacy in passing FERPA, providing only limited exceptions to the release of student records without parent consent, or the consent of a student when 18 or older. For example, FERPA limits the groups that can receive data at 20 U.S.C. 1232g(b) and requires steps to protect student identification in cases where information is shared.³ The America COMPETES Act, which supports SLDS, defers to FERPA at 20 U.S.C. 9871(e)(2).

Congressional concern about privacy should be given particular weight in the age of computerized databases, where almost every kind of data collection imaginable has become possible, and security is an increasing concern. A major study of 50 state record keeping systems by the Center for Law and Information Policy at Fordham Law School, “Children’s Educational Records and Privacy: A Study of Elementary and Secondary State Reporting Systems,” (October 28, 2009)⁴, found many areas of concern, including:

- “[P]rivacy protections for the longitudinal databases were lacking in the majority of states.”

³ For example, within an exception allowing an LEA to share personally identifiable information with organizations conducting studies, FERPA requires that the studies be administered in a way that will not permit the personal identification of students and their parents and requires the subsequent destruction of data. 20 U.S.C. 1232g(b)(1)(F). And within an exception allowing state education authorities to have certain personal data when required by law, FERPA emphasizes precautions to protect personally identifiable information and destroy it when no longer needed. 20 U.S.C. 1232g(b)(3)(C).

⁴ Retrieved from http://law.fordham.edu/assets/CLIP/CLIP_Report_Childrens_Privacy_Final.pdf.

May 23, 2011

Docket ID ED-2011-OM-0002

Page 3

- [M]ost states collect information in excess of what is needed for the reporting requirements of the No Child Left Behind Act and what appeared needed to evaluate overall school progress.”
- “The majority of longitudinal databases that we examined held detailed information about each child in what appeared to be non-anonymous student records.”
- “Typically the information collected included directory, demographic, disciplinary, academic, health and family information. Some striking examples are that at least 32% of the states warehouse children’s social security numbers, at least 22% of the states record children’s pregnancies, at least 46% of the states track mental health, illness and jail sentences as part of the children’s educational records, and almost all states with known programs collect family wealth information.”

The study found that privacy protections were weak and that “often the flow of information from the local educational agencies to the state department of education was not in compliance with [FERPA].” The report said that many states do not have clear access and use rules regarding the longitudinal databases, and “over 80% of the states apparently fail to have data retention policies and are thus likely to hold student information indefinitely.” The report contains numerous recommendations, including that “data at the state level should be anonymized through the use of dual database architecture.”

This study suggests that privacy, particularly with regard to the most sensitive information, is still catching up with technology in the area of databases containing student data. The proposed regulations, with their reference to “reasonable methods,” “written agreements” and threats of five-year debarment, do not appear to provide a sure roadmap that would ensure privacy.⁵ For example, the threat of enforcement is of little solace if a massive leak of personal student data of the types described in the Center on Law and Information Policy study were to occur. The proposed regulations also appear to lack focus on alternatives to sharing personally identifiable data, such as an emphasis on using de-identified or anonymous student data.

Given the challenge of balancing the sharing of important educationally related data and preserving student privacy, we would recommend that the Department consider additional ways of obtaining information from two key stakeholders—parents and students—on the issues raised by the notice prior to issuing a final rule. In our view, both constituencies would benefit from a more thorough presentation of the issues involved in the increased sharing of student data outlined in this notice (the Department of Education press release associated with this federal register notice described it as a privacy initiative⁶), as well as opportunities for dialogue with the Department, e.g. in stakeholder forums where the issues are clearly defined. The best way to advance the long-term, positive use of state longitudinal data systems is to ensure that all stakeholders are engaged and that privacy is ensured both in theory and practice.

⁵Organizations that have been facilitating SLDS, such as the Data Quality Campaign and the IES National Center for Education Statistics have released important information on what ideal state data protection systems should look like. The Center on Law and Information Policy study simply suggests that we are not there yet.

⁶<http://www.ed.gov/news/press-releases/us-education-department-launches-initiatives-safeguard-student-privacy>

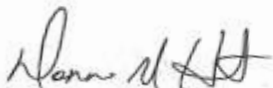
May 23, 2011

Docket ID ED-2011-OM-0002

Page 4

The NEA respectfully submits the above comments for your consideration. Please do not hesitate to contact Matthew Finucane, senior policy analyst, at 202-822-7434 or mfinucane@nea.org should you have any questions about these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna Harris-Aikens". The signature is written in a cursive style with a large initial "D".

Donna Harris-Aikens, Director
NEA Education Policy and Practice

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c87
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-0002-0188
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Farmer

General Comment

The definition of student in 34 CFR 3 is:

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

And attendance:

Attendance includes, but is not limited to—(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and (b) The period during which a person is working under a work-study program.

This suggests materials sent to a college or university prior to attendance would not be covered by FERPA. This would include student financial aid data, test scores, and admissions applications. Is this interpretation correct and, if so, should these materials be covered by FERPA? Would financial aid data be covered by the Program Participation Agreement separate from FERPA?

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c84
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-0002-0189
Comment on FR Doc # 2011-08205

Submitter Information

Name: Wendy
Address:
NY,

General Comment

I thought that FERPA was passed by a representative body. Is it not true that changes also must be passed by our congressional representatives? How could these changes be allowed without going through the proper channels?

As a parent of several children, I would not want any data to be shared without my consent for any reason. I understand that the data would only be shared with the "right people", but I should be allowed to decide who these right people are since they are my children. The schools are supposed to be governed by local school boards with state boards of education, but more and more it is the federal government that is sticking their noses in our schools.

Let the legislators do their jobs and let this go through the proper channels!

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Public elementary/secondary school
Tracking No. 80e30c7b
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-0002-0190
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jon
Address:
Tacoma, WA,
Email: jondolar2@comcast.net
Submitter's Representative: Cong. Adam Smith
Government Agency Type: Federal

General Comment

As an educator of over 30 years, I'm confused as to why the Dept. of Ed. would want to promote such a plan when it does nothing to improve the educational experience of the student.

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
Status: Withdrawn
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c7a
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-0002-0191
Comment on FR Doc # 2011-08205

Submitter Information

Name: Donna Hamilton
Address:
Silverdale, WA,
Email: yoyodonna@yahoo.com
Submitter's Representative: Jay Inslee
Organization: Kitsap PAtriotics Tea Party
Government Agency Type: Federal
Government Agency: ED

General Comment

Hell --- Ilo, Big Brother
Isn't this a bit much? What ever happened to protecting our privacy? Is this not a breach of that? Sounds like invasion of privacy to me. Are we going to lose all of our rights bit by bit? Sure , I can see some benefits that may come from it. But by far is the chance for abuse. You are sent there to govern and represent--not control --- the population!!!

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c79
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-0002-0192
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Farmer

General Comment

The definition of education program as proposed would include continuing education required of doctors, lawyers, auditors, engineers and other professions. This appears to extend FERPA to these professional organizations and their agents that conduct this training. This may be an unintended effect of the definition.

Several of these organizations are required to make the directory information and the amount and results of continuing education public as a condition of continued certification.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c78
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-0002-0193
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Farmer

General Comment

The discussion of the proposed FERPA regulations includes date of birth in directory information. The combination of name and date and place of birth has frequently been used in the past to match student records (typically test scores).. Because students are not permitted to "opt out" of some of the directory information; the date and place of birth should be omitted from directory information since it should have no use by those accessing directory information.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c77
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-0002-0194
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Farmer

General Comment

Although the Department of Education discourages the use of Social Security Numbers, in a presentation, at the 2 September 2009 Data Quality Campaign 's Quarterly Meeting in Washington DC USA, Jane Oates, Assistant Secretary, Employment and Training Administration, U.S. Department of Labor said the The Social Security Number will continue to be used to match records from higher education data with workforce data. All states are developing systems that provide and require a state-issued educational identifier for students.

FERPA could limit the inclusion of Social Security Numbers in data sent to contractors unless it is required for the analysis itself (as it would be when higher education records are being matched with workforce data). This is implied by the discussion but not mandated.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Other
Tracking No. 80e30c73
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-0002-0195
Comment on FR Doc # 2011-08205

Submitter Information

Name: Beth Givens
Address:
San Diego, CA,
Email: bethg@privacyrights.org
Organization: Privacy Rights Clearinghouse

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

Comments of the Privacy Rights Clearinghouse

**Department of Education
Family Educational Rights and Privacy Act
Notice of Proposed Rulemaking**

RIN 1880-AA86

Submitted May 23, 2011

The Privacy Rights Clearinghouse (PRC) respectfully submits the following comments to the Department of Education (Department) for its consideration with respect to the call for public comment in its Notice of Proposed Rulemaking (NPRM) regarding the Family Educational Rights and Privacy Act of 1974 (FERPA).¹

I. Background

The PRC is a nonprofit organization, established in 1992 and located in San Diego, California.² Our mission is two-part: consumer education and consumer advocacy. We have published more than 50 Fact Sheets that provide practical information consumers may employ to safeguard their personal information, and we invite individuals to contact the organization with their privacy-related questions, concerns and complaints.

II. General Statements

The Department proposes to amend the regulations implementing FERPA with the goal of providing states with flexibility in sharing data in statewide longitudinal data systems (SLDS) to enhance their effectiveness. In doing so, the Department proposes extensively widening the scope of nonconsensual disclosure of student data to third parties. Unfortunately and notwithstanding the new safeguards the Department proposes, the proposed amendments do not adequately address data privacy concerns when it comes to disclosing sensitive student information.

The purpose of FERPA is to protect the privacy of student education records that are maintained by educational agencies or institutions who receive funds from the Department.³ This is accomplished in-part by restricting disclosure of personally identifiable information (PII) absent written consent of either a parent or eligible student except in very limited circumstances. However, by compiling increased amounts of student data and allowing greater access to this

¹Family Educational Rights and Privacy, Notice of Proposed Rulemaking, 76 Fed Reg. 19726 (proposed Apr. 8, 2011), RIN 1880-AA86 [Docket ID ED-2011-OM-0002], available at <http://www.federalregister.gov/articles/2011/04/08/2011-8205/family-educational-rights-and-privacy> [hereinafter NPRM].

² Privacy Rights Clearinghouse, www.privacyrights.org (last visited May 23, 2011).

³ See Family Educational Rights and Privacy Act, 20 U.S.C. 1232g (1974), available at http://www.law.cornell.edu/uscode/html/uscode20/usc_sec_20_00001232---g000-.html.

data, the potential for misuse and security breach increases. These databases will also hold extreme value not only for those intending to use the data to improve the education system (as the NPRM contemplates), but also for parties who seek to profit from the data and hackers seeking to use it for nefarious purposes such as committing identity theft.

As the Department is aware, education records can include much more than test scores and class standing. They may include health information, description of physical appearance, family economic circumstances, ethnic background, political and religious affiliations, psychological test results, financial information, etc. The information may be fact, such as birth date or Social Security number, or it may be opinion teachers have expressed about the student.⁴ As such, it is exceedingly important to limit access to this data goldmine and to allow parents and eligible students as much control as possible over when, to what extent, and to whom the data is disclosed.

The PRC believes that the Department's proposed amendments to its regulations implementing FERPA in large part counteract the general purpose of FERPA. However, regardless of its authority to amend its regulations as such, we are concerned that the proposed amendments pose potential data privacy problems, do not adequately address necessary privacy protections, and lack meaningful mechanisms to promote accountability.

III. Response to Proposed Amendments

A. Proposed Definition of "Authorized Representative"

The NPRM proposes to define "authorized representative" as "any entity or individual designated by a State or local educational authority or agency headed by an official listed in Section 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."⁵

Parental or eligible student consent is not required to disclose information to authorized representatives of the Comptroller General of the United States, the Attorney General of the United States, the Secretary, or State and local educational authorities.⁶ "Authorized representative" is currently undefined, but since 2003 has been interpreted as a party under the direct control of an educational authority.⁷ However, due to the fact that the Department believes the current interpretation is unnecessarily restrictive, the proposed definition if enacted will widen the scope of what constitutes an "authorized representative" considerably.

⁴ See Privacy Rights Clearinghouse, Fact Sheet 29, Privacy in Education: Guide for Parents and Adult-Age Students, <http://www.privacyrights.org/fs/fs29-education.htm> (last visited May 19, 2011). See 34 C.F.R. § 99.

⁵ NPRM, *supra* note 1, at 19727.

⁶ 34 C.F.R. § 99.31(a)(3).

⁷ See 73 FR 74806 (2008) (incorporating Memorandum from William D. Hansen, Deputy Sec'y of Educ. to the Chief State Sch. Officials (Jan. 30, 2003), available at <http://www2.ed.gov/policy/gen/guid/secletter/030130.html>).

Allowing non-educational agencies access to students' PII without requiring parental or eligible student consent may further the Department's goal of SLDS efficiency, however, nothing in the proposed definition of "authorized representative" actually limits who may be considered as such. Not only does this seem to counteract the intent of FERPA to protect student privacy, but it also allows accountability of State or local educational authorities or agencies (and their authorized representatives) to the Department to become greatly attenuated.

We urge the Department to consider how and whether a parent or eligible student may seek legal action against or recovery from an "authorized representative" to whom they did not explicitly permit their data to be disclosed. We also express concern with the general effectiveness of the Department's limited enforcement ability under FERPA when it comes to expanded nonconsensual disclosure of education record data, because the proposed standards are very limited and there is no reporting mechanism when it comes to the proposed mandatory written agreements between authorized representatives and a State or local educational authority.

B. Proposed Amendment of "What conditions apply to disclosure of information for Federal or State program purposes?"

1. Written Agreements

The NPRM proposes amending § 99.35 of the regulations to require written agreements between a State or local educational authority or agency and its authorized representative, other than an employee, to whom it will disclose PII from education records without consent.⁸ While requiring an agreement would open up the potential for enforcement in the event that an authorized representative violates a term, the Department has not articulated how and to whom a breach of such an agreement would be reported. The Department should consider how this written agreement requirement may help parents and eligible students recover if they are adversely affected by such a contractual breach, especially since FERPA does not provide a private right of action.⁹

The proposed regulations require agreements to contain certain general provisions. However, the standards are quite vague and only address establishing policies/procedures to protect the PII from further disclosure and unauthorized use. As proposed, these agreements are not necessarily required to include data security measures, data breach notification, need for independent third party audit, and reasonable data destruction and/or return practices. We suggest that the Department amend the proposed rules to create a floor for the requirements in written agreements with authorized representatives that includes the above so that there is a tangible way in which to hold authorized representatives accountable.

⁸ NPRM, *supra* note 1, at 19728.

⁹ *See generally* Gonzaga Univ. v Doe, 563 U.S. 273 (2002).

2. Reasonable Methods to Ensure Authorized Representative Complies with FERPA

The NPRM proposes requiring a State or local educational authority or agency to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA.¹⁰ The Department is stating that it will not propose to define “reasonable methods” to provide flexibility, but seeks comment on what may be considered a reasonable method.

By providing no binding guidance on reasonable methods, State or local educational authorities or agencies will not realistically be held accountable to any meaningful standards, nor will they be able to “ensure” anything. This also raises the question of whether the State or local educational authorities or agencies will be subject to outside audits to determine whether they employ such reasonable methods or whether this will only be determined after FERPA is violated or a complaint is filed and Department has initiated enforcement proceedings.

3. Five-Year Prohibition for Improper Rediscovery

The NPRM states that if the Department’s Family Policy Compliance Office finds that a state or local authority or agency, or authorized rep, improperly rediscovers PII in violation of FERPA the educational agency or institution from which the PII originated will be prohibited from permitting the entity responsible from accessing the PII for at least five years.¹¹ The PRC agrees with the Department that five years is an appropriate time period for such a violation.

However, “rediscovery” is the only action that is punishable by this language. Other violations such as those concerning amendment, accuracy, inspection and review, especially by authorized representatives, should also be subject to a similar prohibition. Also, we encourage the Department to consider its ability to prevent any educational agency or institution, rather than limiting it to the agency or institution whose PII was improperly redisclosed, from allowing the party in violation access to the education record data. Parties in violation should be on a single list accessible to all state or local authorities or agencies and the general public.

C. Proposed Definition of “Education Program”

Under the current regulations, “Authorized representatives of the officials or agencies listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported **education programs**....”¹² The NPRM proposes defining “education program” as “any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and

¹⁰ NPRM, *supra* note 1, at 19728.

¹¹ *Id.*

¹² 34 C.F.R. § 99.35 (emphasis added).

adult education, regardless of whether the program is administered by an educational authority.”¹³

The proposed definition of “education program,” in conjunction with the current regulations, creates expansive access to education records that again goes against any intent of FERPA to safeguard the privacy of education records and allow for nonconsensual disclosure of PII only in extremely limited circumstances.

The Department should clarify not only to what extent an education program must be Federal or State supported, but also narrow its proposed definition of “education program.” For example, it is very vague to what extent a program must be engaged in the provision of education in order to be “principally engaged.” Also, the language “but not limited to” seems to unnecessarily leave the definition open. Because the proposed definition is so expansive, it could lead to the compilation of an unnecessarily rich compilation of data concerning an individual over which both the individual and the Department have very little control or access to remedy or enforcement mechanisms.

D. Directory Information

1. Identification Badges

The NPRM proposes disallowing a parent or eligible student from opting out of wearing, publicly displaying, or disclosing a student ID card or badge that exhibits information designated as directory information.¹⁴ The PRC does not necessarily oppose this proposed amendment to the regulations. However, we urge the Department to consider how this would affect students who are the victims of stalking, for example. This is likely to have the greatest effect on students at postsecondary institutions where the size of the institution may make it more difficult to restrict access.

2. Limited Disclosures

The NPRM proposes allowing educational agencies and institutions to specify in their annual public notices to parents and students that disclosures of directory information may be limited to specific parties and for specific purposes.¹⁵ We support this proposed amendment, and believe that it will make student information less likely to be released for marketing purposes, while providing educational agencies and institutions with more certainty and control in using directory information for their own purposes. The suggestion that the agencies and institutions consider non-disclosure agreements with third parties is also valid, and the PRC would like to see this become common practice.

¹³ NPRM, *supra* note 1, at 19729.

¹⁴ *Id.* at 19731.

¹⁵ *Id.* at 19732.

E. Enforcement Procedures with Respect to any Recipient of Department Funds that Students do not Attend

The current regulations do not authorize the Family Policy Compliance Office to investigate, review and process an alleged violation of FERPA that is committed by recipients of Department funds under a program in which students do not attend.¹⁶ If the Department is going to expand access to and disclosure of student data to facilitate efficiency of SLDS, this provisions seems necessary. However, the Department should evaluate its ability to expand its enforcement capabilities under both the existing enforcement mechanisms and FERPA in general.

IV. Conclusion

While increasing access to data in SLDS will be beneficial to evaluate and improve education in general, it will also significantly increase the chance that data in education records is mishandled or breached. In conclusion we are concerned that the Department has expanded nonconsensual disclosure exceptions under FERPA to the point where it counteracts FERPA's intended purpose. We are further unconvinced that the enhanced enforcement provisions will increase or maintain accountability when it comes to data security and privacy protection measures.

Respectfully submitted,

Beth Givens, Director
Meghan Bohn, Staff Attorney
Privacy Rights Clearinghouse
3100 5th Ave. Ste. B
San Diego, CA 92103
www.privacyrights.org

¹⁶ *Id.*

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c41
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-0002-0196
Comment on FR Doc # 2011-08205

Submitter Information

Name: Jim Farmer
Address:
Oklahoma City, OK,
Email: jxf@immagic.com

General Comment

The majority of higher education's student data comes from the U.S. Department of Education as a result of student financial aid application. These data may include Internal Revenue Service data, confirmation of Selective Service registration, and Social Security Number verification by the Social Security Administration.

According to SHEEO documents these data are included in some current state student longitudinal data systems.

Although the data must meet federal standards—Federal Student Aid has confirmed this is Level of Assurance 2—the proposed FERPA regulations permit colleges and universities and their contractors to use “reasonable methods.” This implies that data from the Department of Education and other federal agencies may have less security than required of the departments themselves. Data security can “step down” from federal requirements—document in the NIST 800 series—when it is moved to another organization.

The FSA Program Participation Agreement does not require the more rigorous standards for security. Similarly the proposed “reasonable methods” applies to contractors as well even though there has been at least one case where a contractor sold excerpts from the FSA data.

The move from federal standards to “reasonable methods” responded to a request from higher education, likely by considering institutional data and not the federally supplied data.

Consideration should be made to (1) change FERPA to include specific requirements for the security of federally supplied data and further contracting and (2) modifying the FSA Program Participation Agreement to require compliance with FERPA.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Association/Organization
Tracking No. 80e30c3f
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-0002-0197
Comment on FR Doc # 2011-08205

Submitter Information

Name: Felice Levine

Address:

Washington, DC, DC,

Email: flevine@aera.net

Submitter's Representative: On Behalf of Eight Organizations

Organization: American Educational Research Association

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205

May 23, 2011

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

Re: Proposed Amendment of the Family Educational Rights and Privacy Act of 1974 (FERPA)
Docket ID: ED-2011-OM-0002

Dear Ms. Miles:

We appreciate the opportunity to comment on the proposed amendment of the regulations implementing the Family Educational Rights and Privacy Act of 1974, as amended (FERPA). We believe that the proposed amendments are necessary to ensure the continued privacy of education records, while allowing for the effective use of data in statewide longitudinal data systems (SLDS). As scientific societies dedicated to sound research, statistics, and evaluation of education and learning from early childhood through higher education and workforce participation, and as organizations dedicated to the highest ethical standards in the conduct of research, we commend the U.S. Department of Education for seeking to advance access to SLDS consonant with steps to ensure and reconcile data sharing and use with privacy protection.

Our comments are directed to specific sections of the proposed regulations that we believe provide appropriate safeguards for protection of student privacy from disclosure of personally identifiable information (PII) while also allowing for valuable research essential to policy, practice, knowledge-driven decision-making, and innovation. We share the view of the Department of Education that, despite modifications to FERPA in 2008, there remain provisions that are not necessary for privacy protection of student PII, yet they hinder the development and expansion of the statewide longitudinal data systems and realizing the benefits of newly created SLDS. We believe that the Department of Education has proposed regulations that will continue to protect student privacy and also will provide data to support those education reforms that are dependent on sharing of pertinent data within and among education agencies and those that they authorize to undertake research and evaluation.

The challenge of providing for data access while protecting privacy, ensuring confidentiality, and minimizing risk of advertent or inadvertent disclosure has engaged the attention of federal agencies, the National Academies, and the scientific community for over three decades. Since 1979, the National Research Council has undertaken over a dozen studies and issued reports directed to promoting the responsible use of data and expanding access consonant with privacy protections (see Attachment A), including a 2008 workshop specifically directed to *Protecting Student Records and Facilitating Education Research* (NRC, 2009). Federal agencies have also for several decades addressed and developed policies and procedures for providing access to PII data in administrative records and other collections of data in accordance with privacy protection. There are as well federal laws that specifically address interagency access, sharing, and research, and statistical use (e.g., Title 13 of the Census Statute, the Confidential Information Protection and Statistical Efficiency Act of 2002 [CIPSEA]). Among federal statistical agencies and with respect to education data and statistics, the National Center for Education Statistics has been a leader in developing and implementing procedures that permit research users to have restricted access to data with personally identifiable information. In seeking to amend FERPA to expand

data access and sharing without eroding student privacy protection, the Department of Education offers amendments consonant with federal practices and guidelines for such use.

Definition: *Authorized Representative* (99.3)

We support adding a definition of “authorized representative.” The proposed definition is appropriate and necessary in providing educationally beneficial access to statewide data systems. It is reasonable in scope to allow an authorized representative to include “any entity or individual designated by a State or local educational authority or agency headed by an official listed in 99.31(a)(3).” We concur as well with the interpretation that “authorized representatives” need not be under the direct control of an agency in order to conduct audits or evaluations. It is, as noted in the proposed regulations, “unnecessarily restrictive to interpret FERPA as prohibiting an individual or entity who is not an employee or contractor under the ‘direct control’ of a State or local educational authority or agency . . . from serving as an authorized representative.”

Definition: *Reasonable Methods* (99.35[a][2])

The Department plans to provide nonbinding guidance to State and local education agencies about “reasonable methods” for ensuring FERPA compliance by their authorized representatives. However, at this time the Department has requested substantive recommendations for provisions to be incorporated in the guidance that will be provided subsequently. We believe that the Department of Education’s initiatives to safeguard student privacy by providing a Chief Privacy Officer and Privacy Technical Assistance Center, discussed below, will be a good source for gathering, codifying, and distributing responsible methods guidelines.

Additionally, the following should be included as criteria for granting the status of authorized representatives: (a) the individual or agency can provide assurances that they have no record of having disclosed pupil information inappropriately previously and that they are not currently under suspension from any State or local agency for inappropriate disclosure of student data; (b) have appropriate disciplinary strategies in place with regard to unauthorized disclosure for their employees; (c) provide assurances of access to the State or local education authority for purposes of reviewing and monitoring the authorized representative’s processes for protecting student data. Additional information that is explicated in the proposed regulations as part of the definition of authorized representative should be included as essential “reasonable methods” as well: *written agreements* that designate the identity of the authorized representative, the purposes for which the information is being disclosed and the scope of the information disclosed to the authorized representative; explicit policies and procedures to safeguard the information from unintended redisclosure; and a timeline for return or destruction of transferred information.

Requirement: *Written Agreements* (99.35)

The proposed regulations call for amending 99.35 to require written agreements between State or local education agencies and authorized representatives and to stipulate features of the agreement: purpose of disclosure, specification of information required and its use, assurances, return or destruction of data, and time line for use of the data. These are necessary and reasonable requirements and would be endorsed by education researchers and other scientists undertaking research with personally identifiable data.

We believe that additional clarification is required in the written agreement regarding destruction of data “when no longer needed for the purposes for which the study is conducted.” A fundamental part of the scientific process is verifying findings and testing new hypotheses

using the same dataset, and premature destruction of the data can waste valuable resources and limit building cumulative and reproducible knowledge. We encourage the Department to provide some latitude and direction to educational agencies and research organizations to determine when data are no longer needed for the agreed upon scientific purposes and to retain identifiable datasets where necessary under strictly-controlled, secure conditions (as is done with other federal and state statistical and record-keeping systems).

Requirement: *Protection of PII Applies to “Authorized Representative” (99.35b)*

The proposed regulations also seek to change 99.35(b) to clarify that FERPA requirements to protect PII from disclosure apply to the authorized representative. While a modest adjustment in language, we believe that this is an essential change in keeping with existing protections and underscoring that any person with delegated authority or acting as an authorized representative needs to protect student privacy.

Requirement: *Family Policy Compliance Officer (FPCO) (99.35d)*

The proposed regulations set forth sanctions for individuals or agencies that have been found by the FPCO to have violated FERPA disclosure provisions. We believe that further delineation is required to eliminate present ambiguities.

(1) Under the proposed regulations an agency or an authorized representative improperly disclosing PII in violation of FERPA would be denied access to PII for a minimum of five years. In most instances, organizations are likely to be designated the authorized representative responsible for the conduct of research or evaluations. Many institutions, particularly universities are made up of subunits that would appropriately become authorized representatives (e.g., a major center or consortium at a university). The regulations should specify more clearly the level of entity that would be prohibited from receiving personally identifiable information.

(2) We believe that the proposed sanctions would protect PII from disclosure. We think it would also be useful not just to prohibit a party responsible for such disclosure from having access to such information for at least five years, as is proposed. We recommend that the State and local educational authority or agency take steps to ensure that all other agencies know of this sanction and consider this information among the reasonable methods for qualifying authorized representatives.

Definition: *Education Program (99.3, 99.5)*

We endorse the inclusion of early childhood education programs through adult learning programs within the definition of “education.” Such inclusion will provide an opportunity to develop linkages across the life-span of educational and learning experiences and to undertake research and evaluation that will explain relationships and observed outcomes. Such information is essential to provide the foundation for improved education policies in all programs. The potential of statewide longitudinal data systems for understanding systemic properties of education is one of the most attractive features of these long-term administrative data for researchers. However, we believe that there should be additional clarification of the term “principally engaged.” We recommend the term “primarily” be substituted for “principally.”

Requirement: *Research Studies* (99.3[a][6])

The Department proposes to add a paragraph in the FERPA regulations (99.31[a][6][ii]) that stipulates that nothing in FERPA or its implementing regulations prevents education agencies from entering into agreements with organizations conducting studies, and entering into written agreements with them allowing disclosure and redisclosure of PII in accordance with FERPA requirements. We believe this clarification will facilitate education agencies in establishing procedures to work with organizations seeking to conduct valuable studies and will alleviate unwarranted assumptions that such activities are prohibited under FERPA. This addition will do much to counter what has been termed the “chilling effect” of current regulations because of the reluctance of State and local education agencies to provide access to administrative data in a climate of uncertainty and ambiguity.

This section on research studies is particularly important. We recommend in the section on research studies and elsewhere that it be made even more explicit that researchers and research organizations can be authorized to have access to PII under restricted access conditions and subject to the same agreements and potential penalties as otherwise would be in place for authorized representatives. We support the clarification that permits State and local agencies to provide data access to researchers, whether or not acting for or on their behalf, as long as this access to PII does not comprise student privacy protections.¹

We believe, and welcome, the observation that “[t]he proposed regulations, therefore, would clarify that studies supported by these State and Federal authorities of publically funded education programs generally may be conducted, while simultaneously ensuring that any PII disclosed is appropriately protected by the organizations conducting the studies.”

Resource: *Department of Education Programs Supporting Protection of Student Privacy*

It is important that the proposed regulations be viewed in the context of commendable actions of the U.S. Department of Education to further provide for protection of personally identifiable student records. The Department has established a Privacy Technical Assistance Center (PTAC) within the National Center for Education Statistics (NCES) that will provide technical assistance through site visits, regional meetings, and training materials. In addition, NCES Technical Briefs

¹ Conditions of access to restricted education data bases are quite familiar to researchers experienced in using such data and adhering to the highest standards of protecting privacy of individuals and the confidentiality of data. As noted above, the NCES has pioneered making available data sets with PII information to researchers through restricted-use data licenses. Authorized users are subject to the laws, regulations, and penalties that apply to the NCES use of confidential data. The NCES Statistical Standards Program monitors the licensing process and inspections. Wide access to NCES data is balanced by stringent sanctions for violation, as follows:

“Alleged violations of the Privacy Act of 1974 or IES-specific laws are subject to prosecution by the United States Attorney after first making reasonable efforts to achieve compliance. Any violation of this license may also be a violation of Federal criminal law under the Privacy Act of 1974, 5 U.S.C. 552a, and may result in a misdemeanor and a penalty of up to \$5,000. Anyone violating the confidentiality provisions of section 183 of the Education Sciences Reform Act of 2002 (P.L. 107-279), or making an unauthorized disclosure, when using the data shall be found guilty of a class E felony and can be imprisoned up to five years, and/or fined up to \$250,000. Penalties, fines and imprisonment, may be enforced for each occurrence of a specific violation.”

The NCES website has extensive materials on data access to public use and restricted-use data, including a *Restricted-Use Data Procedures Manual* (NCES, 2007, at <http://nces.ed.gov/pubs96/96860rev.pdf>).

of high quality are already being developed as a resource for those working with issues of privacy and confidentiality. The first three technical briefs already have become a resource for the education policy community and for school personnel at the State and local level. Their titles are: (1) Basic Concepts And Definitions For Privacy And Confidentiality in Student Education Records; (2) Data Stewardship: Managing Personally Identifiable Information in Electronic Student Education Records; and (3) Statistical Methods for Protecting Personally Identifiable Information in Aggregate Reporting. Finally, we applaud the agency for taking the initiative to create—and to have already staffed—an office of a Chief Privacy Officer.

In conclusion, we are pleased to support the proposed amendments to FERPA recommended by the U.S. Department of Education. We further encourage consideration of some additional modifications offered in these comments to strengthen accomplishing expanded access and use of SLDS consonant with protection of student privacy.

Sincerely,

American Educational Research Association
American Sociological Association
American Statistical Association
Association of Population Centers
Consortium of Social Science Associations
Federation of Associations in Behavioral & Brain Sciences
Knowledge Alliance
Population Association of America

**Attachment A:
Reports on Privacy and Confidentiality and Access to Research Data**

The challenge of providing for data access while protecting privacy, ensuring confidentiality, and minimizing risk of advertent or inadvertent disclosure has engaged the attention of federal agencies, the National Academies, and the scientific community for over three decades. Below is a chronological list of major National Research Council reports.

National Research Council. (1979). *Privacy and confidentiality as factors in survey response*. Washington, DC: National Academy of Sciences.

National Research Council. (1985). *Sharing research data*. Washington, DC: National Academy Press.

National Research Council. (1993). *Private lives and public policies: Confidentiality and accessibility of government statistics*. Washington, DC: National Academy Press

National Research Council. (2000). *Improving access to and confidentiality of research data: Report of a workshop*. Washington, D.C.: National Academy Press.

National Research Council. (2003). *Protecting participants and facilitating social and behavioral sciences research*. Washington, DC: The National Academies Press.

National Research Council. (2005). *Expanding access to research data: Reconciling risks and opportunities*. Washington, DC: The National Academies Press.

National Institutes of Health. (2006). *Data sharing workshop for behavioral and social studies that collect genetic data: Workshop highlights*. Bethesda, MD: National Institute of Aging, National Institutes of Health.

National Research Council. (2006). *Effect of the HIPAA privacy rule on health research: Proceedings of a workshop presented to the National Cancer Policy Forum*. Washington, DC: The National Academies Press.

National Research Council. (2006). *Improving business statistics through interagency data sharing: Summary of a workshop*. Washington, DC: The National Academies Press.

National Research Council. (2007). *Putting people on the map: Protecting confidentiality with linked social-spatial data*. Washington, DC: The National Academies Press.

National Research Council. (2007). *Engaging privacy and information technology in a digital age*. Washington, DC: The National Academies Press.

National Research Council. (2007). *Understanding business dynamics: An integrated data system for America's future*. Washington, DC: The National Academies Press.

National Research Council. (2008). *Health research and the privacy of health information: The HIPAA privacy rule*. Washington, DC: Author. Retrieved from <http://www.iom.edu/CMS/3740/43729.aspx>

National Research Council. (2009). *Ensuring the integrity, accessibility and stewardship of research data in the digital age*. Washington, DC: The National Academies Press.

National Research Council. (2009). *Protecting student records and facilitating education research: A workshop summary*. Washington, DC: The National Academies Press.

National Research Council. (2010). *Conducting biosocial surveys: Collecting, storing, accessing, and protecting biospecimens and biodata*. Washington, DC: The National Academies Press.

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Child advocate
Tracking No. 80e30c51
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-0002-0198
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sheila Kaplan
Address:
Brooklyn, NY,
Email: Sheila@educationNewyork.com
Organization: Education New York

General Comment

Attached are comments submitted by Sheila Kaplan, education and student privacy advocate; founder of Education New York, <http://educationnewyork.com>

Attachments

Comment on FR Doc # 2011-08205



Sheila Kaplan
3 Pierrepont Pl.
Brooklyn, NY 11201
347-486-0361
www.educationnewyork.com
sheila@educationnewyork.com

Education

NEW YORK

When the Family Educational Rights and Privacy Act was enacted in 1974 student data and records existed in an almost completely non-digital environment. More than three decades later, issues of data and information privacy have become of paramount concern to the public, especially to families trying to protect their children's personal information from marketers and advertisers, identity theft, and from those who might do children harm.

But the proposed rule changes to FERPA to accommodate the statewide collection and warehousing of a range of student educational, personal, and employment data and information make clear that the time has come to reconsider whether the law has outlived its ability -- and its original purpose -- to protect student privacy. In the digital age, the line between supposedly secure school directories and the online world is rapidly disappearing. Computer security breaches are rampant, exposing private and proprietary information in online databases. Hackers aggressively target large databases every day. The recent breach of the Sony Playstation database exposing the personal information of 100 million users is but one example of hackers' capabilities. Yet, the proposed FERPA rule changes would authorize more individuals, organizations, and government agencies to have access to students' personal and education information, ensuring that privacy breaches will be rampant and, in the event of a statewide database breach, potentially catastrophic.

Given this environment, proposed rules changes to FERPA should have the overriding goal to strengthen protections of student privacy and provide serious consequences for breaches of student privacy. Unfortunately the proposed changes do not meet these challenges and, in fact, would create more opportunities for student privacy to be compromised. While proposed changes take some positive steps toward giving schools and parents more control over how and when students' personally identifiable information

EDNY

(PII) will be released, and to whom, the changes do not go far enough to address the myriad and complex challenges of the digital age. Schools are stewards of students' personally identifiable information and as such must adhere to the highest standards of practice in protecting privacy and confidentiality. Those high standards are not met by the proposed changes, nor by the statute itself.

The proposed changes to FERPA do not adequately address the capacity of marketers and other commercial enterprises to capture, use, and re-sell student information. Even with privacy controls in place, it is also far too easy for individuals to get a hold of student information and use it for illegal purposes, including identity theft, child abduction in custody battles, and domestic violence. Few parents are aware, for example, that anyone can request -- and receive -- a student directory from a school. Data and information breaches occur every day in Pre-K-20 schools across the country, so that protecting student privacy has become a matter of plugging holes in a dyke rather than advancing a comprehensive policy that makes student privacy protection the priority.

In large part, the proposed changes are driven by the development and expansion of Statewide Longitudinal Data Systems (SLDS) and by efforts to use the SLDSs to audit and evaluate state and local education programs under the America Competes Act and with federal support from the American Recovery and Reinvestment Act (ARRA). It is important to note that ARRA was an economic stimulus and job-creation legislation, not an education mandate. Through ARRA funding for Race to the Top, the Administration is advancing statewide student Pre-K/early learning through workforce databases that would collect information from schools and share with an extensive list of agencies and organizations that may touch the life of a student: state departments of labor, child welfare, social services, juvenile justice, criminal justice agencies, employers, etc.

The federal Government Accounting Office (GAO) has studied this issue in regard to the linking of PII to employment information and exposing information such as social security numbers. In its September 2010 report, the GAO called on the DoE to clarify

EDNY

FERPA in regard to the collection and sharing of employment information.¹ While the proposed rule changes to allow the non-consensual disclosure of students' PII to the vaguely defined "authorized representative" may be in response to the GAO report, the "clarification" increases the potential for privacy breaches.

As noted in the comment of Paul Gammill, former head US Department of Education's Family Policy Compliance Office, filed May 17, 2011:

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 cannot be expanded by a regulatory change. Such an expansive regulatory change to established statutory law exceeds the legal authority of the Department.

The rule changes to make student information more available to SLDS, researchers, and other government agencies likely will also have the effect of creating a new market for data-poachers that will be difficult to control. Few schools or statewide databases are technologically equipped to defend themselves against significant data breaches, and they would be more vulnerable under the proposed rule changes. The sophisticated electronic systems used to identify and breach the privacy of individuals should not have access to the PII of vulnerable students.

One 50-state study of longitudinal databases found they contained excessive amounts of detailed student information in non-anonymous student records, with a lack of effective privacy protections.² The study found that states were collecting PII,

¹ "Postsecondary Education: Many States Collect Graduates' Employment Information, but Clearer Guidance on Student Privacy Requirements is Needed," GAO, September 2010.

² Children's Educational Records and Privacy: A Study of Elementary and Secondary School State Reporting Systems, Joel R. Reidenberg and Jamela Debelak, Fordham Center on Law and Information Policy. 2009.

EDNY

demographics, disciplinary records, academic records, health information as well as information about families. For example, the study found at least 32 percent of the states “warehouse” students’ social security numbers, 22 percent have records of students’ pregnancies, and an astounding 46 percent of the states include mental health, illness, and criminal justice records in educational records. More than 80 percent of states do not appear to have data-retention policies, increasing the chance that they may hold student information indefinitely. The lack of data-retention policies may have the effect, for example, of preserving a student’s juvenile criminal justice record in his or her education file even when those records have been sealed or expunged.

In addition, this study found that several states outsourced the data-warehousing function without any protections for privacy in vendor contracts.

As states move forward with SLDS, more stringent privacy protections need to be in place. Although the Department maintains that the Fair Information Practice Principles (FIPP) underlie its privacy initiatives, the proposed rule changes will compromise those principles in some significant ways. The principles of FIPP, as outlined by the Federal Trade Commission, provide for notice/awareness, choice/consent, access/participation, integrity/security, and enforcement/redress.

First, few parents are aware of FERPA and how it is designed to protect their child's privacy in pre-K through 20 schools -- and now to the workforce. In fact, FERPA is usually associated with higher education and the privacy of college and university education records. Schools have been found to have varying degrees of conformance with the basic FERPA notice requirements to parents and guardians under FERPA. The opt-out system under which parents must file a form with the school to keep their children's PII from being shared is inherently weak and tantamount to de facto consent. Opt-out is a regular practice of marketers and advertisers who know that few consumers will take affirmative action to remove their name and information from a list. Students and their families deserve a more proactive system of consent than opt-out.

EDNY

FERPA has historically lacked effective enforcement measures and has provided little in regard to redressing student privacy breaches. The proposed rule change to sanction the “redisclosure” of PII from education records does not consider the myriad ways the security of education records can be breached or the ways student information can be mishandled or how inaccurate information can harm a student. In addition, since under the proposed change the sanction would only apply to “an authorized representative of a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3),” how would privacy breaches involving other individuals or entities not included in that definition be sanctioned? There appears to be no sanctions or redress for use and disclosure of PII by those not covered under the FERPA definition. When the proposed rule changes have the potential to lead to serious breaches of student privacy, thereby compromising the safety and security of children and young people, the need is even more urgent for strict and enforceable sanctions. The lack of meaningful sanctions and enforcement of student privacy violations under FERPA seriously weakens its authority and again calls into questions its continued usefulness in the digital age.

The proposed rule changes raise the larger question of how the privacy of children will be protected going forward. The divide between how we protect the privacy of “children” vs. “students” under the law is too wide, leaving the privacy, safety, and security of children at risk.

Currently, the online collection of personal information from children under age 13 is protected under the Federal Trade Commission’s Children’s Online Privacy Protection Act (COPPA). COPPA provides a useful framework for protecting student privacy. COPPA outlines requirements of a website operator’s privacy policy, when, and how to seek verifiable consent from parents, privacy protections for children, and restrictions on marketing to children. Yet, an individual or entity could obtain a student directory with email addresses and telephone numbers and contact students directly without fear of legal action. Students need more robust privacy protections than this for their personal information maintained by schools they attend. However, students are not mentioned in the current privacy and consumer protection bills. While

EDNY

“children” are discussed in COPPA, Congress generally remains silent on protecting the sensitive and personally identifiable information of students. Clearly, it is time for Congress to consider children’s privacy in its totality and without regard to federal policy goals or funding opportunities.

Absent strong federal laws to protect student privacy, states may take action to tighten restrictions on what FERPA would allow. New York is one state seeking to advance stronger privacy protections than those available under FERPA. New York State Sen. Suzi Oppenheimer (D-Mamaroneck), a longtime member of the Senate education committee, has sponsored a bill that restricts the use of any directory information for profit-making. The bill also categorizes directory information, requiring affirmative consent for the release of sensitive information. The bill is in the process of being amended.

Privacy expert Daniel Solove said: “Privacy is rarely lost in one fell swoop. It is usually eroded over time, little bits dissolving almost imperceptibly until we finally begin to notice how much is gone.”³ As states collect a trove of information and data for the SLDS, the security of students' information will be put at greater risk and their privacy will be further eroded. With students’ PII increasingly digitized and shared electronically, the need for enhanced privacy protection is greater than ever. Students deserve the highest level of protection possible. Under FERPA, a law enacted to specifically protect the privacy of students' educational records, protections should meet the highest standards available. The proposed rule changes to FERPA fail to meet these standards nor do they adequately address the gathering threats to student privacy in the 21st century.

May 23, 2011

³ “Why Privacy Matters Even if You Have 'Nothing to Hide',” by Daniel J. Solove, The Chronicle Review, May 15, 2011.

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: National Advocacy Organization
Tracking No. 80e30c4e
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-0002-0199
Comment on FR Doc # 2011-08205

Submitter Information

Name: CLASP
Address:
Washington, DC,
Email: bdavispratt@clasp.org
Organization: Center for Law and Social Policy

General Comment

See attached file(s)

Attachments

Comment on FR Doc # 2011-08205



To: Regina Miles
From: Beth Davis-Pratt, Hannah Matthews, Heath Prince
Re: Response to NPRM regarding Family Educational Rights and Privacy [**Docket ID ED-2011-OM-0002**]
Date: May 23, 2011

We are writing on behalf of the Center for Law and Social Policy (CLASP) in response to the notice published in the Federal Register on April 8, 2011 (Vol. 76, No. 68) regarding the Notice of Proposed Rulemaking on Family Educational Rights and Privacy. CLASP is a non-profit organization that develops and advocates for policies at the federal, state, and local levels to improve the lives of low-income people. We focus on policies that strengthen families and create pathways to education and work.

States across the country have undertaken system-wide efforts to share data and information to assess and improve educational outcomes for children and adults through cost-effective and streamlined interagency data systems. Interagency systems can be used to streamline, simplify, and reduce costs for federal and state data reporting requirements, easing the technical and administrative burden on reporting agencies. These efforts have been strongly supported by the Department. See <http://www.ed.gov/open/plan/digital-systems-interoperability>. However, these important efforts have been impeded, in at least some states, by an interpretation that FERPA does not allow certain data to be shared.

CLASP commends the Department of Education for proposing changes to FERPA regulations that appear to greatly facilitate the sharing of data across systems, providing states with additional clarity on the application of FERPA to state longitudinal data systems, and, importantly, clarifying earlier interpretations of FERPA that created barriers to using education data for evaluation and research purposes.

Clarify the Authority to Audit or Evaluate (§99.35)

While we support many changes in the proposed regulations, CLASP seeks clarification in the area of broadening authority to audit or evaluate beyond educational agencies. The proposed regulations would define “authorized representative” to “include any individual or entity designated by an educational authority or certain other officials to carry out audits, evaluations or enforcement or compliance activities in relation to education programs”. CLASP supports this amendment to the regulations as it facilitates education data-sharing across agencies.

However, CLASP believes this language needs further clarification. As written, the proposed regulations raise questions about the extent to which non-education agencies can access personally identifiable information in student education records for the purposes of conducting audits and evaluations of programs under their administration. For example, given that the proposed definition of “educational program” will be broadened to include “career or technical training programs administered by a workforce or labor agency,” and given that the definition of “authorized representative” will be broadened to include “non-educational agencies,” does this mean that workforce agencies can access personally identifiable information in student education records to evaluate the effectiveness of the employment and training programs that they administer? We recommend that the proposed rules permit data sharing with Workforce Development agencies for the purposes of evaluating workforce development programs that include a postsecondary education component.

The proposed regulations also raise questions about the extent to which non-education agencies can access data to audit and evaluate programs that are *not* under their jurisdiction. As stated in the early childhood example on page 19729, this change would permit a state educational authority to designate a state health and human services agency as its authorized representative in order to conduct an audit or an evaluation of any Federal or State supported education program, such as the Head Start program. The proposed regulations go on to say, on page 19731, 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.

CLASP believes this area of FERPA needs further clarification. Head Start is a federal to local program, administered by the Department of Health and Human Services, not the Department of Education; therefore it is not under the administration of either the authorized representative or the disclosing educational agency. CLASP is concerned that the proposed regulations could be interpreted to give state education agencies authority over evaluation and auditing programs outside their administration, such as Head Start. CLASP does not support this expansion of authority.

Moreover, the Department should clarify that if Head Start programs are included in audits or evaluations related to educational programs under the jurisdiction of the state (for example, state-funded prekindergarten delivered in a Head Start classroom), the Secretary of HHS retains authority to promulgate privacy regulations as defined in the Head Start Act, and any such privacy protections of Head Start children would still apply.

Definition of Education Program (§§99.3, 99.35)

CLASP urges clarification around the proposed definition of the term “education program.” The proposal would define “education program” as any program that is

principally engaged in the provision of education, including, but not limited to early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, regardless of whether the program is administered by an educational authority. We commend the Department's proposal to adopt a broad definition of "education program" and recognition that education begins prior to kindergarten and involves programs not administered by state or local educational agencies. We also anticipate that the expansion of the definition of "educational program" will be widely welcomed by the workforce community.

That said, CLASP recommends that the term "early childhood education" be defined in reference to the definition of early childhood education included in The Higher Education Opportunity Act [SEC. 103. (a)(1) `` (21)]. Referencing this existing definition would provide further clarification of the multiple programs and services that comprise early childhood education while maintaining consistency with current law.

Additional Recommendations to Facilitate Data Sharing Between Child Welfare and Education Agencies

While amending FERPA to increase the ability of state agencies to share data at the aggregate level that will help improve the outcomes of children, youth and adults, we also encourage you to considering making important additional changes to facilitate the individual-level data sharing specifically between child welfare agencies and education agencies to improve the outcomes of children in foster care. In framing these recommendations, we focus on the significant impact of the FERPA regulations on children in foster care and the need for revisions to FERPA to address their unique situation and will help improve educational outcomes for those children.

Information sharing between child welfare and education agencies is essential to ensuring each agency meets its federal and state legal obligations, and meets the educational needs of these children. As discussed herein, education agencies and health and human services agencies across the country are increasingly seeking to share data and information to improve educational outcomes for children in foster care. However, obstacles to automated data sharing at the student specific level significantly impede the ability of both agencies to assess and respond to the educational needs of children in foster care or improve their poor educational outcomes. Obstacles to information-sharing between education and child welfare agencies related to individual students plays a significant role in the wide academic achievement gap between children in foster care and their peers by, for example, contributing to inappropriate school placements, enrollment delays, and lost credits. We submit these recommendations to effectively address these barriers and ensure and facilitate necessary information exchange, while protecting and preserving the educational privacy rights of students and parents that FERPA is designed to safeguard.

An Overview

The Achievement Gap

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

We know some of the specific barriers facing youth in care – high rates of school mobility; delays in school enrollment; inappropriate school placements; lack of remedial support; failure to transfer full course credits; and difficulties accessing special education services.³ We also know that some of these particular challenges are exacerbated and sometimes created by the inability of child welfare agencies and local educational agencies to access and share education records and data at a state or local level as well as the inability of foster parents, unaccompanied youth, surrogate parents and caseworkers to access education records at an individual level. For example, delays in school enrollment for this highly mobile population often occur when a child’s initial entry into foster care or a subsequent placement change involves a move across school boundary lines.

These delays are often caused by the failure to transfer records in a timely manner which often results from confusion about, or barriers created by FERPA. For example, forty-two percent of the 8 to 21 year New York City foster youth who were interviewed in 2000 had experienced a delay in school enrollment while in foster care, and nearly half of those who experienced a delay attributed it to lost or misplaced school or immunization records (Advocates for Children in New York, 2000). Similarly, More than three quarters of the California group home operators who were surveyed in 2000 reported that educational records for foster children in group homes are either “frequently” or “almost always” incomplete, 60% reported that the transfer of educational records is “frequently” or “almost always” delayed when youth change schools or group home placements, three quarters reported that youth recently placed in group homes experience long delays when attempting to enroll in public school, and more than two thirds reported that educational placement decisions were “frequently” or “almost always” compromised by incomplete school records (Parrish, et al. 2001 [response rate: 48%]). Delays in school enrollment negatively impact students in many significant ways such as causing children to fall behind academically, forcing students to repeat courses previously taken and

¹National Working Group on Foster Care and Education statistics factsheet at http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National_EdFactSheet_2008.pdf.

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

³National Working Group on Foster Care and Education statistics factsheet at http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National_EdFactSheet_2008.pdf.

undermining future attendance. A caseworker's inability to access education records also contributes to inappropriate classroom placements, and makes it more difficult to evaluate school stability issues or identify and address special education needs.

A Unique Situation

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

It is also important to recognize that these children most often enter foster care abruptly. They are placed with an agency that lacks prior knowledge of the child's background or educational needs. And yet, it is the caseworker who is charged with the responsibility of determining a child's new living placement and, as part of that undertaking, is specifically obligated to consider the appropriateness of the child's current educational setting, decide whether it is in the best interest of the child to remain in the same school, or seek to immediately enroll a child in a new school with all of his or her school records. In the absence of any prior knowledge of the child which a parent would possess, the inability of a caseworker to promptly access a child's education records renders that caseworker unable to effectively make decisions in the child's best interests.

Expanding Role of Child Welfare in Addressing Educational Needs

To improve the education outcomes of children in foster care, federal law has historically placed a number of requirements on child welfare agencies related to education. Title IV-E of the Social Security Act has for a long time required child welfare agencies to maintain the child's "educational reports and records" in the family case plan.⁴ The Child and Family Service Reviews (CFSRs), federal reviews that measure how states are meeting the needs of children in the foster care system, have always included a well-being benchmark focused on meeting the educational needs of children in care as part of that review. Specifically, child welfare agencies are evaluated on whether a child's education record is included in the case plan.

However, the most significant changes to child welfare law and marked expansion of the responsibility of child welfare in addressing education issues occurred with the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections). Fostering Connections now requires significant responsibilities of child welfare agencies related to education. Child welfare agencies are mandated to, among other things: 1) consider the proximity and appropriateness of the school when making living placement decisions, 2) ensure children are enrolled and attending school, and 3) ensure school stability for children in foster care (including immediate transfer of records when a child

⁴ 42 U.S.C.A. § 675(1)(C).

changes school).⁵ Additionally, most state laws mandate that a child welfare agency to whom legal custody (or in child welfare parlance, “responsibility for the care and placement of the child”) of a child has been given by the court has the “right and duty” to provide for the education of the child.⁶

Despite these requirements, in many jurisdictions, child welfare agencies are often denied access to the educational records of the youth they serve on the basis of a belief that the records cannot be shared under FERPA – limiting their ability to comply with legal requirements and address educational issues on behalf of their clients, resulting in delays in school enrollment, inappropriate school placements and lack of educational support, failures to receive full course credits, and difficulties accessing special education services.

The Recommendations

1) Ensure that child welfare agencies with responsible for the care and placement of a student in foster care are able to meet the educational needs of that child by having prompt and continued access to the student’s education records.

To comply with federal and state legal requirements, and to ensure that the educational needs of children in their care are met, child welfare agencies and dependency courts must have prompt and continuing access to the education records of children in foster care. Federal law currently places a number of education-related requirements on child welfare agencies that require access to education records and information. Specifically, child welfare agencies must: 1) consider the proximity and appropriateness of the school when making living placement decisions;⁷ 2) ensure children are enrolled and attending school; 3) ensure school stability for children in care (including immediate transfer of records when a child changes school); and 4) maintain the child’s educational records in the case plan.⁸ Unfortunately, in many jurisdictions, child welfare agencies are denied access to the educational records of the youth they serve – limiting their ability to comply with legal requirements and address educational issues on behalf of their clients.

For children under the care and responsibility of the child welfare agency, there is a clear duty to provide for their educational needs. Furthermore, because of the sensitivity of the information around child welfare cases, child welfare agencies are already bound by stringent federal and state confidentiality laws and safeguards that strictly prohibit re-disclosure of information relating to a child in their care. To meet obligations imposed on child welfare agencies who are acting *in loco parentis*, they must have timely access to education records.

To meet this critical need, we suggest two recommendations. The first recommendation creates an exception so that when a child welfare agency has responsibility for the care

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

⁶ See e.g., 42 P.a.C.S.A. § 6357.

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

⁸ 42 U.S.C.A. § 675(1)(C).

and placement of a child , information relevant to the child’s education can be shared with that custodial agency. The second recommendation clarifies that, for purposes of the court order exception, additional notice is not necessary for parents who are parties to a dependency case. Both of these changes are necessary to give jurisdictions flexibility as to how to permit records to be shared with child welfare agencies. In some communities, obtaining a court order to share these records with the custodial child welfare agency (as well as with other relevant parties including children’s attorneys and advocates) will be a direct and efficient process. In other communities, where courts have not, will not, or cannot in a timely manner, issue such orders, the new exception to allow access to custodial child welfare agencies will be more advantageous. Each allows states and communities flexibility to determine the most appropriate option to allow child welfare agencies access to needed education records.

a) Create a new exception to allow child welfare agencies access to records:

A variety of other exceptions to parental consent already exist, including an exception for the juvenile justice system. This new exception would permit schools to allow access to educational records to child welfare agencies in those cases where the child welfare agency has care and responsibility for a student. §99.31 would then read:

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:...

(17) the state or local child welfare agency with responsibility for the care and placement of a student. Redislosure by child welfare agency shall be permitted in compliance with federal and state child welfare confidentiality laws and policies.

b) Clarify in regulations that additional notice of disclosure is not required under the existing court order exception for dependency cases because parents already have been provided notice through the court case (34 C.F.R. § 99.31(a)):

FERPA currently allows for release of education records without parental consent under a court order, as long as parents are provided advance notice of the release, and an opportunity to object. However, in child welfare cases, the parent is already a party to the case where the court order is being issued, and therefore already has the opportunity to challenge the release of school records if they so desire. To require schools to “re-notify” parents who are already on notice of the court order is redundant and serves as an unnecessary barrier. Therefore, the following clarification would prevent the need for additional notification for parents who are parties to the dependency case.

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.
(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with--

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An ex parte court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(D) A court order issued in a case where the child welfare agency is seeking or has responsibility for the care and placement of a child.

2) Clarify that foster parents and IDEA parents are parents for the purposes of FERPA.

The current definition of parent under FERPA is as follows: “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” Under the Individuals with Disabilities Education Act (“IDEA”) a child who receives special education services is represented by an “IDEA parent” throughout the special education process.⁹ The duties of an IDEA parent include: consenting to an evaluation to determine eligibility; participating in decisions regarding the special education services a student receives; and challenging a school district’s decision through a hearing and appeal process. In many cases, youth who are in the child welfare system are represented by “surrogate parents” who may be appointed by a school district or by a judge to serve in this capacity.¹⁰ These surrogate parents, like all other IDEA parents, must be able to obtain prompt and continued access to education records of the children and youth they represent.¹¹ Without these IDEA parents to advocate for them, they often cannot gain access to the special education services they require or the IDEA parents is forced to act as a rubber stamp for school district’s proposal.¹² In addition, an IDEA parent is closely involved in the student’s educational life and is well-positioned to determine whether and under what circumstances disclosure of the student’s education records should be permitted. Similarly, as recognized in current guidance,

⁹ 20 U.S.C. §1401(23).

¹⁰ 20 U.S.C. §1415.

¹¹ Amy Levine, *Foster Youth: Dismantling Educational Challenges*, Human Rights, Fall 2005, Vol. 32, No. 4, p.5. Available at <http://www.abanet.org/irr/hr/Fall05/fosteryouth.html>.

¹² *Id.*

foster parents are closely involved in the student's education and should be treated as parents for the purposes of FERPA. When clarifying that an IDEA parent is also a parent for the purposes of FERPA, it would be helpful to also clarify in regulations, rather than solely in guidance, that foster parents are also parents for this purpose.

In light of the critical role of foster parents and IDEA parents in advocating on behalf of children in care, we strongly urge that the definition of parent set forth in the FERPA regulations be amended to make explicitly clear that this includes both foster and IDEA parents. Expanding the definition of parent in this way will ensure that all foster and IDEA parents are able to obtain prompt and continued access to the education records of the students with disabilities they care for and/or represent.

a) Clarify in regulations that definition of "Parent" includes a child's foster parent and IDEA parent (34 C.F.R. §99.3)

We propose that the current definition of parent be expanded to include a specific reference to an "IDEA parent" as defined under 34 C.F.R. § 300.300(a) as well as foster parents.¹³

"§99.3...

'Parent' means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian, including a foster parent, or an IDEA parent (as defined by 34 C.F.R. § 300.300(a)), who is acting on behalf of the student."

Thank you for this opportunity to present comments to these important regulations. For further information please contact Beth Davis-Pratt at 202-906-8019 or bdavispratt@clasp.org.

¹³ **34 C.F.R. 300.300** – [Definition of "parent" in conjunction with IDEA regulations]

"(a) Parent means--

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act."

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c26
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-0002-0200
Comment on FR Doc # 2011-08205

Submitter Information

Name: Georgia Halloran
Address:
Berkley, MI,
Email: gshalloran@wowway.com
Submitter's Representative: Rep. GAry Peters

General Comment

This comment is on your proposed advancement of FERPA and the privacy of students. The only people that need to see these records are PARENTS!! This is just another power grab by this administration. I am firmly against increasing this law to allow others to see student records for any reason without the permission of the childs parents.
Why isn't Congress involved in the process? They are the ones that represent us-not not you!

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: State educational agency
Tracking No. 80e30c16
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-0002-0201
Comment on FR Doc # 2011-08205

Submitter Information

Name: Georgiana Theoharis
Address:
Chicago, IL,
Email: gtheohar@isbe.net
Government Agency Type: State
Government Agency: Illinois State Board of Education

General Comment

Comments on proposed regulation § 99.35(d)

The Illinois State Board of Education (ISBE) welcomes the 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). ISBE is the state education agency (SEA) in Illinois authorized by law to secure, compile, catalogue, publish and preserve information and data relative to the public school system of Illinois; and also responsible for education policies for public schools, pre-school through grade 12 and vocational education.

Although FERPA currently permits the re-disclosure of students' personal data in order to facilitate the development and expansion of statewide longitudinal data systems (SLDS), FERPA's NPRM [§ 99.35(d)] would impose crippling sanctions on an SEA if the Family Policy Compliance Office (FPCO) determined that the SEA improperly disclosed personally identifiable student information in violation of FERPA (i.e., prohibiting access to the same for at least five years). Given the severity of this penalty, ISBE recommends that § 99.35(d) be restricted to situations where there is gross mishandling of student data. In this way, students' personal data will be adequately protected while ensuring that SEAs have the continued ability to meet their federal and state statutory obligations.

Thank you for your consideration.

Georgiana Theoharis
Assistant Legal Advisor
ISBE

PUBLIC SUBMISSION

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Individual
Tracking No. 80e30c24
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-0002-0202
Comment on FR Doc # 2011-08205

Submitter Information

Name: Sylvia Nist
Address:
Maple Valley,
Email: sylvian@seattlebox.com
Submitter's Representative: Dave Reichert

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

As of: March 27, 2012
Received: May 23, 2011
Status: Posted
Posted: May 24, 2011
Category: Parent/Relative
Tracking No. 80e30c09
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-0002-0203
Comment on FR Doc # 2011-08205

Submitter Information

Name: Mary Morshed
Address:
Orangevale, CA,
Email: mary_harter@comcast.net

General Comment

My Comments - Bullet Points:

Notice and Opt-In/Out

LEAs should be required to include in their annual public notice to eligible students/parents/guardians whether they are disclosing student PII to SEAs or not, and the process to opt-in/out of this data release. Disclosure of PII should not be mandatory and individuals should be able to maintain control of their personal information.

Record Keeping for Disclosures and Opt-In/Out

LEAs should be required to keep a record of all data that is shared with SEAs or other entities.

At a minimum, the following elements should be recorded for each PII student data disclosure, regardless of it being consensual or nonconsensual: what, when, to whom, and why. This disclosure record should be made available to the eligible student/parent/guardian, along with the student education record.

Mandatory Breach Notification

FERPA should include a mandatory breach notification to individuals when their PII is inappropriately accessed, or reasonably believed to have been inappropriately accessed.

Security

FERPA should require reasonable security safeguards of student PII, specifically calling for encryption of student PII during transit.

Integrity

Student records should be maintained with accuracy and completeness by LEAs and SEAs.

LEAs or SEAs should be required to forward PII corrections/amendments and associated accuracy disputed information with all PII data disclosures, and the LEAs or SEAs should also be required to forward them with the up-stream data sharing and re-disclosures throughout the lifecycle of the data.

Responsibility

Each LEA/SEA should be required to designate an individual to oversee the privacy and security of the student PII information it maintains.

Data Sharing Agreements

Data sharing agreements and system interconnects should be designed to protect privacy of student PII.