

COMMENTS OF ELECTRONIC PRIVACY INFORMATION CENTER

to

THE DEPARTMENT OF EDUCATION

“Notice of Proposed Rulemaking”

RIN 1880-AA86

May 23, 2011

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

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

¹ 5 U.S.C. § 552a (2011).

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

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

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

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

³ 20 U.S.C. § 1232g(b)(1) (2011).

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

⁵ NPRM at 19728.

⁶ *Id.*

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

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

⁷ 20 U.S.C. § 1232g(b)(1)(C).

⁸ 20 U.S.C. § 1232g(b)(3).

⁹ NPRM at 19728.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 19729.

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

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

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

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

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

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

¹⁴ *Id.* at 19729-30.

¹⁵ *Id.* at 19730.

¹⁶ *Id.* at 19729

¹⁷ 34 C.F.R. § 99.3.

¹⁸ 20 U.S.C. § 1232g(a)(5)(A).

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

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

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

²⁰ *Id.* at 19728.

²¹ *Id.* at 19729.

²² *Id.*

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

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

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

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

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

²⁸ 20 U.S.C. § 9607 (2011).

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

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

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

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

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

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

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

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

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

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

³⁵ *Id.*

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

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

³⁸ 20 U.S.C. § 1232g(b)(1) (2011).

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

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

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

⁴⁰ 120 Cong.Rec. at 14580-81 (1974).

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

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

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

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

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

⁴² NPRM at 19728

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

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

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

⁴⁶ See NPRM at 19726-29.

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

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

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

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

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

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

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

⁴⁹ NPRM at 19729.

⁵⁰ 20 U.S.C. 1232g(b)(1)(C) (2011).

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

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

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

⁵¹ NPRM at 19727-29.

⁵² *Id.*

⁵³ *Id.* at 19728.

⁵⁴ *Id.*

⁵⁵ *Id.*

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

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

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

⁵⁷ *Id.*

⁵⁸ *Id.* at 565.

⁵⁹ *Id.* at 564.

⁶⁰ *Id.*

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

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

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

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

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

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

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

⁶² 20 U.S.C. § 1232g(b)(1) (2011).

⁶³ *U.S. Telecom Ass'n* at 565-66.

⁶⁴ *Id.* at 565.

⁶⁵ NPRM at 19729-30.

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

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

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

The reason state-level health and human services agencies administer Part C of the Individuals with Disabilities Act is that Part C is not principally educational. Part C of the Act, while a meritorious program in its own right, is principally engaged in non-academic services provided by: "Audiologists; Family therapists; Nurses; Nutritionists; Occupational therapists; Orientation and mobility specialists; Pediatricians and other physicians; Physical therapists; Psychologists; Social workers; Special educators; and Speech and language pathologists."⁶⁹

Linking state educational records to Part C data would expose a range of personal student information, including data pertaining to "catheterization, tracheostomy care, tube feeding, the

⁶⁶ 34 C.F.R. 99.35(a)(1) (2011).

⁶⁷ NPRM at 19729-30.

⁶⁸ *Id.* at 19730.

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

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

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

⁷⁰ 34 C.F.R. § 303.13(1) (2011).

⁷¹ 34 C.F.R. § 303.12(iii) (2011).

⁷² 34 C.F.R. § 303.12(C)-(D) (2011).

⁷³ 34 C.F.R. § 303.12(10)(1) (2011).

⁷⁴ 34 C.F.R. § 303.12(iv) (2011).

⁷⁵ *Id.*

⁷⁶ NPRM at 19730.

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

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

Congress has explicitly limited "directory information" to:

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

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

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

⁷⁷ 20 U.S.C. § 1232g(b)(1).

⁷⁸ 34 C.F.R. § 99.3.

⁷⁹ 20 U.S.C. § 1232g(a)(5)(A).

⁸⁰ *Id.* at 19729

⁸¹ *Id.* at 19732

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

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

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

⁸² *Id.* at 19737.

⁸³ *Id.* at 19729.

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

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

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

V. Conclusion

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

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

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