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May 19, 2011

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

Re: Docket ID ED-2011-OM-0002

Dear Ms. Miles:

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

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

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

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

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

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

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

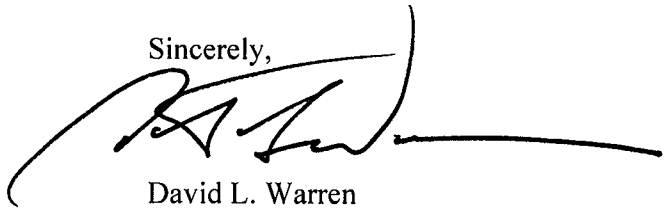
Third, it broadens the "research" exception to permit the redisclosure for research purposes of personally identifiable information without consent on the basis that the entity that received the data has "implied" authority to share it—even if the local educational agency or postsecondary institution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

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

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

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

Sincerely,



David L. Warren

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

Definitions (§ 99.3) – "Authorized representative"

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

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

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

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

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

> . . . then there is no reason why a State health and human services or labor department, for example, should be precluded from serving as the authority's authorized representative and receiving non-consensual disclosures of PII to link education, workforce, health, family services, and other data for the purpose of evaluating, auditing, or enforcing Federal legal requirements related to, Federal or State supported education programs. [*p. 19728*]

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

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

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

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

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

Definitions (§ 99.3) – "Education program"

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

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

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

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

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

> The potential benefits of this proposed change are substantial, including the benefits of non-educational agencies that are administering "education programs" being able to conduct their own analyses without incurring the prohibitive costs of obtaining consent for access to individual student records. *[page 19734]*

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

Research Studies (§99.31(a)(6))

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

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

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

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

> In the event that an educational agency or institution objects to the redisclosure of PII it has provided, the State or local educational authority or agency headed by an official listed in §99.31(a)(3) may rely instead on any independent authority it has to further disclose the information on behalf o the agency or institution. *The Department recognizes that this authority may be implied and need not be explicitly granted. [emphasis added] [p. 19731]*

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

Authority to Audit or Evaluate (§99.35)

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

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

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

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

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

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

Improper Redisclosure (§99.35(d))

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

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

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

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

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

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

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

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

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

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

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

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