



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

The Center on Law and Information Policy of the Fordham University School of Law (“CLIP”) is grateful for the opportunity to comment on the proposed amendments to the regulations of the Department of Education (the “Department”) implementing the Family Educational Rights and Privacy Act as published at 76 Federal Register 19726 (April 8, 2011).

About CLIP and its Research on Longitudinal Databases of Educational Records

CLIP was founded at Fordham in 2005 as an academic research center to address the emerging field of information law. Among its activities, CLIP seeks to advance solutions to legal and policy problems in the field, including information privacy law and policy, through independent, scholarly research. CLIP is staffed by an academic director, Professor Joel R. Reidenberg, an executive director, Jamela Debelak, and student research fellows.

Of particular relevance to this docket, CLIP has researched publicly available information regarding state longitudinal databases of children’s educational records from all 50 states and assessed the privacy protections for those databases. CLIP published the findings of this research in an extensive report: “Children’s Educational Records and Privacy: A Study of Elementary and Secondary School State Reporting Systems” (October 2009) available at <http://law.fordham.edu/childrensprivacy> (hereinafter “Fordham CLIP Study”).

While the Fordham CLIP Study does not challenge the desirability or policy need to create longitudinal databases of educational records, the study demonstrates that the privacy implications of these databases have not been properly addressed. The Fordham CLIP Study found that the majority of states failed to adopt and implement basic privacy protections for longitudinal databases of K-12 children. CLIP found that the majority of longitudinal databases hold detailed information about each child that is identifiable to the individual children. The study found that most states collect excessive and intrusive information about children such as the birth weight of a teen mother’s baby (e.g. Florida), social security numbers (e.g. Tennessee) lead test results (e.g. New Jersey) and the use of foul language in school (Louisiana). CLIP further found that the state databases generally did not have clear access and use rules and that a majority of the states failed to have data retention policies. Most troubling, CLIP discovered that the flow of information from local educational agencies to the respective state department of education was often not in compliance with the legal requirements of FERPA.

These privacy deficiencies are profoundly troubling and the amendments to the regulations proposed by the Department would exacerbate many of the critical deficiencies in the protection of children’s privacy that the Fordham CLIP Study identified.

The Proposed Amendments to the FERPA Regulations contradict Congressional Mandates

As demonstrated through the legislative history of FERPA, Congress has long valued the educational privacy rights of students and FERPA was designed explicitly to restrict when students' personal information could be shared. More recently, the privacy provisions of the newly passed education statutes, particularly the America Creating Opportunities in Technology, Education, and Science Act (the "COMPETES Act"), explicitly require longitudinal databases to comply fully with FERPA.¹ Statements by members of Congress further underscore that Congress seeks strong protection of educational record privacy. Indeed, in 2010, at a hearing before the House Committee on Education and Labor considering the renewal of Elementary and Secondary Education Act, Representative John Kline, then the ranking member and now chair of the Committee, stated that "[n]o conversation about educational data systems would be complete without a discussion of student privacy [and] research indicates not nearly enough is being done to safeguard our students' records."²

It is, thus, very surprising and disturbing that the Department is proposing changes to the FERPA regulations that dramatically expand the disclosure exceptions thereby authorizing the increased sharing of personally identifiable students' data without addressing significant privacy safeguards and the Congressional policy and specific legislative mandates to protect students' privacy. In essence, the changes significantly weaken privacy protection for children's educational records and contravene Congress' stated intent in FERPA, the COMPETES Act and the American Recovery and Reinvestment Act of 2009 (the "ARRA").

Impermissible expansion of "Authorized representative" proposed in §99.3

The Department proposes to redefine the term "authorized representative" to allow disclosure of educational records to individuals or entities who are not under the direct control of control of state, local or federal educational agencies and who are not performing educational audits or evaluations on behalf of state, local or federal education agencies. This new overbroad definition, in connection with the Department's proposed definition for "education program" (which is discussed below), will expand the disclosures under the audit and evaluation exception far beyond the intent and mandate of Congress and allow promiscuous data sharing that undermines accountability for privacy violations.

As the Department has made clear on several occasions, its previous definition of the term "authorized representative" was dictated by the text and legislative history of FERPA. In the 2003 Memorandum from the Deputy Secretary of Education, the Department found that "[t]he multiple references to 'officials' in paragraph (b)(3) reflect a Congressional concern that the authorized representatives of a State educational authority be under the direct control of that authority."³ In the legislative history introducing early amendments to FERPA, the bill's sponsors explained

¹ 20 U.S.C. § 9871(e)(2)

² Hearing on *How Data Can be Used to Inform Educational Outcomes* before the House Committee on Education and Labor, 111th Cong. 2nd Sess. (April 14, 2010).

³ Memorandum from William D. Hansen, Deputy Sec'y of Educ. to the Chief State Sch. Officials (Jan. 30, 2003), available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>

specifically that “[s]ection...(b)(1) of existing law restricts transfer, without the consent of parents or students, of personally identifiable information concerning a student to ... auditors from the General Accounting Office and the Department of Health, Education, and Welfare.”⁴ While these early amendments provided many of the disclosure exceptions we know today, including the audit and evaluation exception, this explanation from the legislative history demonstrates that Congress intended to prevent disclosures to other non-educational agencies. The Department recognized the “plain” meaning of this history, stating in the 2003 Memorandum that “the sponsors of FERPA did not view the concept of ‘authorized representatives’ in an expansive manner; rather, their vision was closely tied to employees and officials of, for example, the Comptroller General and the Secretary.”⁵ Until now, the Department has long followed this mandate to exclude other federal or state agencies because such agencies are not under the direct control of state educational agencies.⁶

Analogously, the Department was clear in all of its previous guidance that outside parties could be treated as “officials” for purposes of another exception only when they are performing “institutional services or functions for which the official or agency would otherwise use its own employees.”⁷ The Department previously found strong support for this position in the statutory text and history.⁸ This conformed to the clear Congressional intent for the disclosure exceptions to remain closely tied to needs of local, state and federal educational agencies. As the Department has previously noted, the requirement of a formal outsourcing relationship for purposes of the school official exception would “ensure that the...exception does not expand into a general exception to the consent requirement in FERPA that would allow disclosure any time a vendor or other outside party wants access to education records.”⁹

This new proposed definition is, thus, a significant and impermissible departure from the Congressional mandate as well as the Department’s previous position that non-educational individuals and entities must be contractors or consultants of a state educational agency in order to qualify as “authorized representatives.” Further, as a policy matter, by expanding the entities and individuals who will gain access to educational records and by allowing educational authority officials to deputize others as “authorized representatives,” the proposal undermines accountability for privacy. As the Fordham CLIP Study found, many states already fail to define clearly the access

⁴ 120 S. Con. Rec. 39862, 39863 (1974).

⁵ Memorandum from William D. Hansen, Deputy Sec’y of Educ. to the Chief State Sch. Officials (Jan. 30, 2003), available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>

⁶ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74828 (Dec. 9, 2008); Memorandum from William D. Hansen, Deputy Sec’y of Educ. to the Chief State Sch. Officials (Jan. 30, 2003), available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>

⁷ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74825 (Dec. 9, 2008).

⁸ *Id.*

⁹ *Id.*

and use authority of recipients of student data.¹⁰ This proposal, if adopted, would significantly exacerbate the problem.

The Department's explanation that the passage of the COMPETES Act and the ARRA reflects a new Congressional intent that justifies creating ever more attenuated responsibility for educational record privacy is patently wrong. As previously discussed, the COMPETES Act explicitly requires compliance with FERPA. If Congress had intended for different privacy and disclosure standards to apply to the new databases, it would have provided new authority. The Department even confirmed that Congress did not intend the COMPETES Act to change FERPA's requirements. In the Department's 2008 rulemaking (one year after the enactment of the Act), the Department found no support for the changes it now proposes, specifically stating:

"there is no other legislative history to indicate that Congress intended that FERPA be interpreted to permit education agencies and institutions, or State and local educational authorities or Federal officials and agencies listed in 99.31(a)(3), to share students' education records with non-educational State officials,"¹¹ and

"[w]e believe that any further expansion of the list of officials and entities in FERPA that may receive education records without consent of the parent or eligible student must be authorized by legislation enacted by Congress."¹²

With respect to the ARRA, the stimulus law provides additional funding for the databases encouraged by the COMPETES Act, but does not suggest any shift in Congressional intent regarding information sharing or the disclosure of student educational records. Congress' choice to rely on the pre-existing FERPA rules when enacting both the COMPETES Act and the ARRA indicate that Congress understood the term "authorized representative" as the Department had previously interpreted the term.

Finally, the Department's new interpretation of "authorized representative" stretches the meaning of the term "representative" beyond its standard use. The re-interpretation alongside the Department's new definition of the term "education program," demonstrates that authorized representatives will now be external agencies or institutions conducting independent reviews and evaluations of programs unrelated to the Department and school based education. This construction of a "representative" is a significant departure from the ordinary usage of the term. A representative is typically considered one who stands in the shoes of another or operates on behalf of another. The new representatives that the Department proposes will not be acting on behalf of or under the direction of anyone. They will be independent actors with independent concerns and interests. If Congress had intended to permit disclosures to independent entities, it would have selected a term other than "representative" to reflect that intent.

¹⁰ Fordham Center on Law and Information Policy, *Children's Educational Records and Privacy: A Study of Elementary and Secondary School State Reporting Systems* (October 2009), p. 39 available at <http://law.fordham.edu/childrensprivacy>

¹¹ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74828 (Dec. 9, 2008).

¹² *Id.*

Problematic expansion of “directory information” proposed in §99.3

The Department proposes to add student ID numbers to the list of items defined as “directory information.” While this change helps facilitate safety requirements at schools where students must wear ID badges to gain access to school facilities, the Department does not seem to have considered some of the risks associated with the public disclosure of student ID numbers.

The Fordham CLIP Study found that many states did a poor job implementing basic access and use restrictions on personally identifiable information. Some states, however, used technical architectures for their databases to anonymize student records so that the risk of disclosure of personally identifiable information would be minimized. These systems used unique IDs at the local level that were decoupled from the ID numbers used in the state longitudinal databases and state officials were barred from linking the ID number used in the database back to an individual student. Such a system allows school officials to have access to all personally identifiable information needed for instruction but would restrict the state’s access to personally identifiable information.

By seeking to include in the definition of directory information any “student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems,” the Department undermines the ability of states and local schools to preserve the anonymity of student ID numbers used in the state databases. This new, expanded definition of “directory information” would include an otherwise anonymous ID number used in a longitudinal database. The disclosure of such a number as directory information would negate the steps taken by states to protect the anonymity of the student in the state database.

Impermissible redefinition of “Education program” proposed in §99.35

The Department proposes to redefine the term “education program” to include programs run by non-educational agencies such as “early childhood education...job training, career and technical education, and adult education.” The Department states as a goal the desire to have a broad definition in order to permit local educational agencies to share personally identifiable education records with non-educational agencies and entities. The Department would, in effect, be including private college test tutoring services, workforce training programs such as courses on bartending and flooring installation, and adventure playground programs within the definition of “educational program” and thus make them eligible to receive detailed educational records from kindergarten onward without student or parental consent. This redefinition of “educational program” contradicts the Department’s enabling mandate in FERPA and would indeed result in the sharing of educational records to organizations not covered by FERPA at all.

When Congress included the term “education program” in the original statute, the meaning was quite narrow. The legislative history explicitly rejected the proposed broad definition now made by the Department, stating: “there has been some question as to whether the Amendment’s provisions should be applied to other HEW education-related programs such as Headstart or the educational research programs of the National Institute of Education. As rewritten, the limited nature of the Act’s coverage should be clear.”¹³ HEW education-related programs and NIE programs were excluded from the definition of “education program.” The Department has also previously

¹³ *Id.*

confirmed the Congressional mandate for a restricted definition and has stated that the term refers to agencies subject to FERPA and has defined the agencies as those:

to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.¹⁴

Elsewhere in FERPA, Congress explicitly tied terms relating to education to traditional elementary and secondary education programs under the authority of the Secretary. In particular, “education records” and “educational agency or institution” are both defined to refer to traditional school based education funded by the Department. The term “education records,” for example, is defined as “records...which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution.”¹⁵ Likewise, “educational agency or institution” is defined as “any public or private agency or institution which is the recipient of funds under any applicable program.”¹⁶ The legislative history for this definition provides that “by explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration.”¹⁷ Congress could not have intended to use the term “education” narrowly when referring to records or agencies and then broadly to refer to programs.

The broad expansion of “education program” would undermine the Congressional goal of limiting access to educational records to those programs directly supervised by state and federal educational agencies. FERPA was very carefully crafted to preserve confidentiality of student records and allow through exceptions the use of students’ personal information for the provision and improvement of the educational programs provided by traditional local education agencies. For example, the exceptions set forth in sections (b)(1)(A-H) of FERPA generally permit disclosures that will help in the execution, review or improvement of Department funded educational programs, such as (a) disclosures to “other schools officials” with “legitimate educational interests,”¹⁸ (b) disclosures to organizations performing studies on educational programs at the specific request of a local educational agency,¹⁹ or (c) disclosures to State agencies or the Department for the purposes of evaluating an educational program funded by the Department.²⁰

¹⁴ 34 C.F.R. § 99.1 (2008).

¹⁵ 20 U.S.C. § 1232g(a)(4)(A).

¹⁶ 20 U.S.C. § 1232g(a)(3).

¹⁷ 120 S. Con. Rec. 39862 (1974).

¹⁸ 20 U.S.C. § 1232g(b)(1)(A).

¹⁹ 20 U.S.C. § 1232g(b)(1)(F).

²⁰ 20 U.S.C. § 1232g(b)(1)(C).

The Department should be guided by this narrow focus in the legislation when it defines the term “education program.”

Furthermore, the legislative history also indicates that Congress did not intend the audit and evaluation exception to include disclosures to non-educational agencies and entities. The proponents of the bill introducing FERPA stated that “Section...(b)(1) of existing law restricts transfer, without the consent of parents or students, of personally identifiable information concerning a student to ... auditors from the General Accounting Office and the Department of Health, Education, and Welfare.”²¹ If Congress wanted educational records to be used in the audit and evaluation of non-educational agency programs it would not have sought to restrict the disclosures to those other agencies. Thus, the adoption of the proposed definition covering entities other than traditional educational agencies would contradict Congress.

Impermissible expansion of the “audit and evaluation” provision proposed in § 99.35(a)(2)

The proposed regulations would expand the “audit and evaluation” exception to allow local educational agencies to share personally identifiable information without parental consent to non-educational agencies and institutions for the evaluation of programs which are not under the authority of Department. The audit and evaluation exception provides that “[n]othing in this section shall preclude authorized representatives of (A) the Comptroller General of the United States (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs.”²² Since the passage of FERPA in 1974, this exception has been commonly understood to allow local educational agencies to share educational records with State and federal educational agencies in order to allow those agencies to evaluate Department funded and authorized educational programs. The Department now seeks to expand the exception to allow broad sharing of personally identifiable information with unlimited third parties so long as those parties can identify some type of educational services they provide.

While the Department claims that it may expand the disclosure exceptions set forth in FERPA because the COMPETES Act and the ARRA encourage the development of and provide funding for statewide P-16 educational data systems, this claim misstates the legal requirements of the statutes. The Department has failed to account for Congress’ declaration in the COMPETES Act that statewide educational data systems must comply with FERPA.²³

In the COMPETES Act, Congress authorized the award of grants to states “to establish or improve a statewide P-16 education data system,”²⁴ but it expressly conditioned those awards on, among other things, (a) compliance with FERPA and other privacy protections and (b) use of the longitudinal databases for evaluation and improvement of Department funded educational

²¹ 120 S. Con. Rec. 39862 (1974).

²² 20 U.S.C. § 1232g(b)(3).

²³ 20 U.S.C. § 9871(e)(2)

²⁴ 20 U.S.C. § 9871(c)(2).

programming.²⁵ The first condition is significant because it demonstrates that Congress considers privacy a priority in the development of longitudinal databases. In fact, the majority of the text in the COMPETES Act devoted to state databases is focused on the privacy protections and access restrictions required of the systems. In two places Congress specifically states that the databases must comply with FERPA and the statute also provides for additional privacy requirements. This focus on privacy demonstrates that Congress thought disclosures associated with the longitudinal databases should be limited and monitored carefully, not expanded.

The second condition in the COMPETES Act is also significant because it provides that the information in the longitudinal databases should be used for specific limited educational purposes. The use restriction in the statute provides that recipients of grants “limit the use of information in the statewide P-16 education data system by institutions of higher education and State or local educational agencies or institutions to the activities set forth in paragraph (1).”²⁶ The paragraph referenced provides a list of ways states can use federal funds to improve elementary and secondary education. The list includes adjusting school curricula so that students are better prepared for the future, implementing new activities to ensure coursework is rigorous and convening with various stakeholders to determine how education can be improved.²⁷ These activities demonstrate a focus on state run elementary and secondary education programs and noticeably absent are any activities or programs organized by other State agencies. Outside parties may, of course, be consulted in order to help improve educational programming, but the programs contemplated are not outside programs run by other agencies. Sharing with non-educational agencies was not authorized by Congress. In addition, the provisions in the COMPETES Act focus solely on local, state and federal educational agencies and officials. Congress never mentions use of the information by other agencies. It is clear from the text of the statute that the databases promoted in the COMPETES Act are educational databases used by educational officials for internal audits and the sharing of student records with other agencies is not expressly authorized.

In terms of the ARRA, this statute provides additional funding for statewide longitudinal databases, but does not remove or limit any of the requirements previously provided in the COMPETES Act. The ARRA is simply an allocation of funds to further support the development of the databases. Nothing in the ARRA suggests that the applicable privacy protections from FERPA as incorporated by reference in the COMPETES Act are supplanted for the databases funded by the appropriation. Similarly, nothing in the ARRA suggests that Congress intended a new set of privacy protections to apply to the longitudinal databases. If new protections were desired, Congress would have been the proper legal entity to articulate the new standards.

Under FERPA, the “audit and evaluation” exception is narrowly drawn and its expansion exceeds the Department’s legal authority. FERPA is a privacy statute that has the primary purpose of protecting the privacy and confidentiality of children’s education records. Some disclosure exceptions are built into the statute’s general prohibition on sharing, but these exceptions are narrowly tailored. An examination of language, structure and legislative history of FERPA demonstrates that the proposed changes exceed the Department’s authority.

²⁵ 20 U.S.C. § 9871(e)(2).

²⁶ 20 U.S.C § 9871(e)(2)(c)(i)(II).

²⁷ 20 U.S.C § 9871(e)(1).

FERPA starts with the fundamental rule that student educational records should not be disclosed from a school or local educational agency without parental consent. It was the intent of Congress that “the moral and legal rights of parents shall not be usurped.”²⁸ Congress began with a basic rule that parents should have the initial authority to determine when identifiable information about their children may be disclosed. Therefore, when promulgating regulations, the Department should start with the presumption that parental consent for disclosure is the preferred method and exceptions to that rule should be narrowly constructed and closely track clearly articulated Congressional intent.

Congress then built in a few carefully crafted exceptions to this blanket rule to allow some limited sharing for delivering and improving federally funded school-based education programs and for ensuring safety and security. A first category of exceptions is tied directly to the provision and improvement of the educational programs provided by traditional local education agencies. For example, the exceptions set forth in sections (b)(1)(A-H) of FERPA generally permit disclosures that will help in the execution, review or improvement of Department funded educational programs, such as (a) disclosures to “other schools officials” with “legitimate educational interests,”²⁹ (b) disclosures to organizations performing studies on educational programs at the specific request of a local educational agency,³⁰ or (c) disclosures to State agencies or the Department for the purposes of evaluating an educational program funded by the Department.³¹ Each of these is tied specifically to the provision of education services by a traditional elementary or secondary school. The second category of disclosure exceptions focuses on ensuring safety and security. These exceptions, for example, permit disclosure if it “is necessary to protect the health or safety of students or other persons”³² or permit disclosure for certain types of legal proceedings.³³

The exceptions provided in the statute reflect Congressional intent to allow some sharing when it will aid or improve federally funded elementary and secondary educational programs, but deny non-consensual sharing to other state agencies for non-traditional educational programs, social services programs or other non-educational purposes. The legislative history makes clear, for example, that the act was intended “to [apply] only to Office of Education programs and those programs delegated to the Commissioner of Education for administration.”³⁴ In addition, in crafting the exception for the audit and evaluation of education programs, Congress was “very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them.”³⁵ An expansion of the audit and evaluation exception to include disclosures to non-educational agencies

²⁸ S. CONF. REP. 93-1026, at 47 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4206, 4250.

²⁹ 20 U.S.C. § 1232g(b)(1)(A).

³⁰ 20 U.S.C. § 1232g(b)(1)(F).

³¹ 20 U.S.C. § 1232g(b)(1)(C).

³² 20 U.S.C. § 1232g(b)(1)(I).

³³ 20 U.S.C. § 1232g(b)(1)(J).

³⁴ 120 S. Con. Rec. 39862 (1974).

³⁵ S. CONF. REP. 93-1026, at 48 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4206, 4251.

for evaluations of programs that are unrelated to the provision of elementary and secondary education poses a threat to student privacy and does not reflect the intentions of Congress.

The Congressional intent to protect educational records from disclosure to external non-educational entities and agencies is also strongly reflected in each of the more recent statutes that the Department mischaracterizes to support its proposed changes.

Notwithstanding the proposed changes, the Department has acknowledged and clearly stated that “there is no provision in FERPA that allows disclosure or re-disclosure of education records, without consent, for the specific purpose of establishing and operating consolidated databases and data sharing systems, and, therefore, we are without authority to establish one in these regulations.”³⁶ The Department also commented specifically on whether disclosures could be made to non-educational agencies, stating that “there is no other legislative history to indicate that Congress intended that FERPA be interpreted to permit education agencies and institutions, or State and local educational authorities or Federal officials and agencies listed in 99.31(a)(3), to share students’ education records with non-educational State officials.”³⁷ In addition, the Department has previously recognized that it did not have the authority to enact the regulations it now proposes, stating: “We believe that any further expansion of the list of officials and entities in FERPA that may receive education records without consent of the parent or eligible student must be authorized by legislation enacted by Congress.”³⁸

Lastly, the expansion would also allow disclosures where the recipient had no explicitly authorized “audit and evaluation” purpose.³⁹ As demonstrated in the Fordham CLIP Study, the rampant failure by states to articulate the purposes for disclosure violates privacy principles. This approach, weakening the controls on “audit and evaluation” purposes, contradicts basic principles of privacy and Congressional intent.

By contrast, the Department has proposed the requirement for a written agreement that designates any authorized representative (third party) and the specified purpose for the disclosure of student information along with data deletion obligations. This is a step in the right direction. However, the proposed changes relieve data recipients of responsibility for actually implementing protections as the agreements would only have to “establish policies and procedures” to avoid unauthorized disclosures and use. Agreements for third party processing must be comprehensive and must not relieve any of the parties from strict privacy obligations.

Questionable Enforcement proposed in §99.35

The Department’s proposed changes to §99.35 create a number of risks that information may be disclosed unlawfully without providing an adequate remedy for such privacy violations. In conjunction with the proposed authorization for disclosures of personally identifiable information

³⁶ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74822 (Dec. 9, 2008).

³⁷ Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74828 (Dec. 9, 2008).

³⁸ *Id.*

³⁹ 76 Fed. Reg. 19726, 19731 (Apr. 8, 2011)

to non-educational agencies and institutions for the audit and evaluation of external programs, the Department is trying to extend enforcement authority beyond its statutory mandate.

The remedies available for a violation of FERPA are significantly limited. In *Doe v. Gonzaga*, the Supreme Court made clear that there is no private right of action under FERPA.⁴⁰ The sole remedy available for a violation, therefore, is the withholding of Federal funds by the Department.⁴¹ If the Department finds there has been a violation of FERPA by a State or local educational agency, it may withhold funds from the State. This penalty is severe and, as a result, has never in the history of FERPA been used by the Department.

The Department's proposed regulation expands the sharing of personally identifiable information in a way that is risky considering the limited remedy available under FERPA. The new regulation permits outside sharing and limits penalties for improper disclosures as long as a local educational agency uses "reasonable methods" to prevent the disclosure. The "reasonable methods" requirement is vague and, without a proper enforcement mechanism, it does not adequately protect the privacy interests of students. The new regulations would allow State and local educational agencies to share personally identifiable information with external non-educational third parties as long as they use "reasonable methods" to ensure the information is protected from further disclosure. Under this proposal, there would be no FERPA violation if information was disclosed by the third party as long as the state educational agency used "reasonable methods" to limit the disclosure. The Department does not define reasonable methods and plans only to issue non-regulatory guidelines about what steps agencies should take to ensure additional disclosure is restricted. This vague standard will make violations difficult to judge. Arguably, as long as the agency takes some measures, even if they are not effective, there will be no FERPA violation and no remedy for the parties harmed by a disclosure. A poorly defined standard without an effective method of enforcement provides little incentive for local educational agencies to take privacy seriously.

The proposed regulation also creates a penalty provision for improper re-disclosures of information by third-party recipients. Agencies and organizations found to have improperly disclosed personally identifiable information will be restricted from receiving information for at least five years after the violation. This debarment remedy is not found in FERPA and the Supreme Court held in *Doe v. Gonzaga* that withholding of federal funds is the sole remedy available under FERPA.⁴² Since the Family Policy Compliance Office ("FPCO") does not have authority over the non-educational third party agencies or institutions, the FPCO has no direct way to penalize the outside parties and additionally no authority to enforce a ruling that an educational agency may not disclose information to third party who has been penalized.

Although FERPA only contains a limited enforcement remedy, the expansion of sharing as contemplated by the proposed regulations will be likely to result in significant litigation at the state level under various state rights. Security breaches and improper use of the data increase in likelihood with the centralization of educational records in longitudinal databases and wider sharing. These events will take place at the local and state levels and will be likely to involve large

⁴⁰ 563 U.S. 273 (2002).

⁴¹ 20 U.S.C. § 1232g(a)(1)(A).

⁴² 563 U.S. 273 (2002).

numbers of families like the exposure of the educational records of all the students in the Nashville, Tennessee public schools during 2009. State tort doctrines and, in some states, state constitutional rights of privacy will be available for aggrieved families to initiate litigation against schools, state agencies and those responsible for the processing of student data. The permissiveness encouraged by the proposed regulations is, thus, likely to lead to extensive litigation and privacy liability for states and their partners.

Conclusion

While the Department's initiative to address privacy in longitudinal educational databases is critically important and laudable, the issues with FERPA cannot be resolved through regulation as they go to the heart of the statute's mandate. The trade-offs between privacy and the sharing of educational records for data analysis are policy decisions that belong to Congress. The Department should be seeking legislative reform to address:

- 1) any new statutorily authorized recipients of educational records;
- 2) any new statutorily permitted purposes for disclosures; and
- 3) the creation of effective enforcement rights, powers and remedies.