

May 23, 2011

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

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

Dear Ms. Miles,

Thank you for the opportunity to provide comments and recommendations in response to the notice of proposed rulemaking published in the Federal Register on Friday, April 8, 2011 regarding amendments to the regulations for the Family Educational Rights and Privacy Act (FERPA). This letter represents comments on the proposed amendments from the Education Information Management Advisory Consortium (EIMAC) of the Council of Chief State School Officers (CCSSO). EIMAC is CCSSO's network of state education agency (SEA) officials tasked with recommending policy and practice with regard to data collection and reporting, information system management and design, and assessment-related data issues. The comments made here express the collective voice of the 47 SEA members currently engaged in the EIMAC consortia.

State education agencies are committed to creating a public education system that prepares every child for lifelong learning, work, and citizenship. In order to fulfill this promise we know that we need to use quality data to make decisions from the policy level to the classroom. The proposed changes to the FERPA regulations will allow us to facilitate better research and evaluation using our statewide longitudinal data systems (SLDS) in order to do just this. Use of quality data will increase our accountability and transparency, allow us to measure outcomes and continuously improve the way we approach the business of education. State education agencies are equally as committed to protecting and securing the privacy and confidentiality of individual student records.

These proposed regulations strike the needed balance between data use for the improvement of education and the privacy protection of educational records. Please consider the following comments and recommendations on the notice of proposed rulemaking.

Authorized Representatives (§§99.3, 99.35)

The proposed regulation would add a definition of the term “authorized representative”. Under the proposed definition, an authorized representative would mean any entity or individual designated by a State or local educational authority or agency headed by an identified official to conduct – with respect to federal or State supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal legal requirements that relate to those programs.

EIMAC members are pleased to see a definition being applied to the term Authorized Representative. This will assist state education agencies in handling education data to evaluate the effectiveness of education programs. We would like to recommend the addition of the word “state” to the second half of the definition so that the full definition reads: “an authorized representative would mean any entity or individual designated by a State or local educational authority or agency headed by an official listed in §99.31 (a) (3) to conduct—with respect to Federal or State supported education programs—any audit, evaluation, or compliance or enforcement activity in connection with Federal *or State* legal requirements that relate to those

programs.” Consistently referring to both Federal and State will serve to minimize confusion in implementation.

#### Reasonable Methods (§ 99.35 (a)(2))

The proposed regulations provide that the responsibility remain with the State or local educational authority or agency headed by an identified official to use reasonable methods to ensure that any entity designated as its authorized representative remains compliant with FERPA. No definition is given in these regulations as the Department intends to issue non-regulatory guidance on the subject.

EIMAC members appreciate the flexibility offered by issuing non-regulatory guidance. The protection of student information is a top priority of state education agencies and methods used to ensure compliance with FERPA can vary based on available technologies and governance structures.

EIMAC members would like to take this opportunity to applaud the Department for the establishment of the Privacy Technical Assistance Center (PTAC) and the hiring of a Chief Privacy Officer (CPO). We are excited to work with both the CPO and PTAC on these issues. PTAC is in an excellent position to provide both technical assistance and a library of best practices around securing data, ensuring privacy, and defining reasonable methods that meet the needs of both the Department and State and local agencies.

EIMAC members would like to offer the following points for consideration in defining guidelines around “reasonable methods” for ensuring FERPA compliance:

- The guidance should set the minimum standards for “reasonable methods” and leave flexibility for the states to define and implement processes and practices to meet those standards.
- The guidance should encourage differentiated solutions for meeting the needs for research and maintaining security, privacy, and confidentiality.
- The guidance should include examples of best practices for governing and securing data both “at rest” and “in flight”.

#### Written Agreements (§ 99.35)

The proposed regulations would require written agreements between a State or local educational authority or an agency headed by an identified official and its authorized representative. The regulations propose specific points with regard to the content of these written agreements that include provisions on purpose of the disclosure, time period for the work, and policies that protect against redisclosure.

EIMAC members applaud the Department for including this provision. Formal written agreements provide necessary privacy safeguards while allowing for data to be used to appropriately evaluate education programs and provide information to improve student outcomes. We want to be sure that in listing the specific points to be laid out in a written agreement the Department is not creating a minimum standard, but instead providing state agencies with the flexibility to draft agreements that meet state-specific needs. The addition of the phrase “including but not limited to” will help to make clear the flexibility of a state agency to include additional provisions if needed.

This is another area where the assistance provided through PTAC will be well positioned to showcase best practices with regard to written agreements. EIMAC members look forward to working with PTAC staff to identify and share best practice around the privacy and security of personally identifiable data.

#### Education Program (§§99.3, 99.35)

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

EIMAC members applaud the Department’s broadening of the term education program. In order to understand and improve the business of education it is important for policymakers and practitioners to know the impact of services provided prior to kindergarten, outside the school day, and after high school graduation. With this expanded definition, state education agencies can appropriately evaluate and audit learning throughout the educational process.

That said, EIMAC members would recommend further clarification and definition of education programs. We ask for clarification around early childhood programs that take place in a variety of settings and under the jurisdiction of a variety of authorities or agencies. We also ask for the inclusion of extended learning opportunities and afterschool programs.

Accordingly, we recommend that the NPRM further define “publicly-funded early childhood education programs” to include but not be limited to those programs and services that are, in whole or in part, designed to advance school readiness of children from birth through the age at which a child may start kindergarten in a given state, such as Head Start; Early Head Start; child care (licensed or regulated by the state or funded by the Child Care and Development Block Grant); home visiting; pre-kindergarten; infant-toddler; and early intervention for infants, toddlers and preschoolers funded through the IDEA programs. We also recommend defining extended learning opportunities to include but not be limited to before- and after-school programs; weekend, vacation, and summer programs; extended-day and -year initiatives; and digital/distance learning.

EIMAC members understand the importance of setting clear boundaries in defining education programs. We want to be sure that we have the flexibility to use comprehensive data in effective and secure ways to improve the education system for all students and become a truly data driven enterprise.

#### Research Studies (§ 99.31 (a)(6))

The proposed regulations clarify that nothing in FERPA or its implementing regulations prevents a State or local educational authority or agency headed by an identified official from entering into agreements with organizations conducting research studies and, as part of such agreements, prevents the use of PII on behalf of the education agencies and institutions.

EIMAC members fully support this clarification. The information housed in our statewide longitudinal data systems is best utilized for the purpose of research to improve the education system as a whole. EIMAC members urge the Department to consider adopting a clear definition of research to provide further clarity around these disclosures.

This provision also brings up often confusing issues between FERPA and the Freedom of Information Act (FOIA). EIMAC members would like the Department to strengthen language to ensure that FERPA protections extend to protect personally identifiable education records against FOIA requests.

#### Improper redisclosure of PII (§99.33)

The proposed regulations clarify the enforcement policies around redisclosure of PII stating that if the Department finds that a State or local education authority, an agency headed by an identified

official, or an authorized representative there of improper redisclosures of PII in violation of FERPA, the educational authority that provided the data would be required to deny that representative further access to personally identifiable data for at least five years.

EIMAC members understand and agree that substantial consequences are needed. A debarment from access to PII is an appropriate consequence for FERPA violations. We would however like the Department to consider several suggestions in relation to the improper redisclosure.

- EIMAC members would first ask the Department to define the debarment procedures to include clarity around potential remedy and due process for violations.
- We would also ask that states have the ability to differentiate degrees of offenses and impose potentially harsher penalties on flagrant violations, and lighter sentences on lesser misdemeanors. For example, the posting of an aggregate report that is found to improperly suppress the N size may not need the same penalty as leaving a data set with PII in a public place.
- Finally, we would ask the Department to clarify whether penalties are uniformly levied on an individual or an organization/agency. If an individual working for an authorized representative is responsible for the improper redisclosure and leaves the organization/agency is that agency still disbarred? Moreover, if the individual is then hired at a second organization/agency that is also an authorized representative should she be allowed access to PII?

#### Authority to Audit or Evaluate (§99.35)

The proposed regulations would remove the provision that a State or local education authority or other agency headed by an identified official must establish legal authority under other Federal, State or local law to conduct an audit, evaluation, or compliance or enforcement activity. This proposed regulation would permit state or local education officials to disclose data to any entity or person designated by the state or local education authority for the purpose of evaluating or auditing federal or state-supported education programs or enforcing compliance with federal legal requirements. This change would also permit education data to be housed in a centralized state data agency that is not an education agency, while not permitting disclosure of data to a non-education agency solely for that non-education agency's purposes.

EIMAC members are supportive of this clarification. Clarifying our ability to use a centralized data facility to house education data provides states with the ability to make cost effective warehousing decisions where the technology is available while maintaining the privacy, security, and confidentiality of those data under other provisions of FERPA. However, EIMAC members urge the Department to issue non-regulatory guidance or provide best practice through the Privacy Technical Assistance Center on the boundaries between agencies, data stewardship, and what constitutes an educational purpose outside of the education agency. A centralized data center must still include strong data governance with the education agency maintaining ownership of the educational data.

#### Enforcement procedures with respect to any recipient of Department Funds that students do not attend (§99.60)

The proposed regulation would clarify that in addressing enforcement procedures, an "education agency or institution" includes any public or private agency or institution to which FERPA, as well as any State education authority or local educational authority or any other recipient to which funds have been made available under any program administered by the Secretary. This clarification extends the ability of the department to investigate and enforce alleged violations of FERPA by State and local education authorities beyond those entities that enroll students.

This clarification is welcomed and needed. EIMAC members fully support the expansion of enforcement procedures and welcome additional accountability.

State education agencies and EIMAC members have long awaited clarification to FERPA and we thank you for the comprehensive language provided in these proposed amendments. In closing, we ask only that you finalize changes with all due speed. As we race to meet deadlines for creating the State Fiscal Stabilization Fund comprehensive P-20 data systems by September 2011, we hope to have the necessary FERPA guidance finalized.

Thank you again for your attention to these comments.

Sincerely,



**Carissa Miller**  
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Idaho Department of Education  
EIMAC Board Chair



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