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

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

Submitted By

American Bar Association

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

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

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

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

OVERVIEW

The Achievement Gap

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

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

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

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

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

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

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

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

A Unique Situation

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

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

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

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

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

Expanding Role of Child Welfare in Addressing Educational Needs

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

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

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

Expanding Interagency Data Exchange and Interoperability

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

⁸ 42 U.S.C.A. § 675(1)(C).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ 42 U.S.C.A. § 675(1)(C).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁴ 20 U.S.C. §1401(23).

¹⁵ 20 U.S.C. §1415.

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

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

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

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

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

"§99.3...

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

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

¹⁷ *Id.*

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

"(a) Parent means--

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

