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MEMORANDUM

To: Yasmina Vinci, Executive Director
National Head Start Association

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Re: Notice of Proposed Rulemaking (76 Fed. Reg. 19726 (Apr. 8, 2011));
RIN 1880-AA86

Date: May 17, 2011

We appreciate the opportunity to develop analysis and comments for the National Head Start Association ("NHSA") on the Department of Education's ("DoEd") Notice of Proposed Rulemaking ("NPRM");(76 Fed. Reg. 19726 (Apr. 8, 2011)); RIN 1880-AA86, setting forth proposed changes to the Family Educational Rights and Privacy Act ("FERPA") regulations (34 C.F.R. Part 99). This Memorandum sets forth an overview of key points, followed by discussion of various sections of the NPRM, as well as recommendations to strengthen the final rule. All comments were developed under the guiding principle that NHSA believes in balancing data sharing for longitudinal purposes with protecting the privacy of the nation's most at-risk children and families.

Overview of Key Points

- While the DoEd intends this NPRM to adjust FERPA requirements to ensure that they allow for information flow in statewide longitudinal data systems, it overreaches its authority in attempting to apply FERPA directly to all Head Start and Early Head Start (collectively, "Head Start") programs that are under the purview of the Department of Health and Human Services ("HHS").

    - The Head Start Act (42 U.S.C. 9801 et seq.), which authorizes the Head Start program, expressly requires the Secretary of HHS to promulgate regulations that "ensure the confidentiality of any personally identifiable data, information, and records collected or maintained by… any Head Start agency. Such regulations shall provide the policies, protections, and rights equivalent to those provided to a parent, student, or educational agency or institution under section 1232g of Title 20 [FERPA]." 42 U.S.C.A. § 9836a(b)(4).

- Moreover, the COMPETES Act and the American Reinvestment and Recovery Act ("ARRA") do not provide DoEd the express authority to supplant the authority of HHS as they relate to Head Start.

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- Certain of the NPRM's proposed definitions and new interpretations of authority will improperly impede on HHS' oversight of Head Start agencies. Accordingly, we make a series of suggestions to NHSA to provide to DoEd on these issues.

Definition of Education Program (§§ 99.3, 99.35) and Definition of Authorized Representative (§§99.3, 99.35) as They Relate to Head Start and Early Head Start Programs

We have significant concerns about the legality of the proposed new definitions for "Education Program" and "Authorized Representative," at 76 Fed. Reg. 19729 and 19734, respectively, because their combined effect would be to give to state and local educational authorities the power to audit, evaluate, and conduct compliance and enforcement activity with respect to Head Start programs, a function that is squarely and exclusively vested in the Secretary of HHS.

As background, DoEd proposes to allow "education program[s]" to include any programs principally engaged in the provision of education, including early childhood education, "regardless of whether the program is administered by an educational authority." *See* 76 Fed. Reg. 19726 at 19729-30. It also proposes that "authorized representatives," which currently include "state or local educational authorities" (*see* 34 C.F.R. §99.31(a)(3)(iv)), would also include "any entity or individual designated by a State or local educational authority or agency…*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*." 76 Fed. Reg. 19726 at 19728 (italics added).

Our reasons for concern are set forth below:

A) DoEd's Proposed Regulatory Activity is, as it Relates to Head Start, Already Expressly Committed to Another Department

By changing these definitions as proposed, DoEd would be overreaching its authority as it relates to Head Start agencies. Under the Administrative Procedure Act ("APA") that allows federal courts to hold unlawful and set aside federal agency actions that are "not in accordance with law," 5 U.S.C. § 706(2)(A), when the authority to regulate in an area is vested in one federal agency, it necessarily means that a sister agency may not issue regulations governing the same sphere of activity. In enacting the APA, Congress expressly stated that "no agency may undertake directly or indirectly to exercise the functions of some other agency." H.R. Rep. No. 79-1980 (1946), reprinted in U.S. Gov't. Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 211 (1946). *See also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962) ("Implicit in this analysis is a recognition that if either agency is not careful it may trench upon the other's jurisdiction, and, because of lack of expert competence, contravene the national policy as to transportation or labor relations."); *New York Shipping v. Federal Maritime Commission,* 854 F.2d 1338, 1370 (D.C. Cir.1988) ("[A]n agency, faced with alternative methods of effectuating the policies of the statute it administers, … must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime.").

Here, the authority to issue separate privacy regulations for Head Start has been expressly granted to the Secretary of HHS through Head Start's authorizing legislation.[1] The exact language of the Head Start Act states that "*The Secretary* [of HHS], *through regulation, shall ensure* the confidentiality of any personally identifiable data, information, and records collected or maintained under this subchapter by the Secretary and any Head Start agency. Such regulations *shall provide* the policies, protections, and rights *equivalent to those* provided to a parent, student, or educational agency or institution under section 1232g of Title 20 [FERPA]." 42 U.S.C. §9836A(b)(4)(A)(italics added). Thus, Congress provided express authorization, clear on the face of the statute, for the Secretary of HHS, not DoEd, to issue privacy and confidentiality regulations under the Head Start Act. Further, HHS' regulations are intended to be separate and apart from the preexisting regulations implementing FERPA. *See id.* Through that statutory language, Congress specifically directed the HHS Secretary to draft regulations that would emulate the privacy protections of FERPA, but that would be designed for the unique structures and functions of Head Start agencies.

Therefore, under the APA, DoEd may not issue regulations governing the same sphere of activity as HHS. In addition, DoEd fails in the NPRM to explain why its proposed actions are minimizing its intrusion into HHS' sphere.

B) The Proposed Regulatory Activity by DoEd Exceeds That Agency's Statutory Authority

Even if the authority to issue privacy regulations for Head Start programs were not already expressly committed to another federal agency, the proposed expansion of DoEd's authority would still be improper as it exceeds that agency's legislative authority. Under the APA's Section 706(2)(C), federal agency actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," are found to be unlawful, and courts invalidate such actions. *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978) (Court has responsibility to determine whether agency practice is consistent with the agency's statutory authority); *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 801 (10th Cir. 2010) ("Because the APA empowers reviewing courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), an essential function of our review under the APA is determining whether an agency acted within the scope of its authority"); *Citizens Coal Council v. U.S. E.P.A.*, 385 F.3d 969, 979 (6th Cir. 2004) *on reh'g en banc*, 447 F.3d 879 (6th Cir. 2006) ("Generally, when an agency issues a rule that contradicts the enabling statute, the rule is 'in excess of statutory jurisdiction,' and therefore violates the APA"); *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) (it is not particularly controversial that a federal agency does

[1] It should be noted that Head Start is authorized within HHS, not DoEd. While health and education used to reside within the same federal department – the Department of Health, Education and Welfare – when DoEd was carved out, the Head Start program remained within the newly-titled HHS. "Nothing in the provisions of this section or in the provisions of this chapter [Transfers from Department of Health, Education, and Welfare] shall authorize the transfer of functions under part A of Title V of the Economic Opportunity Act of 1964 [42 U.S.C.A. § 2928 et seq.], relating to Project Head Start, from the Secretary of Health, Education, and Welfare to the Secretary [of Education]." 20 U.S.C. §3441(d). This has made sense over the years because Head Start encompasses far more than solely education. "It is the purpose of this subchapter to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development…(2) through the provision to low-income children and their families of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary." 42 U.S.C. § 9831.

not have the power to act unless Congress, by statute, has empowered it to do so, and agency actions beyond delegated authority are "*ultra vires,*" and courts must invalidate them).

Here, the proposed expansion of DoEd's privacy regulations to cover Head Start programs is improper as it exceeds that agency's statutory authority. Specifically, FERPA's statute protects the privacy of student education records maintained by or for "educational agencies or institutions" that receive funds administered by DoEd. Educational agencies or institutions are defined in the statute as "any public or private agency or institution which is the recipient of funds under any applicable program." 20 U.S.C.A. § 1232g(a)(3). In addition, statutes governing DoEd's jurisdiction specifically cover applicable programs over which the department has "administrative responsibility" and allow for the issuance of rules "governing the applicable programs *administered by*" DoEd. *See* 20 U.S.C. §1221(c)(1); *see also* 20 U.S.C. 1221e-3. At most, this might allow for DoEd to apply FERPA's provisions to certain school districts that run Head Start programs; however, on its face FERPA provides no basis for extending DoEd's regulatory reach to the myriad Head Start agencies that do not receive direct funds from DoEd-administered programs. Nonetheless, the NPRM is rife with language explicitly describing the attempted improper expansion of authority by DoEd, *see* 76 Fed. Reg. 19726 at 19729-30, demonstrating that DoEd seeks to expand its reach to programs over which it clearly has no legislative authority.

Additionally, neither the language of ARRA, nor the COMPETES Act, direct DoEd to usurp HHS' authority here. The State Fiscal Stabilization language of ARRA merely allows DoEd to use funds to support early childhood education, as appropriate. *See* P.L. 111-5, Title XIV, Section 14002(a)(1)(Feb. 17, 2009). The COMPETES Act that the NPRM implies gave rise to these proposed regulatory amendments references "P-16" education programs and provides for grants to establish longitudinal data collection. *See* 20 U.S.C. §9871. It does not provide a legislative basis for expanding the reach of the FERPA regulations to Head Start. Rather, it sets out the range of programs to which its grant funding provisions apply, requires states to follow FERPA in setting up data systems, and requires the Secretary of DoEd to promulgate regulations regarding unique identifiers. *See id.* at §9871 (e)(2)(C)(ii)(II). Thus, both statutes lack language giving DoEd the authority to apply its privacy regulations to Head Start programs.

Accordingly, were DoEd to regulate Head Start, it would be exceeding its authority.

c) The Proposed Regulatory Activity by DoEd Would Constitute a Purpose Violation in Violation of 31 U.S.C. §1301(a)

Further, DoEd would violate appropriations law if it included Head Start in its final regulation. 31 U.S.C. §1301(a) prohibits the use of appropriations for purposes other than those for which they were appropriated (known as a violation of "purpose availability"). 70 Comp. Gen. 592 (Comp.Gen.), 592, 1991 WL 135552 (Comp.Gen.); 63 Comp. Gen. 422 (Comp.Gen.), 422, 1984 WL 43540 (Comp.Gen.); B-95136, 1979 WL 12212 (Comp.Gen.). The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the "wrong" appropriation violates the purpose statute. *See* U.S. General Accounting Office, *Improper Accounting for Costs of Architect of the Capitol Projects,* PLRD-81-4 (Washington, D.C.: Apr. 13, 1981). Thus, DoEd's appropriations are therefore only to be used for DoEd activities that are duly authorized. The department has no statutory authorization to promulgate privacy regulations for Head Start agencies, nor to audit or evaluate those agencies. Any use of DoEd funds for these purposes would be a violation of purpose availability under 31 U.S.C. §1301(a).

Recommendation: In sum, DoEd cannot overstep its bounds with these proposed definitions and attempt to regulate Head Start within the context of FERPA. We strongly suggest that NHSA clarify this for DoEd and suggest that if indeed the goal is to ensure more consistent communications between and among organizations for long-range data purposes, then DoEd should either jointly promulgate a rule with HHS, which is authorized to promulgate rules governing Head Start's confidential information, or urge HHS to promulgate its own parallel rules, that would include definitions that apply specifically to Head Start programs.

New Interpretation of Authority to Audit or Evaluate (§99.35) as It Relates to Two-Way Information Flow

In tandem with promulgating regulations for Head Start, the Secretary of HHS also has express authority to audit and evaluate Head Start programs under 42 U.S.C. § 9842 and § 9844. Because Head Start is a federal to local program (unlike funding from DoEd which passes from federal to state to local), its authorizing language does not give power to state actors to have any oversight of Head Start grantees for federal purposes. Thus, as structured in the proposed regulation, any audits and evaluations of Head Start agencies by proposed designees of the DoEd Secretary would be an improper encroachment into the regulatory purview of the Secretary of HHS (set forth above and therefore not restated here). Importantly, these actions would also constitute an unlawful delegation of power.

Pursuant to the unlawful delegation doctrine, federal courts uniformly agree that, absent express authorization from Congress, federal agencies may not sub-delegate their statutory responsibilities to non-agency, outside entities, including state sovereigns. *See e.g., Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (8th Cir. 2008) ("absent statutory authorization, . . . [d]elegation of statutory responsibility by federal agencies and officers to outside parties" is impermissible); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004) ("federal agency officials . . . may not subdelegate to outside entities-private or sovereign — absent affirmative evidence of authority to do so."); *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983)("an agency may not delegate its public duties to private entities."); *High Country Citizens' Alliance v. Norton*, 448 F.Supp. 2d 1235, 1246-47 (D. Co. 2006)("The fact that the subdelegation is to state commissions rather than private organizations does not alter the [improper delegation doctrine] analysis"); *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999)(if Congress did not intend for a federal agency to delegate authority conferred to it by Congress, the agency may not "completely shift its responsibility to administer" a statute to another actor).

In this instance, DoEd would be improperly usurping HHS' federal authority and then delegating authority to a state or locality to audit or evaluate Head Start programs. The NPRM proposes to "amend § 99.35(a)(2) by removing the provision that a State or local educational authority or other agency headed by an official listed in § 99.31(a)(3) must establish legal authority under other Federal, State or local law to conduct an audit, evaluation, or compliance or enforcement activity." 76 Fed. Reg. 19726 at 19731. The NPRM goes on to explain that part of the purpose of the change is to clarify that "FERPA permits non-consensual disclosure of PII to a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity with respect to the Federal or State supported education programs of the recipient's own Federal or State supported education programs as well as those of the disclosing educational agency or the institution." *Id.* In other words, state or local educational authorities ("S/LEAs") would be empowered to conducts audits,

evaluations, and compliance/enforcement activities not only of the programs they themselves administer, but of the broad range of programs in the proposed definition of "education programs," which would include Head Start agencies.

Here, as above, if Congress had wanted DoEd to have authority over audit and evaluations of Head Start agencies, it would have provided for this in the recently reauthorized Head Start Act. Yet it did not. Instead, it left Head Start solely in the purview of HHS for these purposes. *See* 42 U.S.C. § 9842 (Records and Audits) and § 9844 (Research, Demonstrations and Evaluation). Section 9842 allows HHS, the Comptroller General, or their duly authorized representatives to audit and examine Head Start programs, and § 9844 allows the Secretary of HHS to carry out research and evaluation activities. There is one provision of the Head Start Act, 42 U.S.C. 9844(b)(2), that allows the Secretary of HHS, "to the extent appropriate, [to] undertake such [research and evaluation] activities in collaboration with other Federal agencies, and with non-Federal agencies, conducting similar activities." However, we are doubtful that a court would construe this provision to mean that DoEd would have the authority to regulate audits and evaluations of Head Start programs. Rather, a plain reading of the provision is that HHS is to collaborate with other agencies.

Recommendation: This proposed framework does not comport with what the Head Start Act allows, and as such, we suggest that NHSA inform DoEd accordingly. NHSA might further propose that DoEd expressly address in the preamble to the final rule that it is not attempting to overstep its reach into HHS's authority and will carve out Head Start from any audits or evaluations that DoEd is delegating to S/LEAs. We suggest that NHSA share these concerns with HHS so that HHS might work with DoEd to develop HHS' own regulatory language allowing Head Start programs to share personally identifiable information with S/LEAs when appropriate, that would assist in two-way information flow leading to easier analysis of longitudinal data but that would not provide S/LEAs with additional authority to conduct audits or evaluations of Head Start programs beyond their (and DoEd's) reach.

Cost to Programs

In addition to the issues raised above, we are mindful that any changes to how Head Start programs currently operate in terms of maintaining the privacy and confidentiality of personally identifiable data will require new systems, policies, and procedures. While we expect that NHSA and Head Start agencies want to be able to share information appropriately with states to be able to ascertain a more accurate picture of how children fare over time, we are also acutely aware of the financial pressures that these agencies face day-to-day. Any new systems required would add costs to Head Start agencies, including for training as well as documenting disclosures and authorizations.

Recommendation: We therefore suggest that NHSA request that DoEd and HHS take into account the financial burden the proposed rule (or its properly promulgated HHS equivalent) would have on Head Start agencies and do whatever they can to minimize expense and burden so that these agencies can focus on what they do best — providing comprehensive services to at-risk children and families.

Conclusion

Thank you for the opportunity to provide comments to NHSA on the NPRM. Please do not hesitate to contact us at (202) 466-8960 should you have any questions or require further explanation or comment.