



Western Interstate Commission for Higher Education

3035 Center Green Drive Suite 200 Boulder, CO 80301-2204 303.541.0200 (ph) 303.541.0291 (fax)

May 19, 2011

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

RE: Comments concerning proposed regulations on the Family Educational Rights and Privacy Act published in the *Federal Register*, April 8, 2011 (Docket ID #ED-2011-OM-0002)

Dear Ms. Miles:

The Western Interstate Commission for Higher Education (WICHE) appreciates the opportunity to provide comments in response to the Notice of Proposed Rule Making on new regulations governing the Family Educational Rights and Privacy Act (FERPA). As the principal federal statute addressing the privacy and security of student records, FERPA plays a vital role in safeguarding individual privacy as well as in determining the extent to which such information can be used to improve educational policy and practice.

WICHE is a regional compact representing 15 Western states and dedicated to promoting student access to and success in high-quality postsecondary education for residents of the West. In doing so, WICHE is active in providing policy solutions and expertise, facilitating dialogue among policymakers and practitioners, and broadening access through regional student exchange programs, among other activities. One current effort is particularly concerned with the proposed changes to FERPA regulations. With support from the Bill and Melinda Gates Foundation, WICHE has been leading a project to develop a pilot multi-state longitudinal data exchange that incorporates secondary education, postsecondary education, and workforce data. The data exchange is a logical extension of the statewide longitudinal data systems development efforts currently sponsored by the federal government and by each state. In taking a regional view spanning education and workforce segments, the data exchange is aimed at providing public policymakers a more comprehensive picture of human capital development, and its ebbs and flows, than is possible by looking exclusively within a single state. The project holds great promise in helping states to more effectively align their educational investments and their workforce development needs and to improve educational attainment for individuals from all groups and backgrounds. The data exchange project proceeds from the assumption that the best use of multi-state data is for policy and practice-relevant research, for which aggregate reports and analytical work are most suitable, and not for transactional or operational purposes where real-time data on individuals is necessary. Four states are initial participants in this project: Oregon, Washington, Idaho, and Hawaii.

www.wiche.edu

ALASKA ARIZONA CALIFORNIA COLORADO HAWAII IDAHO MONTANA NEVADA NEW MEXICO
NORTH DAKOTA OREGON SOUTH DAKOTA UTAH WASHINGTON WYOMING

With rising federal expectations for state utilization of longitudinal data through the SLDS and Race to the Top competitions and the assurances embedded within the State Fiscal Stabilization Fund, there has been a growing need to clarify FERPA and to provide greater flexibility in the use of student-level data. In general, WICHE commends the Department for taking necessary steps to do just that while trying to strike a balance between provisions enabling greater data sharing with tougher and clearer enforcement mechanisms that will help to ensure security and preserve privacy. Most importantly, the proposed changes would eliminate a number of barriers currently preventing or unnecessarily hindering the sharing of data among educational and workforce partners within a state, which have reduced states' ability to make effective use of their data. Others will no doubt comment at greater length about the provisions broadening access to the data, but WICHE fully supports those related to a more reasonable definition of "authorized representative" and "education program" and to the expanded permission for disclosures related to research studies, without which the whole point of longitudinal data systems development and related investments is seriously eroded.

Instead, WICHE will focus its specific observations and reactions to the NPRM to the lessons it is learning about how FERPA has impacted our data exchange development effort to date. A project of this nature encounters all the widely-cited challenges related to current interpretations of FERPA, and which the Department is seeking to address through this NPRM. But the nature of our attempt to combine data from multiple states, together with our project's particular focus on workforce outcomes, leads us to raise the issues that follow.

- *Specifically authorize the exchange of data among education agencies and "educational authorities" in different states for the purpose of examining human capital development and its mobility from a regional view.* Despite the Department's attempts in the ARRA SLDS RFA and elsewhere to encourage states to link data with their neighbors, data sharing activity across state lines has been limited to date. WICHE's project is the most systematic effort to do so currently underway. Nothing in the NPRM appears to explicitly prohibit a state or local educational agency from designating a public entity in a different state as an authorized representative to which it may disclose personally identifiable information (PII) for the purpose of conducting educational research or evaluation, or to designate a duly empanelled multi-state data exchange governance body. Yet state attorneys general who have frequently taken a narrow view of FERPA disclosures may prohibit the disclosure of PII across state lines on the grounds that such sharing does not serve their own state's public interest sufficiently well to justify it. It would be helpful for states seeking to take a regional view of educational supply and workforce demand that such a use be explicitly stated within the regulations as allowable. Other state agencies or a multi-state governance body obtaining data from originating states should be expected to uphold the same standards for data security and confidentiality already captured in the NPRM for other authorized representatives.

Furthermore, to create a true exchange of data among participating states, those that contribute student records into a multi-state matchmaking process may reasonably expect to receive in return additional information concerning their own students than they themselves already have on hand. Specifically, state educational agencies are interested in using the exchange to fill in information on their own students that was missing due to individual mobility. As an example, a state may want to examine the workforce outcomes of students who attended or graduated from its public postsecondary institutions as a way of judging performance or improving instruction or student services. Without capturing information for those individuals who leave for jobs elsewhere, the state has an incomplete picture of the extent to which it is successfully preparing its residents for the workforce and, more narrowly, for jobs within its own borders. There exist states that have set up arrangements under existing rules and regulations to perform limited cross-border data integration to supplement the information they have about their own students, but doing so is time-consuming and inefficient. Existing programs like the Wage Record Interchange System (WRIS) that state labor market information directors have access to can provide national picture of individual mobility, but WRIS can only provide aggregate information back to the education agencies, leaving them unable to perform their own analytical work on a fuller dataset. While it does not appear as though anything in the proposed regulations would thwart the kind of data exchange done bilaterally (or in other limited ways) among states, it is unclear whether the proposed regulations would allow for PII on former students to flow back to the originating states in order to supplement the information that state has available for policy and practice-relevant analysis. That is particularly true if each state party to a multi-state data exchange has designated a single authorized representative for the task of coordinating the exchange and assuming the record linking duties. In such a scenario, would that authorized representative have the ability to redisclose PII assembled from the several participating states for a set of individuals originally submitted by one of their number? The extent to which the proposed regulations envision that PII be protected from redisclosure beyond the original disclosing entity may impose a chilling effect on multi-state partnerships for data exchange.

- *Loosen restrictions preventing the exchange of social security numbers as the key linking field for workforce information.* One of the most basic challenges facing states that are trying to link education and workforce data is the fact that, with few exceptions, the only piece of information that connects these records is an individual's social security number. The proposed regulations are largely silent on the use of SSNs, except to explicitly state that SSNs may not be designated as directory information. Nevertheless, if adopted the proposed regulations will ease the task of linking education and workforce data within a state. What is less clear is the extent to which a multi-state data exchange will be able to take advantage of that expanded authority to match data fields using the SSN. Given the sensitivity of the

SSN and the particular challenges of the multi-state approach articulated above, it would be helpful if the regulations specifically allowed for the use of SSNs to make the linkage between education and workforce data without requiring consent either from “eligible students” or from the schools, school districts, or institutions where they are (or were at one time) enrolled. Already we have extremely limited capacity to use administrative records to observe the workforce outcomes of student who do not go on to postsecondary education, since K-12 schools and school districts are moving away from collecting or storing the SSN in any way. The regulations could explicitly allow the use of the SSN for this exclusive purpose, which, once connected, should be stripped from the student record.

- *Clarify the extent to which data can be retained for the purpose of long-term analysis and offer guidance on how PII can be safeguarded for research that necessitates a lengthy time horizon.* Echoing other approaches to data security and privacy protection, one of the chief means by which the proposed regulations is to require that personally identifiable data be destroyed after a time period specified in a written agreement. Such a provision is of great help in preserving the security of PII, although the provision does not provide detail concerning a maximum time period for which PII may be kept. Yet limiting the time period over which data may be collected and stored may potentially constrain the scope of relevant research. As is evident in the design of longitudinal sample surveys managed by the Department, effective research on policy-relevant questions often requires many years of observations. For example, in order to obtain reasonable estimates of the workforce outcomes of former high school students, a research project would need PII for a minimum of six or seven years. Moreover, too narrow a focus on initial employment could be misleading since educational programs are not all alike in the degree to which they are tightly coupled to occupations in the labor market. Similarly, one of the most promising possibilities of interrogating the link between education and workforce is to examine how individuals already in the labor market return to formalized schooling for more skills or credentials and what their subsequent outcomes are. Neither the proposed regulations nor interpretations of them should limit research and evaluation by conveying an expectation that PII must be destroyed so quickly that insufficient time allows for the exploration of such questions. Similarly, the regulations should clarify that this requirement does not constrain research to one-off projects or to prohibit the collection (and storage) of observations in several stages over time. Subsequent guidance issued by the Department on this topic may also be helpful.
- *Strike an appropriate balance between the public’s legitimate interests and institutions’ reasonable expectation for autonomy in data submission for non-public institutions.* The proposed regulations are mainly silent concerning private schools and postsecondary institutions. Yet we note the fact that, by and large, the SLDS development activity in most states is relevant for public schools and public postsecondary institutions only. Typically, state data systems and other data

collections like the National Student Clearinghouse include information from private institutions only if they voluntarily submit that information. Private institutions, both non-profit and for-profit, contribute substantially to the civic and economic life of a state. Therefore, language in the final regulations could recognize that the public has an interest in the extent to which private educational institutions are contributing to a state's or a region's human capital, and to offer encouragement to that sector to provide at least a limited set of individual-level data (including at least enrollment and degree information) that captures those contributions, and supplements public sector data, for policy-relevant research.

Thank you for the opportunity to weigh in on the proposed FERPA regulations. On balance, they will go far toward clearing up confusion and uncertainty around the use of longitudinal data for policy and practice relevance, and significantly improve the chilled climate for such work that has been the case in many states. Nevertheless, while they do not appear to us to preclude the collection and sharing of data across state lines that would be necessary for a multi-state approach to examining human capital development and its mobility, greater clarity around the above points may go a long way in forestalling interpretations that could be too restrictive for a multi-state data exchange to thrive. Please let us know if we can answer any additional questions. We look forward to seeing the proposed regulations, ideally with minor modifications addressing the changes we have outlined above, adopted.

Sincerely,

A handwritten signature in black ink, appearing to read "David A. Longanecker". The signature is fluid and cursive, with a large initial "D" and "L".

David A. Longanecker
President