

May 23, 2011

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

**Re:** Proposed Amendment of the Family Educational Rights and Privacy Act of 1974 (FERPA)  
**Docket ID:** ED-2011-OM-0002

Dear Ms. Miles:

We appreciate the opportunity to comment on the proposed amendment of the regulations implementing the Family Educational Rights and Privacy Act of 1974, as amended (FERPA). We believe that the proposed amendments are necessary to ensure the continued privacy of education records, while allowing for the effective use of data in statewide longitudinal data systems (SLDS). As scientific societies dedicated to sound research, statistics, and evaluation of education and learning from early childhood through higher education and workforce participation, and as organizations dedicated to the highest ethical standards in the conduct of research, we commend the U.S. Department of Education for seeking to advance access to SLDS consonant with steps to ensure and reconcile data sharing and use with privacy protection.

Our comments are directed to specific sections of the proposed regulations that we believe provide appropriate safeguards for protection of student privacy from disclosure of personally identifiable information (PII) while also allowing for valuable research essential to policy, practice, knowledge-driven decision-making, and innovation. We share the view of the Department of Education that, despite modifications to FERPA in 2008, there remain provisions that are not necessary for privacy protection of student PII, yet they hinder the development and expansion of the statewide longitudinal data systems and realizing the benefits of newly created SLDS. We believe that the Department of Education has proposed regulations that will continue to protect student privacy and also will provide data to support those education reforms that are dependent on sharing of pertinent data within and among education agencies and those that they authorize to undertake research and evaluation.

The challenge of providing for data access while protecting privacy, ensuring confidentiality, and minimizing risk of advertent or inadvertent disclosure has engaged the attention of federal agencies, the National Academies, and the scientific community for over three decades. Since 1979, the National Research Council has undertaken over a dozen studies and issued reports directed to promoting the responsible use of data and expanding access consonant with privacy protections (see Attachment A), including a 2008 workshop specifically directed to *Protecting Student Records and Facilitating Education Research* (NRC, 2009). Federal agencies have also for several decades addressed and developed policies and procedures for providing access to PII data in administrative records and other collections of data in accordance with privacy protection. There are as well federal laws that specifically address interagency access, sharing, and research, and statistical use (e.g., Title 13 of the Census Statute, the Confidential Information Protection and Statistical Efficiency Act of 2002 [CIPSEA]). Among federal statistical agencies and with respect to education data and statistics, the National Center for Education Statistics has been a leader in developing and implementing procedures that permit research users to have restricted access to data with personally identifiable information. In seeking to amend FERPA to expand

data access and sharing without eroding student privacy protection, the Department of Education offers amendments consonant with federal practices and guidelines for such use.

**Definition: *Authorized Representative* (99.3)**

We support adding a definition of “authorized representative.” The proposed definition is appropriate and necessary in providing educationally beneficial access to statewide data systems. It is reasonable in scope to allow an authorized representative to include “any entity or individual designated by a State or local educational authority or agency headed by an official listed in 99.31(a)(3).” We concur as well with the interpretation that “authorized representatives” need not be under the direct control of an agency in order to conduct audits or evaluations. It is, as noted in the proposed regulations, “unnecessarily restrictive to interpret FERPA as prohibiting an individual or entity who is not an employee or contractor under the ‘direct control’ of a State or local educational authority or agency . . . from serving as an authorized representative.”

**Definition: *Reasonable Methods* (99.35[a][2])**

The Department plans to provide nonbinding guidance to State and local education agencies about “reasonable methods” for ensuring FERPA compliance by their authorized representatives. However, at this time the Department has requested substantive recommendations for provisions to be incorporated in the guidance that will be provided subsequently. We believe that the Department of Education’s initiatives to safeguard student privacy by providing a Chief Privacy Officer and Privacy Technical Assistance Center, discussed below, will be a good source for gathering, codifying, and distributing responsible methods guidelines.

Additionally, the following should be included as criteria for granting the status of authorized representatives: (a) the individual or agency can provide assurances that they have no record of having disclosed pupil information inappropriately previously and that they are not currently under suspension from any State or local agency for inappropriate disclosure of student data; (b) have appropriate disciplinary strategies in place with regard to unauthorized disclosure for their employees; (c) provide assurances of access to the State or local education authority for purposes of reviewing and monitoring the authorized representative’s processes for protecting student data. Additional information that is explicated in the proposed regulations as part of the definition of authorized representative should be included as essential “reasonable methods” as well: *written agreements* that designate the identity of the authorized representative, the purposes for which the information is being disclosed and the scope of the information disclosed to the authorized representative; explicit policies and procedures to safeguard the information from unintended redisclosure; and a timeline for return or destruction of transferred information.

**Requirement: *Written Agreements* (99.35)**

The proposed regulations call for amending 99.35 to require written agreements between State or local education agencies and authorized representatives and to stipulate features of the agreement: purpose of disclosure, specification of information required and its use, assurances, return or destruction of data, and time line for use of the data. These are necessary and reasonable requirements and would be endorsed by education researchers and other scientists undertaking research with personally identifiable data.

We believe that additional clarification is required in the written agreement regarding destruction of data “when no longer needed for the purposes for which the study is conducted.” A fundamental part of the scientific process is verifying findings and testing new hypotheses

using the same dataset, and premature destruction of the data can waste valuable resources and limit building cumulative and reproducible knowledge. We encourage the Department to provide some latitude and direction to educational agencies and research organizations to determine when data are no longer needed for the agreed upon scientific purposes and to retain identifiable datasets where necessary under strictly-controlled, secure conditions (as is done with other federal and state statistical and record-keeping systems).

**Requirement: *Protection of PII Applies to “Authorized Representative” (99.35b)***

The proposed regulations also seek to change 99.35(b) to clarify that FERPA requirements to protect PII from disclosure apply to the authorized representative. While a modest adjustment in language, we believe that this is an essential change in keeping with existing protections and underscoring that any person with delegated authority or acting as an authorized representative needs to protect student privacy.

**Requirement: *Family Policy Compliance Officer (FPCO) (99.35d)***

The proposed regulations set forth sanctions for individuals or agencies that have been found by the FPCO to have violated FERPA disclosure provisions. We believe that further delineation is required to eliminate present ambiguities.

(1) Under the proposed regulations an agency or an authorized representative improperly disclosing PII in violation of FERPA would be denied access to PII for a minimum of five years. In most instances, organizations are likely to be designated the authorized representative responsible for the conduct of research or evaluations. Many institutions, particularly universities are made up of subunits that would appropriately become authorized representatives (e.g., a major center or consortium at a university). The regulations should specify more clearly the level of entity that would be prohibited from receiving personally identifiable information.

(2) We believe that the proposed sanctions would protect PII from disclosure. We think it would also be useful not just to prohibit a party responsible for such disclosure from having access to such information for at least five years, as is proposed. We recommend that the State and local educational authority or agency take steps to ensure that all other agencies know of this sanction and consider this information among the reasonable methods for qualifying authorized representatives.

**Definition: *Education Program (99.3, 99.5)***

We endorse the inclusion of early childhood education programs through adult learning programs within the definition of “education.” Such inclusion will provide an opportunity to develop linkages across the life-span of educational and learning experiences and to undertake research and evaluation that will explain relationships and observed outcomes. Such information is essential to provide the foundation for improved education policies in all programs. The potential of statewide longitudinal data systems for understanding systemic properties of education is one of the most attractive features of these long-term administrative data for researchers. However, we believe that there should be additional clarification of the term “principally engaged.” We recommend the term “primarily” be substituted for “principally.”

**Requirement: *Research Studies* (99.3[a][6])**

The Department proposes to add a paragraph in the FERPA regulations (99.31[a][6][ii]) that stipulates that nothing in FERPA or its implementing regulations prevents education agencies from entering into agreements with organizations conducting studies, and entering into written agreements with them allowing disclosure and redisclosure of PII in accordance with FERPA requirements. We believe this clarification will facilitate education agencies in establishing procedures to work with organizations seeking to conduct valuable studies and will alleviate unwarranted assumptions that such activities are prohibited under FERPA. This addition will do much to counter what has been termed the “chilling effect” of current regulations because of the reluctance of State and local education agencies to provide access to administrative data in a climate of uncertainty and ambiguity.

This section on research studies is particularly important. We recommend in the section on research studies and elsewhere that it be made even more explicit that researchers and research organizations can be authorized to have access to PII under restricted access conditions and subject to the same agreements and potential penalties as otherwise would be in place for authorized representatives. We support the clarification that permits State and local agencies to provide data access to researchers, whether or not acting for or on their behalf, as long as this access to PII does not comprise student privacy protections.<sup>1</sup>

We believe, and welcome, the observation that “[t]he proposed regulations, therefore, would clarify that studies supported by these State and Federal authorities of publically funded education programs generally may be conducted, while simultaneously ensuring that any PII disclosed is appropriately protected by the organizations conducting the studies.”

**Resource: *Department of Education Programs Supporting Protection of Student Privacy***

It is important that the proposed regulations be viewed in the context of commendable actions of the U.S. Department of Education to further provide for protection of personally identifiable student records. The Department has established a Privacy Technical Assistance Center (PTAC) within the National Center for Education Statistics (NCES) that will provide technical assistance through site visits, regional meetings, and training materials. In addition, NCES Technical Briefs

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<sup>1</sup> Conditions of access to restricted education data bases are quite familiar to researchers experienced in using such data and adhering to the highest standards of protecting privacy of individuals and the confidentiality of data. As noted above, the NCES has pioneered making available data sets with PII information to researchers through restricted-use data licenses. Authorized users are subject to the laws, regulations, and penalties that apply to the NCES use of confidential data. The NCES Statistical Standards Program monitors the licensing process and inspections. Wide access to NCES data is balanced by stringent sanctions for violation, as follows:

“Alleged violations of the Privacy Act of 1974 or IES-specific laws are subject to prosecution by the United States Attorney after first making reasonable efforts to achieve compliance. Any violation of this license may also be a violation of Federal criminal law under the Privacy Act of 1974, 5 U.S.C. 552a, and may result in a misdemeanor and a penalty of up to \$5,000. Anyone violating the confidentiality provisions of section 183 of the Education Sciences Reform Act of 2002 (P.L. 107-279), or making an unauthorized disclosure, when using the data shall be found guilty of a class E felony and can be imprisoned up to five years, and/or fined up to \$250,000. Penalties, fines and imprisonment, may be enforced for each occurrence of a specific violation.”

The NCES website has extensive materials on data access to public use and restricted-use data, including a *Restricted-Use Data Procedures Manual* (NCES, 2007, at <http://nces.ed.gov/pubs96/96860rev.pdf>).

of high quality are already being developed as a resource for those working with issues of privacy and confidentiality. The first three technical briefs already have become a resource for the education policy community and for school personnel at the State and local level. Their titles are: (1) Basic Concepts And Definitions For Privacy And Confidentiality in Student Education Records; (2) Data Stewardship: Managing Personally Identifiable Information in Electronic Student Education Records; and (3) Statistical Methods for Protecting Personally Identifiable Information in Aggregate Reporting. Finally, we applaud the agency for taking the initiative to create—and to have already staffed—an office of a Chief Privacy Officer.

In conclusion, we are pleased to support the proposed amendments to FERPA recommended by the U.S. Department of Education. We further encourage consideration of some additional modifications offered in these comments to strengthen accomplishing expanded access and use of SLDS consonant with protection of student privacy.

Sincerely,

American Educational Research Association  
American Sociological Association  
American Statistical Association  
Association of Population Centers  
Consortium of Social Science Associations  
Federation of Associations in Behavioral & Brain Sciences  
Knowledge Alliance  
Population Association of America

**Attachment A:  
Reports on Privacy and Confidentiality and Access to Research Data**

The challenge of providing for data access while protecting privacy, ensuring confidentiality, and minimizing risk of advertent or inadvertent disclosure has engaged the attention of federal agencies, the National Academies, and the scientific community for over three decades. Below is a chronological list of major National Research Council reports.

National Research Council. (1979). *Privacy and confidentiality as factors in survey response*. Washington, DC: National Academy of Sciences.

National Research Council. (1985). *Sharing research data*. Washington, DC: National Academy Press.

National Research Council. (1993). *Private lives and public policies: Confidentiality and accessibility of government statistics*. Washington, DC: National Academy Press

National Research Council. (2000). *Improving access to and confidentiality of research data: Report of a workshop*. Washington, D.C.: National Academy Press.

National Research Council. (2003). *Protecting participants and facilitating social and behavioral sciences research*. Washington, DC: The National Academies Press.

National Research Council. (2005). *Expanding access to research data: Reconciling risks and opportunities*. Washington, DC: The National Academies Press.

National Institutes of Health. (2006). *Data sharing workshop for behavioral and social studies that collect genetic data: Workshop highlights*. Bethesda, MD: National Institute of Aging, National Institutes of Health.

National Research Council. (2006). *Effect of the HIPAA privacy rule on health research: Proceedings of a workshop presented to the National Cancer Policy Forum*. Washington, DC: The National Academies Press.

National Research Council. (2006). *Improving business statistics through interagency data sharing: Summary of a workshop*. Washington, DC: The National Academies Press.

National Research Council. (2007). *Putting people on the map: Protecting confidentiality with linked social-spatial data*. Washington, DC: The National Academies Press.

National Research Council. (2007). *Engaging privacy and information technology in a digital age*. Washington, DC: The National Academies Press.

National Research Council. (2007). *Understanding business dynamics: An integrated data system for America's future*. Washington, DC: The National Academies Press.

National Research Council. (2008). *Health research and the privacy of health information: The HIPAA privacy rule*. Washington, DC: Author. Retrieved from <http://www.iom.edu/CMS/3740/43729.aspx>

National Research Council. (2009). *Ensuring the integrity, accessibility and stewardship of research data in the digital age*. Washington, DC: The National Academies Press.

National Research Council. (2009). *Protecting student records and facilitating education research: A workshop summary*. Washington, DC: The National Academies Press.

National Research Council. (2010). *Conducting biosocial surveys: Collecting, storing, accessing, and protecting biospecimens and biodata*. Washington, DC: The National Academies Press.