

May 8, 2008

Mr. LeRoy S. Rooker
Director, Family Policy Compliance Office
U.S. Department of Education
400 Maryland Ave, SW, Room 6W243
Washington, DC 20202-5920

RE: Proposed Revisions to the Family Educational Rights and Privacy Act (FERPA)
Docket ID: ED-2008-OPEPD-0002

Dear Mr. Rooker:

Thank you for the opportunity to comment on the proposed revisions to the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The professional research societies listed at the end of this letter commend the Department for taking steps to clarify and improve FERPA through the proposed revisions. Our comments are consistent with renewed efforts by both the administration and Congress to build the science underlying educational policy and practice. The emphasis on rigorous research is most evident in the No Child Left Behind Act which mentions the phrase “scientifically-based” research 111 times.

Implementing the No Child Left Behind law has produced an enormous amount of data that could be tapped to address some of the most pressing questions about student achievement or what makes a teacher effective. Although educational agencies and institutions are trying to make use of this data, many are faced with limited financial and personnel resources. By making the data accessible to researchers outside these agencies and coupling the practice with solid confidentiality practices, the investment of taxpayer dollars to create these data systems can be put to maximum use. There are currently a number of successful models for achieving this balance, and more should be done to facilitate the development of partnerships between educational agencies and researchers in order to build a solid science for education.

A particularly significant initiative is the U.S. Department of Education’s push for the development of statewide longitudinal data systems (SLDS). Since November 2005, IES has awarded grants to 27 states to develop these data systems. The sharing of data between state educational agencies to build longitudinal databases that allow tracking of student progress across educational levels is critical. Likewise, the creation of mechanisms within the FERPA regulations to encourage research is absolutely essential if we are to generate the knowledge for data-driven decisions about educational policy and practice.

Our comments are directed at achieving these shared goals, while honoring the intent of the law to protect the privacy and confidentiality of student education records. We offer specific comments on the proposed changes and suggest additional recommendations for the Department to consider.

Section 99.3

Redefining “disclosure”

Currently, the federal government is investing millions of dollars into building state longitudinal data systems. According to the Department’s own web site, these data systems “are intended to enhance the ability of States to efficiently and accurately manage, analyze, and use education data, including individual student records. The data systems...should help States, districts, schools, and teachers make data-driven decisions to improve student learning, as well as facilitate research to increase student achievement and close achievement gaps.” The current interpretation of the term “disclosure” is severely limiting the ability of state education agencies and SLDS’s to integrate data across state education agencies. In addition, the restrictions on the redisclosure of education records by state educational agencies is further hindering the ability to track student progress and understand factors that influence achievement.

We recommend that the Department of Education change the definition of the term “disclosure” in the regulations such that a *transfer* of student data from education records to a state education agency or a state authority holding SLDSs is not considered a disclosure of student records. Likewise, we recommend that the transfer of education data between the state and local education agencies or between multiple state education agencies (such as K-12 or postsecondary agencies or multiple SLDSs within the state) not be considered a disclosure. The restrictive interpretation of the term “disclosure” has limited the ability of state education agencies to monitor student progress and provide access to valuable education data for research purposes. Redefining the term disclosure would address this problem. In our view, the FERPA statute itself seems to provide the leeway needed to make this change.

Section 99.31(a)(6)(i)

Interpretation of the phrase “for, or on behalf of”

Section 99.31(a)(6)(i) permits educational agencies or institutions to disclose personally identifiable information without consent if the disclosure is to “organizations conducting studies for, or on behalf of, educational agencies or institutions to: (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction.” We applaud the efforts of the Department to broaden the interpretation of the phrase “for or on behalf of.” Although the phrase is not defined in the *current* regulations, the current *guidance* requires educational agencies to “authorize” a study and has placed significant restrictions on research that could be highly beneficial to educational agencies. The proposed regulations would allow an outside research organization to initiate a study, and this is a significant improvement.

We remain concerned, however, that the vast amount of data collected and maintained for the purpose of improving education will not be available for research. Therefore, we urge that the revised regulations define “for, or on behalf of” so that it is clear that the intent is to make data available for research and statistical purposes consonant with privacy protections, whether or not explicitly sought by an educational agency or institution.

(a) Certification of agreements. States such as Florida and Michigan have been leaders in creating partnerships with research organizations, but there is a great deal of inconsistency across states in providing access for research purposes. In addition, the Department's own Institute of Education Sciences (through the National Center for Education Statistics) provides licensing agreements for the research use of personally-identifiable information in its databases using a "strict" process that protects the confidentiality of the data. Thus, there exist a range of successful models to show how these agreements may take shape, and states should be able to use these and other such models if a solid data security plan is in place and there are sanctions for the unauthorized disclosure of confidential information.

In addition, we encourage the U.S. Department of Education to take additional steps to make clear that such arrangements are acceptable under FERPA. There is substantial need to alleviate the concerns of state officials in providing research access to conduct studies for, or on behalf of, educational agencies or institutions. One significant step the Department could take would be to "certify" agreements between educational agencies and research organizations as meeting the requirements of FERPA. Furthermore, the Department could post such sample agreements on the Family Policy Compliance Office web page to advise and help educational agencies. This approach would give educational agencies some assurance regarding the boundaries of FERPA, reduce the burden on agencies to create these agreements, and signal that the Department encourages research within the limits of the law.

(b) State education agencies and written agreements. As mentioned above, the federal government is investing substantial resources into building state longitudinal data systems, but the current regulations significantly limit the use of these data for research purposes. One of the keys to achieving this is to be able to connect individual student data across databases and across years of education. The Department should clarify that state education agencies and state authorities that maintain SLDSs are authorized (as with local educational agencies) to enter into written agreements with research organizations.

Section 99.31(a)(6)(i)(C)

Interpretation of the phrase "improve instruction"

Efforts to "improve instruction" must account for the context of children's lives. Research aimed at understanding the many factors (such as developmental disabilities or socioeconomic status or physical health) that affect learning is critical in helping children and in guiding policymakers and educators. The revised regulations should make clear that research to improve instruction includes the spectrum of research essential to understanding children's education, learning, and academic achievement and progress. To enable this to happen, the U.S. Department of Education should clarify that educational agencies, under Section 99.31(a)(6)(i) through (iv), may disclose personally-identifiable data directly to research organizations (or governmental agencies under (6)(iv)) to conduct these types of studies for, or on behalf of, educational agencies, as long as strong data protection plans to protect confidentiality are in place. Although FERPA regulations currently allow for the disclosure of de-identified data, understanding the relationship between health or social factors and learning often requires the

use of personally-identifiable data. Addressing the issues of disclosure and redisclosure as described elsewhere in this letter as well as broadening the interpretation of the phrase “improve instruction” would importantly facilitate this type of research that will be instrumental in meeting childrens’ needs.

Section 99.31(6)(ii)(B)

Destruction of data

The current regulations require that information which is disclosed (or redisclosed) for use in a study be “destroyed 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. We encourage the Department to provide some latitude to educational agencies and research organizations to determine when the data are no longer needed for the agreed upon scientific purposes and to retain identifiable datasets where necessary under strictly-controlled conditions (as is done with other federal and state statistical and record-keeping systems).

Section 99.32

Allowing (re)disclosure and record-keeping by state education agencies

The proposed regulations would allow state education agencies (in line with Section 99.33) to redisclose personally-identifiable data without consent to parties who qualify under Section 99.31 if the educational agency complies with the recordkeeping requirements in Section 99.32. This would help to resolve the problem created by the definition of disclosure (although not as clearly as redefining the term “disclosure”). To enable the effective implementation of this proposed change, we recommend that the new regulations also allow state educational agencies to maintain a record of requests and (re)disclosures made at the state level in accordance with Section 99.32. Specifically, the Department should clarify that a state education agency or a state authority maintaining a SLDS is considered an educational agency or institution under the regulations and thereby has the authority under Section 99.32 to maintain these records at the state level. If necessary, the Department should redefine or reinterpret the phrase “educational agency or institution” to grant this authority. Other approaches may also be possible to permit (re)disclosures and record-keeping at the state level.

Other Issues

Despite the regulations and guidance offered by the Department, there remains considerable confusion regarding FERPA at the state and local levels. For example, we are aware of reports that some states will not release aggregate data even though privacy protections are in place. While the individual educational agencies and institutions ultimately decide when and to whom to release data, we are concerned that the reluctance to do so may be the result of reading more into the term “education records” than is warranted under the regulations as well as concerns about possible sanctions by the Department (including a misunderstanding about the fact that any penalty must be linked to a “policy or practice” and that voluntary compliance must be sought

first). The Department should consider clarifying some of these issues either in the regulations or through guidance.

Finally, under 45CFR46, Institutional Review Boards (IRBs) have the responsibility to review investigator research protocols to ensure that human participants are protected and confidentiality protections, when needed, are in place. IRBs are often charged with other responsibilities such as ensuring that research protocols are in line with other federal or state statutory requirements such as FERPA. We encourage the Department to reach out to IRBs through workshops and written materials to clarify issues relating to the “study” exception, disclosure and redisclosure requirements, and other research-related matters as needed, especially when the revisions to the regulations have been promulgated.

Concluding Thoughts

As representatives of researchers who conduct many of the studies upon which educational policies and practices are based, we wholeheartedly agree with the necessity to safeguard student privacy and protect the confidentiality of education records that contain personally-identifiable information. The comments and recommendations offered here do this, while also allowing responsible access to student data for research purposes.

In summary, measures must be taken to achieve a rational balance between research access and privacy/confidentiality protections within the limits of the statute. Without this, policymakers at the federal, state, and local level will not have the science upon which to base educational decisions, and taxpayer dollars used to build education databases will not be well spent. Again, we appreciate the opportunity to comment on the proposed revisions to FERPA regulations.

Sincerely,

American Educational Research Association
American Statistical Association
Consortium of Social Science Associations