American Association of Collegiate Registrars and Admissions Officers

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May 23, 2011

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

Re: April 8, 2011 Notice of Proposed Rulemaking
Family Education Rights and Privacy Act of 1974, as amended
Docket ID ED-2011-OM-0002

Dear Ms. Miles:

On behalf of the American Association of Collegiate Registrars and Admissions Officers (AACRAO), I write to respectfully submit our comments on the Notice of Proposed Rulemaking (NPRM) published in the April 8, 2010 *Federal Register*.

AACRAO is a nonprofit association of more than 2,600 institutions of higher education and more than 10,000 campus enrollment officials. By far the vast majority of our individual members are campus officials with direct responsibility for admissions, recruiting, academic records, and registration functions.

Because they serve as custodians of educational records for current and former students, our members are particularly knowledgeable about privacy issues in general, and about information security and privacy requirements of Federal and State laws. Compliance with the Family Educational Rights and Privacy Act of 1974, as amended (FERPA), has long been a primary area of professional jurisdiction for AACRAO members, who are often the leading FERPA experts on their campuses. Because they are so central to the interests and priorities of our members, data security, privacy, and FERPA have also been top priorities for AACRAO, and we devote considerable attention and resources to them as primary policy issues of concern.

Since its original enactment in 1974, and through the numerous amendments, court decisions, and administrative policy revisions that have further refined that original construct over the years, AACRAO has been constructively engaged with the U.S. Department of Education (Department) to promote FERPA compliance and achieve the right balance between individual educational privacy rights and the rights of third-parties to obtain access to data for appropriate purposes. We recognize that judgments about

where to strike that balance are ever evolving, and we have always been open to discussions about changes to FERPA. Examples of our receptivity to change include past modifications to FERPA necessitated by campus security concerns, the needs of military recruiters, and governmental access to records for anti-terrorism purposes. In keeping with that tradition of accommodating reasonable evolutionary changes to FERPA, we remain open to any regulatory or legislative modifications that might be needed to accommodate legitimate and well-articulated policy goals.

In reviewing the regulatory changes proposed by the Department, we are alarmed by several striking facts.

First, the proposed changes represent a wholesale repudiation of fair information practices. Well-settled principles of notice, consent, access, participation, data minimization, and data retention are all undermined by the new paradigm promoted by this proposal.

Second, the substantive goals that the Department cites as motivating these changes could be just as effectively achieved through much more artfully crafted modifications that would avoid the proposed regulations' *de facto* nullification of individual privacy rights.

Third, we believe that the Department has shortsightedly avoided a sufficiently inclusive policy development process, and that the proposed regulations have been overwhelmingly influenced by the single-issue lobbying of a well-financed campaign to promote a data free-for-all in the name of educational reform. Lost in the frenzied rush to do good with other people's education data is FERPA's underlying purpose. We sincerely believe that reasonable compromises can be made to accommodate legitimate policy goals, but the Department has instead chosen to facilitate an unconditional surrender of educational privacy rights of American families and students.

Finally, most of the radical changes proposed by the Department require legislative amendments to FERPA, and the Department lacks legal authority to implement them through regulatory action. As our section-by-section analysis and commentary below indicates, the Department seems to grasp at straws and appears to be manufacturing statutory authority out of thin air to justify these changes, several of which clearly conflict with congressional intent.

We offer comments on each section of the proposed regulations, in the order issues are presented in the NPRM.

I. Definitions

A. Authorized Representative (§§99.3, 99.35)

Section (b)(1) of FERPA conditions receipt of any Department funds to any educational agency or institution having a policy or practice of permitting the release of education

records (or personally identifiable information (PII) other than directory information) of students without first obtaining written consent, except under very specific circumstances. One exception to this requirement is for release of education records to "authorized representatives" of the Comptroller General of the United States, the Secretary, State educational authorities, or (for law enforcement purposes) the Attorney General. 20 U.S.C. 1232g (b)(1)(C). Redisclosure of information obtained by "authorized representatives" of State educational agencies may only occur under the conditions set forth in Section (b)(3):

> Provided, that except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials….

20 U.S.C. 1232g (b)(3). The statutory language makes clear that Congress intended to restrict redisclosures by such official recipients of personally identifiable information from student education records. In addition, the use of the word "officials" twice to signify who was collecting the data and releasing such data on behalf of the State educational agencies demonstrates that Congress envisioned "authorized representatives" to be employees of the State educational agencies or agents under the direct control of such employees. This legal position is supported in the Joint Statement included in the Congressional Record in 1974 when Congress amended FERPA. 120 Cong. Rec. at 39863 (December 13, 1974) (stating that existing law at Section (b)(1) "restricts transfer, without the consent of parents or students, of personally identifiable information concerning a student to…auditors from the General Accounting Office and the Department of Health, Education, and Welfare").

In direct conflict with that longstanding and well-settled interpretation of the law, the NPRM rescinds the guidance issued by U.S. Deputy Secretary of Education William D. Hansen, dated January 30, 2003, which clarified that for purposes of FERPA, an "authorized representative" of a State educational authority must be under the direct control of that authority (in other words, either an employee or contractor). Instead, the proposed regulation advances a novel and counterintuitive definition of "authorized representative," which would allow "*any entity or individual* designated by a State or local educational authority or 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 these program." (Emphasis added.) The State or local education authority or agency headed by an official listed in §99.31(a)(3) would be required "to use reasonable methods" to ensure that any entity designated as its authorized representative remains compliant with FERPA. Future non-regulatory guidance may be issued on what would be considered "reasonable" methods by the Department.

The effect of this extraordinarily overbroad definition is to expand the scope of who can be designated as an "authorized representative" of a State or local educational agency to entities and individuals well outside its direct control. Virtually any State or local employee could be designated an authorized representative under the proposed regulations, no matter how remote or dubious their actual standing as an educational functionary. What's worse, nongovernmental entities, including non-profits, religious organizations, foundations, independent researchers, and for-profit companies, as well as individuals, could be granted access to personally identifiable information without notice or consent. While this information free-for-all may be conducive to the Department's policy goal of simplifying State compliance with the requirements of the American Recovery and Reinvestment Act of 2009 (ARRA) and the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act (America COMPETES Act), it is unnecessarily and unjustifiably overbroad.

In addition, the Department lacks the legal authority for abandoning its longstanding interpretation that an authorized representative must be under the direct control of the State or local agency. In so narrowly enumerating, by title, the officials who may access personally identifiable records without the student's consent, Congress surely meant "authorized representative" to be tightly linked to those positions. The Department, however, would eviscerate that intent by allowing literally *anyone* (presumably even including representatives of foreign governments) to exercise that authority, if they are so designated. In justifying this radical shift, the Department merely asserts that the current interpretation is "restrictive" given "Congress' intent in the ARRA to have States link data across sectors." Nothing in the ARRA explicitly amended FERPA, however. In fact, ARRA did not amend a preexisting statutory requirement in the America COMPETES Act that explicitly requires States developing state longitudinal data systems (SLDS) to comply with FERPA. Congress could easily have provided a different standard for release and protection of data by States linking education records across sectors, but it did not do so. The Department's reference to ARRA, therefore, can hardly justify the dangerous experiment with the sensitive information contained in Americans' education records that this proposal would promote.

Under the proposed definition, a chief state school officer or higher education authority could authorize as its representatives nonprofit organizations, independent researchers, or other state agencies, which would enter into a written agreement with the State or local educational authority to make sure that student records and personally identifiable information would be protected. Such agreements, however, will be virtually useless in stopping an authorized representative who is not under the direct control of the State or local agency from misusing the data for other purposes or redisclosing the data to others. Under the proposed regulations, the written agreements may be required to spell out how nonconsensually redisclosed data should be used and released, but without the element of direct control, the State or local educational agencies will have no ability to enforce them. A chief state school officer could call over to her colleague heading the State labor or health department and beg the colleague to crack down on a rogue authorized representative working under the colleague's direct control, but there would be no regulatory assurance that the improper activity would stop, or could be stopped.

Similarly, a researcher conducting an independent higher education evaluation could not easily be stopped from using student records for purposes other than those envisioned when she was made an authorized representative for a legitimate evaluation.

Without retaining the element of meaningful direct control, the proposed definition of an authorized representative invites mischief and creates predictable data disclosure problems that Congress was clearly seeking to prevent by enacting FERPA in the first place. This novel definition of authorized representative, as proposed, would take control of education records away from parents and students, and hand it over to entities and individuals over whom State and local authorities would have no control.

B. Directory Information (§§99.3)

The NPRM would modify the definition of "directory information," as defined in current 34 CFR 99.3, to clarify that

> an educational agency or institution may designate as directory information and nonconsensually disclose a student ID number or other unique personal identifier that is displayed on a student ID card or badge if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity….

76 Fed. Reg. 19729 (Apr. 8, 2001). AACRAO supports the clarification that institutions may require students to carry ID cards or display badges. See additional discussion below at IV.A., analyzing proposed regulations at Section 99.37(c) (Student ID Cards and ID Badges).

C. Education Program (§§99.3, 99.35)

For the first time, the Department proposes a definition for the term "education program," which is used in current 34 CFR 99.35(a)(1). That subsection provides that authorized representatives of the officials or agencies headed by officials listed in §99.31(a)(3) may have nonconsensual access to personally identifiable information from education records 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 relating to those programs. The proposed definition defines "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 education authority.*

(Emphasis added.) 76 Fed. Reg. 19729-19730 (Apr. 8, 2001). The Department's rationale for including programs not administered by an education agency include: (1)

education may begin before kindergarten and may involve learning outside of postsecondary institutions, and not all of these programs are administered by State or local educational agencies; (2) agencies other than State educational agencies may administer career and technical education or adult education programs; (3) the Department believes all these programs could benefit from the type of rigorous data-driven evaluation that SLDS will facilitate; and (4) greater access to information on students before entering or exiting the P-16 programs could be used to evaluate these education programs and provide increased opportunities to build upon successful ones and improve less successful ones.

The rationale articulated by the Department in support of this astonishing definition strains credulity. First, Congress never intended such a broad sweep in terms of the kinds of audits or evaluations for which nonconsensual access to personally identifiable information from education records may be provided. Second, even accepting, *arguendo*, that the policy purposes articulated in the preamble are sufficiently compelling, the proposed definition is unnecessarily overbroad and recklessly imprecise. Finally, completely missing in the rationale is any shred of legal authority for such a wholesale weakening of the legal protections of personally identifiable information provided under the statute. The proposed definition, when combined with the proposed definition of "authorized representative," could permit every federal or state-supported county recreation program to be considered an education program eligible for evaluation using personally identifiable information from education records, without the evaluator needing to obtain consent from the parents or student. The proposed definition would provide virtually unlimited access to education records in the name of evaluating program outcomes to any program evaluators that can convince an authorized representative that they are reviewing an education program, as loosely defined by the proposed definition.

II. Research Studies (§99.31(a)(6))

Section (b)(1)(F) of FERPA permits educational agencies and institutions nonconsensually to disclose personally identifiable information to organizations conducting studies "for, or on behalf of" educational agencies and institutions to improve instruction, administer student aid programs, or develop, validate, or administer predictive tests. 20 U.S.C. 1232g (b)(1)(F). Current regulations in 34 C.F.R. 99.31(a)(6)(ii)(C) require that an educational agency or institution enter into a written agreement with the organization conducting the study that specifies the purpose, scope, and duration of the study and the information to be disclosed and meets certain other requirements. The proposed regulations would circumvent the statutory requirement that any disclosures of personally identifiable information under the studies exception be done "for, or on behalf of" educational agencies or institutions by allowing State or local educational authorities (or agencies headed by an official listed in 34 CFR 99.31(a)(3)) to enter into agreements with organizations conducting studies under 34 C.F.R. 99.31(a)(6)(i) and to redisclose personally identifiable information on behalf of educational agencies and institutions that provided the information in accordance with other FERPA regulatory requirements. The proposed regulations would also make the written agreement requirements and other provisions in 34 CFR 99.31(a)(6) apply to

State and local educational authorities or agencies headed by an official listed in 34 CFR 99.31(a)(3), as well as educational agencies and institutions.

The Department claims that these changes to existing regulations

> are necessary to clarify that while FERPA does not confer legal authority on State and Federal agencies to enter into agreements and act on behalf of or in place of LEAs and postsecondary institutions, nothing in FERPA prevents them from entering into these agreements and redisclosing PII on behalf of LEAs and postsecondary institutions to organizations conducting studies under §99.31(a)(6)….

76 Fed. Reg. 19730 (Apr. 8, 2001). The Department notes that State educational authorities, and State higher educational agencies in particular, typically have the role and responsibility to perform and support research and evaluation of publicly funded education programs for the benefit of multiple educational agencies and institutions in their States.

While deferring to the Department's policy goals of enhancing the ability of State educational authorities to enter into research agreements with institutions of higher education and then redisclose the information they gather, AACRAO is very concerned that the Department is expansively broadening the scope of both access to and redisclosures of personally identifiable information without statutory authority to do so. In particular, in the event that an educational agency or institution objects to the redisclosure of personally identifiable information it has provided to the State educational authority for other purposes, under the proposed regulations, the State educational authority need only play its new trump card—that it has *implied* authority to do whatever it wants with the personally identifiable information in the name of supporting research and evaluation efforts.

This represents a disturbing erosion of educational privacy rights and a renunciation of the Department's historic role as the protector of educational privacy rights of American students and families. Particularly because the Department fails to mandate compliance with the most basic fair information practices by such recipients of personally identifiable information, students and families would not even be aware that various and sundry data repositories of education records may have redisclosed their information to other third parties.

This ill-advised proposal also makes FERPA compliance a nightmarishly impossible task for institutions. Educational institutions would be unable to verify the extent to which and the parties to whom personally identifiable information they have previously disclosed has been redisclosed. Institutions would be realistically unable to provide students who request records of what items of their personally identifiable information have been released and to whom with complete records under FERPA's regulatory recordation requirements. Currently, an institution of higher education has control over disclosures of student education records and personally identifiable information. Under the proposed

regulations, the State educational authority will be required to record redisclosures, but need not send those recordations back to the institution, or, for that matter, to the students and families. Only on specific request to the State educational authority would an institution or student be able to determine what redisclosures have been made of a student's education records and personally identifiable information and to whom. At a minimum, the State educational authority considering the redisclosure of student education records and personally identifiable information should be required to notify the student and institution of the redisclosure and provide an avenue for the student to opt out of the redisclosure. As written, the proposed regulations are unnecessarily overbroad and do great violence to the underlying privacy tenets of FERPA.

III. Authority to Audit or Evaluate (§99.35)

Current regulations in 34 CFR 99.35(a)(2) provide that in order for a State or local educational authority or other agency headed by an official listed in §99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity, its authority to do so must be established under other Federal, State, or local authority because that authority is not conferred by FERPA. The proposed regulations seek to remove the requirement to establish legal authority under other Federal, State, or local law to conduct an audit, evaluation, or compliance or enforcement activity. The Department's stated purposes are (1) to clarify that the authority for a State or local educational authority or Federal agency headed by an official listed in 34 CFR 99.31(a)(3) to conduct an audit, evaluation, enforcement or compliance activity may be express or implied, and (2) to promote Federal initiatives to support the robust use of data by State and local education authorities to evaluate the effectiveness of Federal or State-supported education programs, in particular by providing postsecondary student data to P-12 data systems in order to permit the evaluation of whether P-12 schools are effectively preparing students for college.

The proposed change, therefore, would substitute the mere invocation of an audit or evaluation for actual authority. This extraordinary proposal thus turns another narrow consent exception into a magic incantation by which entities with no legal authority and no intention of actually conducting audits or studies can circumvent congressional intent, violate the privacy rights of students and families, and obtain unfettered access to personally identifiable information.

This breathtaking new approach, which would make the Department an accomplice in facilitating false, evasive, or dubious assertions of audit or evaluation authority, is not only ill-advised, it is unnecessary. Third parties with real legal authority to engage in auditing or evaluating programs have always had access to data. Once again, in attempting to facilitate somewhat broader access, the Department is proposing an overbroad remedy that would result in predictably unfortunate outcomes that we doubt it truly intends to enable.

In addition, the amorphous expansion of this exception to entities that the Department suggests may have "implied authority" to conduct audits will result in confusion and

noncompliance as institutions struggle to separate real claims of authority from frivolous ones. Finally, the Department does not have legal authority to eviscerate the clear statutory limitations imposed by Congress through linguistic equivocations and euphemistic redefinitions.

IV. Directory Information (§99.37)

A. Section 99.37(c) (Student ID Cards and ID Badges)

The proposed regulations for 34 CFR 99.3(c) clarify that the right to opt out of directory information disclosures is not a mechanism for students, when in school or at school functions, to refuse to wear student badges or to display student ID cards that display information that may be designated as directory information under 34 CFR 99.3 and that has been properly designated by the educational agency or institution as directory information under 34 CFR 99.37(a)(1). This proposed regulation responds to the need for school and college campuses to implement measures to ensure the safety and security of students and is intended to ensure that FERPA is not used as an impediment to achieving school safety.

AACRAO supports and welcomes the additional flexibility offered by the proposed regulation on this topic.

B. Section 99.37(d) (Limited Directory Information Policy)

The proposed regulations would clarify that an educational agency or institution may specify in the public notice it provides to parents and eligible students in attendance provided under 34 CFR 99.37(a) that disclosure of directory information will be limited to specific parties, for specific purposes, or both. The proposed regulations also clarify that an educational agency or institution that adopts a limited directory information policy must limit its directory information disclosures only to those parties and purposes that were specified in the public notice provided under 34 CFR 99.37(a). The purpose of these regulations is to give educational agencies and institutions greater discretion in protecting student privacy by permitting them to limit the release of directory information for specific purposes, to specific parties, or both, and to provide a regulatory authority for the Department to investigate and enforce a violation of a limited directory information policy by an educational agency or institution.

We note that the ability to limit directory information to specific parties or purposes currently exists under FERPA. The proposed regulations require an institution that includes such restrictions in its notice of directory information to abide by the policy specified in its public notice.

The Department does not propose changes to the recordkeeping requirement in 34 CFR 99.32(d)(4) or the redisclosure provisions in 34 CFR 99.33(c), instead recommending that educational agencies and institutions that choose to adopt a limited directory information policy assess the need to protect the directory information from further disclosure by the

third parties to which they disclose directory information. When a need to protect the information from further disclosure is identified, the Department recommends that educational agencies and institutions should enter into non-disclosure agreements with the third parties.

AACRAO supports this proposed regulation.

V. Enforcement Procedures with Respect to Any Recipient of Department Funds that Students Do Not Attend (§99.60)

Current regulations in 34 CFR 99.60 designate the Family Policy Compliance Office (FPCO) as the office within the Department responsible for investigating, processing, and reviewing alleged violations of FERPA. Current FERPA regulations addressing enforcement procedures (subpart E, at 34 CFR 99.60 through 99.67) only address alleged violations of FERPA committed by an educational agency or institution. The proposed regulations would provide that, solely for purposes of subpart E of the FERPA regulations, an "educational agency or institution" includes any public or private agency or institution to which FERPA applies under 34 CFR 99.1(a)(2), as well as any State educational authority or local educational authority or any other recipient (for example, a nonprofit organization, student loan guaranty agency, or a student loan lender) to which funds have been made available under any program administered by the Secretary. The proposed regulations update the Department's authority to investigate and enforce alleged violations of FERPA by the expanded range of State and local educational authorities and other recipients of Department funds that may come into possession of student records and PII. The proposed regulations also clearly authorize FPCO to investigate, review, and process an alleged violation committed by recipients of Department funds under a program administered by the Secretary in which students do not attend. The Department states that it believes that these enhanced enforcement procedures are especially important given the disclosure of personally identifiable information needed to implement SLDS.

Given the vast expansion of entities that would gain access to and maintain education records, AACRAO would certainly understand and support greater enforcement authority for the Department should the proposed regulations be adopted. Desirable and necessary as such expanded authority would be, it cannot be unilaterally manufactured by the Secretary. Nothing in the underlying statute even remotely hints at the Secretary having any authority to treat entities enumerated in the preamble discussion of this section as educational agencies or institutions. This lack of statutory enforcement authority, in fact, should give the Department some pause with regard to its expansive approach to the sharing of personally identifiable information with entities with remote or questionable educational interest in the records they would access under the new regulations. We note, in addition, that it is not clear which enforcement tools legally available to the Secretary would be utilized in actions against State education authorities and other entities.

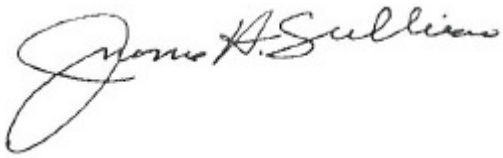
It is also quite puzzling that the Secretary is not using this putative authority to subject these entities to other critical FERPA compliance requirements such as the right to inspect or the right to correct or amend education records. We strongly believe that extending these requirements to the new actors would be just as legally justifiable as what has been proposed, and that it would provide an important tool for parents and students to at least have awareness and minimal access *to their own records.*

Indeed, we believe that the Department is confounding privacy and security in this proposal. The dire need to manufacture new enforcement authority out of whole cloth is the direct consequence of the overbroad and ill-thought-through access and disclosures that would be permitted under the proposed regulations. A much wiser approach would be to limit nonconsensual data disclosures to compelling cases where a specific and articulable need can be demonstrated, and focus enforcement attention on the much smaller universe of entities maintaining these data. The Department is, instead, proposing a rule under which data are released to the custody of a vastly expanded number of entities, which the Department lacks legal authority and resources to adequately police.

While each of the changes discussed above might, by itself, do limited damage to privacy rights, we are all the more alarmed at the interactive effects of so many ill-conceived and legally unsupportable changes. The Department is arbitrarily expanding the number of entities that can gain access to personally identifiable information from education records, the reasons why they get access, and what they may do with the information they collect, even over the objections of the custodians of those records. We are dismayed by the Department's disregard for privacy rights, as well as its failure to consider the impossible compliance environment these proposed regulations would create. In addition, given the radical abandonment of historical interpretation, we find the short comment period quite insufficient and inadequate for purposes of eliciting broad community input.

We thank you for your consideration of our views and stand ready to work with you in addressing changes to the Family Educational Rights and Privacy Act within the framework of the statute.

Sincerely,



Jerome H. Sullivan
Executive Director