



*Working with and  
through our State  
Associations, NSBA  
Advocates for Equity and  
Excellence in Public  
Education through  
School Board Leadership*

May 23, 2011

The Honorable Arne Duncan  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington D.C. 20202

Dear Mr. Duncan:

The National School Boards Association (NSBA), representing through our state associations approximately 14,500 school districts, offers the following comments to the recent notice of proposed rulemaking regarding the Family Educational Rights and Privacy Act (FERPA). As discussed in more detail below, NSBA does not support a number of the proposed changes to the FERPA regulations. FERPA is a data privacy law. The proposed changes facilitate data sharing well beyond the scope of the current FERPA statute. Broadening FERPA beyond its data privacy purpose should be done legislatively and not through regulations. More specifically, if Congress wants FERPA to be used to facilitate data sharing it should modify the statute and create clear exceptions to facilitate information sharing.

#### **Definitions – Authorized Representative**

First, NSBA suggests that the Department of Education's (DOE) proposed definition of "authorized representative" is overly broad. A more logical interpretation of "authorized representative" that keeps more with the purposes of FERPA is DOE's longstanding view that limits an "authorized representative" of the Comptroller General of the United States, Secretary of Education, etc. to an employee or contractor of such person or entity. This interpretation makes sense because it recognizes that the Comptroller General of the United States, Secretary of Education, etc. would never be personally involved in data gathering for an audit of a federal supported education program. Instead, one of his or her employees or contractors would be involved upon being so authorized.

As a practical matter, it is not clear how the effective use of data in statewide longitudinal data systems (SLDS) as envisioned by the COMPETES Act or ARRA necessitates designation of others beyond an employee or a contractor as authorized representatives. Under what circumstances would others besides these two types of representatives conduct an audit or evaluation of a Federal or state education program that would necessitate non-consensual disclosure of PII?

Second, NSBA notes that FERPA is a very complicated law. Will “reasonable methods” and a written agreement likely ensure that “authorized representatives” unfamiliar with the privacy concerns inherent in educational programs comply with FERPA?

Third, if for some reason, such an authorized representative, state or local educational authority, or agency headed by an official listed in § 99.31(a)(3) makes an improper re-disclosure, DOE proposes that the educational agency or institution from which the personally identifiable information (PII) originated would be prohibited from permitting the entity responsible for the improper re-disclosure access to data for at least five years. NSBA suggests that instead of requiring the educational agency or institution to deny access to data for five years, the entity responsible for the re-disclosure should be *prohibited from requesting* PII from the educational agency or institution for at least five years. It is unfair to put the onus on the originating educational agency or institution to deny access to the entity that made an improper disclosure. After all, the educational agency or institution did not make the improper disclosure and was reasonably relying on “reasonable methods” and a written agreement to prevent improper re-disclosure. Likewise, the educational agency or institution may not even be aware that an improper re-disclosure has been made. In a similar vein, NSBA encourages DOE to modify current § 99.33(e) to state that if a third party improperly re-discloses PII from education records that third party may not *request* PII from the originating education agency or institution for at least five years.

Fourth, DOE states that “a written agreements [must be developed] between a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and its authorized representative, other than an employee (*see* proposed § 99.35(a)(3)).” NSBA is unclear why the “other than an employee” language is included in this sentence and what this language means.

### **Research studies**

In this section DOE proposes that a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) be able to disclose PII to organizations conducting studies. NSBA suggests that this proposal exceeds the statutory authority of FERPA. The studies exception to FERPA allows for disclosures of PII without consent to “organizations conducting studies *for, or on behalf of*, educational agencies or institutions.” 20 U.S.C. § 1232g(b)(1)(F). The “for, or on behalf of” language indicates that the educational agency or institution to which the PII relates wants and agrees to the study being conducted and is aware of the study’s purpose and the intended use of results. NSBA suggests that if a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) wants to turn over non-consensual PII to an organization conducting a study then it should be required to first obtain written consent from the original disclosing educational agency or institution in which the educational agency or institution approves the release of PII to the organization conducting such a study.

## **Authority to Audit or Evaluate**

First, NSBA found the discussion of this proposed change very confusing and difficult to understand. School administrators, parents, and other people not well-versed in FERPA may read the commentary to the regulations and will have difficulty comprehending this change unless it is clarified. NSBA suggests that in the final regulations DOE completely and clearly explains in the commentary exactly what it is trying to accomplish and provides a number of clear examples.

NSBA found the following two sentences in particular confusing:

However, we believe that our prior guidance and statements made in the preambles to the notice of proposed rulemaking published on March 24, 2008 (73 FR 15574), and the final regulations published on December 9, 2008 (73 FR 74806), may have created some confusion about whether a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) that receives PII under the audit and evaluation exception must be authorized to conduct an audit or evaluation of a Federal or State supported education program, or enforcement or compliance activity in connection with Federal legal requirements related to the education program of the disclosing educational agency or institution or whether the PII may be disclosed in order for the recipient to conduct an audit, evaluation, or enforcement or compliance activity with respect to the recipient's own Federal or State supported education programs.

And, second, the Department would 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.

DOE appears to be suggesting in this section that an educational agency or institution can disclose non-consensual PII to a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) so that such officials can use the data to evaluate *another* educational agency or institution's program, regardless of whether the authority to conduct such an evaluation is established by another law. If NSBA's understanding is correct, nothing in the FERPA statute states that a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) have authority to receive non-consensual PII from one educational agency or institution to evaluate another educational agency or institution. If Congress wanted the audit or evaluation exception to be so broad it could have written 20 U.S.C. § 1232g (b)(3) to clearly permit data sharing for evaluation purposes between all educational agencies or institutions. Furthermore, as a practical matter, this regulatory change could be very burdensome on school districts that will have to respond to countless data requests, not supported by any legal authority, to help officials evaluate other educational agency or institution's programs.

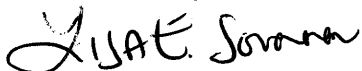
If NSBA is correct about what the deletion of § 99.35(a)(2) is intended to mean and if DOE concludes despite NSBA's objections that it wants this practice to be allowable under FERPA, NSBA does not think that deleting § 99.35(a)(2) will make DOE's intentions clear. If DOE wants this to be clear it needs to write a regulation stating that a State or local educational authority or agency headed by an official listed in § 99.31(a)(3) has authority to collect non-consensual PII from one educational agency or institution to evaluate another regardless of whether the planned evaluation is authorized by any legal authority.

### **Limited directory information policy**

First, NSBA would like DOE to clarify that under the proposed rules related to limited directory information policies, school districts that choose *not* to adopt a policy of limiting access to directory data for specific purposes or specific parties may still limit access to directory information to whomever they want for whatever reason they want *under FERPA* (state law may require disclosure). This is the case because FERPA does not require the mandatory release of information to anyone for any reason.

Second, regarding DOE's suggestion that school districts adopt non-disclosure agreements with parties to which they disclose directory data, NSBA suggests that such agreements are unrealistic. First, school districts may have difficulty identifying who may re-disclose data. Second, school districts have no authority and limited resources to enforce such agreements. Third, making recipients sign such agreements could be a significant administrative burden for school districts that receive many requests for directory data, even if they have adopted a limited directory information policy.

Respectfully submitted,



Lisa E. Soronen  
NSBA Senior Staff Attorney