

U.S. Department of Education Final FERPA Regulations: Advisory and Overview

Prepared by EducationCounsel, LLC for the Data Quality Campaign on December 2, 2011

Overview

The U.S. Department of Education (ED) today [published in the Federal Register](#) new final amendments to regulations implementing the Family Educational Rights and Privacy Act (FERPA). The amended regulations take effect January 3, 2012. They are based on proposed regulations issued by the Department on April 8, 2011, and on the Department's review of 274 public comments submitted in response to the proposed regulations. The final regulations include several changes from the proposed regulations, but are fully consistent with the substantive provisions in the proposed regulations designed to foster more comprehensive use of student data for educational research, evaluation, accountability, and improvement purposes, while enhancing privacy protections and enforcement.

FERPA protects the privacy of student education records maintained by or for educational agencies or institutions that receive funds from ED.¹ FERPA generally bars disclosure of personally identifiable information derived from student records without written parent or eligible student consent unless the disclosure comes within a list of authorized disclosures in the law. With the emergence of state data systems and the recognition that robust use of student data is foundational for education reform, difficult issues have arisen as to how to reconcile or balance privacy protections for students under FERPA with these educational needs. For years, states have asked for clarity on these issues. ED's previous FERPA interpretations and inconsistent guidance have created ambiguity, left states to interpret guidance in conflicting ways, and created a chilling effect among state and local educators in their efforts to use education data consistent with state and local needs and with federal mandates. In regulations issued under the American Recovery and Reinvestment Act of 2009 (ARRA), ED indicated that it would be issuing amended FERPA regulations to address these issues.

The regulations transform the FERPA issue, as it relates to education reform efforts, from *whether student data may be used for important educational purposes* to *how student data may be used for these purposes*. They:

- **Reflect the new reality of state longitudinal data systems:** The regulations clarify, strengthen, and update an outdated federal law to reflect states' roles in administering state data systems and responsible stewardship of student-level data.
- **Clarify existing ambiguities for states:** After seven years of piecemeal and inconsistent guidance, the regulations provide clear answers to states' fundamental questions so that they can effectively move ahead with their responsibilities.
- **Balance access with protection:** The regulations facilitate fuller access for research and evaluation purposes to student data contained in state and local data systems in order to increase transparency and inform accountability for educational outcomes and to contribute to a culture of innovation and continuous improvement in education, while at the same time enhancing privacy protections and ED enforcement mechanisms.
- **Provide consistency with federal data requirements:** The regulations reflect ED's view (stated in the preamble) of the possible impact of prior FERPA regulations and interpretations on the level of state-level student data sharing contemplated under the ARRA and other federal legislation.
- **Promote the efficient use of data system investments:** The regulations authorize fuller, more cost effective use of state-level student data for research, evaluation, and accountability, subject to clear privacy protections, as well as effective use of data across all levels of education to evaluate and improve education programs.

¹ FERPA also provides access to student records for parents or -- for students who are 18 years of age or above or enrolled in a postsecondary institution -- the student ("eligible student"), and a right for the parent or eligible student to challenge the accuracy of the record .

Key Areas of Change from Prior Regulations

State and local data systems - The regulations broaden access to data² by:

- **Broadening the categories of individuals/entities that may receive data for evaluation/audit purposes.**
Subject to privacy safeguards discussed below, the regulations permit disclosure of data to any entity or person designated by the state or local educational authority for the purpose of evaluating or auditing federal or state-supported education programs, or enforcing compliance with federal legal requirements relating to those programs. Thus, a state or local education official may disclose data to a workforce agency or other non-education agency for these purposes. This change also permits education data to be housed in a centralized state data agency that is not an education agency. (The rule does not permit disclosure of data to a non-education agency for its own purposes—for example, to evaluate or strengthen non-education programs or services.)
- **Authorizing disclosures from postsecondary institutions/data systems to K-12 officials/data systems and from K-12 agencies/data systems to publicly funded early childhood learning programs/data systems.**
The regulations reverse ED's prior interpretation that data could be disclosed only to evaluate or audit programs of the disclosing agency.³ That previous interpretation barred postsecondary institutions from disclosing data to local school districts if the purpose was to evaluate how well the K-12 system or secondary schools had prepared students for college. It had a parallel effect on the disclosure of data by elementary schools to publicly funded early childhood learning programs, an effect also reversed by the new regulations.
- **Broadly defining education programs under the law's evaluation/audit provisions.**
The regulations broadly define an "education program" that may be the subject of an evaluation or audit (for purposes of authorizing a disclosure of student data) to mean 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. The final regulation was revised to provide that any program administered by an educational agency or institution is considered an education program, but the preamble also expresses ED's view that the definition includes education programs administered by any entity. The final regulations also add a broad definition of early childhood education programs for this purpose (derived from a definition in section 103(8) of the Higher Education Act) including Head Start-related programs; a state licensed or regulated child care program; or a program that serves children from birth through age six that addresses the children's cognitive and physical development and is a state pre-kindergarten program, a program authorized under Section 619 or Part C of the Individuals with Disabilities Education Act, or a program operated by a local educational agency.
- **Authorizing state or local agency disclosures for research studies.**
The regulations provide that nothing in FERPA prevents a state or local education authority from [1] entering into agreements with organizations conducting research studies (for example, to improve instruction) and [2] re-disclosing data to such organizations for such studies on behalf of schools, postsecondary institutions, or school districts (subject to the same kind of agreement to protect privacy that already applies to schools, postsecondary institutions, and school districts making such disclosures). This provision, for the first time, makes the research studies provision in FERPA applicable to state-level data. The preamble to the regulations recognizes that state educational agencies and state higher education agencies typically have either express or implied authority to perform and support research to improve instruction in publicly funded education programs for the benefit of multiple educational agencies and institutions in their state.
- **Clarifying, in the preamble, that nothing in FERPA bars interstate disclosures** that are made for the purposes and consistent with the requirements of the regulations.

² References in this summary analysis to "data" and to "disclosures" refer to personally identifiable information and disclosures of personally identifiable information derived from student education records without the written consent of a parent or eligible student.

³ That interpretation was based on USED's interpretation of a regulatory provision – repealed by these new regulations – indicating that an education agency must have express legal authority to conduct the evaluation that is the basis for the disclosures.

New Privacy Safeguards - The regulations balance the provisions for expanded access, described above, with new provisions to protect the privacy of student records, including:

- ***Reasonable methods to ensure compliance.***
The regulations vest responsibility in the state or local education authority to use "reasonable methods" to ensure "to the greatest extent practicable" that any entity designated as its authorized representative to receive data to conduct evaluations, audits, or compliance activities — [1] uses student data only for authorized evaluation, audit, or compliance purposes; [2] protects the data from further disclosure or other uses; and [3] destroys the data when no longer needed for the authorized purpose. A number of public comments proposed very prescriptive methods to this end, but the Department elected to leave flexibility to state and local agencies, while at the same time issuing non-binding guidance that accompanies the regulations on the Department's web-site with information on "best practices" in this area.
- ***Written agreements with authorized representatives.***
The regulations require written agreements that address privacy safeguards between the state or local education authority and its authorized representative to which it provides data to carry out evaluations, audits or compliance activities. The agreements, among other things, must designate the authorized representative as such; specify the information to be disclosed; describe the activity with sufficient specificity to make clear that it comes within an authorized purpose; provide for the destruction of the data when no longer needed for the authorized purpose (and the time period for such destruction); and establish policies and procedures to protect the student data from further disclosure and unauthorized use, including limiting use of the data to authorized representatives with legitimate interests in the purposes of the disclosure.

Strengthened Enforcement. The regulations also provide for strengthened enforcement of FERPA:

- ***Debarring access for violations.***
The regulations provide that if an authorized representative that receives data to perform evaluations, audits, or compliance activities or any other recipient of disclosures under FERPA (including a state or local educational agency) improperly re-discloses the data in violation of FERPA, the educational institution or authority that provided the data would be required to deny that recipient further access to personally identifiable data for at least five years.
- ***Expanded jurisdiction for investigations and enforcement.***
The regulations provide that state education authorities and other recipients of funds from ED – not just educational agencies and institutions that enroll students -- are subject to investigations and enforcement, including possible withholding of funds, for FERPA violations. They also require other third party recipients of data to comply with reporting and informational requirements of the Department in enforcing FERPA.
- ***Investigation/Enforcement procedures.***
The regulations clarify that complaints of FERPA violations may be filed with USED's Family Policy Compliance Office (FPCO) by parents or students; FPCO may investigate a possible violation in the absence of a complaint; and, if FPCO finds a violation, it will give the non-compliant agency or institution an opportunity to come into voluntary compliance before taking any enforcement action, including a funds withholding action and an action to debar an agency or institution for at least 5 years from receiving further student data from the disclosing agency or institution.

Other provisions: The regulations include other provisions, all regarding directory information⁴:

- ***Student ID numbers as directory information.***
The regulations reiterate a prior regulation that an educational agency or institution, subject to restrictions, may designate as disclosable directory information a student ID number or other unique personal identifier

⁴ "Directory information" is personally identifiable information in a student's education record – such as a student's name, address, dates of attendance, major field of study, etc. – that would not generally be considered harmful or an invasion of privacy if disclosed. An educational agency may adopt a policy to disclose all or some categories of directory information without written parent (or eligible student) consent and provide annual notice to parents or eligible students of that policy. A parent or eligible student has an opt out right to require that directory information relating to the student not be disclosed without prior written consent.

(other than a student's social security number) displayed on a student ID card or badge.

- ***No opt out for student IDs/badges.***

Based on school security and safety concerns, the regulations provide that parents (or eligible students) may not use their right to opt out of directory information disclosures to prevent an educational agency or institution from requiring students to disclose the student's name, identifier, or email address in a class in which the student is enrolled or prevent the agency or institution from requiring the student to wear or otherwise publicly disclose student ID badges or cards designated as directory information.

- ***Limited recipients/purposes for directory information disclosures.***

The regulations clarify that an educational agency or institution may adopt a directory information policy limited to disclosure to specific parties, for specific purposes, or both – and not just a directory information policy for disclosure of directory information to the public – if it specifies those limits in the annual public notice it provides to parents and eligible students. The rule would not impose record-keeping requirements for these disclosures or regulate re-disclosure by third parties that receive the directory information.

Guidance The regulations, as posted on the Department's web-site, include as appendices A-C, respectively:

- guidance on reasonable methods and agreements to ensure FERPA compliance by authorized representatives of state and local education authorities, including helpful information on best practices;
- a model notification of FERPA rights for elementary and secondary schools; and
- a model notification of FERPA rights for postsecondary institutions. (Notification of rights to parents or students is required under FERPA regulations.)

Prepared by EducationCounsel, LLC for the Data Quality Campaign on December 2, 2011

If you have questions about FERPA or about the proposed regulations, please contact EducationCounsel, LLC:

Steve Winnick at steve.winnick@educationcounsel.com or (202) 545-2913;
Art Coleman at arthur.coleman@educationcounsel.com or (202) 245-2912;
Scott Palmer at scott.palmer@educationcounsel.com or (202)545-2916;
Kate Lipper at kate.lipper@educationcounsel.com or (202) 545-2905.