CENTER FOR LAW AND EDUCATION

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May 23, 2011

Ms. Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-7100

Re: Comments on ED-2011-OM-000

Dear Ms. Miles:

Attached are comments submitted by the Center for Law and Education in response to the Notice of Proposed Rulemaking (April 8, 2011) re: the Family Educational Rights and Privacy Act. We have identified areas of concern in which we believe that Department's proposed revisions to the regulations promulgated under FERPA are inconsistent with the statute and ought to be addressed more appropriately through legislation. We are especially concerned that the Department's proposed changes to non-consensual disclosure of personally identifiable information for the purpose of creating a more robust SLDS compromise the privacy rights of eligible students and/or parents.

The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities -- from federal policy through state and local implementation.

The following organizations join CLE in submitting these comments:

Council of Parent Attorneys and Advocates (COPAA)
ECAC - Exceptional Children's Assistance Center, NC
Exceptional Parents Unlimited, Central California PTI
Parent Information Center of New Hampshire
PTI Nebraska
Statewide Parent Advocacy Network, NJ

We appreciate this opportunity to comment and would be pleased to discuss with the Department constructive approaches for addressing any of the issues we have flagged.

Yours truly,

Kathleen B. Boundy
Co-Director

Enclosure/Attachment

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Comments of the Center for Law and Education to NPRM re: Family Educational Rights and Privacy Act (FERPA), 76 FR 19726, April 8, 2011

U.S. Department of Education Docket ID: ED-2011-OM-0002

General Overriding Concern

> In the preamble to the NPRM under the Family Education Rights and Privacy Act (FERPA) issued in the Federal Register (76 FR 19726) April 8, 2011, the U.S. Department of Education (ED) indicates that it is proposing revised regulations under FERPA based on provisions in the American Recovery and Reinvestment Act (ARRA) that relate to the expansion and development of a State Longitudinal Data System (SLDS) consistent with the COMPETES Act. The ARRA provided an infusion of federal funds on a competitive basis to a limited number of States to improve their education data capabilities, including to the extent they did not already do so, assigning all students a unique Statewide student identifier, and collecting such data as yearly test records, student level transcript information, including courses completed and grades earned, college readiness test scores, information about transition from secondary to postsecondary education, including participation in remedial work, and postsecondary and work force information. Because ED recognizes that explicit provisions of FERPA and its current regulations may restrict non-consensual disclosure and re-disclosure of personally identifiable information (PII) in students' education records – information that would help to build the State grantees SDLS and make the system more useful - ED has proposed regulatory revisions to allow significantly greater flexibility for inter-agency exchange, including among non-educational agencies and institutions.

While the purpose of making the SLDS more robust and useful to multiple State agencies (not only agencies with direct control of educational agencies and institutions) may help enhance the accountability and monitoring of program quality and effectiveness, the Center for Law and Education (CLE) believes that the proposed changes to the regulations are not consistent with, and undermine, the explicit protections set forth in FERPA, as the authorizing statute. The proposed changes in the regulations reflect serious policy decisions in which the stakeholders – i.e., parents and eligible students whose PII from their education records are at issue – have had minimal opportunity for reflection, discussion, debate and review despite the potential and serious harm that might result to them through disclosure and re-disclosure of PII without adequate safeguards and protections to individuals or entities not under the direct control of the educational agencies and institutions entrusted with such PII. Given the plain language and intent of FERPA to protect disclosure of PPI from students' education records without prior consent by eligible students or parents, CLE believes that the kind of changes proposed in the NPRM should properly and lawfully be made through statutory amendment to 20 U.S.C. §1232g, and not by revisions to regulations that arguably undermine the protections of the law which, as enacted, was designed to be strictly read and narrowly construed.

Moreover, prior to the introduction of any statutory changes to FERPA for the purpose of facilitating a more robust SLDS, CLE would encourage a study by the Government Accounting Office (GAO) to examine the extent to which barriers exist under current protections, including but not limited to, non-consensual disclosure of PII under FERPA, that impede effective research and evaluation of educational agencies and institutions and other federal and State supported programs, including those primarily for the purpose of education, that are or may be relevant to children and youths' academic achievement and success in attaining improved educational outcomes. In addition, it would be important for GAO to consider the trade-offs in attempting to balance the facilitation of research and evaluation with the impact on loss of individual rights to privacy and expectations of not disclosing without prior consent of PII.

Specific Comments on Proposed Regulations

Definitions (§ 99.3)

ED seeks to build the SLDS and make it more robust and useful by accessing and sharing PII student and family data across State agencies. This outcome is primarily accomplished by ED's proposing to expand two regulatory definitions under FERPA – "authorized representative" and "education program." Together the proposed changes to these definitions have the effect of substantially modifying FERPA by impinging upon privacy rights and protection from non-consensual disclosure of PPI that parents and eligible students possess under current law.

CLE's Position: CLE opposes the proposed changes to the regulations because they are not consistent with the statute. If such changes are believed to be warranted, changes ought to be made through amendment of the statute following open debate, review and discussion of potential benefits and harm from changes in students' expectations of privacy in PII contained in their education records, and consideration of additional, necessary protections from disclosure and re-disclosure of PII.

- Authorized Representative (§§ 99.3, 99.35)

ED proposes a new regulatory definition of an "authorized representative." The new proposed definition would expand the term beyond authorized representatives of only those individuals explicitly referenced by statute (i.e., Comptroller General of the United States, the Secretary, or State educational authorities), who have access to student or other records for a statutorily specified purpose – as "may be necessary in connection with an audit and evaluation of Federally supported education programs or in connection with Federal legal requirements that relate to such programs" – or the authorized representatives of the U.S. Attorney General for law enforcement, to include additionally *"any individual or entity* designated by a State or local educational agency authority" to carry out audits, evaluations, or compliance or enforcement activities relating to *"education programs."*

Because the plain language of FERPA is restrictive and the term "authorized representative" has been interpreted as limited to the officials so designated and does not include other State or federal agencies because they are not under the direct control (e.g., employees or contractors) of a State or local educational agency, [see 76 FR 19728], ED cannot point to the authorizing statute to support the proposed loosening of this authority to access, disclose, and re-disclose PII without prior consent. Indeed, ED acknowledges this "truth" that was incorporated in the preamble to the final FERPA regulations published on December 9, 2008 (73 FR 74806, 74825). However, because ED has changed its mind, and no longer believes that FERPA [irrespective of its statutory language at 20 U.S.C.§1232g(b)(1)(C) and (3)] limits authorization to PII to those either listed specifically in the statute or to authorized representatives under the direct control of State educational authorities for purposes of audit and evaluation of federally supported education programs, or in connection with the enforcement of Federal legal requirements, ED

cites its own previously modified regulations to justify this foray into undermining the statutory limitations and protections provided by FERPA.

ED attempts to justify the proposed changes by referencing its prior changes in the 2008 *regulations* that expanded re-disclosure authority as well as the preamble discussion to those regulations, both of which ED suggests "promote the development and expansion of robust SLDS" (76 FR 19727). In the current preamble to the NPRM, ED suggests that, in light of Congress's intent in the ARRA to have States link data across the sectors, it is necessary [apparently notwithstanding the language of the statute and prior interpretations of "authorized representative"] "to clarify" that PII information may be disclosed without prior consent to an entity or an individual (authorized representative) who is not under the *direct control* of the educational agency or institution. 76 Fed. Reg. 19728. To get around this statutory limitation, ED proposes a new regulatory definition of an "*authorized representative*" that would encompass *"any individual or entity designated by a State or local educational agency authority*" to carry out audits, evaluations, or compliance or enforcement activities relating to "*education programs.*" [As discussed below, by defining the term "education programs" broadly, ED's proposed change will enable those individuals and entities designated as "authorized representatives" to seek access to and disclose without prior consent PII data from records in the possession, custody, and control of an expanded set of programs in addition to programs receiving Federal education support].

ED rationalizes that this change in the regulations is needed because educational agencies or institutions cannot disclose educational records without prior consent to entities over which they do not have "direct control" with respect to the use and maintenance of education records. See 34 C.F.R. §99.31(a)(1)(B)(2). ED perceives this as a problem because a State educational agency (SEA) is not able to disclose PII from student academic records to another State agency, such as a State department of labor or human services, because it does not have "direct control" over the other agency. In the preamble to the proposed regulations, ED states that there is no reason why a State health and human services or labor department, for example, should be precluded from serving as the authorized representative and receiving non-consensual disclosures of PII to link education, workforce, health, family services, and other data for the purpose of evaluating, auditing, or enforcing Federal legal requirements related to Federal or State supported education programs.

Moreover, ED proposes three additional changes to § 99.35 to ensure "that PII, including PII in SLDS, will be appropriately protected while giving each State the needed flexibility to house information in a SLDS that best meets the needs of the particular State." 76 FR 19729. First, under proposed § 99.35(a)(2), ED would require the State or local educational authority or agency to use "reasonable methods" to ensure that the designated authorized representative: uses the PII only to carry out audits, evaluations, or enforcement or compliance activities related to education programs; protects the PII from further unauthorized disclosures or uses; and destroys the PII in accordance with FERPA requirements. ED, however, purposefully chose not to define the term "reasonable methods" in order to provide flexibility for the State or local educational authority or agency. ED is soliciting comments on what might be considered "reasonable methods" in order to issue non-regulatory guidance on this matter at a later date. 76 FR 19728. Second, under proposed § 99.35(a)(3), ED would require the State or local educational authority or agency to "use a written agreement" that would: designate the individual or entity as an authorized representative; specify the information to be disclosed and that the purpose is to carry out an audit, evaluation, or enforcement or compliance activity for an education program; require the authorized representative to destroy or return to the State or local educational authority or agency the PII when the information is no longer needed; specify the time period in which the information must be returned or destroyed; and establish policies and procedures to protect the PII from further unauthorized disclosure or use. Third, under proposed § 99.35(d), ED would clarify that if the Family Policy Compliance Office finds that a State or local educational authority or agency or an authorized representative improperly re-discloses PII, the educational agency or institution from which the PII

originated would be prohibited from permitting the authorized representative or the State or local educational authority or agency (or both) access to the PII for at least five years.

CLE's Position: CLE does not support the proposed expanded definition of "authorized representative" as set forth in the NPRM. The new proposed definition is overly broad and not consistent with the specific statutory language in FERPA. Access to PII in students' records is neither limited to the statutorily identified personnel nor limited, as per the statute, to the identified functions of such officials. 20 U.S.C. §§1232g(b)(1)(C), (b)(3). Of particular concern to CLE is the shift from the current protective regulatory language that restricts access to, use of, and re-disclosure of PII from students' educational records without prior consent of eligible students or parents to school officials and those under their direct control having a legitimate educational interest, to an overly broad, general authorization for access and disclosure of PII to *"any individual or entity* designated by a State or local educational agency authority" without sufficient protections. Although ED asserts that it has included sufficient protections to ensure that there is an appropriate balance between protecting PII and allowing States the needed flexibility to maintain an effective SLDS, the protections that ED has proposed will have a minimal impact on preventing improper re-disclosures – e.g., ED has not defined "reasonable methods" but, rather, has intentionally left the definition open to allow for "flexibility" on the part of States, and the "written agreement" has no enforcement mechanism. Furthermore, the only possible sanction is that the authorized representative or educational authority/agency (or both) will be denied access to the PII for at least five years. Regardless of the rationale offered by ED or even its merits, CLE opposes the proposed revisions to the regulations as inconsistent with the statute; changes in the law should be made through legislative amendment not contorted rulemaking

- Education program

ED also proposes a new definition for an "education program." The term would be defined 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." Under current law and regulations, authorized representatives of the officials expressly listed in §99.31(a)(3) [i.e., U.S. Comptroller General, U.S. Attorney General, Secretary, SEA and LEA officials] "may have access to 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 that relate to those programs." 34 C.F.R. § 99.35 (a)(1); 20 USC 1232(g)(b)(3), (5). By defining an "education program" as principally engaged in providing education *regardless of whether it is administered by an educational authority,* ED would expand authorization for sharing data containing PII without prior parental/eligible student consent with programs that may be administered, e.g., by public health and human services, or labor, which are precluded as recipients of PII under current law. 34 C.F.R. §99.31. Such data sharing would allow other State agencies to take advantage of research opportunities over a wide variety of programs (e.g., HeadStart) not just ED programs, so long as the programs (e.g., adult education, GED programs, workforce training) are principally engaged in the provision of education. By making these changes, it is anticipated that the SLDS will become more useful.

Through these two definitional changes, ED would achieve its goal of making it significantly easier to share non-consensual PPI from education records across State agencies and systems. An SEA or LEA would be able to appoint a non ED agency/entity or individual, who need NOT be among those statutorily authorized officials to access such information, as its authorized representative to share (i.e., disclose and re-disclose) data containing PPI without prior consent by eligible students or parents among agencies, including non-educational agencies and personnel not under the direct control of the educational agency or institution.

CLE's Position: Because the change in definition of "education program" undermines the plain language and intent of FERPA by, for example, allowing access to such programs as adult literacy and workforce training that are not administered by an educational agency or institution, CLE opposes the modification of the definition outside of the legislative process.

Other Proposed Changes

- Directory Information

In addition to these regulatory provisions, ED identifies what it describes as a small number of additional regulatory provisions and policy statements that "unnecessarily hinder the development and expansion of SLDS consistent with the ARRA."

The NPRM proposes changes to "directory information," which is defined as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed" and includes BUT is not limited to: student's name, address, telephone listing, e-mail address, DOB, place of birth, enrollment status, awards, participation in sports, most recent education institution attended and whatever additional information that the school district has marked as directory information. First, the NPRM proposes to authorize an educational agency to designate as "directory information" a student ID number or other unique personal identifier that is displayed on a student ID card, provided that 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*. 34 C.F.R. § 99.3(b)(2),(c).

CLE's Position: To the extent that ED is defining a student ID as "directory information" not subject to consensual requirements under IDEA, CLE believes that concerns for physical safety and protection from identity theft warrant heightened protection. Instead of authorizing an educational agency or institution to designate a student ID as directory information provided 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*, CLE urges that a student ID number or other unique personal identifier that may be displayed on a student ID card and is classified as "directory information" shall not be used (even in conjunction with one or more factors that authenticate the user's identity) to gain access to education records.

- "Opt-Out"

The NPRM proposes in a new provision (proposed §99.37(c)(1)) that a parent or eligible student may not use their right to opt out of directory information disclosures to prevent an educational agency from disclosing or requiring a student to disclose the student's name, *identifier,* or institutional e-mail address in a class in which the student is enrolled. Nor may the parent or eligible student prevent an educational agency from requiring a student to wear, display publicly, or disclose a student ID card or badge that exhibits information designated as directory information. [34 C.F.R. § 99.37(c)(2)].

CLE's Position: If the identifier is defined in a manner to ensure safety and protection consistent with CLE's position in the above paragraph, CLE supports this provision.

- Different Treatment of Directory Information

The NPRM also proposes that an educational agency or institution would be authorized to indicate in its public notice to parents and eligible students that disclosure of directory information will be limited to specific parties, for specific purposes, or both. Based on this proposed change, access by third parties (e.g., vendors) to directory information could be limited by the educational agency despite the information

having been designated as "directory information" for which prior consent is not required. If said limitations are included in the public notice to parents and eligible students, the educational agency must limit access/disclosure consistent with the notice. [See proposed §99.37(d)]

CLE's Position: This proposed provision would seem to be in the interest of students and their families, although CLE can conceive of how differential treatment of what constitutes "directory information" for different third parties may raise serious policy questions for consideration by school communities, including eligible students and parents.

- Research Studies

Section 1232g(b)(1)(F) of FERPA authorizes educational agencies and institutions to disclose PII without prior consent to organizations "conducting studies *for, or on behalf of, educational agencies and institutions*" to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction. Current regulation §99.31(a)(6)(ii) conditions receipt of PII by such an organization conducting studies upon its restricting access to representatives: having a legitimate interest in the information; destroying PII when the information is no longer needed for the purposes of the study; entering a written agreement specifying the purpose, scope, and duration of the study as well as the specific PII to be accessed; and limiting use of PII to the stated purposes of the study consistent with the written agreement. ED, through the NPRM, would amend §99.31(a)(6) by adding a new provision that would "clarify" that these same provisions apply to SEAs so they may enter into agreements on behalf of school districts with organizations conducting studies, after the law's written agreement requirements are met. ED reasoned that the amendment was necessary because ED had previously opined [Dec. 9, 2008, 73 FR 74806, 74826] that an SEA was not authorized to re-disclose PII obtained from LEAs to an organization for research studies unless the SEA had separate legal authority to act on the LEA's behalf. The amendment would expressly allow SEAs to enter into agreements with individuals or entities designated as the SEA's "authorized representative" without limitation regarding access to, disclosure of, or re-disclosure of PII by such "authorized representative" to such PII that was entrusted to LEAs.

Significantly, while the educational agency or institution, as the holder of the obligation to protect PII from non-consensual disclosure, is subject to loss of all Federal funding for violating FERPA's protections of PII from students' education records, the sanction for unlawful re-disclosure by an "authorized representative" designated by the State or local education agency would result in such individual or entity being precluded from entering into an agreement with the State or LEA for a period of 5 years.

CLE's Position: CLE believes that this proposed change that would authorize SEAs to enter into agreements on behalf of school districts with organizations conducting studies may argue for heightened, not weakened, security and protection of students' ID numbers (as discussed above) in light of the NPRM's proposed shift to broaden disclosure of PII from students' education records. Moreover, consistent with rules of statutory interpretation, this proposed revision and amendment of §99.31(a)(6) is another significant change that would have the effect of broadly authorizing the SEA without limitations as specified in the statute and ought to be made by legislation amending the statute.

- Authority to Evaluate

The NPRM proposes to make it easier for State or local educational authorities to conduct an audit, evaluation, or compliance enforcement activity by removing current regulatory language requiring a basis of separate Federal, State, or local "authority" to undertake these tasks or activities, given that such authority to engage in such activities does not derive from FERPA. The removal of the specific reference to "authority" would remove a barrier to agencies that do not administer educational agencies or

institutions from accessing PII to conduct evaluations of the effectiveness of Federal and State supported education programs primarily for the purpose of education. These are the agencies that presumably would be encompassed under the NPRM's new definitions of "authorized representative" and "education program" discussed above.

CLE's Position: As described above specifically with respect to the proposed change in the definition of "authorized representative," this proposed change would represent an additional related change in the underlying protections set forth in FERPA, and any such revision ought to be made through legislation not rulemaking.

- Enforcement Procedures

Changes proposed through the NPRM will make clear that FERPA's enforcement procedures apply to all educational agencies or institutions, including any public or private agency to which FERPA applies, as well as any SEAs, postsecondary agency, or LEA or any recipient to which funds have been made available under any program administered by the Secretary (e.g., a nonprofit organization, student loan guaranty agency, or a student loan lender), including funds provided by grant, cooperative agreement, contract, subgrant, or subcontract. FERPA's enforcement provisions would therefore apply to any agency or other recipient of ED funds that has inappropriately disclosed or re-disclosed PII, regardless of where the student attends school or if the agency did not generate the original student records.

CLE's Position: CLE supports this proposed change. CLE believes that the need for this proposed revision to current regulations, 34 C.F.R. §§ 99.60-99.67, underscores the importance of SEA and LEAs, IHEs, and all educational agencies or institutions, including any public or private agency to which FERPA applies, being vigilantly held accountable for complying with those provisions of FERPA governing non-consensual access, disclosure, and re-disclosure of PII from students' education records. The very need for expanding ED's limited enforcement authority, as currently construed based on current regulations, should be a warning to ED as to the problems that will lie ahead if the proposed new definitions of "authorized representative" and "education program" are adopted. They would encourage sharing of data among State agencies, organizations and entities over which ED has no jurisdiction and which are not subject to the mandates or protections of FERPA.