



The Council of Parent Attorneys and Advocates, Inc.
A national voice for special education rights and advocacy

May 7, 2008

Re: FERPA Notice of proposed rulemaking, ED-2008-OPEPD-0002

LeRoy S. Rooker
Office of Planning, Evaluation, and Policy Development
U.S. Department of Education
400 Maryland Avenue, S.W., Room 6W243
Washington, DC 20202-5920

Dear Mr. Rooker:

We sincerely appreciate the opportunity to submit comments on the Department of Education's proposed regulations under section 444 of the General Education Provisions Act, also known as the Family Educational Rights and Privacy Act of 1974 (FERPA).

The Council of Parent Attorneys and Advocates (COPAA) is a national nonprofit organization of parents, attorneys, and advocates who work to protect the civil rights of children with disabilities and ensure that they receive appropriate educational services. COPAA members see the successes and failures of the educational system through thousands of eyes, every day of every week of every year.

The final regulations must be guided by FERPA's two explicit purposes: to safeguard student privacy and to ensure that parents can access their children's records. Students and their parents entrust schools with their personal information with the expectation that this information will be used to serve the needs of the students effectively and efficiently. To protect the privacy of students and their families, school staffs are legally and ethically responsible for safeguarding the information collected about and from students. At the same time, it is understood that they also have a duty to protect others from harm. Likewise, it is important that parents have access to their children's records, as provided by law. Sunshine promotes greater accountability, and when school districts are entrusted with the care and education of children, parental access is important.

Thank you for considering COPAA's comments. Please feel free to contact us if COPAA may be of additional assistance or provide additional information.

Sincerely,

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**Council of Parent Attorneys and Advocates, Inc. (COPAA)
Comments on Notice of Proposed Rule Making
Regarding FERPA**

ED-2008-OPEPD-0002

www.copaa.org

Throughout these comments, additions are indicated by double-underlining, and deletions are indicated by strike-outs.

SUBPART A - General

Proposed § 99.3 Disclosure

Recommendation: Strike the proposed change to the regulation in its entirety. Alternatively, create a new §99.31(a)(17) and (18) as follows:

An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions:

* * *

(17) an educational agency or institution may send a transcript, letter of recommendation, or other record that appears to have been falsified back to the institution or school official identified as the creator or sender of the record for confirmation of its status as an authentic record;

(18) A State Educational Agency (SEA) that maintains a consolidated student records system may allow a Local Educational Agency (LEA) to obtain access to personally identifiable information from education records provided to the SEA by that LEA.

Rationale: By exempting a large class of documents from many of FERPA's requirements, the proposed regulation is overbroad and would violate FERPA's privacy provisions.

The proposed regulation would exempt from the definition of "disclosure" the release of records or information from such records to the party identified as the provider or creator of the record. The NPRM states that the proposed change is needed to allow receiving schools to verify that documents such as transcripts are not fraudulent and to allow schools access to their consolidated records maintained by the SEA. 73 Fed. Register 15576. These needs can be addressed by the language we propose above.

The proposed regulation is much broader than needed for these purposes. The proposed regulation could potentially result in the release of sensitive student records to any person who allegedly authored or provided them. These could include mental health records, IEP performance records, IDEA eligibility materials, accommodation

plans, email between teachers regarding a student, and other such documents. FERPA does not include an exemption allowing records to be given to the person or entity that created or provided them, and release of records in this manner would therefore violate the Act. 20 U.S.C. 1232g(b)(1). It would improperly invade students' privacy.

Second, the regulation does not define what is meant by the "identified" creator or provider. The aforementioned problems would be even worse if anyone could claim to be the creator or author and access the record.

For these two reasons, the regulation should be narrowly written to address only the fraud and consolidated records issues stated in the NPRM. But there is a third problem. In addressing the stated problems by redefining "disclosure," the proposed regulation means that such releases of sensitive information would not be subject to FERPA's requirement to keep a log of disclosures that a parent or student may review, 34 C.F.R. § 99.32, and FERPA's limitations upon redisclosure, 34 C.F.R. § 99.33. This is inappropriate and could result in abuses. Therefore, if any proposed regulation is necessary, it should be made part of § 99.31, as stated above. Moving it would permit disclosure of without the parent's or student's consent, but would subject the disclosure to FERPA's logging requirements and redisclosure limits, just like other permitted non-consensual disclosures in 34 C.F.R. §99.31.

Finally, if the entire regulation remains in its present form, a former teacher can request records that he/she wrote; the release would not be noted in the disclosure log; and the former teacher can include the records in a book or internet blog. Clearly this is not the intent of the regulation or the FERPA.

Proposed § 99.3 Personally identifiable information

Recommendation: Revise the definition of personally identifiable information to better protect parents' and students' rights of access to records and their privacy. First, retain the current (e) "a list of personal characteristics that would make the student's identity easily traceable" and current (f) "other information that would make the student's identity easily traceable." Second, if the new (f) is retained, amend as follows:

Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person ~~in the school or its community, who does not have personal knowledge of the relevant circumstances,~~ to identify the student with reasonable certainty.

Rationale: The elimination of the current (e) and (f) and substitution of the new (e) and (f) is a change to long-standing FPCO policy. These proposed changes would expose children and families to an unwarranted invasion of privacy and go beyond what Congress authorized and intended in the FERPA. At the same time, they could be misused to prevent parents and children from accessing their educational records by

personnel who use nicknames, initials, and other similar personal characteristics to refer to children.

First, by removing the “easily traceable” language, the proposed regulations imply that records would not be considered to contain personally identifiable information if the child were identified by initials, nicknames, staff-made nicknames, or other personal characteristics that could be used by the recipient or someone else to easily trace the child’s identity. As a result, parents would not be able to access the records under FERPA, and schools could freely disclose them, even though it would invade a child’s privacy. School personnel should not be able to circumvent FERPA’s requirements by replacing children’s names in email and other documents with alternate identifiers and descriptions that school personnel understand refer to the child.

Second, the new standard in proposed (f)--by focusing only on a reasonable person in the child’s school and community—fails to account for the reality in the internet age that someone outside the community (such as a potential predator) could also assemble information and trace it to the child.

Third, the reference to a person without knowledge of the circumstances in (f) should be struck. Whether or not someone in the community knows of the circumstances should not be the factor that determines whether a document contains personally identifiable information. For example, a record could refer to a red-haired girl with autism. A person unaware of the circumstances may not regard this as personally identifiable information. But if others familiar with the circumstances know that there are only 3 girls in the school with red hair and autism, they would likely be able to identify the student who is the subject of the record. This is particularly important to safeguard parents’ access and privacy rights.

Subpart B—Rights of Inspection and Review of Education Records

Current 34 C.F.R. § 99.10

Recommendation: The current regulation should be changed to allow parents to receive copies of records.

Rationale: The current regulation only allows parents to inspect and review education records. Access rights should be expanded to allow parents to receive a copy of student records upon request so they may fully participate in their child’s education. The original language requiring only inspection and review was written at a time when photocopying was not as widespread or inexpensive as it is today. With photocopying an inexpensive widespread technology, and electronic record copying quite easy, the regulation should affirmatively provide that parents can get copies.

Proposed § 99.31 Conditions under which Prior Consent is not required to disclose information

Recommendation: The use of the term “reasonable methods” is too vague and equivocal. It should be replaced with the language “take all appropriate steps.”

(ii) An educational agency or institution must ~~use reasonable methods~~ take all appropriate steps to ensure that school officials obtain access to only those education records in which they have legitimate educational interests.

Rationale: The dangers posed when a child’s confidential information is disclosed are significant. The new regulations would designate all volunteers as school officials, permitting them access if they had legitimate educational interests. Great care must be taken with determining what defines legitimate educational interest so that private information contained in student records (disciplinary records, medical treatment, diagnoses, accommodations, test scores, etc.) is not inappropriately accessed by an individual simply by virtue of meeting the definition of a volunteer. At a time when corporations, hospitals, and others are strongly safeguarding private information, schools should not be moving in the other direction.

Recommendation: Change the language in (b) (1) as indicated:

(b)(1) De-identified records and information. An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by Sec. 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student’s identity is not personally identifiable or easily traceable because of characteristics or unique patterns of information about that student, whether through single or multiple releases, and taking into account other reasonably available information.

Rationale: While the proposed changes clarify matters, the regulation will permit too much private information to be released if the term “personally identifiable” is narrowly defined as in proposed regulation § 99.3. As explained above, this could permit the disclosure of information used to identify a child, such as initials, nicknames, code names, disability status, hair color, and other physical characteristics. If the proposed § 99.3 is adopted, then this regulation should be amended to make clear that the institution must have determined, before releasing the record, that all information has been removed which would allow the student’s identity to be easily traced from characteristics.

Proposed § 99.36 Disclosure of information in health and safety emergencies

Recommendation: Change language as indicated below:

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the safety or health of a student or other individuals. If the educational agency or institution determines that there is articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. If, based on the information available at the time of the determination, the school can show that it made an individualized assessment and, based on that assessment, believed there was an emergency that warranted disclosure, the record may be disclosed. ~~If there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination. Furthermore, the agency must clearly document in its records both the specific threat and its assessment of emergency before the disclosure if possible, and if not, within 5 business days.~~

Rationale: We suggest removing the sentence stricken above because as written, the proposal errs too much in the direction of weakening FERPA enforcement, eroding privacy, and placing at risk the confidentiality of students' mental health and other personal information. To protect students' rights, it is important that school districts make an individualized assessment and determine that there is an emergency warranting disclosure, and promptly document that assessment in the child's file. Otherwise, there is a risk that school personnel may rely on this exemption to disclose information when there is not a true emergency. It is unwise to eliminate the Department's review of school districts' actions, as the proposed regulation appears to do. Review of school district actions is an important watchdog function of FPCO. When there is a serious emergency, schools should, of course, be able to release documents if appropriate. Appropriate FPCO review will not prevent this. Prompt documentation ensures that the asserted assessment is not rationalized after the fact when concerns are raised about the disclosure. Documentation will in no way impede schools from taking action in emergencies, but will guard against any potential for abuse.

Proposed § 99.64 Complaint Procedure

Recommendation: The changes proposed in (a) should be retained.

Rationale: Parents are not lawyers and should not be expected to make their complaints with the same level of detail that lawyers would. FERPA complaints should not be subject to highly technical rules.

Recommendation: The changes proposed in (b) should be retained.

Rationale: The proposed change clarifies that FPCO may investigate complaints that do not come from a parent or student, but perhaps a school employee or another knowledgeable member of the community. As the NPRM comments recognize, it is important that the regulations not discourage reporting of potential FERPA violations. To ensure that persons with evidence of a violation come forward to FPCO, the proposed regulation properly states that complaints may be filed by any person with knowledge of a violation.

Proposed § 99.67 Enforcement

Recommendation: Clarify the intent in the final rule that all methods of enforcing FERPA, including § 99.67(a)(3), permitting funding termination, will be retained.

Rationale: Due to what appears to be a typographic error, amendments to the regulation are described in such a way as to suggest the elimination of 34 C.F.R. § 99.67(a)(3) permitting the Department to terminate funding to programs that violate the FERPA. The problem arises because in the Federal Register publication, the “or” is eliminated after (2), and when the proposed regulation was supposed to be reprinted in full, (a)(1), (a)(2), and (a)(3) were not included.

COPAA exchanged correspondence with the Family Policy Compliance Office on April 15, 2008. FPCO indicated in its response that “[t]he proposed revisions to section § 99.67(a) clarify that the Office must first determine that an agency or institution has a ‘policy or practice in violation of [FERPA]’ before it may take any legally available enforcement action. The ability to terminate funding would not be eliminated in these proposed regulations. The descriptions in paragraph 16.B and C on page 15602 refer to changing semicolons to periods. Each of the three enforcement mechanisms listed in section § 99.67(a) has been retained. In the final rule we will clarify that only the punctuation is being changed.”