AMERICAN COUNCIL ON EDUCATION

GOVERNMENT RELATIONS

May 8, 2008

LeRoy S. Rooker
Director, Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Room 6W243
Washington, DC 20202-5920

Re: Docket ID# ED-2008-OPEPD-0002

Dear Mr. Rooker:

On behalf of the higher education associations listed below, I am pleased to submit the following comments in response to the notice of proposed rulemaking ("NPRM") published on March 24, 2008 in the *Federal Register*. The NPRM sought public comment on certain amendments proposed by the U.S. Department of Education ("the Department") to the Department's regulations implementing the Family Educational Rights and Privacy Act ("FERPA").

The organizations below and their member institutions are committed to student privacy and to safeguarding student education records through the proper application of FERPA. Since its enactment 34 years ago, the importance of FERPA as a tool to protect student privacy has been repeatedly affirmed. Given the significant changes in technology in recent years, there is a need for continued vigilance to ensure that FERPA's protections will continue to protect student privacy. None of our comments should be seen as a deviation from our commitment to the core principles of FERPA and to our commitment to the good faith application of FERPA in the light of changing and challenging circumstances. We appreciate the opportunity to provide the Department with a greater understanding of the intricacies of applying of FERPA on the campuses we represent.

We congratulate the Department on its effort to clarify aspects of the FERPA regulations and appreciate the Department's responsiveness to many of the concerns that colleges and universities expressed. In particular, we commend the Department for its proposal to provide more specific guidance regarding the delicate balance between student privacy and campus safety. Below, we have provided detailed recommendations and comments designed to provide additional clarification regarding the proposed regulations and to protect against any unintended consequences that might arise in administering the statute.

I. Definitions (34 C.F.R. § 99.3)

A. Directory Information

The Department's proposed rules usefully clarify that Social Security numbers do not constitute "directory information" under FERPA. Institutions of higher education have already moved aggressively to eliminate use of the Social Security number as the primary identifier for

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their students, faculty and staff, and they understand the need to protect it from disclosure. We are concerned, however, that the proposed regulations' treatment of "student ID number" as the functional equivalent of a Social Security number in all cases and as functionally distinct from "user ID or other electronic identifier" in all cases does not reflect common actual practice and will lead to unnecessary confusion and unduly restrictive results.

According to the discussion, "student ID numbers can be used to impersonate the owner of the number and obtain information or services by fraud." We understand that this is widespread practice with respect to how the private sector uses the SSN for obtaining a variety of products and services. We do not believe, however, that unique student ID numbers created for internal educational uses typically are used in the same way or are subject to the same abuses. More often than not, such numbers are treated as identifiers only; they normally cannot be used to obtain access to education records by themselves, without a further act of authentication, nor can they normally be used in combination with other commonly available information to establish accounts or impersonate people. Moreover, on many campuses, the general "student ID number" and the "user ID" used to log in to electronic systems are in fact one and the same. As a result, many campuses may believe that they cannot designate these various kinds of identifiers as directory information even when doing so would yield clear benefits and could cause no harm.

We therefore respectfully suggest that proposed revisions to (b) and (c) of the "Directory Information" section under §99.3 be redrafted as follows to focus on the effect of the various types of identifiers, rather than on the labels that are attached to them inconsistently on different campuses:

> "(b) Directory information does not include a student's Social Security number; or other student identification (ID) number, user ID, or unique personal identifier that can be used to gain access to education records without further authentication through the use of a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.
>
> "(c) Directory information includes a student's student ID number, user ID, or other unique personal identifier that cannot be used to gain access to education records without further authentication through the use of a PIN, password, or other factor known or possessed only by the authorized user."

Such a change would not only result in greater clarity, but also better encourage the beneficial change of business processes to treat ID numbers as identifiers only and to require an additional act of authentication before obtaining access to education records, whether in an electronic system or through face-to-face interactions.

In addition, while the Department's analysis of the potential costs and benefits of the proposed regulations suggests that, under the proposed rules, institutions would be permitted to continue to post grades using a "code known only to the teacher and the student," the proposed rules themselves do not address the use of such codes for the posting of grades. We suggest that the regulations be amended to make clear that FERPA still permits posting of grades associated with codes known only to the teacher and student.

B. Education Records

1. *Alumni records*

We welcome the Department's proposal to clarify the circumstances under which alumni records are excluded from the definition of "education records" covered by FERPA, and offer the following suggestion for the Department's consideration. The proposed regulations would exclude from the definition of "education records" those "[r]ecords . . . that are not directly related to the individual's *attendance* as a student." (Emphasis added.) We note that the phrase "directly related" also appears elsewhere in the Department's current FERPA regulations, as part of the definition of "education records." To satisfy the definition of "education records," records must be "[d]irectly related to a *student*." (Emphasis added.) In that context, the FPCO has traditionally equated the term "directly related" with "personally identifiable" -- that is, a record is directly related to a student if it is personally identifiable to a student -- but that meaning does not appear to translate clearly to the context of "attendance" or to reflect the intent of the proposed language regarding alumni records.

We are concerned that use of the same term in two different parts of the regulations with two different meanings would cause confusion. We therefore recommend that the Department replace the phrase "and that are not directly related to the individual's attendance as a student" with the phrase "and that do not directly pertain to the individual as a student in attendance at the institution."

2. *Peer-graded papers*

In light of the U.S. Supreme Court's decision in *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002), the Department proposes to exclude from the definition of "education records" "[g]rades on peer-graded papers before they are collected and recorded by a teacher." That language appears to imply that a grade does not become an education record until it is formally recorded by a teacher, even if it is marked on a paper before the paper is handed in to the teacher, which we assume is not the intention. Under existing interpretations, the paper, including the grade marked on it, would become an "education record" once the teacher has collected it; alternatively, the grade would become an "education record" when the teacher recorded it, if it was called out before the papers were handed in. To enhance the clarity of the proposed provision, we recommend modifying the proposed regulatory language to read "grades on peer-graded papers before either such papers are collected and/or the grades are recorded by a teacher."

C. Personally Identifiable Information

The Department's proposed definition of "personally identifiable information" in subsection (f) would include "[o]ther 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." We are unclear regarding the reason for the Department's inclusion of the phrase "in the school or its community" in this definition. If, as it appears, the intent of this subsection is to deal only with situations in which a student's identity is deducible from information within the four corners of the document, without reference to the reader's knowledge

– by contrast to subsection (g), which does take the reader's knowledge into account – the location of the reader should not matter, and the inclusion of that language may prove confusing. Therefore, we ask the Department to revise the proposed language to further clarify the standard used in this definition.

II. Authorized Disclosure of Education Records Without Prior Written Consent (34 CFR § 99.31)

A. Outsourcing (proposed § 99.31(a)(1)(i)(B))

The Department's proposal to expand the "school official" exception to cover contractors, consultants, volunteers and other outside parties to which an institution has outsourced functions or services is a helpful clarification. However, certain aspects of the proposed language raise concern.

1. Nature of Outsourced Functions

The proposed regulations would require that the outside party perform "an institutional service or function *for which the agency or institution would otherwise use employees*." (Emphasis added). We are concerned that the language requiring the outside party to perform functions or services for which the institution would otherwise use employees is too restrictive. For example, would the proposed regulations prohibit non-consensual disclosure to independent auditors, who by definition cannot be employees of the institution, or to the institution's insurance providers, who cannot be employees of the institution as a practical matter? Further, would smaller schools be prohibited from having a needed function performed by a contractor if they do not have employees in a relevant area?

We respectfully suggest that the broader "acting for" concept, reflected in the legislative history cited in the preamble, is more workable. As the Department notes, FERPA defines "education records" to include records maintained by a "party acting for the agency or institution" and the Joint Statement in Explanation of Buckley/Pell Amendment "refers specifically to materials that are maintained by a school 'or by one of its agents' when describing the meaning of the new term *education records* . . . ." In our view, such language better captures the full range of "professional, business, and other services" that, as FPCO has recognized, institutions often obtain from outside persons and entities.

Accordingly, we recommend that the Department modify the proposed regulations to provide that a "contractor, consultant, volunteer or other party that performs an institutional service or function on behalf of the agency or institution may be considered a school official." Under the regulations, the contractor, consultant, volunteer or other party would, as a school official, still need to have a legitimate educational interest in order to access personally identifiable information from education records without consent and would, as specified in the proposed regulations, still be "subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records."

2. Direct Control Standard

We would also respectfully recommend that the Department modify the proposed requirement that the outside party be "under the direct control" of the institution. As an initial matter, we note that the proposed rule leaves unclear the steps that institutions would be required to take to satisfy the "direct control" standard. In addition, we are concerned that the proposed standard may require more than a contractual arrangement that provides for the protection of education records in compliance with FERPA. As stated above, it is our view that the exception for disclosures to outside parties providing professional, business or other services to an institution should apply to all such parties that perform an institutional service or function on behalf of the agency or institution; yet some of these parties will not have a relationship with the institution that is amenable to "direct control." For example, an independent auditor cannot by definition be subject to the "direct control" of the institution, if that term requires direct oversight and management. From a practical perspective, we believe that institutions will also find it difficult to satisfy a "direct control" standard with respect to large vendors that provide services to large numbers of institutions.

In addition, we note that the proposed "direct control" standard would appear to prohibit an institution from outsourcing functions without assuming vicarious liability, under some state's laws, for all actions of the outside party. Some state institutions may be prohibited from assuming vicarious liability under state law and therefore would be prevented from outsourcing functions that involve education records to third parties.

As an alternative to the Department's proposed "direct control standard," we suggest that the Department adopt language similar to the "safeguarding standard" adopted in regulations implementing the Financial Services Modernization Act of 1999 (Gramm Leach Bliley or "GLB"), 16 C.F.R. § 314.4(d). Adapted to the FERPA context, that standard would require that for an outside party acting on behalf of an educational institution to be deemed a "school official," the institution must: (1) take reasonable steps to select and retain contractors, consultants, volunteers or other outside parties that are capable of maintaining appropriate safeguards with respect to education records; and (2) mandate by contract that the outside parties implement and maintain such safeguards.

B. School Official Access to Education Records

We applaud the Department's recognition, in the preamble, that institutions require flexibility in selecting appropriate controls to protect education records from access by unauthorized individuals. We are concerned, however, that the language of the proposed regulation could be read to disfavor institutions that adopt administrative rather than physical or technological controls. As the Department acknowledges in its preamble, many institutions rely upon computerized or electronic systems that may not have role-based security features contained in commercial software. Even PeopleSoft, one of the major commercial vendors in this field, does not currently offer a "view access" function that allows a school to track individuals who have accessed a particular record when no change to the record has been made.

The proposed regulations would require an institution that "does not use physical or technological access controls" to "ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational

interest requirement in paragraph 99.31(a)(1)(i)(A)." This language seems to omit the "reasonableness" concept that is reflected in the proposed requirement that an institution use "reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests."

In addition, the Department's preamble states that if an institution has not adopted physical or technological controls, and a complaint is filed, the institution will be required to demonstrate that the school official who accessed the information "possessed a legitimate educational interest in obtaining the personally identifiable information from education records." This language, though not included in the proposed rules themselves, suggests that the Department might impose a higher standard on institutions that adopt administrative rather than physical or technological controls. We are concerned that any presumption favoring physical or technological over administrative controls would disadvantage smaller schools and other institutions that lack resources to create or purchase a system that fully monitors record access.

In light of these concerns, we recommend that the Department modify the proposed language to require that institutions "use reasonable physical, technological or administrative methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests."

C. Disclosure to Other Institutions (34 C.F.R. § 99.31(a)(2))

The Department proposes to amend its regulations to permit non-consensual disclosure of education records to another institution where the student "has already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer." We believe that the concept reflected in the proposed regulation is useful and appropriate. However, we respectfully suggest that additional clarification would be helpful. In our view, the scope of the phrase "for purposes related to the student's enrollment or transfer" is ambiguous. Does the Department intend to restrict allowable disclosures only to information that is relevant to the second institution's decision to *admit* the student, or does the Department intend more broadly to permit disclosures related to the student's ongoing *attendance* at the second institution? In the preamble to the proposed regulations, the Department recognizes that "in the aftermath of the shooting at Virginia Tech, some questions have arisen about whether FERPA prohibits the disclosure of certain types of information from students' education records to new schools or postsecondary institutions to which they have applied." The Department states that "FERPA permits school officials to disclose any and all education records, including health and disciplinary records, to another institution where the student seeks or intends to enroll." To improve the clarity of the proposed regulations, we recommend that the Department provide greater guidance regarding the types of records that may be disclosed to another institution in which the student has already enrolled.

On a related technical point, it appears that the phrase ", or where the student is already enrolled" should be added to § 99.34(a)(1)(ii) for purposes of consistency with the proposed revisions to § 99.31(a)(2).

D. Organizations Conducting Studies for or on Behalf of an Educational Agency or Institution (34 C.F.R. § 99.31(a)(6)(ii))

The Department's current regulations track FERPA's language that permits disclosure, without consent, to "organizations conducting studies for, or on behalf of, educational agencies or institutions to: (A) Develop, validate, or administer predictive tests; (B) Administer student aid programs; or (C) Improve instruction." The Department proposes to amend its regulations to specify that an institution may disclose personally identifiable information under this exception "only if it enters into a written agreement with the organization specifying the purposes of the study."

In the preamble to the regulations, the Department states that an institution "need not initiate research requests or agree with a study's results and conclusions under this exception." Instead, "the statutory language 'for, or on behalf of' indicates that the disclosing agency or institution agrees with the purposes of the study and retains control over the information from education records that is disclosed." Although the proposed regulations provide that an institution "is not required to agree with or endorse the conclusions or results of the study," they omit the concept that the institution "need not initiate research requests." To avoid uncertainty as to the scope of the exception, we respectfully suggest that the proposed regulations be modified to specify that institutions need not initiate research requests to invoke this FERPA exception.

E. De-Identified Records and Information (§ 99.31(b))

The circumstances in which records are deemed de-identified and thus not subject to FERPA's general limitations on disclosure are addressed in two sections: the definition of personally identifiable information, discussed above, and in proposed § 99.31(b). Proposed §99.31(b) states that "[a]n educational agency or institution, or a party that has received education records or information from education records . . . may release the records or information without the consent required by § 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 identifiable because of unique patterns of identification about that student, whether through single or multiple releases, and taking into account other reasonably available information*." (Emphasis added).

We believe that the italicized language may be confusing in light of the proposed definition of personally identifiable information. The immediately preceding language in the sentence requires "removal of all personally identifiable information," and such removal would, according to subsections (f) and (g) of the proposed definition of personally identifiable information, entail removal of

> "(f) [o]ther 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"

and

> "(g) [i]nformation requested by a person who the educational agency or institution reasonably believes has direct, personal knowledge of the identity of the student to whom the education record directly relates."

Because the proposed definition of personally identifiable information itself thus incorporates a standard for de-identification, the italicized language quoted above, which appears to adopt a somewhat different standard, creates ambiguity in the proposed rule.

III. USA Patriot Act (34 C.F.R. § 99.31(a)(9)(ii)(C))

We believe that the proposed amendment intended to implement provisions of the USA Patriot Act is appropriate. We note that it may be helpful to incorporate in the regulation itself (applicable to all parts of subsection 99.31(a)(9)) the Department's statement in the preamble that an institution is responsible only for determining the facial validity of a court order or subpoena, not for determining the relevance of the information sought to the matter at hand or the merits of the underlying claim. In our experience, this issue has been a source of frequent confusion for institutions.

IV. Redisclosure of Education Records and Recordation Requirements (34 C.F.R. §§ 99.32 and 99.33)

The Department's discussion in the preamble regarding redisclosure and recordation of redisclosures highlights that those provisions of the regulations are among the most challenging for institutions to navigate. We respectfully suggest that the Department consider supplementing §§ 99.32 and 99.33 with a chart setting forth, for each of the exceptions listed in § 99.31, whether (a) the party to whom disclosure is made is restricted from redisclosing the information, (b) the institution is required to inform that party of that restriction, and (c) the institution is required to record the redisclosure.

V. Health and Safety Emergencies (34 C.F.R. § 99.36)

As noted at the outset of this letter, we applaud the Department for providing more specific guidance regarding the delicate balance between student privacy and campus safety. We believe that the Department's proposed language on health and safety emergencies could be strengthened even further with the following additional clarification. The proposed regulations provide that if an institution "determines that there is [an] 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." Although the proposed regulations indicate that the Department will defer to an institution's rational determination that a health or safety emergency exists, based on the information available at the time the determination was made, the proposed rules appear to retain the objective standard for determining who is a "person whose knowledge of the information is necessary to protect the health and safety or the student or other individuals."

In light of the Department's aim to provide administrators with "greater flexibility and deference . . . so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals," we respectfully recommend that the Department adopt a

subjective standard regarding the persons to whom personally identifiable information may be disclosed, without consent, in a health or safety emergency, which we believe would be in keeping with both existing practice and the intent of the proposal. To implement this comment, the proposed regulations might be amended to read as follows (proposed changes appear in capital letters):

> If the educational agency or institution determines that there is AN 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 THE EDUCATIONAL AGENCY OR INSTITUTION DETERMINES 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 EDUCATIONAL AGENCY'S OR INSTITUTION'S determinationS, there is a rational basis for the determinationS, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determinationS.

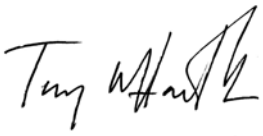
VI. Enforcement (34 C.F.R. § 99.64(b))

As noted in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), "Congress expressly authorized the Secretary of Education to 'deal with violations'" of FERPA and "required the Secretary to 'establish or designate [a] review board' for investigating, and adjudicating such violations." *Id.* at 289. Pursuant to this authority, the Department issued regulations that permit students and parents who suspect a violation of FERPA to file timely written complaints that the Family Policy Compliance Office ("FPCO") then investigates. Although the Department states that the proposed regulations "do not reflect an intention or plan …to initiate investigations beyond the current practice" of the FPCO, the proposed revisions to § 99.64(b) raise serious concerns about the broad investigatory discretion that the Department would afford the FPCO. Specifically, the proposed regulations vastly expand the FPCO's current authority, which is limited to investigation of timely complaints, and authorize FPCO to investigate any potential violation of FERPA, even when no complaint has been filed or a complaint has been withdrawn. We do not believe that *Gonzaga* requires or contemplates such a result. In addition, we are concerned that, in the absence of a timely complaint, the affected institution would not have the opportunity to review and respond to "specific allegations of fact giving reasonable cause to believe that a violation . . . has occurred." Although we respectfully acknowledge the Department's enforcement authority, we believe that the existing regulations appropriately provide for clear notice of specific allegations contained in the form of a timely written complaint.

We are strongly supportive of the effort by the Department to bring additional clarity to FERPA through revised regulations. However, we ask that you modify the proposed regulations to address the concerns we have raised in our submission. Should you have further questions, we

would be pleased to provide you with additional information or clarification on any of the issues discussed. Thank you for your time and consideration of our views.

Sincerely,



Terry W. Hartle
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On behalf of:
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