

## **December 2011 FERPA Regulations: Information Sharing Around Child Welfare and Education**

### Background

Several months ago, the U.S. Department of Education (DOE) released a Notice of Proposed Rulemaking (NPRM) proposing certain amendments to 34 C.F.R. Part 99, the regulations that implement the Family Education Rights and Privacy Act (FERPA). Numerous advocacy groups and state and local governmental agencies, concerned that FERPA and its implementing regulations were functioning as real or perceived barriers to the flow of critical information between state and local education and child welfare agencies, collectively submitted comments seeking to improve the flow of information to child welfare agencies while protecting the confidentiality of individual students.<sup>1</sup> Specifically, these groups:

- Supported proposed changes to clarify and expand the exceptions to the parental consent requirement relating to studies and to audits and evaluations. The commenters also suggested that the “studies” exception be expanded to include assessments of the educational needs of children in care, and that the “audit and evaluation” exception for “authorized representatives” permit the monitoring of school stability and education outcomes for children in care.
- Recommended a new exception to allow child welfare agencies to obtain student records without parental consent.
- Recommended the elimination of the requirement that parents receive notice from educational agencies of the release of personally identifiable information (PII) authorized pursuant to a court order.
- Recommended that the definition of “parent” under FERPA include a person serving as the “parent” under the Individuals with Disabilities Education Act (*e.g.*, a surrogate parent, a foster parent or person with whom the child lives who is acting as the parent).

### The New Regulations: Highlights

DOE has now issued final amendments to 34 C.F.R. Part 99. The new regulations go into effect on January 3, 2012.

Unfortunately, DOE did not adopt any of the commenters’ suggestions specific to the child welfare system and children in care, but rather suggested that legislative changes are needed first. (“[A]ny expansion of the current statutory exceptions to the consent requirement must be authorized by Congress .... Today’s change is not an expansion of the statutory exceptions to the consent requirement; rather it is a modification of the Department’s interpretation of a term used in one of FERPA’s existing statutory exceptions to consent so as to be consistent with recent developments in the law.”). 76 F.R.at 75604, 75617 (December 2, 2011).

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<sup>1</sup> To access a copy of the submitted comments, please visit:

[http://www2.americanbar.org/BlueprintForChange/Documents/ferpa\\_comments.pdf](http://www2.americanbar.org/BlueprintForChange/Documents/ferpa_comments.pdf).

**The good news** is that to facilitate data sharing, particularly through statewide longitudinal data systems, the new regulations clarify and expand two “exceptions” to the general rule that PII from students’ records can be released only with parental consent. Each of these clarifications offer expanded opportunities for state or local child welfare and education agencies to share information.

### The New Regulations: Details

The new regulations clarify and expand two “exceptions” to the general rule that PII from students’ records can be released only with parental consent. The **“studies” exception** (34 C.F.R. §99.31(a)(6)) permits the education agencies and certain specific listed persons (e.g., the Comptroller General of the U.S.) to disclose PII without parental consent to organizations conducting studies for or on behalf of the school entities to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction. The **“audit or evaluation” exception** permits state and local education agencies and the other specifically listed persons to designate an “authorized representative” to release PII in connection with “an audit or evaluation of Federal or State supported education programs, or for the enforcement or compliance with Federal legal requirements that relate to those programs.” 34 C.F.R. §99.35(a)(1). The regulations now include a definition of “authorized representative” as “any entity or individual” so designated to perform these functions. 34 C.F.R. §99.3.

While DOE’s comments expressly recognize that child welfare agencies can be authorized representatives under the “audit or evaluation” exception, DOE specifically rejected the recommendation that child welfare agencies be authorized to obtain PII for the purpose of monitoring the educational outcomes of children in care.

Some commenters asked that we expand the definition of the term “authorized representative” to include child welfare agencies, to allow these agencies to monitor the educational outcomes of children under their care and responsibility. Paragraph (b)(3) of FERPA, however, does not allow the expansion of the purpose for which PII from education records may be used by authorized representatives. While we agree that authorized representatives of State educational authorities may generally include child welfare agencies, authorized representatives may only access PII from education records under paragraph (b)(3) of FERPA in order to conduct audits, evaluations, or enforcement or compliance activities. 76 F.R. at 75618.

The regulations also add a new and quite broad definition of “education program”:

[A]ny 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, and any program that is administered by an educational agency or institution. 34 C.F.R. §99.3.

Importantly, this definition makes clear that, for example, an early childhood program is an education program even though it is administered by a non-education agency as it is “principally engaged in the provision of education.”

While the requirements differ somewhat, both the “studies” and the “audit or evaluation” exceptions require written agreements with the entities to which the PII is disclosed that ensure that the information is being used for the mandated purposes and that students’ privacy rights are being protected. The agencies must also use reasonable methods to ensure that the authorized representative complies with FERPA. Absent consent from the parent or eligible student, PII cannot be published in a way that would allow individual students and their parents to be identified.

### Why This Is Important for Child Welfare

The new regulations present an exciting opportunity to expand data collection around children in foster care. It is not yet entirely clear how broadly these exceptions will be read, but it should be possible, for example, for a state or local education agency to, by written agreement, designate a state or local child welfare agency as an “authorized representative,” and to release PII, for an audit of a federally funded after school program to determine whether children in care are benefitting. Or a state education agency, via a written agreement, could share PII with the state child welfare agency for a study of a program designed to improve instruction for children who have experienced family violence or to improve instruction for children in care in general. Finally, since children in care are among the most “at-risk” and lowest performing students, they will especially benefit from any targeted reforms designed to improve student performance.

### Next Steps

The new rules offer expanded opportunities for state or local child welfare and education agencies to share information. However, given that these new regulations do not sufficiently eliminate the barriers to intersystem communication for children in care, we look forward to legislative changes to ensure that child welfare agencies can fulfill their duty to ensure that the educational needs of the children in their care are met.

To review the full text of the new regulations, together with DOE’s explanations of the changes, see: <http://www.gpo.gov/fdsys/pkg/FR-2011-12-02/pdf/2011-30683.pdf>.