FERPA – FINAL REGULATION AMENDMENTS

The U.S. Department of Education (USED) published final regulation amendments under the Family Educational Rights and Privacy Act (FERPA) on December 9, 2008. (They take effect January 8, 2009.) These regulations are based on proposed regulations published March 24, 2008, and USED's analysis of public comments submitted in response to the proposed regulations.

Many states and other organizations that support the Data Quality Campaign have viewed these regulations as an opportunity to address the chilling effect that FERPA has had on the willingness of states to develop robust state longitudinal data systems (SLDSs) as a necessary foundation for standards-based reform. The intent of these organizations has not been to subvert privacy protections, but rather to ensure that they are balanced with the need to use education records for legitimate educational needs, consistent with the terms of FERPA and with safeguards that protect the information, both in educational agencies and in authorized recipients of disclosures. FERPA's chilling effect has been caused by narrow USED interpretations or a lack of USED guidance, in particular on – (1) the authority to share data between separate P-12 & postsecondary data systems; (2) the authority for SLDSs to redisclose education records at all; (3) the authority of SLDSs to disclose education records for research studies; and (4) the authority to share education records with workforce and social service agencies.

Based on a quick, preliminary analysis, the final regulations appear to make several positive changes that may be helpful on a number of these issues, but decline to take additional steps that would fully resolve them. Although the regulations address a wide range of issues, the following analysis focuses on issues that implicate SLDSs.

Issue 1: General Authority of SLDSs to Redisclose Education Records: Sharing Data Between P-12 and Postsecondary Data Systems

Problem. Although prior regulations authorized a recipient of an authorized disclosure of student records to make further disclosures to other recipients (if the purpose and recipient of the further disclosure came within an authorized disclosure in the law), those provisions did not apply to further disclosures by a state educational agency.[1] In effect, a SLDS could disclose student records only to its own employees or contractors. Disclosures between separate P-12 and postsecondary state data systems would not be permitted. USED's view was that the FERPA provisions that authorized schools and local educational agencies (LEAs) to

[1] References in this document to the authority to disclose or share education records relate to disclosures made without written parental consent or, for students who are 18 years old or above or enrolled in postsecondary education, without written consent of the student. References to "education records" relate to personally identifiable information in student records, not to de-identified data from those records that cannot easily be traced to the student.

provide student records to the state for evaluation, audit, and compliance purposes barred these records from being further disclosed to other recipients.

Do the regulations solve this problem? Generally, yes, although there is some language in the preamble that may continue to confuse the situation and chill sharing between P-12 and postsecondary systems. The regulations clearly permit state educational agencies to redisclose education records that they receive from schools or LEAs to other authorized recipients. The preamble to the final regulations includes a positive discussion that this authority includes sharing of data between P-12 and postsecondary data systems (while cautioning that the disclosure needs to be for an evaluation, audit, or compliance activity that the receiving system has authority to perform under state, local, or federal law and suggesting that states consult with their state attorneys general). However, there is confusing language in the preamble that suggests that the issue may turn on whether P-12 and postsecondary educational authorities have authority to evaluate or audit each other's programs. That is not the correct standard or question. For example, postsecondary data may be disclosed to a P-12 data system not to evaluate postsecondary programs, but rather to evaluate P-12 programs, which is perfectly consistent with FERPA.

Issue 2: Redisclosures and Recordations

Problem. Prior regulations could be read to mean that a recipient of an authorized disclosure of student records could only make a redisclosure of the records if the redisclosure was anticipated at the time of the initial disclosure to the recipient and recorded by the school or LEA. Even if issue #1 above were resolved, this interpretation, as a practical matter, could generally frustrate the ability of a SLDS to make further disclosures. It would mean, for example, that a state P-12 data system could only disclose student education records to a state postsecondary data system (or vice versa) if that disclosure were anticipated when the records were initially disclosed by the school or LEA and included in the disclosure recordation by the school or LEA.

Do the regulations solve the problem? Yes. The regulations permit states to record their redisclosures to third parties and permit them to maintain those redisclosures by group (rather than by individual student); for example, by district, school, or class. Also, the regulations appear to require that the recordation be transmitted to the school or LEA only at such time as a parent (or eligible student) requests access to the recordations (which should reduce administrative burdens). Further, a discussion in the preamble to the regulations indicates that USED will interpret current regulations not to require redisclosures to be anticipated and recorded at the time of the initial disclosure.

Issue 3: Research Studies

Problem. FERPA permits disclosures of education records to organizations conducting studies to improve instruction "for, or on behalf of," educational agencies or institutions. In the past, USED informally interpreted this authorized disclosure narrowly to refer only to studies initiated by a school or LEA, not to studies initiated by the research organization, and also took the position that a state educational agency, in any event, could not use this provision to disclose data to a research organization.

Do the regulations solve this problem? Not for the most part. The regulations may provide some potential relief on this issue, but a narrow interpretation of the statutory language, continuing ambiguity, and the restrictiveness of a suggested alternative approach described in the preamble likely will continue to have a chilling effect. Specifically, like the proposed regulations, the final regulations provide for an "educational agency or institution," to enter a written agreement with the research organization. The problem is that the regulations separately define "educational agency or institution" to refer to a school or LEA, not a state agency. The preamble to the regulations -- interpreting the statutory language that the study be "for or on behalf of" the educational agency or institution – indicates that a state may enter such an agreement if it has authority under state law to enter agreements for LEAs or postsecondary institutions. This interpretation appears to be much narrower than a literal reading of the statute to mean simply that the study must be for (i.e., for the benefit of) the school or LEA, and may present a barrier in the states. The preamble further encourages states, in lieu of the studies provision, to rely on the separate state evaluation provisions, which permit disclosure of education records to state education officials or their authorized representatives. However, USED has narrowly interpreted this provision to require direct contractual control of the outside organization by the state, which greatly narrows circumstances where the state may disclose education records to a research organization.

Issue 4: Disclosures to a Former School/LEA for Evaluation/Accountability

Problem. FERPA authorizes disclosure of student education records to a new school that the student seeks or intends to attend. It does not authorize disclosures of education records to a student's former school. Thus, for example, it has been unclear whether a postsecondary institution or data system may disclose personally identifiable information on student postsecondary performance (such as the need for remedial courses, academic progress, etc.) back to the student's former high school or school district for evaluation or accountability purposes.

Do the regulations solve this problem? No. The preamble (while not legally binding) expressly rules out such disclosures, although it includes some ambiguous language that may be read to

suggest that state law may be revised to confer evaluation authority on a student's former district or school.

Issue 5: Disclosures to Workforce and Social Service Agencies

Problem. FERPA does not generally authorize disclosures of education records to workforce and social service agencies for purposes served by those agencies; for example, to strengthen workforce or social services. This particularly impairs the ability of education and other agencies to collaborate in meeting the needs of individual at-risk students. Even if the purpose of the disclosure is solely educational (e.g., to evaluate education programs), USED's longstanding position has been that state educational agencies cannot disclose student education records to state labor departments (or presumably to other non-education agencies) because they do not have control of these other agencies and cannot regard them as their representatives. To comply with this interpretation, states that wanted to link education and employment data for the purpose of evaluating education programs have had to do so by providing personally identifiable employment or social services data to the state educational agency.

Do the regulations solve this problem? No. The regulations could not legally solve the broad problem that FERPA does not generally authorize disclosures of education records to work force and social services agencies for non-education purposes. Also, the regulations reaffirm USED's position that education records may not be disclosed to non-education state agencies, even for solely educational purposes, because the education agency does not control the other agency. (Indeed, the final regulations delete a proposed provision that would have authorized disclosures to state auditors who are not education officials, based on concerns as to the breadth of audit functions, indicating that these disclosures would be considered on a case-by-base basis.) Nor does the regulation make any inroads in broadly defining "education" to include job training and other activities for these purposes. The preamble does include a practical suggestion that may be useful to many states in resolving these constraints; namely, to include an appropriate consent form to disclosure of education records for parents (or the individual served, if 18 years or older) to sign as part of the registration process for workforce or social services.

Issue 6: De-identified Data

Problem. FERPA restrictions on disclosure of student education records apply only to personally identifiable information, not to aggregate or de-identified data derived from those records. USED hitherto has provided no clear standards or guidance for when information can be deemed to be de-identified and therefore exempt from FERPA restrictions. The absence of

such standards and guidance has likely impeded that research that could be effectively done without using personally identifiable data.

Do the regulations solve this problem? The final regulations, like the proposed regulations, include general standards for when data are de-identified, including how data may be coded for research purposes. The standards (probably appropriately) are not very specific and leave judgments to be made by regulated agencies. On balance, these provisions should be helpful.