

Proposed FERPA Regulations: Analysis of Provisions Related to Early Childhood Education

Prepared by EducationCounsel, LLC for the Data Quality Campaign on April 27, 2011

Proposed regulations under the Family Educational Rights and Privacy Act (FERPA) issued by the U.S. Department of Education (USED) on April 8, 2011, are designed to facilitate use of state-level student data to evaluate federal- and state- supported education programs and to conduct research studies to improve instruction. They fulfill a commitment made by USED to review FERPA regulations as they apply to state longitudinal data systems and whether they are aligned with state obligations under the American Recovery and Reinvestment Act of 2009.

The proposed regulations address discrete issues related to use of state data and specific directory information issues. They do not make comprehensive changes to existing FERPA regulations, which were the subject of broad amendments in 2008, and do not generally address issues related to the application of FERPA to early childhood programs.

Two proposed changes may have particular significance for early learning programs:

- Evaluation of Publicly Funded Early Childhood Education Programs. First, the proposed regulations make an important change that allows K-12 agencies to disclose data to publicly funded early childhood providers to determine how well the provider prepared its former students for elementary school. The proposed regulations reverse a prior USED position that the FERPA provision authorizing disclosures for evaluation (or audit) of federal- or state supported education programs only applied to evaluations of programs administered by the disclosing agency. The prior interpretation meant that local educational agencies (LEAs), elementary schools, or K-12 data systems could disclose student records (without parent consent) back to early childhood learning programs only for the purpose of evaluating elementary or secondary programs. (Under the proposed change, postsecondary institutions likewise would be able to disclose data to LEAs for the purpose of evaluating how well secondary schools prepared their former students for college.)
- Scope of "Education Programs" Subject to Evaluation. Second, the proposed regulations would add a definition of "education program" to the FERPA regulations for purposes of determining what programs may be the subject of an evaluation as the basis for disclosures of student records. The proposed regulations define education program as "any program principally engaged in the provision of education, including, but not limited to, early childhood education..." The preamble to the proposed regulations makes it clear that the definition would include programs administered by agencies or entities that are not educational agencies or institutions and specifically cites to the Head Start program as an example.

Thus, under this proposed provision, student records could be disclosed to Head Start programs and other publicly funded early learning programs – irrespective of which agency administers the program.

Two other proposed provisions may also have significance for early learning programs:

- Disclosures to Non-Education Agencies. The proposed regulations reverse a prior USED position that student records used for evaluation (or audit) of federal- or state-supported education programs could be disclosed only to employees or private contractors of the state or local education agency, and not to other state or local agencies. That prior position meant that if data needed to be matched with data from non-education agencies for evaluation purposes, individual data needed to be provided by the non-education agency to the education agency, which would have to perform the match, and could then release only aggregate student data to the non-education agency. It also meant that student records could not be warehoused in a centralized data agency that was not itself an education agency. (Current FERPA regulations generally define education
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agencies and institutions as local educational agencies, schools, and institutions of higher education that enroll students.)

Under the proposed reinterpretation, student education records used to evaluate publicly funded early learning programs may be disclosed to a non-education state or local agency – such as an agency responsible for non-educational child care programs – and may be warehoused in such an agency as an authorized representative of the educational agency providing the data, provided the records are used only to evaluate or audit education programs.

- Use of State-Level Data for Research Studies. The proposed regulations would, for the first time, make the research studies provision in FERPA applicable to state-level data. Under the proposed regulations, state education agencies – and not just educational agencies or institutions that enroll students – may enter into agreements with research organizations to perform a study designed to improve instruction or develop or administer assessments. They may do so if they have express or implied authority under state law to perform or provide for research on behalf of schools and educational agencies in the state. This change should facilitate use of state-level data for research projects designed to improve the quality of instruction in early learning programs.

All of these proposed provisions for expanded use of data are balanced with proposed provisions to safeguard the data and to enforce those safeguards, as summarized in the attached analytical summary of the proposed regulations.

One significant issue regarding the privacy of children's records in early childhood programs that is not addressed in the proposed regulations relates to the incoherent patch-work of privacy laws as they apply or do not apply to early childhood services. FERPA, for example, applies to the education records of students. It does not literally apply to all childhood care services, unless those services are defined as education programs and the children served as students. (The proposed definition of "education programs" in the proposed rule applies to the evaluation authority and does not solve this issue.) The Head Start Act includes provisions that mandate that the Secretary of HHS issue regulations on confidentiality of records in Head Start programs comparable to those in FERPA, so that should provide a basis for developing a consistent approach to privacy of records in Head Start programs, even where the Head Start agency is not funded by USED and therefore is not subject to FERPA. However, it is unclear which other early childhood programs can or would be viewed as education programs and the children served as students. As a matter of public policy, it seems questionable whether privacy protections for the children who are served should turn on these distinctions, but this is an issue that may require a legislative solution.

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Steven Y. Winnick
Tel: 202.545.2913
Fax: 202.545.2945
steve.winnick@educationcounsel.com

101 Constitution Avenue, NW
Suite 900
Washington, DC 20001
Tel: 202.545.2929 Fax: 202.545.2945
www.educationcounsel.com
