

**Comments of the Student Press Law Center  
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**Family Educational Rights and Privacy; Proposed Rule  
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Office of Planning, Evaluation and Policy Development  
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**Introduction and Statement of Commenter's Interest**

The Student Press Law Center (“SPLC”), a 501(c)(3) nonprofit founded in 1974, is an educational and advocacy organization that supports student journalists at the college and high-school levels, and their faculty advisers, nationwide. SPLC teaches student journalists how to use open-records and open-meetings laws to cover news stories of importance to a campus audience, and also educates journalists about legal obstacles they may encounter in attempting to gather information – including the Family Educational Rights and Privacy Act (“FERPA”).

It is SPLC’s experience, confirmed by many years of complaints from the student media, that schools regularly deny access to harmless and legitimately newsworthy records under the invocation of FERPA. SPLC does not know how many of these illegitimate denials are the result of honest confusion about schools’ legal obligations and how many are simply pretextual. Nevertheless, it is a frequent occurrence. (Specific examples are discussed below).

Nothing in the Proposed Rule will do anything to ameliorate the “over-compliance” that is obstructing media and public access to needed information. To the contrary, as discussed below, some elements of the Proposed Rules will magnify confusion over the proper scope of FERPA and will promote additional “over-compliance.” While the disclosure of truly private educational records is a legitimate concern, the denial of access to records not truly private is an equally legitimate concern; the Proposed Rules evidence no consideration of this countervailing concern. The Department should re-think the sections described below, giving full weight to the harm that the public suffers when the blanket of secrecy is mistakenly thrown over records that contain no individually identifying educational information.

**Comments**

1. Section 99.3 (Definitions) – Education Records

The Proposed Rules would expand FERPA to apply not only to educational records created during a student’s period of enrollment, but also to those created or received after enrollment if they are “directly related to the individual’s attendance as a

student.” This is potentially a significant expansion of FERPA that goes beyond the Department’s grant of statutory authority; nothing in FERPA authorizes the Department to define a confidential “educational” record to include records created after an individual’s education is completed.

The example cited in the Department’s justification well illustrates the excessive scope of this proposed expansion. The Department states that the proposed rule would apply to “a settlement agreement that concerns matters that arose while the individual was in attendance as a student.” A settlement agreement is exactly the sort of document that is potentially newsworthy and that is highly unlikely to contain any confidential educational information, yet the Department holds it up as the archetype of a document that should remain confidential. If a student settles a claim against a school for sexual harassment by an instructor, or personal injury due to the school’s negligence, or wrongful denial of employment, such a settlement undeniably would be newsworthy, and disclosure could serve a beneficial public purpose. By using a “settlement agreement” as an example of a confidential record, the Department sends a very dangerous message to schools – a message that invariably will multiply the already alarming number of wrongful FERPA-based denials.

The Department explains that the addition of subsection (b)(5) to the definition of Education Records will “clarify” that FERPA does not apply to alumni events or other events occurring after the individual’s enrollment has ceased. But nothing in proposed subsection (b)(5) mentions alumni activity or otherwise clarifies this distinction. To the contrary, many schools will interpret any interaction between a former student and the institution, including alumni activity, as “directly related to the individual’s attendance as a student.”

RECOMMENDATION: Proposed subsection (b)(5) should be deleted. In the alternative, the wording should be changed from “directly related to the individual’s attendance as a student” to “directly related to the individual’s participation in instructional activities during the period of enrollment, not to include alumni activities or any other events occurring after the date of last attendance.”

## 2. Section 99.3 (Definitions) – Personally Identifiable Information

Proposed subsections (f) and (g) to the definition of “Personally Identifiable Information” will make FERPA administratively unwieldy and unnecessarily subjective, and will lead to significant numbers of unwarranted denials of information. These subsections should be withdrawn.

The Department proposes to codify a requirement that the entity receiving an information request “read the mind” of the requestor. If, in the judgment of the recipient, the requestor could use generic school records to ascertain the identity of a particular student (subsection (f)) or the requestor is making the request with knowledge of the identity of particular students to whom the records apply (subsection (g)), then the school is directed to deny the request.

These proposed changes introduce a degree of subjective judgment that invariably will lead to abuse. There is no other open-records regime anywhere under which the agency's subjective judgment about the individual knowledge of the requestor is a deciding factor in whether a record is open or closed. Under this bizarre and confusing system, the very same piece of paper could be a public record to one requestor and a confidential document to the next requestor. As a matter of state open-records law, what a requestor intends to do with a document is none of the agency's business. Agencies may not lawfully deny a document request on the grounds that they dislike the requestor's intended use of the document. The Proposed Rules would encourage agencies to make illegitimate inquiries into the requestor's motives, and to condition the receipt of documents on furnishing an "innocent" motive.

The Department's mandate under FERPA is simply to prevent schools from releasing individually identifying, confidential education records. If the record is itself not individually identifying or confidential, it does not matter under the law what the requesting party is able to do with that record and his own knowledge. That the requestor is able to use independently gathered knowledge to add significance to a generic document is simply good journalism; it is not (and should not be made into) a privacy violation on the part of the school.

Proposed subsection (g), combined with the similar change contemplated in Section 99.31(b)(2), is particularly unworkable. If enacted, these rules would require that a school deny an otherwise legitimate request for records that are not themselves individually identifying, if the recipient believes that the requestor has "knowledge of the identity of the student to whom the education record directly relates." The inevitable result of this rule will be that schools will never release even numerical database information if the request yields a small number of results.

For example, suppose a requestor asks for statistics on all varsity athletes who have been removed from their teams for committing crimes (an unquestionably newsworthy story). Even though the request asks merely for statistical information, if there have been only two athletes removed, the school undoubtedly will infer that the requestor must know the names of the two individuals and will reject the request – even though the statistic adds absolutely no identifying information to what the requestor already knows.

The illustration given in the Department's explanation for Section 99.31(b) makes the case for why these changes are not merely unnecessary but dangerous:

For example, a school has suspended a student from school and given the student a failing grade for cheating on a test. The parent believes the discipline is too harsh and inconsistent with discipline given to other students who have been disciplined for cheating on tests that year. Only one student has been disciplined for this infraction during the year, and the name of that student is widely known because her parents went to the

media about the accusation. The school may not release the record in redacted form because the publicity has made the record personally identifiable.

Incredibly, the Department proposes to prohibit a school from releasing non-identifying statistical information *after* the supposedly protected individual has herself waived any pretense of confidentiality by going to the media. This is patently absurd, and would expand FERPA beyond all bounds of rationality. Indeed, when an incident is “widely known” because of media coverage, statistical information is at its greatest value, and continued attempts at secrecy are at their lowest value. (Incongruously, the Department takes the position that schools have a higher duty to protect the “confidentiality” of information that is already widespread public knowledge than to protect information that is unknown.)

The Proposed Rules make no acknowledgement whatsoever of the public’s interest in school accountability. For example, in the Department’s hypothetical, suppose the media had in fact learned that 10 students were caught cheating, but the schools’ records showed that only one received discipline. That only one of 10 known cheaters was disciplined is a matter of great public concern for which schools should be held accountable, yet the Department would shut down the ability of parents and the media to discharge their vital oversight responsibilities.

In another hypothetical, the Department states that a school may not release a statistical record of the number of students disciplined for plagiarism during 1978 where there has been media coverage of rumors that a political candidate received such discipline. The confirmation that one student (with name redacted) was disciplined in 1978 in no way confirms that the candidate was that student. Moreover, there are legitimate uses unrelated to the candidate for which this statistical information is relevant, *e.g.*, for an academic study about trends in reported instances of plagiarism. Yet the Department would throw a cloak of secrecy over this innocent and non-identifying information. (Additionally, the Department again fails to show that it has given any consideration to the high degree of legitimate public interest in plagiarism by a candidate. Assuming that a record of plagiarism exists, the value of one’s privacy interest in an act of plagiarism would seem greatly outweighed by the public’s right to know of misconduct by would-be public officials.)

The Department’s own illustrations confirm that schools are already going overboard in invoking FERPA to deny requests for information that can in no way be classified as legitimately private:

Some schools have indicated, for example, that they would not disclose that two Hispanic, female students failed to graduate, even if there are several Hispanic females at the institution, because of the likelihood that students who failed to graduate could easily be identified in such a small data set.

To state the obvious, a graduation is a public ceremony. The names of those graduating are listed in a program, published in local newspapers, and so forth. That a person failed to graduate is hardly a “secret” (especially if the person re-enrolls in school the following year). That a school would go to such lengths to avoid, indirectly, allowing someone to confirm a readily observable fact suggests that schools believe there is a protected legal right to lie about having graduated outweighing the public’s right to know. That the Department has documented such abuses should give the agency great pause about entrusting schools to apply FERPA judiciously.

Schools, colleges and the Department should not be in the business of affirmatively attempting to thwart people from figuring out information on their own. FERPA requires merely that covered entities refrain from releasing individual educational records, period. The Department’s proposed amendments are unsupported by statutory authority, would be burdensome and unworkable, and would result in the widespread and unjustified denial of meritorious requests.

RECOMMENDATION: Proposed subsections (f) and (g) in the definition of Personally Identifiable Information, and subsection 99.31(b)(2), should be deleted.

3. Section 99.31(a)(1) – Outsourcing

Section 99.31(a)(1) would make explicit the Department’s view that FERPA confidentiality procedures apply to third-party contractors that receive student information in performing services under contract with schools. This proposed rule, like the others discussed above, is likely to lead to confusion and over-compliance unless it is narrowly tailored.

There is ample anecdotal evidence that contracting entities already are illegitimately invoking FERPA to conceal information that belongs in the public domain. For example, a student newspaper in Kansas reported to SPLC earlier this year that the county jail was refusing to release any information whatsoever about the incarceration of students in the jail, on the grounds that the county was holding the prisoners under a contract with a university police department and was thus prevented by FERPA from confirming the identities of the inmates, offering any information about the offenses for which they were held, or otherwise responding to media requests. This gulag-like blackout goes wildly beyond what Congress could have envisioned in attempting to prevent *schools* from disclosing *educational* records. Proposed Section 99.31(a)(1) would only reinforce (and indeed, validate) the confusion on the part of non-school actors like this Kansas county.

RECOMMENDATION: Proposed subsection 99.31(a)(1) should be removed. In the alternative, the subsection should at least be clarified to provide that it applies solely to private contractors, and not to other government agencies, because government agencies are governed by an independent legal duty to disclose their records that exists apart from FERPA.

## **Conclusion**

FERPA already is generating too many “false positives” that result in the wrongful denial of legitimate, newsworthy information requests. The Proposed Rules will only reinforce the erroneous perception among too many schools that FERPA obligates them not only to reject requests for individual student information (report cards, attendance records, and the like) but also for harmless statistical data, even with identities redacted. Because FERPA overrides states’ policy decisions to open their government records, the Department’s rules should make clear that FERPA is to be narrowly construed and that any close judgment calls must be resolved in favor of openness.