



First Look: New FERPA Regulations

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People and organizations who've been frustrated by severe restrictions on sharing data about young people received some relief from new guidance on FERPA released yesterday by the U.S. Department of Education.

What is FERPA and why does it matter?

Ensuring that young people are ready for college, work and life requires a number of institutions, systems and organizations to work together. To do so with precision, community leaders need rigorous data which crosses departmental lines to hold decision-makers collectively accountable for results.

A leading reason they don't have the interagency data they need is FERPA: the Family Educational Rights and Privacy Act (FERPA). This Act, passed before the days of the Internet, inadvertently prevents data from being used in common sense ways to help ensure that programs for young people are efficient and effective.

Too often, instead of pooling resources and developing one effective data and accountability system, communities and states are faced with redundant technological expenditures, overlapping or missing sets of information, and cumbersome (if not impossible) transfer of data. Consequently, most community leaders and service providers still do not have the information they need to be effective despite having new resources to build and improve data systems.

FERPA, along with the Health Insurance Portability and Accountability Act (HIPAA), are the biggest obstacles communities and states face when trying to implement a data system which that works.

This is why the Forum has been working to get these policies changed.

The new FERPA regulations are an important step in the right direction. A true fix, which would complete the work of allowing all relevant departments to share information and would allow the information to be used for commonsense purposes, will require congressional action.

Analysis of the New Regulations

No Changes on For What Purposes the Data Can Be Used, But Important Changes on Who is Allowed to Share Information

We have focused in on two key questions governed by FERPA: **Who is allowed to share information, and for what purposes are they are allowed to use that information?**

There are no significant changes regarding for what purposes the data can be used. In both the old and new FERPA regulations, the data can be used only for "audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs."

The new guidance from the Department of Education does make significant changes to who is allowed to share information. Interestingly, the *regulations allow more agencies to share data on children aged 0-6 than they allow for children 7 and older.*

FERPA regulations state that "educational agencies and institutions are permitted to nonconsensually disclose Personally Identifiable Information (PII) to 'authorized representatives' of State and local educational authorities, the Secretary, the Attorney General of the United States, and the Comptroller General of the United States, as may be necessary in connection with the audit, evaluation, or the enforcement of Federal legal requirements related to

Federal or State supported education programs.”

So the key question becomes, who are the “authorized representatives” who are allowed to share the data? As the department pointed out in its notice of proposed rulemaking, the previous interpretation of FERPA was that authorized representatives “does not include other State or Federal agencies because these agencies are not under the direct control (e.g., they are not employees or contractors) of a State educational authority.” Under this interpretation, “an SEA or other State educational authority may not make further disclosures of PII to other State agencies, such as State health and human services departments, because these agencies are not employees or contractors to which the State educational authority has outsourced the audit or evaluation of education programs (or other institutional services or functions).”

The new guidance rescinds this restrictive interpretation. It defines an authorized representative as “any entity or individual designated by a State or local educational authority or an agency headed by an official listed in §99.31(a)(3) who is involved in Federal- or State-supported education programs.”

This means that **state and local education authorities are now allowed to share data with other government agencies that are not under their direct control, as long as those other agencies are involved in federal or state-supported education program.**

So the next question becomes, what is meant by an “education program”? Does that just mean schools?

The new guidance anticipates this question, and provides the following definition: “any 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.”

This provides greater flexibility than before, signaling that “education program” means more than just schools. But it could, and should, have gone farther. In fact, for early childhood programs it did go farther, much to its credit. The new guidance defines an early childhood education program as one that, in part, “serves children from birth through age six that addresses the children’s cognitive (including language, early literacy, and early mathematics), social, emotional and physical development).”

Who is Allowed to Share Data?

Can you share data with a department not controlled by the state education authority?		
	Old FERPA regulations	New FERPA regulations
Children aged 0-6	No	Yes
Children 7 years and older	No	Yes

Can you share data with an agency running early childhood education programs, postsecondary education programs, special education programs, job training, career and technical education programs, and adult education programs?		
	Old FERPA regulations	New FERPA regulations
Children aged 0-6	No	Yes
Children 7 and older	No	Yes

Can you share data with an agency running programs to improve social, emotional and physical development?		
	Old FERPA regulations	New FERPA regulations
Children aged 0-6	No	Yes
Children 7 and older	No	No

Understanding the Department of Education's Intent

In addition to the handful of pages detailing the specific changes to the regulation itself, the Department of Education also released hundreds of pages about its rationale for making the changes, the comments it received from the public regarding the proposed changes and its response to those comments.

Our take on these accompanying documents is that they **strongly suggest that Department of Education supports interagency data sharing, and that it would likely be supportive of such efforts by states and localities.**

In this section, we provide selected excerpts from the accompanying materials which support interagency data sharing.

Excerpts from the Notice of Proposed Rulemaking

- The new guidance goes as far as explicitly stating that **“there is no reason why a State health and human services or labor department, for example, should be precluded from serving as the authority's authorized representative and receiving non-consensual disclosures of PII to link education, workforce, health, family services, and other data** for the purpose of evaluating, auditing, or enforcing Federal legal requirements related to, Federal or State supported education programs.”

Excerpts from the Public Comments Submitted to the Department

- **Supporters of the proposed regulations noted that, by reducing barriers to data sharing, more States would be able to connect their data systems to drive improvement in K-12 schools.** Commenters noted several specific evaluations that would be possible with the proposed amendments to the audit or evaluation exception. For example, an evaluation of college freshmen, who all graduated from the same high school, may reveal the students needed postsecondary remediation in math. This information could help the high school improve its math program. Likewise, career and technical education (CTE) agencies would be able to improve program effectiveness by accessing more data with their collaborative partners in workforce development and other non-educational agencies that prepare students for college and careers.
- Many commenters were supportive of the proposal to define the term “education program.” **Many of these commenters commended the Department's proposal to adopt a broad definition of “education program” because doing so recognizes the fact that education begins prior to kindergarten and involves programs not administered by State or local educational agencies.**
- While some commenters expressed concern that an overly broad definition of “education program” would result in extraneous programs being wrongly allowed access to student PII from education records, **others expressed concern that an overly narrow definition would hinder legitimate data sharing needed to improve education programs.** One commenter was concerned that the definition would omit programs many believe are necessary for students to succeed but may not be “principally engaged in the provision of education.” The commenter gave several examples including substance abuse, anti-bullying, and suicide prevention programs. Numerous commenters provided other examples of specific programs and asked the Department to identify if those programs would be considered an education program under the proposed definition.
- Commenters specifically requested clarity about what types of early childhood programs would be considered education programs. A few commenters suggested that the Department utilize the HEA definition of “early childhood education program.” One commenter suggested that we change “principally” to “primarily” in the definition of “education program.” Another recommended that the definition include “transitions from secondary to postsecondary education.” We also received the suggestion that we amend the definition of “education program” to specify that the program must be principally engaged in the provision of education to students in early childhood through postsecondary.

Excerpts from the Department's Responses to the Comments

- The Department has decided to make several changes to the definition as a result of the comments received. Whether a program is determined to be an education program should be based on the totality of the program and not on whether the program contains a specific “incidental educational or training activity within a broader non-education program,” as suggested by one commenter.
- The final regulations provide that any program administered by an educational agency or institution is considered to be an education program. We have made this change to ensure that, in addition to programs dedicated to improving academic outcomes, **this definition includes programs, such as bullying prevention, cyber-security education, and substance abuse and violence prevention, when administered by an educational agency or institution.**
- It is the Department's intent that **the following types of programs, regardless of where or by whom they are administered, fall under the new definition of “education program”:** the educational programs conducted by correctional and juvenile justice facilities or alternative long-term facilities such as hospitals, dropout prevention and recovery programs, afterschool programs dedicated to enhancing the academic achievement of its enrollees, schools for the hearing and visually impaired, college test tutoring services, and high school equivalency programs. The following are examples of the types of programs that will generally be excluded from the definition of “education program”: programs that are principally engaged in recreation or entertainment (such as programs designed to teach hunting, boating safety, swimming, or exercise), programs administered by direct marketers, and neighborhood book clubs. These are not all-inclusive lists; each program will need to be assessed to determine if it meets this regulatory definition of “education program” because it is principally engaged in the provision of education.
- While nothing in the final regulations specifically prohibits a State politician or private company, for example, from being designated as an authorized representative, the full requirements under FERPA must be met before PII from education records may be disclosed to any party. **These regulations do not expand any of the reasons an individual or an entity can be designated as an authorized representative. As before, it may only be done to conduct an audit, evaluation, or enforcement or compliance activity.**
- Some commenters also appear to have misunderstood the Department's previous interpretation of the term “authorized representative” and mistakenly assumed that the Department has historically only permitted employees and contractors of FERPA-permitted entities to serve as authorized representatives. This is not the case. For instance, prior to the issuance of the Hansen Memorandum in 2003, the Department entered into a memorandum of agreement with the Centers for Disease Control and Prevention (CDC) in which the Department designated the CDC to serve as its authorized representative for purposes of collecting information under the Metropolitan Atlanta Developmental Disabilities Surveillance Program.
- **The new definition of “education program” helps to ensure that the FERPA regulations do not impede States' ability to comply with ARRA [American Recovery and Reinvestment Act, which called for the creation of State Longitudinal Data Systems].** As discussed in the NPRM [Notice of Proposed Rulemaking], in order to ensure that the Department's regulations do not create obstacles to States' compliance with ARRA, the Department sought to find a solution that would give effect to both FERPA and this more recent legislation by **defining the term “education program” to include programs that are not administered by an educational agency or institution.**
- In this case, the Department is interpreting its regulations in a manner that is consistent with FERPA, the America COMPETES Act, and ARRA. Under section 6401(e)(2)(D) of the **America COMPETES Act, Congress clearly set forth its desire that States develop SLDS that cover students from preschool through postsecondary education by including information such as “the capacity to communicate with higher education data systems,” “information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework,”**

and “other information determined necessary to address alignment and adequate preparation for success in postsecondary education.”

- The Department’s definition of the term “education program” is intended to facilitate the disclosure of PII [Personally Identifiable Information] from education records, as necessary, to evaluate a broad category of education programs.”
- We believe that the definition of the term “education program” sufficiently recognizes those common elements among entities that need to evaluate education programs and services, regardless of whether the education programs are funded by the Department.

Conclusion

Our work is not done.

We remain hopeful that the Department of Education will allow data sharing with agencies running programs to improve social, emotional and physical development for young people older than 6, the same way it now does for agencies running programs for children 6 and younger.

Beyond that, more complete flexibility would likely require action by Congress, not just the administration. We look forward to working with Congress to ensure that the necessary changes are made.

There can be no doubt, however, that today there is one less bureaucratic hurdle standing in the way of community efforts to hold departments and institutions collectively accountable for achieving results.