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COMMENT FROM EAGLE FORUM OF ALABAMA IN SUPPORT OF RESCINDING

34 CFR § 99 AND RESTORING THE CORRESPONDING REGULATION THAT EXISTED BEFORE 2012

Since FERPA was passed in 1974 technology has rapidly advanced but the privacy protections at the federal level have remained antiquated in public education. Instead of increasing protections to meet the latest demands in technology and data collection techniques the U. S. Department of Education (USED) reduced protections under the Obama administration. When the USED under the Obama administration implemented a new regulation (34 CFR § 99) under the Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, in January 2012, the USED it essentially eliminated important privacy protections for millions of Americans. This meant millions of Americans, primarily students in their earliest years of learning would be made more vulnerable to privacy violations and targeted for harm. Eagle Forum of Alabama urges USED to withdraw that regulation in its entirety. It is important to revert to the previous regulation and guidance issued, then either the statute or the regulations, or preferably both, can be rewritten to address pressing issues of student data-privacy today.

The regulation in question severely weakened the statute in major ways:

- **It abandoned the settled, longstanding interpretation of the term "authorized representative" (34 CFR § 99.3).** FERPA prohibits nonconsensual disclosure of personally identifiable information (PII) except in several limited circumstances, one of which allows disclosure to "authorized representatives" of certain education institutions and individuals. Since at least 2003, USED had allowed such disclosure only to "authorized representatives" that are under the direct control of the disclosing entity (*i.e.*, either an employee or a contractor). The 2012 regulation eliminated the "direct control" requirement, allowing instead the disclosing entity to designate "any entity or individual" as an authorized representative for purposes of receiving PII. This has led to a "data free-for-all" in which "nongovernmental entities, including non-profits, religious organizations, foundations, independent researchers, and for-profit companies, as well as individuals, could be granted access to [PII] without notice or consent."[1]
- **It created a broad definition of "education program" that includes programs not administered by an education agency under FERPA (34 CFR §§ 99.3).** This means that government officials can be given nonconsensual access to students' PII from any private program that receives any federal or state aid (such as preschool, recreation, special education, or job-training programs). This expansion provides "virtually unlimited access to education records in the name of evaluating program outcomes to any program evaluators that can convince an authorized representative that they are reviewing an education program, as loosely defined [in the regulation]."[2]
- **To assist "research studies," it allowed nonconsensual redisclosure of PII that was provided by certain educational agencies and institutions to other such agencies and institutions pursuant to FERPA requirements (34 CFR § 99.31(a)(6).** For example, a state department of education would be

[1] See https://aacrao-web.s3.amazonaws.com/migrated/FERPA-AACRAO-Comments.sflb.ashx_520501ad842930.77008351.ashx.
[2] Ibid.

allowed to grant researchers access to PII that the DOE received from a local school district for other purposes, without the knowledge or consent of that local district or the students/families whose data is being passed along. USED has no legal authority to allow such redisclosure – and the "implied disclosure" enshrined by the regulation is a lawless usurpation of statutory authority.

- **It removed the requirement (previously contained in 34 CFR §99.35(a)(2)) that in order for a state or local educational authority to conduct an audit, evaluation, or compliance or enforcement activity, it must demonstrate authority to do so under some federal, state, or local grant of authority (because FERPA itself does not confer such authority) (34 CFR § 99.35(a)(1),(2).** Instead, the SEA or LEA can simply cite "audit or evaluation" as justification for disclosing PII, even if there is no statutory authority for the SEA/LEA's action. This change "turns another narrow consent exception into a magic incantation by which entities with no legal authority and no intention of actually conducting audits or studies can circumvent congressional intent, violate the privacy rights of students and families, and obtain unfettered access to [PII]."[3]

FERPA must be revised to address such threats. In the meantime, USED can at least withdraw the January 2012 regulation and restore the protections that existed before the Obama administration eliminated them. Eagle Forum of Alabama urges USED to act swiftly to restore these protections for students in America.

[3] Ibid.