By implementing a new regulation (34 CFR § 99) under the Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, in January 2012, the U.S. Department of Education (USED) under the Obama administration greatly diminished the privacy of millions of American schoolchildren. USED should withdraw that regulation in its entirety and revert to the previous regulation and guidance issued thereunder, until either the statute or the regulations, or preferably both, can be rewritten to address pressing issues of student data-privacy.

The regulation in question essentially gutted the statute in several fundamental 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 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**

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

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]

These and other problematic provisions of the January 2012 regulation seriously undermined the privacy protections of FERPA, which are already inadequate to address dangerous and increasing threats to student privacy that have arisen since the statute was enacted in 1974. 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 gutted them.

[3] Ibid.