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Re: Response to NPRM regarding Family Educational Rights and Privacy [**Docket ID ED-2011-OM-0002**]

Date: May 23, 2011

We are writing on behalf of the Center for Law and Social Policy (CLASP) in response to the notice published in the Federal Register on April 8, 2011 (Vol. 76, No. 68) regarding the Notice of Proposed Rulemaking on Family Educational Rights and Privacy. CLASP is a non-profit organization that develops and advocates for policies at the federal, state, and local levels to improve the lives of low-income people. We focus on policies that strengthen families and create pathways to education and work.

States across the country have undertaken system-wide efforts to share data and information to assess and improve educational outcomes for children and adults through cost-effective and streamlined interagency data systems. Interagency systems can be used to streamline, simplify, and reduce costs for federal and state data reporting requirements, easing the technical and administrative burden on reporting agencies. These efforts have been strongly supported by the Department. See <http://www.ed.gov/open/plan/digital-systems-interoperability>. However, these important efforts have been impeded, in at least some states, by an interpretation that FERPA does not allow certain data to be shared.

CLASP commends the Department of Education for proposing changes to FERPA regulations that appear to greatly facilitate the sharing of data across systems, providing states with additional clarity on the application of FERPA to state longitudinal data

systems, and, importantly, clarifying earlier interpretations of FERPA that created barriers to using education data for evaluation and research purposes.

### **Clarify the Authority to Audit or Evaluate (§99.35)**

While we support many changes in the proposed regulations, CLASP seeks clarification in the area of broadening authority to audit or evaluate beyond educational agencies. The proposed regulations would define “authorized representative” to “include any individual or entity designated by an educational authority or certain other officials to carry out audits, evaluations or enforcement or compliance activities in relation to education programs”. CLASP supports this amendment to the regulations as it facilitates education data-sharing across agencies.

However, CLASP believes this language needs further clarification. As written, the proposed regulations raise questions about the extent to which non-education agencies can access personally identifiable information in student education records for the purposes of conducting audits and evaluations of programs under their administration. For example, given that the proposed definition of “educational program” will be broadened to include “career or technical training programs administered by a workforce or labor agency,” and given that the definition of “authorized representative” will be broadened to include “non-educational agencies,” does this mean that workforce agencies can access personally identifiable information in student education records to evaluate the effectiveness of the employment and training programs that they administer? We recommend that the proposed rules permit data sharing with Workforce Development agencies for the purposes of evaluating workforce development programs that include a postsecondary education component.

The proposed regulations also raise questions about the extent to which non-education agencies can access data to audit and evaluate programs that are *not* under their jurisdiction. As stated in the early childhood example on page 19729, this change would permit a state educational authority to designate a state health and human services agency as its authorized representative in order to conduct an audit or an evaluation of any Federal or State supported education program, such as the Head Start program. The proposed regulations go on to say, on page 19731, that FERPA permits non-consensual disclosure of PII to a State or local educational authority or agency headed by an official listed in §99.31(a)(3) to conduct an audit, evaluation or compliance or enforcement activity with respect to the Federal or State supported education programs of the recipient’s own Federal or State supported education programs as well as those of the disclosing educational agency or the institution.

CLASP believes this area of FERPA needs further clarification. Head Start is a federal to local program, administered by the Department of Health and Human Services, not the Department of Education; therefore it is not under the administration of either the authorized representative or the disclosing educational agency. CLASP is concerned that the proposed regulations could be interpreted to give state education agencies authority

over evaluation and auditing programs outside their administration, such as Head Start. CLASP does not support this expansion of authority.

Moreover, the Department should clarify that if Head Start programs are included in audits or evaluations related to educational programs under the jurisdiction of the state (for example, state-funded prekindergarten delivered in a Head Start classroom), the Secretary of HHS retains authority to promulgate privacy regulations as defined in the Head Start Act, and any such privacy protections of Head Start children would still apply.

### **Definition of Education Program (§§99.3, 99.35)**

CLASP urges clarification around the proposed definition of the term “education program.” The proposal would define “education program” as 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, regardless of whether the program is administered by an educational authority. We commend the Department’s proposal to adopt a broad definition of “education program” and recognition that education begins prior to kindergarten and involves programs not administered by state or local educational agencies. We also anticipate that the expansion of the definition of “educational program” will be widely welcomed by the workforce community.

That said, CLASP recommends that the term “early childhood education” be defined in reference to the definition of early childhood education included in The Higher Education Opportunity Act [SEC. 103. (a)(1) `` (21)]. Referencing this existing definition would provide further clarification of the multiple programs and services that comprise early childhood education while maintaining consistency with current law.

### **Additional Recommendations to Facilitate Data Sharing Between Child Welfare and Education Agencies**

While amending FERPA to increase the ability of state agencies to share data at the aggregate level that will help improve the outcomes of children, youth and adults, we also encourage you to considering making important additional changes to facilitate the individual-level data sharing specifically between child welfare agencies and education agencies to improve the outcomes of children in foster care. In framing these recommendations, we focus on the significant impact of the FERPA regulations on children in foster care and the need for revisions to FERPA to address their unique situation and will help improve educational outcomes for those children.

Information sharing between child welfare and education agencies is essential to ensuring each agency meets its federal and state legal obligations, and meets the educational needs of these children. As discussed herein, education agencies and health and human services

agencies across the country are increasingly seeking to share data and information to improve educational outcomes for children in foster care. However, obstacles to automated data sharing at the student specific level significantly impede the ability of both agencies to assess and respond to the educational needs of children in foster care or improve their poor educational outcomes. Obstacles to information-sharing between education and child welfare agencies related to individual students plays a significant role in the wide academic achievement gap between children in foster care and their peers by, for example, contributing to inappropriate school placements, enrollment delays, and lost credits. We submit these recommendations to effectively address these barriers and ensure and facilitate necessary information exchange, while protecting and preserving the educational privacy rights of students and parents that FERPA is designed to safeguard.

## **An Overview**

### ***The Achievement Gap***

It is well documented that youth in foster care are among the most educationally at risk of all student populations. They experience lower academic achievement, lower standardized test scores, higher rates of grade retention and higher dropout rates than their peers who are not in foster care.<sup>1</sup> Based on a review of studies conducted between 1995 and 2005, one report estimated that about half of foster youth complete high school by age 18 compared to 70% of youth in the general population.<sup>2</sup>

We know some of the specific barriers facing youth in care – high rates of school mobility; delays in school enrollment; inappropriate school placements; lack of remedial support; failure to transfer full course credits; and difficulties accessing special education services.<sup>3</sup> We also know that some of these particular challenges are exacerbated and sometimes created by the inability of child welfare agencies and local educational agencies to access and share education records and data at a state or local level as well as the inability of foster parents, unaccompanied youth, surrogate parents and caseworkers to access education records at an individual level. For example, delays in school enrollment for this highly mobile population often occur when a child's initial entry into foster care or a subsequent placement change involves a move across school boundary lines.

These delays are often caused by the failure to transfer records in a timely manner which often results from confusion about, or barriers created by FERPA. For example, forty-two percent of the 8 to 21 year New York City foster youth who were interviewed in

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<sup>1</sup>National Working Group on Foster Care and Education statistics factsheet at [http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National\\_EdFactSheet\\_2008.pdf](http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National_EdFactSheet_2008.pdf).

<sup>2</sup> Wolanin, T. R. (2005). *Higher education opportunities for foster youth: A primer for policymakers*. Washington, DC: The Institute for Higher Education Policy.

<sup>3</sup>National Working Group on Foster Care and Education statistics factsheet at [http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National\\_EdFactSheet\\_2008.pdf](http://www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/1241/National_EdFactSheet_2008.pdf).

2000 had experienced a delay in school enrollment while in foster care, and nearly half of those who experienced a delay attributed it to lost or misplaced school or immunization records (Advocates for Children in New York, 2000). Similarly, More than three quarters of the California group home operators who were surveyed in 2000 reported that educational records for foster children in group homes are either “frequently” or “almost always” incomplete, 60% reported that the transfer of educational records is “frequently” or “almost always” delayed when youth change schools or group home placements, three quarters reported that youth recently placed in group homes experience long delays when attempting to enroll in public school, and more than two thirds reported that educational placement decisions were “frequently” or “almost always” compromised by incomplete school records (Parrish, et al. 2001 [response rate: 48%]). Delays in school enrollment negatively impact students in many significant ways such as causing children to fall behind academically, forcing students to repeat courses previously taken and undermining future attendance. A caseworker’s inability to access education records also contributes to inappropriate classroom placements, and makes it more difficult to evaluate school stability issues or identify and address special education needs.

### ***A Unique Situation***

Children and youth in foster care are in a unique situation that is unlike that of other students; it is a situation that is not addressed – nor perhaps contemplated - by FERPA regulations. For a child who in foster care, the child welfare agency and court have intervened to remove the child from the home of their parents, and make decisions about what is in the best interest of the child, in lieu of his or her parents. During the time that the child is under the care and responsibility of the child welfare agency, the agency is responsible for ensuring that their educational needs are met.

It is also important to recognize that these children most often enter foster care abruptly. They are placed with an agency that lacks prior knowledge of the child’s background or educational needs. And yet, it is the caseworker who is charged with the responsibility of determining a child’s new living placement and, as part of that undertaking, is specifically obligated to consider the appropriateness of the child’s current educational setting, decide whether it is in the best interest of the child to remain in the same school, or seek to immediately enroll a child in a new school with all of his or her school records. In the absence of any prior knowledge of the child which a parent would possess, the inability of a caseworker to promptly access a child’s education records renders that caseworker unable to effectively make decisions in the child’s best interests.

### ***Expanding Role of Child Welfare in Addressing Educational Needs***

To improve the education outcomes of children in foster care, federal law has historically placed a number of requirements on child welfare agencies related to education. Title IV-E of the Social Security Act has for a long time required child welfare agencies to maintain the child’s “educational reports and records” in the family case plan.<sup>4</sup> The Child and Family Service Reviews (CFSRs), federal reviews that measure how states are

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<sup>4</sup> 42 U.S.C.A. § 675(1)(C).

meeting the needs of children in the foster care system, have always included a well-being benchmark focused on meeting the educational needs of children in care as part of that review. Specifically, child welfare agencies are evaluated on whether a child's education record is included in the case plan.

However, the most significant changes to child welfare law and marked expansion of the responsibility of child welfare in addressing education issues occurred with the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections). Fostering Connections now requires significant responsibilities of child welfare agencies related to education. Child welfare agencies are mandated to, among other things: 1) consider the proximity and appropriateness of the school when making living placement decisions, 2) ensure children are enrolled and attending school, and 3) ensure school stability for children in foster care (including immediate transfer of records when a child changes school).<sup>5</sup> Additionally, most state laws mandate that a child welfare agency to whom legal custody (or in child welfare parlance, "responsibility for the care and placement of the child") of a child has been given by the court has the "right and duty" to provide for the education of the child.<sup>6</sup>

Despite these requirements, in many jurisdictions, child welfare agencies are often denied access to the educational records of the youth they serve on the basis of a belief that the records cannot be shared under FERPA – limiting their ability to comply with legal requirements and address educational issues on behalf of their clients, resulting in delays in school enrollment, inappropriate school placements and lack of educational support, failures to receive full course credits, and difficulties accessing special education services.

### **The Recommendations**

#### **1) Ensure that child welfare agencies with responsible for the care and placement of a student in foster care are able to meet the educational needs of that child by having prompt and continued access to the student's education records.**

To comply with federal and state legal requirements, and to ensure that the educational needs of children in their care are met, child welfare agencies and dependency courts must have prompt and continuing access to the education records of children in foster care. Federal law currently places a number of education-related requirements on child welfare agencies that require access to education records and information. Specifically, child welfare agencies must: 1) consider the proximity and appropriateness of the school when making living placement decisions;<sup>7</sup> 2) ensure children are enrolled and attending school; 3) ensure school stability for children in care (including immediate transfer of records when a child changes school); and 4) maintain the child's educational records in the case plan.<sup>8</sup> Unfortunately, in many jurisdictions, child welfare agencies are denied

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<sup>5</sup> 42 U.S.C.A. § 675(1)(G) and 42 U.S.C.A. § 671.

<sup>6</sup> See e.g., 42 P.a.C.S.A. § 6357.

<sup>7</sup> 42 U.S.C.A. § 675(1)(G) and 42 U.S.C.A. § 671.

<sup>8</sup> 42 U.S.C.A. § 675(1)(C).

access to the educational records of the youth they serve – limiting their ability to comply with legal requirements and address educational issues on behalf of their clients.

For children under the care and responsibility of the child welfare agency, there is a clear duty to provide for their educational needs. Furthermore, because of the sensitivity of the information around child welfare cases, child welfare agencies are already bound by stringent federal and state confidentiality laws and safeguards that strictly prohibit re-disclosure of information relating to a child in their care. To meet obligations imposed on child welfare agencies who are acting *in loco parentis*, they must have timely access to education records.

To meet this critical need, we suggest two recommendations. The first recommendation creates an exception so that when a child welfare agency has responsibility for the care and placement of a child, information relevant to the child's education can be shared with that custodial agency. The second recommendation clarifies that, for purposes of the court order exception, additional notice is not necessary for parents who are parties to a dependency case. Both of these changes are necessary to give jurisdictions flexibility as to how to permit records to be shared with child welfare agencies. In some communities, obtaining a court order to share these records with the custodial child welfare agency (as well as with other relevant parties including children's attorneys and advocates) will be a direct and efficient process. In other communities, where courts have not, will not, or cannot in a timely manner, issue such orders, the new exception to allow access to custodial child welfare agencies will be more advantageous. Each allows states and communities flexibility to determine the most appropriate option to allow child welfare agencies access to needed education records.

**a) Create a new exception to allow child welfare agencies access to records:**

A variety of other exceptions to parental consent already exist, including an exception for the juvenile justice system. This new exception would permit schools to allow access to educational records to child welfare agencies in those cases where the child welfare agency has care and responsibility for a student. §99.31 would then read:

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:...

(17) the state or local child welfare agency with responsibility for the care and placement of a student. Redisclosure by child welfare agency shall be permitted in compliance with federal and state child welfare confidentiality laws and policies.

**b) Clarify in regulations that additional notice of disclosure is not required under the existing court order exception for dependency cases because parents already have been provided notice through the court case (34 C.F.R. § 99.31(a)):**

FERPA currently allows for release of education records without parental consent under a court order, as long as parents are provided advance notice of the release, and an opportunity to object. However, in child welfare cases, the parent is already a party to the case where the court order is being issued, and therefore already has the opportunity to challenge the release of school records if they so desire. To require schools to “re-notify” parents who are already on notice of the court order is redundant and serves as an unnecessary barrier. Therefore, the following clarification would prevent the need for additional notification for parents who are parties to the dependency case.

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with--

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An ex parte court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(D) A court order issued in a case where the child welfare agency is seeking or has responsibility for the care and placement of a child.

## **2) Clarify that foster parents and IDEA parents are parents for the purposes of FERPA.**

The current definition of parent under FERPA is as follows: “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” Under the Individuals with Disabilities Education Act (“IDEA”) a child who receives special education services is represented by an “IDEA parent” throughout the special education process.<sup>9</sup> The duties of an IDEA parent include: consenting to an evaluation to determine eligibility; participating in decisions regarding the special education services a student receives; and challenging a school district’s decision through a hearing and appeal process. In many cases, youth who are in the child

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<sup>9</sup> 20 U.S.C. §1401(23).

welfare system are represented by “surrogate parents” who may be appointed by a school district or by a judge to serve in this capacity.<sup>10</sup> These surrogate parents, like all other IDEA parents, must be able to obtain prompt and continued access to education records of the children and youth they represent.<sup>11</sup> Without these IDEA parents to advocate for them, they often cannot gain access to the special education services they require or the IDEA parent is forced to act as a rubber stamp for school district’s proposal.<sup>12</sup> In addition, an IDEA parent is closely involved in the student’s educational life and is well-positioned to determine whether and under what circumstances disclosure of the student’s education records should be permitted. Similarly, as recognized in current guidance, foster parents are closely involved in the student’s education and should be treated as parents for the purposes of FERPA. When clarifying that an IDEA parent is also a parent for the purposes of FERPA, it would be helpful to also clarify in regulations, rather than solely in guidance, that foster parents are also parents for this purpose.

In light of the critical role of foster parents and IDEA parents in advocating on behalf of children in care, we strongly urge that the definition of parent set forth in the FERPA regulations be amended to make explicitly clear that this includes both foster and IDEA parents. Expanding the definition of parent in this way will ensure that all foster and IDEA parents are able to obtain prompt and continued access to the education records of the students with disabilities they care for and/or represent.

**a) Clarify in regulations that definition of “Parent” includes a child’s foster parent and IDEA parent (34 C.F.R. §99.3)**

We propose that the current definition of parent be expanded to include a specific reference to an “IDEA parent” as defined under 34 C.F.R. § 300.300(a)) as well as foster parents.<sup>13</sup>

“§99.3...

‘Parent’ means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian, including a foster

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<sup>10</sup> 20 U.S.C. §1415.

<sup>11</sup> Amy Levine, *Foster Youth: Dismantling Educational Challenges*, Human Rights, Fall 2005, Vol. 32, No. 4, p.5. Available at <http://www.abanet.org/irr/hr/Fall05/fosteryouth.html>.

<sup>12</sup> *Id.*

<sup>13</sup> **34 C.F.R. 300.300** – [Definition of “parent” in conjunction with IDEA regulations]

“(a) Parent means--

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or
- (5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act.”

parent, or an IDEA parent (as defined by 34 C.F.R. § 300.300(a)), who is acting on behalf of the student.”

Thank you for this opportunity to present comments to these important regulations. For further information please contact Beth Davis-Pratt at 202-906-8019 or [bdavispratt@clasp.org](mailto:bdavispratt@clasp.org).