



From the Desk of the Executive Director *AERA and the National Research Council Address FERPA*

The Family Educational Rights and Privacy Act (FERPA) was originally enacted in 1974 to protect the privacy of personally identifiable information in student education records. Also known as the Buckley Amendment (named after its principal sponsor, then Senator James Buckley of New York), the law requires educational agencies and institutions that receive federal funds to obtain written permission from a student (or parent if the student is a minor) before personally identifiable information in an education record can be released. Although a number of exceptions to the informed consent requirement have been built into the law—notably a “study” exception for “organizations conducting studies for, or on behalf of, educational agencies”—researchers have struggled, particularly in recent years, to obtain access to education records even with strict confidentiality protections in place.

Meanwhile, Congress and the Bush administration have, under the No Child Left Behind Act, put renewed emphasis on scientifically based education research to guide policy makers and have provided substantial funds for building state longitudinal data systems that will allow student academic progress to be tracked over time. Indeed, the No Child Left Behind Act repeatedly refers to “scientifically-based” research in calling for rigorous science on which to base policy decisions. Limiting research access to education records has placed obstacles in the way of much valuable research.

Balancing research access and confidentiality protections is a key issue for researchers, including education researchers, and has been on the agenda of the National Academies for decades. To examine the issue in the context of FERPA and other privacy laws such as the Health Insurance Portability and Accountability Act (HIPAA), the National Research Council (NRC) of the National Academies and the American Educational Research Association held a workshop on April 24–25, 2008. I was pleased to be invited by the NRC to chair the planning committee for this initiative.

The Workshop on Protecting Student Records and Facilitating Education Research addressed the critical importance of researchers’ access to education records for producing research-based information for policy makers; it also addressed the gaps in knowledge when research access is restricted. The workshop was supported by grants to the NRC from the William T. Grant Foundation, the Ewing Marion Kauffman Foundation, and the Spencer Foundation. Serving with me on the planning committee were Robert F. Boruch, University of Pennsylvania; Helen F. (Sunny) Ladd, Duke University; Martin Oland, WestEd; Jay Pfeiffer, Florida Department of Education; and Barbara Schneider, Michigan State University. Schneider also is Chair of the AERA Government Relations Committee, which strongly encouraged AERA’s taking a leadership role in addressing how best to reconcile researcher access with the privacy protections afforded under FERPA.

As far back as the spring of 2006, when AERA first decided to examine how best to address researcher access to student records, appropriate mechanisms for safeguarding confidentiality, and pathways for reconciling access with privacy, we were aware of ethically sound mechanisms that were permissible under other privacy protection regulations. When we learned that the NRC was simultaneously considering the same issue, the two organizations formed this partnership and plans for a workshop ensued. It was not until later in 2007 that the U.S. Department of Education also began to consider revisions to the FERPA regulations. Although driven primarily by safety issues surrounding the Virginia Tech tragedy, the Department reexamined the entirety of the regulations, including the provisions related to research. In fact, the NRC-AERA FERPA workshop occurred during the Department’s open comment period for revising the regulations; therefore, an added benefit of the workshop was that substantive discussions provided a valuable backdrop for responses to the proposed regulations.



Jane Hannaway (left) of the Urban Institute and Thomas Bailey of Teachers College, Columbia University, discuss important gains from research using administrative record systems.

Educational Researcher, Vol. 37, No. 5, pp. 302–306
DOI: 10.3102/0013189X08322877
© 2008 AERA. <http://er.aera.net>

Workshop speakers addressed a range of topics, including the history and context of FERPA and the proposed regulations; how privacy, confidentiality, and research access have been achieved in federal statistical, health, and education programs; models used in some states to provide research access to education data through state administrative data systems; how access to individually identifiable longitudinal data can provide insights into student learning and achievement that cannot be attained otherwise; and the value of partnerships between educational agencies and researchers in raising broad questions, utilizing research expertise, and spreading limited resources.

The NRC is in the process of preparing a summary of the workshop. In addition, many workshop speakers were asked to prepare papers for the workshop, which now will be peer-reviewed and published by AERA. These activities, aimed at understanding the need for research access to education records consonant with appropriate confidentiality safeguards, are moving forward at the same time that the U.S. Department of Education considers comments on its proposed changes to the FERPA regulations.

In addition to the NRC workshop, AERA undertook efforts to examine and improve the policy environment that shapes the



Three members of the workshop's planning committee confer: from left, Robert Boruch of the University of Pennsylvania, Helen (Sunny) Ladd of Duke University, and Barbara Schneider of Michigan State University.

conduct of research. On May 8 of this year, AERA submitted comments on the Department's proposed changes to the FERPA regulations. Our comments were aimed at building a foundation within the revised regulations for research access to education



Myron Gutmann (left) of the University of Michigan speaks at a session on models for assuring data access and privacy protection as Lizanne DeStefano of the University of Illinois, Urbana-Champaign, listens attentively.

records while honoring the law's intent to safeguard student privacy and protect student confidentiality. (See letter to U.S. Department of Education, page 304.) The American Statistical Association and the Consortium of Social Science Associations joined AERA in submitting these comments.

The planned AERA publication and the NRC workshop summary will add to the growing body of work on ways to balance the need for data-driven research and confidentiality protections. The issue, as with many others, will likely come to the fore again. Still, we hope that solid research and the feasibility of doing it in ethically sound ways soon are enabled through an improved FERPA regulatory framework.

These AERA efforts reflect one of the key responsibilities of the Association as the national education research society—that is, to educate and advocate for policies that advance education research as a field. We hope that the work of the Association will have a net benefit in facilitating the pursuit of important research and furthering knowledge that serves the public good. Please do not hesitate to send me an e-mail with your thoughts, comments, professional experiences, or concerns on this or any other issue. As in this instance, it is hearing from education researchers in the field that shapes the agenda of what we at AERA do.

Felice J. Levine
Executive Director
flevine@aera.net

Letter on FERPA

Note. This letter was submitted during the open comment period held by the U.S. Department of Education on the proposed revisions to FERPA.

May 8, 2008

Mr. LeRoy S. Rooker
Director, Family Policy Compliance
Office
U.S. Department of Education
400 Maryland Ave, SW, Room 6W243
Washington, DC 20202-5920

RE: Proposed Revisions to the Family
Educational Rights and Privacy Act
(FERPA)
Docket ID: ED-2008-OPEPD-0002

Dear Mr. Rooker:

Thank you for the opportunity to comment on the proposed revisions to the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The professional research societies listed at the end of this letter commend the Department for taking steps to clarify and improve FERPA through the proposed revisions. Our comments are consistent with renewed efforts by both the administration and Congress to build the science underlying educational policy and practice. The emphasis on rigorous research is most evident in the No Child Left Behind Act which mentions the phrase “scientifically-based” research 111 times.

Implementing the No Child Left Behind law has produced an enormous amount of data that could be tapped to address some of the most pressing questions about student achievement or what makes a teacher effective. Although educational agencies and institutions are trying to make use of this data, many are faced with limited financial and personnel resources. By making the data accessible to researchers outside these agencies and coupling the practice with solid confidentiality practices, the investment of taxpayer dollars to create these data systems can be put to maximum use. There are currently a number of successful models for achieving this balance, and more should be done to facilitate the development of

partnerships between educational agencies and researchers in order to build a solid science for education.

A particularly significant initiative is the U.S. Department of Education’s push for the development of statewide longitudinal data systems (SLDS). Since November 2005, IES has awarded grants to 27 states to develop these data systems. The sharing of data between state educational agencies to build longitudinal databases that allow tracking of student progress across educational levels is critical. Likewise, the creation of mechanisms within the FERPA regulations to encourage research is absolutely essential if we are to generate the knowledge for data-driven decisions about educational policy and practice.

Our comments are directed at achieving these shared goals, while honoring the intent of the law to protect the privacy and confidentiality of student education records. We offer specific comments on the proposed changes and suggest additional recommendations for the Department to consider.

Section 99.3

Redefining “disclosure”

Currently, the federal government is investing millions of dollars into building state longitudinal data systems. According to the Department’s own web site, these data systems “are intended to enhance the ability of States to efficiently and accurately manage, analyze, and use education data, including individual student records. The data systems...should help States, districts, schools, and teachers make data-driven decisions to improve student learning, as well as facilitate research to increase student achievement and close achievement gaps.” The current interpretation of the term “disclosure” is severely limiting the ability of state education agencies and SLDS’s to integrate data across state education agencies. In addition, the restrictions on the redisclosure of education records by state educational agencies is further hindering the ability to track student progress and understand factors that influence achievement.

We recommend that the Department of Education change the definition of the

term “disclosure” in the regulations such that a *transfer* of student data from education records to a state education agency or a state authority holding SLDSs is not considered a disclosure of student records. Likewise, we recommend that the transfer of education data between the state and local education agencies or between multiple state education agencies (such as K-12 or postsecondary agencies or multiple SLDSs within the state) not be considered a disclosure. The restrictive interpretation of the term “disclosure” has limited the ability of state education agencies to monitor student progress and provide access to valuable education data for research purposes. Redefining the term disclosure would address this problem. In our view, the FERPA statute itself seems to provide the leeway needed to make this change.

Section 99.31(a)(6)(i)

Interpretation of the phrase “for, or on behalf of”

Section 99.31(a)(6)(i) permits educational agencies or institutions to disclose personally identifiable information without consent if the disclosure is to “organizations conducting studies for, or on behalf of, educational agencies or institutions to: (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction.” We applaud the efforts of the Department to broaden the interpretation of the phrase “for or on behalf of.” Although the phrase is not defined in the *current* regulations, the current *guidance* requires educational agencies to “authorize” a study and has placed significant restrictions on research that could be highly beneficial to educational agencies. The proposed regulations would allow an outside research organization to initiate a study, and this is a significant improvement.

We remain concerned, however, that the vast amount of data collected and maintained for the purpose of improving education will not be available for research. Therefore, we urge that the revised regulations define “for, or on behalf of” so that it is clear that the intent is to make data available for research and statistical purposes consonant with privacy protections, whether

or not explicitly sought by an educational agency or institution.

(a) Certification of agreements. States such as Florida and Michigan have been leaders in creating partnerships with research organizations, but there is a great deal of inconsistency across states in providing access for research purposes. In addition, the Department's own Institute of Education Sciences (through the National Center for Education Statistics) provides licensing agreements for the research use of personally-identifiable information in its databases using a "strict" process that protects the confidentiality of the data. Thus, there exist a range of successful models to show how these agreements may take shape, and states should be able to use these and other such models if a solid data security plan is in place and there are sanctions for the unauthorized disclosure of confidential information.

In addition, we encourage the U.S. Department of Education to take additional steps to make clear that such arrangements are acceptable under FERPA. There is substantial need to alleviate the concerns of state officials in providing research access to conduct studies for, or on behalf of, educational agencies or institutions. One significant step the Department could take would be to "certify" agreements between educational agencies and research organizations as meeting the requirements of FERPA. Furthermore, the Department could post such sample agreements on the Family Policy Compliance Office web page to advise and help educational agencies. This approach would give educational agencies some assurance regarding the boundaries of FERPA, reduce the burden on agencies to create these agreements, and signal that the Department encourages research within the limits of the law.

(b) State education agencies and written agreements. As mentioned above, the federal government is investing substantial resources into building state longitudinal data systems, but the current regulations significantly limit the use of these data for research purposes. One of the keys to achieving this is to be able to connect individual student data across databases and across years of education. The Department should clarify that state

education agencies and state authorities that maintain SLDSs are authorized (as with local educational agencies) to enter into written agreements with research organizations.

Section 99.31(a)(6)(i)(C)

Interpretation of the phrase "improve instruction"

Efforts to "improve instruction" must account for the context of children's lives. Research aimed at understanding the many factors (such as developmental disabilities or socioeconomic status or physical health) that affect learning is critical in helping children and in guiding policymakers and educators. The revised regulations should make clear that research to improve instruction includes the spectrum of research essential to understanding children's education, learning, and academic achievement and progress. To enable this to happen, the U.S. Department of Education should clarify that educational agencies, under Section 99.31(a)(6)(i) through (iv), may disclose personally-identifiable data directly to research organizations (or governmental agencies under (6)(iv)) to conduct these types of studies for, or on behalf of, educational agencies, as long as strong data protection plans to protect confidentiality are in place. Although FERPA regulations currently allow for the disclosure of de-identified data, understanding the relationship between health or social factors and learning often requires the use of personally-identifiable data. Addressing the issues of disclosure and redisclosure as described elsewhere in this letter as well as broadening the interpretation of the phrase "improve instruction" would importantly facilitate this type of research that will be instrumental in meeting children's needs.

Section 99.31(6)(ii)(B)

Destruction of data

The current regulations require that information which is disclosed (or redisclosed) for use in a study be "destroyed when no longer needed for the purposes for which the study is conducted." A fundamental part of the scientific process is verifying findings and testing new hypotheses

using the same dataset, and premature destruction of the data can waste valuable resources. We encourage the Department to provide some latitude to educational agencies and research organizations to determine when the data are no longer needed for the agreed upon scientific purposes and to retain identifiable datasets where necessary under strictly-controlled conditions (as is done with other federal and state statistical and record-keeping systems).

Section 99.32

Allowing (re)disclosure and record-keeping by state education agencies

The proposed regulations would allow state education agencies (in line with Section 99.33) to redisclose personally-identifiable data without consent to parties who qualify under Section 99.31 if the educational agency complies with the recordkeeping requirements in Section 99.32. This would help to resolve the problem created by the definition of disclosure (although not as clearly as redefining the term "disclosure"). To enable the effective implementation of this proposed change, we recommend that the new regulations also allow state educational agencies to maintain a record of requests and (re)disclosures made at the state level in accordance with Section 99.32. Specifically, the Department should clarify that a state education agency or a state authority maintaining a SLDS is considered an educational agency or institution under the regulations and thereby has the authority under Section 99.32 to maintain these records at the state level. If necessary, the Department should redefine or reinterpret the phrase "educational agency or institution" to grant this authority. Other approaches may also be possible to permit (re)disclosures and record-keeping at the state level.

Other Issues

Despite the regulations and guidance offered by the Department, there remains considerable confusion regarding FERPA at the state and local levels. For example, we are aware of reports that some states will not release aggregate data even though privacy protections are in place.

While the individual educational agencies and institutions ultimately decide when and to whom to release data, we are concerned that the reluctance to do so may be the result of reading more into the term “education records” than is warranted under the regulations as well as concerns about possible sanctions by the Department (including a misunderstanding about the fact that any penalty must be linked to a “policy or practice” and that voluntary compliance must be sought first). The Department should consider clarifying some of these issues either in the regulations or through guidance.

Finally, under 45CFR46, Institutional Review Boards (IRBs) have the responsibility to review investigator research protocols to ensure that human participants are protected and confidentiality protections, when needed, are in place. IRBs are often charged with other responsibilities such as

ensuring that research protocols are in line with other federal or state statutory requirements such as FERPA. We encourage the Department to reach out to IRBs through workshops and written materials to clarify issues relating to the “study” exception, disclosure and redisclosure requirements, and other research-related matters as needed, especially when the revisions to the regulations have been promulgated.

Concluding Thoughts

As representatives of researchers who conduct many of the studies upon which educational policies and practices are based, we wholeheartedly agree with the necessity to safeguard student privacy and protect the confidentiality of education records that contain personally-identifiable information. The comments and recommendations offered here do this, while

also allowing responsible access to student data for research purposes.

In summary, measures must be taken to achieve a rational balance between research access and privacy/confidentiality protections within the limits of the statute. Without this, policymakers at the federal, state, and local level will not have the science upon which to base educational decisions, and taxpayer dollars used to build education databases will not be well spent. Again, we appreciate the opportunity to comment on the proposed revisions to FERPA regulations.

Sincerely,

American Educational Research
Association
American Statistical Association
Consortium of Social Science
Associations

Ethical Standards of the American Educational Research Association: Cases and Commentary



This indispensable 21st-century volume communicates and clarifies the central intentions of the Standards. It also explores and discusses any ambiguities in the Standards and in the broader role of code of ethics and ethical obligations.

Authors: Kenneth A. Strike, Melissa S. Anderson, Randall Curren, Tyll van Geel, Ivor Pritchard, and Emily Robertson

Order from the American Educational Research Association.

Online: <http://www.aera.net>

By Phone: (202) 238-3200

Member Price: \$30 plus shipping

Non-Member Individual Price: \$35 plus shipping

Institution Price: \$35 plus shipping

Paperback: 193 pages

ISBN: 0-935302-28-X