National School Boards Association

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June 3, 2015

The Honorable John Kline
Chairman
Committee on Education and the Workforce
United States House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert C. "Bobby" Scott
Senior Democratic Member
Committee on Education and the Workforce
United States House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Re: ***Family Educational Rights and Privacy Act (FERPA)***

Dear Chairman Kline and Senior Democratic Member Scott:

The National School Boards Association commends Chairman Kline and Senior Democratic Member Scott for proposing a bold and comprehensive new look at the Family Educational Rights and Privacy Act (FERPA),[1] now over forty years old. School boards and their attorneys recognize that the law needs a fresh approach, one that reflects the new and emerging reality of how schools collect, store, manage and work with student information in the 21st century.

Educators, parents, students and communities no longer think of "education records" as paper files in cabinets stored at a school or in a central office. In fact, the whole notion of student learning is quickly changing from an in-person experience at a school building, with work completed on paper, to an ongoing, 24/7 process in which students are connected to information, teacher input, and each other through various technologies.

Since FERPA's enactment in 1974, a complex and varied patchwork of state laws has developed, all affording slightly different and locally-determined protections to student education records. Indeed, this year and last, state legislatures rapidly are proposing and passing new bills designed to update state laws by addressing student data privacy protections. [2]

NSBA Recommendations

NSBA urges Congress to update FERPA so that it continues to provide a federal framework of privacy protections for student information held by schools and their delegates, while allowing states and local districts to continue to fashion policy consistent with local priorities and existing data systems. The law should be crafted to remain relevant and applicable to ever-evolving technology tools, school practices, and societal norms.

[1] 20 U.S.C. §1232g.

[2] Data Quality Campaign reports tracking 178 student data privacy bills in 45 states, and law passed in 6 states. www.datauqalitycampaign.org.

Because 21st century technologies gather data at a pace and scale not anticipated in 1974, an updated FERPA necessarily must address which of these data remain covered and how schools' responsibilities may have changed as a result. The current draft continues to use familiar terms like "education records" and "personally identifiable information," (PII) which school officials know. These terms have been used for forty years to cover sensitive student information – discipline records, grades, and special education files, for example – contained in official school records. Similarly, "directory information," including a student's name, address, phone number and the like, has been addressed in FERPA and remains a familiar concept.

Today, we have a third category of data that does not so easily fall under familiar FERPA concepts – the trove of metadata and de-identified data created each day with students' use of online learning tools. NSBA urges Congress to refrain from expanding FERPA to cover such data, thereby dramatically expanding the role of schools in tracking and policing vast amounts of information held by private companies. Most school systems are not currently equipped with sufficient personnel time or expertise to police operators' maintenance and use of data collected through their online or mobile services to the extent contemplated in this draft. In addition, Local Educational Agencies (LEAs) currently lack the bargaining power necessary to negotiate favorable terms with operators in the first place.

With these general ideas in mind, NSBA proposes the following specific suggestions on the draft bill.

1. The definition of "education record" or "PII" should not be broadened, for purposes of FERPA requirements, to include data not currently included in the regulatory definition of PII.[3] As written, the current draft bill expands the definition of "education records" to include those maintained "electronically or physically," and adds to the definition those records "accessible, collected, used or maintained by an education service provider [in the course of providing services to a school official]." We suggest including the spirit of the bracketed language, but changing the wording to be clear that FERPA covers education records maintained by a provider "on behalf of an educational agency or institution."

   Additionally, we urge Congress to combine the prohibitions on release of "education records" and "PII" contained in them, rather than separating the prohibition on release of PII.

   NSBA urges Congress to make it clear that schools are responsible for FERPA protections only for education records and PII within them that schools control and maintain for the purpose of a child's education. This includes, under the new language, FERPA-covered education records in the hands of an education service provider working on behalf of an agency or institution, but not, as the draft

[3] Personally Identifiable Information
The term includes, but is not limited to--
(a) The student's name;
(b) The name of the student's parent or other family members;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number, student number, or biometric record;
(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.
34 CFR 99.3.

currently suggests, one providing services to a "school official" individually. For example, an LEA should not be bound under FERPA for data collected by an individual teacher who acts outside of LEA policy when he requires students to use a particular app in the classroom, and agrees to the operator's "click-wrap" terms of service. As written, the draft also seems to place more restrictions on release of PII in education records than that placed on education records alone, a distinction that is confusing and unnecessary.

2. Congress should refrain from adding layers of federal regulation or expanding the role of the Department of Education ("the Department") beyond encouraging consistency in practice across the country, and providing support through guidance and training, as its Privacy Technical Assistance Center is currently doing. Specifically, NSBA opposes the expansion of the Department's role in the provisions labeled "ENFORCEMENT" and "COMPLIANCE OFFICE."

   The draft bill contains new provisions allowing the Department to impose fines for violations. ($2000 per student harmed up to a max of $500,000). Fines against LEAs will have a punitive effect on students by drawing away resources for investigations and punitive measures. NSBA asks that Congress consider an incremental enforcement approach beginning with an opportunity to remedy, and ending with supportive intervention, not fines. Suggested language appears in highlight below.

   > (l) ENFORCEMENT. – The Secretary shall take appropriate actions to enforce this section and to address violations of this section by an educational agency or institution or a party with which such agency or institution has agreed to share information, in accordance with this Act~~, which~~. SUCH ACTIONS MUST BEGIN WITH SPECIFIC NOTICE OF THE ALLEGED VIOLATION AND AN OPPORTUNITY TO REMEDY AND may include SUPPORTIVE INTERVENTION AND TRAINING PROVIDED BY THE SECRETARY. ONLY WHEN SUCH ACTIONS HAVE NOT RESULTED IN VOLUNTARY COMPLIANCE WITH THIS ACT WITHIN A REASONABLE TIME PERIOD MAY THE SECRETARY EVENTUALLY TAKE action to terminate Federal assistance. ~~if there is not voluntary compliance [and fines of $2,000 per student harmed up to a maximum of $500,000]~~.

   The draft bill also proposes establishment of a new office within the Department to monitor compliance, and to investigate, process, review, and adjudicate violations and complaints. Again, NSBA notes that the appropriate federal role in the student data privacy sphere is consistency in practice across the country, and building local capacity through training and resources, rather than strong enforcement. The Department's Privacy Technical Assistance Center has been producing helpful guidance and training; NSBA urges Congress to support that office's current efforts. NSBA suggests, therefore, that the following provision be eliminated as indicated below:

   > ~~(n) COMPLIANCE OFFICE. –~~
   >
   > ~~(1) The Secretary shall establish or designate an office within the Department for the purpose of monitoring compliance with this section, investigating processing, reviewing, and adjudicating violations of this section and investigating, processing, reviewing, and adjudicating complaints which may be filed concerning alleged violations of this section.~~
   >
   > ~~(2) Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.~~

3. Several new requirements in this draft bill, although consistent, in spirit, with best practice recommendations under FERPA today,[4] nevertheless would impose significant administrative burden on LEAs. We urge Congress to work in consultation with school boards, administrators and school attorneys to clarify the proposed requirements, listed below, to further refine how districts may implement these requirements with the least amount of disruption and administrative burden.
    a. The draft requires educational agencies and institutions to designate an official responsible for maintaining security of education records. "Security" suggests protecting the records against breach, which is indeed an important concern. A "security" function, however, would not necessarily include protecting "privacy," as that term has come to be understood. We ask that Congress clarify whether this official would act to maintain "security" of records only, or would act in a role akin to a Chief Privacy Officer, which groups including NSBA have recommended as a best practice.
    b. The draft requires educational agencies and institutions to establish, implement and enforce security policies and procedures and to require parties that maintain or store PII to follow the security practices established in the bill. The statute should be clear that schools can meet this burden with respect to "parties" by specifying it through contract. NSBA recommends that the Department provide non-binding model terms for written agreements that meet federal statutory requirements. States and local districts can then adapt new policies and procedures to comply with their own state and local laws.
    c. The draft requires a written agreement containing specific provisions for an educational agency or institution to share "information" with a party. Here, "information" should be changed to "education records and personally identifiable information within them" to be clear that only FERPA-protected information is covered. The word "guarantees" should be changed to "assures." NSBA recommends that LEAs be afforded a generous implementation period, with grandfathered status for contracts with providers in place at the time of passage. We recommend that the Department develop a non-binding model written agreement that complies with the new federal FERPA requirements that states and local districts may adapt to reflect their own laws and policies.
    d. The draft requires educational agencies and institutions to "ensure" that parties with access to education records comply with the parent access provisions. The wording should be changed as indicated below to reflect a notice, rather than policing, function for LEAs. NSBA urges Congress to make clear that the Department should state through regulation or guidance that an LEA complies with this provision with a negotiated written agreement requiring such compliance.

> (12) REQUIREMENTS FOR ACCESS. –
>
> (A) The education agency or institution shall ~~ensure that~~ NOTIFY any party with access to education records with personally identifiable information ~~complies with~~ THAT IT AGREES TO the following:

4. While the bill's goal to foster transparency is laudable and consistent with NSBA-recommended best practice that school boards regularly communicate with school communities about privacy rights and policies, the statute should clarify how districts may meet the requirements. As written, the draft bill requires that an educational agency sharing information in education records give parents notice of the

[4] For example, NSBA has recommended that schools craft policies with clear guidelines or procedures for evaluation and adoption of internet ("Cloud")-based services, including requiring a written contract. See "Data in the Cloud: A Legal and Policy Guide for School Boards on Student Data Privacy in the Cloud Computing Era," *available at* http://www.nsba.org/sites/default/files/Data_In_The_Cloud_Guide_NSBA_COSA_02-09-15.pdf.

sharing in an easy-to-understand format, and make available written agreements between the agency and the party receiving the information. The notice requirement could become burdensome for LEAs if it is interpreted by regulation or enforcement to be an ongoing obligation.

The proposed requirement that schools post written contracts with operators online raises numerous concerns, including confidentiality provisions in existing contracts. Congress should consider a framework in which operators are regulated under a separate regulatory regime, and permit state Freedom of Information and similar sunshine laws to continue to govern transparency requirements at the local level.

With these concerns in mind, NSBA suggests the following changes to the draft:

> (B) Any educational agency or institution sharing information contained in an education record shall –
>
> (i) give parents notice of the sharing in an easy-to-understand format AT LEAST ONCE PER SCHOOL YEAR ON THE AGENCY OR INSTITUTION'S WEBSITE OR IN WRITING~~; and~~
>
> ~~(ii) make available the written agreements between the agency or institution and the party receiving the information~~.

5. The draft bill's purported ban on marketing and advertising is written broadly to encompass any marketing or advertising directly to students with the use of information gained through access to PII or the education record, by any "person," and prohibits schools from entering into an agreement with a provider that has policy or practice of doing so (except with respect to school pictures). Without clarification, this provision is problematic on several levels. By purporting to regulate a "person," it is likely beyond the scope of FERPA, which applies to recipients of federal funds. By regulating, but not defining, "marketing or advertising," it may sweep in a vast array of practices targeting individual students, such as a school counselor directing information from colleges to students who might be good matches. Finally, by placing the burden on schools to police operator policies, it creates another burden for LEAs that most are not equipped to carry. NSBA urges Congress to re-draft the provision to be consistent with any new federal law directly regulating providers themselves.

6. NSBA suggests that Congress remove the provisions allowing parent-opt-out of research studies and release of education records or PII to "a party" pursuant to a written agreement. "Opt-out" provisions can impose significant administrative burdens on schools if large numbers of students and parents opt out. Similarly, large numbers of students or parents opting out of studies will have a detrimental effect and hinder efforts to improve student achievement.

7. NSBA urges Congress not to add an unfunded mandate by requiring training, but instead to require the Department to support LEA efforts to train staff by providing funding, direct training, and resources.

In conclusion, NSBA applauds the Committee for undertaking a bipartisan update to the 1974 law, and further applauds the depth and breadth of stakeholder involvement in preparation of draft legislation. At a time when problem-solving, creativity, critical thinking, and other high-level 21st century skills are critical for success in a global workplace, we have an opportunity to support LEA capacity to provide the technology and tools necessary to foster these skills. At the same time, we must balance the promise of data-driven instructional strategies with privacy and transparency for students and their families, and the operational consequences for LEAs. NSBA welcomes this opportunity to provide recommendations for the legislation, and to be a resource going forward.

Sincerely,

Thomas J. Gentzel
Executive Director, NSBA