

May 20, 2011

Regina Miles
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

RE: Docket ID ED-2011-OM-0002

Dear Ms Miles:

On behalf of the Software & Information Industry Association (SIIA) and our member high-tech companies, we write to comment on the U.S. Department of Education's notice of proposed rulemaking to amend the regulations governing the Family Educational Rights and Privacy Act (FERPA) – Docket ID ED-2011-OM-0002. SIIA commends the Department for taking steps to update and clarify the regulations, and appreciates the opportunity to share our perspective on these and other suggested changes.

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital content industry, representing more than 500 leading high-tech companies. Many SIIA members provide products and services to educational agencies and institutions, including in the areas of instruction, curriculum, assessment, data management, and enterprise management, among others. Many of these products and services are technology-based – e.g., software, web-based content, web-delivered services, data systems, etc. – and involve the collection, warehousing, and management of student data.

In most cases, personally identifiable information is either not collected, or if collected, is maintained in such a secure manner that the vendor may not access the data. For example, in some cases, a software application – e.g., assessment, gradebook, student information system, etc. – is licensed that enables schools to build their own files or databases and host them on local computers or servers. The vendor would have no means to access such data. In other cases, the vendor is merely providing a platform that the educational entity is solely able to utilize and that also has controls for data access, even increasingly as those applications, systems and data warehousing move to a service or cloud-computing model. In most instances, both a unique student identifier and student authentication is required to enable students to sign-on and access these systems, with similar security needed for other authorized individuals to access personally identifiable information. In nearly all these cases, SIIA members have a contract with the institution or agency through, for example, either a software license agreement, a web-based subscription services agreement, or some other services agreement that would govern data access protocols.

SIIA appreciates that the Department's proposed regulatory changes were motivated, in part, by the important need to enable the effective use of data in statewide longitudinal data systems (and therefore to respond to changes in the use of information technology), while also protecting the privacy of education records.

In general, SIIA members have found FERPA to be an appropriate regulation that facilitates the provision of their products and services, though there are limited cases where FERPA is, or is perceived to be, inappropriately a barrier to delivery of products and services. SIIA therefore provides below a number of comments on the proposed regulations, and on additional regulatory changes, intended to ensure that the regulations do not inappropriately increase barriers to agency or institution use of SIIA member products and services in a manner otherwise not intended.

SIIA's comments will focus in three areas:

- SIIA generally supports the proposed changes to the regulations to facilitate states' ability to evaluate education programs, and to foster innovation and continuous improvement.
- SIIA encourages further clarification aimed at enhancing the public-private research partnerships necessary to improve education.
- SIIA encourages further clarifications aimed at avoiding unintended consequences that would provide barriers to the delivery by third party vendors of electronic educational products and services.

Research Studies (§99.31(a)(6))

Many SIIA members – providing instructional, curricular, testing, and data management products and services to educational institutions and agencies – also partner with these entities to evaluate such products and services. Through these partnerships, products and services are enhanced in order to serve the goal of better instruction. In many cases, FERPA is, or is perceived to be, a barrier to an education agency or institution otherwise willing to participate in such a study. Agencies and institutions are too often inappropriately interpreting these provisions too narrowly and excluding research simply because it involves third-party products and services, is initiated by third-party providers, or doesn't fit within a narrowly-defined interpretation of the authorized research purposes.

SIIA supports the proposed regulations to “clarify that nothing in FERPA or its implementing regulations prevents a State or local educational authority or agency headed by an official listed in §99.31(a)(3) from entering into agreements with organizations conducting studies under §99.31(a)(6)(i) and redisclosing PII on behalf of the educational agencies and institutions that provided the information in accordance with the requirements of §99.33(b)” and to “require written agreements between a State or local educational authority or agency headed by an official listed in §99.31(a)(3) and any organization conducting studies with redisclosed PII under this exception (see proposed §99.31(a)(6)(iii)(C)).” We especially believe that binding written agreements are appropriate for addressing many issues that arise with the use of student data, as is the best practice for SIIA members in entering service or license agreements with educational agencies and institutions.

In addition, SIIA recommends the following modifications to the proposed regulatory changes:

- In Section 99.31(a)(6)(i) and (a)(6)(i)(C): Clarify “on behalf of” to explicitly include a broader array of studies which the educational agency or institution certifies as in their interest and that of their students. SIIA asks that Section 99.31(a)(6) be further amended to read:

“(i) The disclosure is to organizations conducting studies for, on behalf of, *in partnership with, or in the interest of* educational agencies or institutions, *as determined by those agencies or institutions*, to:”

- In current Section 99.31(a)(6)(i)(A): Clarify this paragraph allowing studies for “predictive tests” to support research for a broader array of related assessment and instructional resources. In so doing, SIIA asks that the Department recognize the evolving purposes, designs and uses of tests, including their common integration within larger instructional programs. Research studies intended to “develop” or improve a variety of educational products and services – not just “predictive tests” – are in the interest of all of education, including the participating educational institution or agency. SIIA therefore asks that the regulations be amended so that Section 99.31(a)(6)(i)(A) reads as follows:

“(A) Develop, validate, or administer predictive, *formative and summative tests, and other instructional, curricular, and assessment resources and interventions;*”

- In Section 99.31(a)(6)(i)(C): Clarify “improve instruction” to explicitly include a broader array of studies which the educational agency or institution certifies as in their interest and that of their students. There is evidence that agencies and institutions are narrowly interpreting “improve instruction.” SIIA asks that Section 99.31(a)(6)(i)(C) be further amended to read:

(i) “(C) Improve *learning and instruction, either directly or indirectly such as improvement of instructional interventions, including studies that will improve educational agencies or institutions*”

- In current Section 99.31(a)(6)(iv): Amend this section to make clear that a third party who violates the conditions upon which it is provided access to personally identifiable information for research purposes shall be prohibited future access for only such purposes of “conducting studies” and not necessarily for other purposes related to the provision of products, services and other functions. Absence of such clarification could otherwise force an institution or agency to curtail a valued vendor relationship. SIIA therefore asks the regulation be amended so that Section 99.31(a)(6)(iv) reads at the end:

(iv) “. . . the educational agency or institution may not allow that third party access to personally identifiable information from education records *for conducting studies* for at least five years.”

Directory Information (§99.37)

SIIA supports the proposed regulation that “parents or eligible students may not use their right to opt out of directory information disclosures to prevent an educational agency or institution from requiring students to wear or otherwise disclose student ID cards or badges that display information that may be designated as directory information under §99.3 and that has been properly designated by the educational agency or institution as directory information under §99.37(a)(1).” SIIA views this proposed change as consistent with the goal of ensuring that educational agencies or institutions be able to use directory information for the provision of basic educational (including administrative) services, and that student opt-out can have very disruptive impact, including with regard to instructional and administrative technologies.

In addition, SIIA recommends the following modifications to the proposed regulations:

- Opt-Out. SIIA wants to ensure that other FERPA regulations are explicitly understood NOT to allow students and parents to opt out of participation in education activities just because they require sign-on access to products and services through electronic systems. SIIA proposes amending Section 99.37(c) to read as follows:

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled, *including for access to communications, instruction, curriculum, courses or administrative functions provided online and through other technology as well as for research purposes.*

In light of the increasing use of electronic systems for both instructional and administrative activities, SIIA suggests that the Department can not and should not differentiate between these types of activities nor in the degree to which students may opt out. The allowances for students to opt out on this basis could have great unintended consequences by undermining the use of products and services accessed through electronic systems. SIIA, therefore, asks for these changes to ensure that

student's may NOT opt out of participation in all manner of classroom, institutional or agency activities simply because they employ sign-on access through electronic systems.

Directory Information (§99.3)

SIIA supports the proposed regulation to “modify the definition of directory information to clarify that an educational agency or institution may designate as directory information and nonconsensually disclose a student ID number or other unique personal identifier that is displayed on a student ID card or badge if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.” SIIA views it as critical that barriers be minimized to the routine access to, communicating in, or use of increasingly mission critical electronic systems.

In addition, SIIA recommends the following modifications to the proposed regulations:

- Social Security Numbers. As agencies and institutions move increasingly to the use of unique student identifiers that are distinct from student Social Security Numbers (SSNs), SIIA encourages regulations and guidance that provide a path for ultimately limiting institutions and agencies from using a student's SSN as their student identifier and instead require assignment of, and exclusive use of, the student identifier. As vendors of instructional, student information, assessment and other electronic systems and applications, SIIA members recommend the absolute minimal use of SSNs as prudent practice, no matter how strong the data privacy and security measures taken.

Other Proposed Regulations

In addition to responses to the above responses to proposed regulations, SIIA recommends that the U.S. Department of Education consider the following additional regulatory changes:

- De-identified Records and Information. In Section 99.31(b): SIIA supports “de-identification” – i.e., the removal of personally identifiable information from education records – as a means for exempting such records from disclosure requirements. In addition, to ensure such “de-identification” can be leveraged within the context of research studies, SIIA believes further changes are needed.

The actual process of de-identification is often too resource intensive for educational institutions and agencies to conduct for certain research purposes, especially in cases where such studies require data to be assembled from multiple education records and sources. This is most often best done by the researcher, not the school. We therefore ask that the regulations be further amended to allow the entity conducting the research to “de-identify” the education records under terms of a written agreement. To achieve this objective, SIIA suggests that the regulations explicitly allow that the research entity may be treated as a “contractor” as described by the regulations in Section 99.31(a)(1)(i)(B).

In Section 99.31(b)(1), insert “, including an organization conducting a study under Section 99.31(a)(6) and acting for these purposes as a contractor as described under Section 99.31(a)(1)(i)(B),” after “or information from education records under this part”

SIIA believes that other protections included in current and proposed Section 99.31 in conjunction with both standard research protocols and security procedures are otherwise sufficient to ensure personally identifiable student information is adequately protected in the course of research studies. These procedures include use of binding agreements between the educational agency or institution and the entity conducting the study.

- Location of Data Hosting. In the case of electronic data, SIIA wants to ensure that the regulations make clear that FERPA does not discriminate based upon where data is hosted. In other words, it should not matter under the regulations whether the data is: (a) hosted in a vendors' offsite network and delivered over the Internet, or (b) hosted within the institution's local network servers or on its computers. SIIA appreciates that the NPRM states that: "FERPA does not constrain State administrative choices regarding the data system architecture, data strategy, or technology for SLDS as long as the required designation, purpose, and privacy protections are in place." However, that finding is not backed by the regulations.

SIIA therefore asks for the addition of explicit regulatory language regarding the neutral treatment regarding the physical location of student education records to counter the misperceptions among some education agencies and entities that: (a) such data may not be hosted offsite under FERPA; or (b) at least that this would automatically trigger FERPA disclosure and consent requirements. This is consistent with the Obama Administration's cybersecurity proposal: "Data Centers. The Federal Government has embraced cloud computing, where computer services and applications are run remotely over the Internet. Cloud computing can reduce costs, increase security, and help the government take advantage of the latest private-sector innovations. This new industry should not be crippled by protectionist measures, so the proposal prevents states from requiring companies to build their data centers in that state, except where expressly authorized by federal law." (See <http://www.whitehouse.gov/the-press-office/2011/05/12/fact-sheet-cybersecurity-legislative-proposal>)

SIIA therefore suggests adding regulations that:

"Notwithstanding other regulatory provisions, a local educational agency, an educational institution, a state educational agency, or their authorized representative are not constrained regarding the data system architecture, data strategy, data hosting location, or technology as long as the required designation, purpose, and privacy protections are in place, and the storage of data in offsite or out-of-state data centers does not itself trigger FERPA requirements different than if the data were hosted within the institution or agency itself."

- Disclosure to Contractors without Consent. SIIA supports the allowance that education records may be disclosed without consent to agencies, contractors and other outside parties providing institutional services and functions that might otherwise be provided by "school officials" and other employees of the agency or institution already exempted from consent requirements. In SIIA's view, this should include the possibility that providers of electronic, computer-based, Internet-hosted and related products and services – including in the areas of instruction, curriculum, assessment, data management, and enterprise management – should be considered "contractors" and thus "school officials" for these purposes.

However, SIIA wants to ensure that the inclusion of such school vendors in this category of contractors does not introduce new, unintended challenges to current education-vendor relationships through which FERPA and student privacy models are well-established.

SIIA is also concerned with potential unintended consequences from two qualifying conditions required under Section 99.31(a)(1)(i)(B) and asks that the regulations be amended to explicitly address the following:

- First, SIIA asks that the Department further amend the condition that the contractor "performs an institutional service or function for which the agency or institution would otherwise use employees." It is our view that this test is inconsistent with the stated purpose. A test based solely on use of employees is likely to prove impractical. We would recommend, instead, the

test of performance based on whether the service or function would otherwise be performed by the agency or institution. The proposed test could otherwise exclude a contractor simply because their service or function had never been, or could not be, performed by a school employee, which could especially be a barrier for software and other new and innovative services of functions.

In Section 99.31(a)(1)(i)(B)(1), amend to read: “(1) Performs an institutional service or function *otherwise provided by the agency or institution;*”

- Second, SIIA asks that the Department address the condition that the contractor be “under the direct control of the agency or institution.” Interpretation of “direct control” appears ambiguous, and likely assumes such contractor is an individual person, rather than an independent company. SIIA asks for clarification in the definition of direct control.

In Section 99.31(a)(1)(i)(B)(2), amend to read: “(2) Is *accessing and disclosing student education records in a manner that is* under the direct control of the agency or institution, *according to terms of the contract for goods or services, of the agency or institution.*”

Thank you for the opportunity to comment on the U.S. Department of Education’s proposed amendments to the regulations governing the Family Educational Rights and Privacy Act. SIIA again commends the Department for addressing changes to this important law as needed to keep pace with evolving circumstances and technologies. We look forward to the final regulations and to the positive impact we hope they will have on education, and on the ability of SIIA members to help meet education needs. If we can be of further assistance, please contact me at 202-789-4444 or marks@siiia.net.

Sincerely,



Mark Schneiderman
Senior Director of Education Policy