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DEPARTMENT OF EDUCATION

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[Docket ID ED–2008–OPEPD–0002]

Family Educational Rights and Privacy

AGENCY: Office of Planning, Evaluation, and Policy Development, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends our regulations implementing the Family Educational Rights and Privacy Act (FERPA), which is section 444 of the General Education Provisions Act. These amendments are needed to implement a provision of the USA Patriot Act and the Campus Sex Crimes Prevention Act, which added new exceptions permitting the disclosure of personally identifiable information from education records without consent. The amendments also implement two U.S. Supreme Court decisions interpreting FERPA, and make necessary changes identified as a result of the Department's experience administering FERPA and the current regulations.

These changes clarify permissible disclosures to parents of eligible students and conditions that apply to disclosures in health and safety emergencies; clarify permissible disclosures of student identifiers as *directory information;* allow disclosures to contractors and other outside parties in connection with the outsourcing of institutional services and functions; revise the definitions of *attendance, disclosure, education records, personally identifiable information,* and other key terms; clarify permissible redisclosures by State and Federal officials; and update investigation and enforcement provisions.

DATES: These regulations are effective January 8, 2009.

FOR FURTHER INFORMATION CONTACT: Frances Moran, U.S. Department of Education, 400 Maryland Avenue, SW., room 6W243, Washington, DC 20202–8250. Telephone: (202) 260–3887.

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SUPPLEMENTARY INFORMATION: On March 24, 2008, the U.S. Department of Education (the Department or we) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (73 FR 15574). In the preamble to the NPRM, the Secretary discussed the major changes proposed in that document that are necessary to implement statutory changes made to FERPA, to implement two U.S. Supreme Court decisions, to respond to changes in information technology, and to address other issues identified through the Department's experience in administering FERPA.

We believe that the regulatory changes adopted in these final regulations provide clarification on many important issues that have arisen over time with regard to how FERPA affects decisions that school officials have to make on an everyday basis. Educational agencies and institutions face considerable challenges, especially with regard to maintaining safe campuses, protecting personally identifiable information in students' education records, and responding to requests for data on student progress. These final regulations, as well as the discussion on various provisions in the preamble, will assist school officials in addressing these challenges in a manner that complies with FERPA and protects the privacy of students' education records.

Notice of Proposed Rulemaking

In the NPRM, we proposed regulations to implement section 507 of the USA Patriot Act (Pub. L. 107–56), enacted October 26, 2001, and the Campus Sex Crimes Prevention Act, section 1601(d) of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106–386), enacted October 28, 2000. Other major changes proposed in the NPRM included the following:

- Amending § 99.5 to clarify the conditions under which an educational agency or institution may disclose personally identifiable information from an eligible student's education records to a parent without the prior written consent of the eligible student;
- Amending § 99.31(a)(1) to authorize the disclosure of education records without consent to contractors, consultants, volunteers, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions;
- Amending § 99.31(a)(1) to ensure that teachers and other school officials only gain access to education records in which they have legitimate educational interests;
- Amending § 99.31(a)(2) to permit educational agencies and institutions to disclose education records, without consent, to another institution even after the student has enrolled or transferred so long as the disclosure is for purposes related to the student's enrollment or transfer;
- Amending § 99.31(a)(6) to require that an educational agency or institution may disclose personally identifiable information under this section only if it enters into a written agreement with the organization specifying the purposes of the study and the use and destruction of the data;
- Amending § 99.31 to include a new subsection to provide standards for the release of information from education records that has been de-identified;
- Amending § 99.35 to permit State and local educational authorities and Federal officials listed in § 99.31(a)(3) to make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution; and
- Amending § 99.36 to remove the language requiring strict construction of this exception and add a provision stating that if an educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individual, it may disclose the information to any person, including parents, whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

Significant Changes From the NPRM

These final regulations contain several significant changes from the NPRM as follows:

- Amending the definition of *personally identifiable information* in § 99.3 to provide a definition of *biometric record;*
- Removing the proposed definition of *State auditor* in § 99.3 and provisions in § 99.35(a)(3) related to State auditors and audits;
- Revising § 99.31(a)(6) to clarify the specific types of information that must be contained in the written agreement between an educational agency or institution and an organization conducting a study for the agency or institution;
- Removing the statement from § 99.31(a)(16) that FERPA does not require or encourage agencies or institutions to collect or maintain information concerning registered sex offenders;
- Requiring a State or local educational authority or Federal official or agency that rediscloses personally identifiable information from education records to record that disclosure if the

educational agency or institution does not do so under § 99.32(b); and

- Revising § 99.32(b) to require an educational agency or institution that makes a disclosure in a health or safety emergency to record information concerning the circumstances of the emergency.

These changes are explained in greater detail in the following *Analysis of Comments and Changes.*

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 121 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

We group major issues according to subject, with applicable sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes, or suggested changes that the law does not authorize the Secretary to make. We also do not address comments pertaining to issues that were not within the scope of the NPRM.

Definitions (§ 99.3)

(a) Attendance

Comment: We received no comments objecting to the proposed changes to the definition of the term *attendance.* Three commenters expressed support for the changes because the availability and use of alternative instructional formats are not clearly addressed by the current regulations. One commenter suggested that the definition could avoid obsolescence by referring to the receipt of instruction leading to a diploma or certificate instead of listing the types of instructional formats.

Discussion: We proposed to revise the definition of *attendance* because we received inquiries from some educational agencies and institutions asking whether FERPA was applicable to the records of students receiving instruction through the use of new technology methods that do not require a physical presence in a classroom. Because the definition of *attendance* is key to determining when an individual's records at a school are education records protected by FERPA, it is essential that schools and institutions understand the scope of the term. To prevent the regulations from becoming out of date as new formats and methods are developed, the definition provides that attendance may also include ''other electronic information and telecommunications technologies.''

While most schools are aware of the various formats distance learning may take, we believe it is informative to list the different communications media that are currently used. Also, we believe that parents, eligible students, and other individuals and organizations that use the FERPA regulations may find the listing of formats useful.

We do not agree that the definition of *attendance* should be limited to receipt of instruction leading to a diploma or certificate, because this would improperly exclude many instructional formats.

Changes: None.

(b) Directory Information (§§ 99.3 and 99.37)

(1) Definition (§ 99.3)

Comment: We received a number of comments on our proposal to revise the definition of *directory information* to provide that an educational agency or institution may not designate as directory information a student's social security number (SSN) or other student identification (ID) number. The proposed definition also provided that a student's user ID or other unique identifier used by the student to access or communicate in electronic systems could be considered directory information but only if the electronic identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the student's identity.

All commenters agreed that student SSNs should not be disclosed as directory information. Several commenters strongly supported the definition of *directory information* as proposed, noting that failure to curtail the use of SSNs and student ID numbers as directory information could facilitate identity theft and other fraudulent activities.

One commenter said that the proposed regulations did not go far enough to prohibit the use of students' SSNs as a student ID number, placing SSNs on academic transcripts, and using SSNs to search an electronic database. Another commenter expressed concern that the proposed regulations could prohibit reporting needed to enforce students' financial obligations and other routine business practices. According to this commenter, restrictions on the use of SSNs in FERPA and elsewhere demonstrate the need for a single student identifier that can be tied to the SSN and other identifying information to use for grade transcripts, enrollment verification, default prevention, and other activities that depend on sharing student information. Another commenter stated that institutions should not be allowed to penalize students who opt out of directory information disclosures by denying them access to benefits, services, and required activities.

Several commenters said that the definition in the proposed regulations was confusing and unnecessarily restrictive because it treats a student ID number as the functional equivalent of an SSN. They explained that when providing access to records and services, many institutions no longer use an SSN or other single identifier that both identifies and authenticates identity. As a result, at many institutions, the condition specified in the regulations for treating electronic identifiers as directory information, *i.e.*, that 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, often applies to student ID numbers as well because they cannot be used to gain access to education records without a personal identification number (PIN), password, or some other factor to authenticate the user's identity. Some commenters suggested that our nomenclature is the problem and that regardless of what it is called, an identifier that does not allow access to education records without the use of authentication factors should be treated as directory information. According to one commenter, allowing institutions to treat student ID numbers as directory information in these circumstances would improve business practices and enhance student privacy by encouraging institutions to require additional authentication factors when using student ID numbers to provide access to education records.

One commenter strongly opposed allowing institutions to treat a student's electronic identifier as directory information if the identifier could be made available to parties outside the school system. This commenter noted that electronic identifiers may act as a key, offering direct access to the student's entire file, and that PINs and passwords alone do not provide adequate security for education records. Another commenter said that if electronic identifiers and ID numbers can be released as directory information, then password requirements need to be more stringent to guard against unauthorized access to information and identity theft.

Some commenters recommended establishing categories of directory information, with certain information

made available only within the educational community. One commenter expressed concern about Internet safety because the regulations allow publication of a student's e-mail address. Another said that FERPA should not prevent institutions from printing the student's ID number on an ID card or otherwise restrict its use on campus but that publication in a directory should not be allowed.

Two commenters asked the Department to confirm that the regulations allow institutions to post grades using a code known only by the teacher and the student.

Discussion: We share commenters' concerns about the use of students' SSNs. In general, however, there is no statutory authority under FERPA to prohibit an educational agency or institution from using SSNs as a student ID number, on academic transcripts, or to search an electronic database so long as the agency or institution does not disclose the SSN in violation of FERPA requirements. As discussed elsewhere in this preamble, FERPA does prohibit using a student's SSN, without consent, to search records in order to confirm directory information.

Some States prohibit the use of SSNs as a student ID number, and some institutions have voluntarily ceased using SSNs in this manner because of concerns about identity theft. Students are required to provide their SSNs in order to receive Federal financial aid, and the regulations do not prevent an agency or institution from using SSNs for this purpose. We note that FERPA does not address, and we do not believe that there is statutory authority under FERPA to require, creation of a single student identifier to replace the SSN. In any case, the Department encourages educational agencies and institutions, as well as State educational authorities, to follow best practices of the educational community with regard to protecting students' SSNs.

We agree that students should not be penalized for opting out of directory information disclosures. Indeed, an educational agency or institution may not require parents and students to waive their rights under FERPA, including the right to opt out of directory information disclosures. On the other hand, we do not interpret FERPA to require educational agencies and institutions to ensure that students can remain anonymous to others in the school community when using an institution's electronic communications systems. As a result, parents and students who opt out of directory information disclosures may not be able to use electronic communications systems that require the release of the student's name or electronic identifier within the school community. (As discussed later in this notice in our discussion of the comments on § 99.37(c), the right to opt out of directory information disclosures may not be used to allow a student to remain anonymous in class.)

The regulations allow an educational agency or institution to designate a student's user ID or other electronic identifier as directory information if the identifier functions essentially like the student's name, and therefore, disclosure would not be considered harmful or an invasion of privacy. That is, the identifier cannot be used to gain access to education records except when combined with one or more factors that authenticate the student's identity.

We have historically advised that student ID numbers may not be disclosed as directory information because they have traditionally been used like SSNs, *i.e.*, as both an identifier and authenticator of identity. We agree, however, that the proposed definition was confusing and unnecessarily restrictive because it failed to recognize that many institutions no longer use student ID numbers in this manner. If a student identifier cannot be used to access records or communicate electronically without one or more additional factors to authenticate the user's identity, then the educational agency or institution may treat it as directory information under FERPA regardless of what the identifier is called. We have revised the definition of *directory information* to provide this flexibility.

We share the commenters' concerns about the use of PINs and passwords. In the preamble to the NPRM, we explained that PINs or passwords, and single-factor authentication of any kind, may not be reasonable for protecting access to certain kinds of information (73 FR 15585). We also recognize that user IDs and other electronic identifiers may provide greater access and linking to information than does a person's name. Therefore, we remind educational agencies and institutions that disclose student ID numbers, user IDs, and other electronic identifiers as directory information to examine their recordkeeping and data sharing practices and ensure that, when these identifiers are used, the methods they select for authenticating identity provide adequate protection against the unauthorized disclosure of information in education records.

We also share the concern of commenters who stated that students' e-mail addresses and other identifiers should be disclosed as directory information only within the school system and should not be made available outside the institution. The disclosure of directory information is permissive under FERPA, and, therefore, an agency or institution is not required to designate and disclose any student identifier (or any other item) as directory information. Further, while FERPA does not expressly recognize different levels or categories of directory information, an agency or institution is not required to make student directories and other directory information available to the general public just because the information is shared within the institution. For example, under FERPA, an institution may decide to make students' electronic identifiers and e-mail addresses available within the institution but not release them to the general public as directory information. In fact, the preamble to the NPRM suggested that agencies and institutions should minimize the public release of student directories to mitigate the risk of re-identifying information that has been de-identified (73 FR 15584).

With regard to student ID numbers in particular, an agency or institution may print an ID number on a student's ID card whether or not the number is treated as directory information because under FERPA simply printing the ID number on a card, without more, is not a disclosure and, therefore, is not prohibited. *See* 20 U.S.C. 1232g(b)(2). If the student ID number is not designated as directory information, then the agency or institution may not disclose the card, or require the student to disclose the card, except in accordance with one of the exceptions to the consent requirement, such as to school officials with legitimate educational interests. If the student ID number is designated as directory information in accordance with these regulations, then it may be disclosed. However, the agency or institution may still decide against making a directory of student ID numbers available to the general public.

We discuss codes used by teachers to post grades in our discussion of the definition of *personally identifiable information* elsewhere in this preamble.

Changes:

(2) Conditions for Disclosing Directory Information

(i) 99.37(b)

Comment: All comments on this provision supported our proposal to clarify that an educational agency or institution must continue to honor a valid request to opt out of directory information disclosures even after the student no longer attends the institution. One commenter stated that the proposed regulations appropriately provided former students with the continuing ability to control the release of directory information and remarked that this will benefit students and families. One commenter asked how long an opt out from directory information disclosures must be honored. Another commenter said that students may object if their former schools do not disclose directory information without their specific written consent because the school is unable to determine whether the student previously opted out. This could occur, for example, if a school declined to disclose that a student had received a degree to a prospective employer.

Discussion: The regulations clarify that once a parent or eligible student opts out of directory information disclosures, the educational agency or institution must continue to honor that election after the student is no longer in attendance. While this is not a new interpretation, school districts and postsecondary institutions have been unclear about its application and have not administered it consistently. The inclusion in the regulations of this longstanding interpretation is necessary to ensure that schools clearly understand their obligation to continue to honor a decision to opt out of the disclosure of directory information after a student stops attending the school, until the parent or eligible student rescinds it.

Educational agencies and institutions are not required under FERPA to disclose directory information to any party. Therefore, parents and students have no basis for objecting if an agency or institution does not disclose directory information because it is not certain whether the parent or student opted out. The regulations provide an educational agency or institution with the flexibility to determine the process it believes is best suited to serve its population as long as it honors prior elections to opt out of directory information disclosures.

Changes: None.

(ii) § 99.37(c)

Comment: We received two comments in support of our proposal to clarify in this section that parents and students may not use the right to opt out of directory information disclosures to prevent disclosure of the student's name or other identifier in the classroom.

Discussion: We appreciate the commenters' support.

Changes: None.

(iii) § 99.37(d)

Comment: Two commenters supported the prohibition on using a student's SSN to disclose or confirm directory information unless a parent or eligible student provides written consent. One of these commenters questioned the statutory basis for this interpretation.

Several commenters asked whether, under the proposed regulations, a school must deny a request for directory information if the requester supplies the student's SSN. One commenter asked whether a request for directory information that contains a student's SSN may be honored so long as the school does not use the SSN to locate the student's records. One commenter stated that the regulations could more effectively protect students' SSNs but was concerned that denying a request for directory information that contains an SSN may inadvertently confirm the SSN.

One commenter expressed concern that the prohibition on using a student's SSN to verify directory information would leave schools with large student populations unable to locate the appropriate record because they will need to rely solely on the student's name and other directory information, if any, provided by the requester, which may be duplicated in their databases. This commenter said that students would object if institutions were unable to respond quie9By oo resuestesby tbank

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disclose the student's SSN to the requester.

There is no authority in FERPA to require a school to notify requesters that it is not confirming the student's SSN (or other non-directory information) when it discloses or confirms directory information. However, when a party submits a student's SSN along with a request for directory information, in order to avoid confusion, unless a parent or eligible student has provided written consent for the disclosure of the student's SSN, the school may indicate that it has not used the SSN (or other non-directory information) to locate the student's records and that its response may not and does not confirm the accuracy of the SSN (or other non-directory information) supplied with the request.

We recognize that with a large database of student information, there may be some loss of ability to identify students who have common names if SSNs are not used to help identify the individual. However, schools that do not use SSNs supplied by a party requesting directory information, either

FERPA does not prohibit the discussion of group or individual grades on classroom group projects, so long as those individual grades have not yet been recorded by the teacher. The process of assigning grades or grading papers falls outside the definition of *education records* in FERPA because the grades are not ''maintained'' by an educational agency or institution at least until the teacher has recorded the grades.

Changes: None.

NPRM in which we explained that an institution can determine that a parent claimed a student as a dependent by asking the parent to supply a copy of the parent's most recent Federal tax return. Another commenter stated that the NPRM did not go far enough and recommended specifically requiring an institution to rely on a copy of a parent's most recent Federal tax return to determine a student's dependent status, while another commenter recommended that we change the regulations to indicate that only the parent who has claimed the student as a dependent may have access to the student's education records.

A commenter noted that some States have high school students who are concurrently enrolled in secondary schools and postsecondary institutions as early as ninth grade and supported the clarification that postsecondary institutions may disclose information to parents of students who are tax dependents.

Discussion: Parents' rights under FERPA transfer to a student when the student reaches age 18 or enters a postsecondary institution. 20 U.S.C. 1232g(d). However, under § 99.31(a)(8), an educational agency or institution may disclose education records to an eligible student's parents if the student is a dependent as defined in section 152 of the Internal Revenue Code of 1986. Under § 99.31(a)(8), neither the age of a student nor the parent's status as custodial parent is relevant to the determination whether disclosure of information from an eligible student's education records to that parent without written consent is permissible under FERPA. If a student is claimed as a dependent for Federal income tax purposes by either parent, then under the regulations, either parent may have access to the student's education records without the student's consent.

The statutory exception to the consent requirement in FERPA for the disclosure of records of dependent students applies

circumstances under which volunteers may serve as school officials and have access to personally identifiable information from education records in connection with their services or responsibilities to the school. One commenter noted that this clarification was needed especially for parent-volunteers working at a school attended by their own children where they are likely to know other students and their families.

Several commenters asked that we clarify in the regulations that § 99.31(a)(1) also applies to school transportation officials, school bus drivers, and school bus attendants who need access to education records in order to safely and efficiently transport students. Another commenter asked for clarification whether, under the proposed regulations, practicum students, fieldwork students, and unpaid interns in schools would be considered ''school officials.'' One commenter asked whether § 99.31(a)(1) permits outsourced medical providers to be considered ''school officials.''

One commenter asked how proposed § 99.31(a)(1) would apply to parties other than educational agencies and institutions. The commenter was concerned about permitting SEAs to disclose personally identifiable information to outside parties under § 99.31(a)(1)(i)(B) because SEAs are not subject to § 99.7, which requires educational agencies and institutions to annually notify parents and eligible students of their rights under FERPA, including a specific requirement in § 99.7(a)(3)(iii) that an educational agency or institution that has a policy of disclosing information under § 99.31(a)(1) must include in its annual notice a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. A number of commenters requested clarification about the applicability of § 99.31(a)(1)(i)(B) to State authorities that operate State longitudinal data systems that maintain records of local educational agencies (LEAs) or institutions and are responsible for certain reporting requirements under the No Child Left Behind Act. Some of these commenters believe that State authorities operating these systems are ''school officials'' under § 99.31(a)(1) who should be able to disclose education records for the purpose of outsourcing under § 99.31(a)(1)(i)(B).

One commenter recommended that the regulations permit the disclosure of education records to non-educational State agencies for evaluation purposes under § 99.31(a)(1). Another commenter asked that we revise the regulations to permit representatives of the Centers for Disease Control and Prevention to access education records for the purpose of public health surveillance under the ''school officials'' exception.

Another commenter requested further guidance on how § 99.31(a)(1) would apply to local law enforcement officers who work in collaboration with schools in various capacities and whether education records could be shared with these officers in order to ensure safe campuses.

Discussion: The Secretary does not agree that the proposed changes to § 99.31(a)(1) go beyond the plain reading of the statute and congressional intent. As we explained in the NPRM, FERPA's broad definition of *education records*

records in connection with the institutional services and functions outsourced by the school. We think it would be impossible to provide a comprehensive listing and believe that agencies and institutions are in the best position to make these determinations. At the discretion of a school, school officials may include school transportation officials (including bus drivers), school nurses, practicum and fieldwork students, unpaid interns, consultants, contractors, volunteers, and other outside parties providing institutional services and performing institutional functions, provided that each of the requirements in § 99.31(a)(1)(i)(B) has been met.

Under § 99.31(a)(1), a university could outsource the practical training of students. The information disclosed to the hospital, clinic, or business conducting the practical training may only be used for the purposes for which it was disclosed. In the NPRM, we discuss in more detail the types of services and functions covered under § 99.31(a)(1)(i)(B). (73 FR 15578–15580.)

In response to the comment about the applicability of § 99.31(a)(1)(i)(B) to State educational authorities that operate State longitudinal data systems, such officials are not ''school officials'' under FERPA. Rather, these officials are generally considered authorized representatives of a State educational authority, and LEAs typically disclose information from students' education records to a longitudinal data system maintained by an SEA or other State educational authorities under the exception to the consent requirement for disclosures to authorized representatives of State and local educational authorities, § 99.31(a)(3)(iv)), not the ''school officials'' exception. This issue is explained in more detail elsewhere in this preamble under *Educational research (§§ 99.31(a)(6), 99.31(a)(3).* We also discuss disclosures to non-educational agencies, such as to public health agencies, in the section of this preamble entitled *Disclosure of Education Records to Non-Educational Agencies.*

Members of a school's *law enforcement unit,* as defined in § 99.8 of the regulations, who are employed by the agency or institution qualify as school officials under § 99.31(a)(1)(i)(A) if the school has complied with the notification requirements in § 99.7(a)(3)(iii). As school officials, they may be given access to personally identifiable information from those students' education records in which the school has determined they have legitimate educational interests. The school's law enforcement unit must protect the privacy of education records it receives and may disclose them only with consent or under one of the exceptions to consent listed in § 99.31. For that reason, it is advisable that officials of a law enforcement unit maintain education records separately from law enforcement unit records, which are not subject to FERPA requirements. As we explained in *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools,* investigative reports and other records created by an institution's law enforcement unit are excluded from the definition of *education records* under § 99.3 and, therefore, are not subject to FERPA requirements. Accordingly, schools may disclose information from law enforcement unit records to anyone, including local police and other outside law enforcement authorities, without consent. This brochure can be found on FPCO's ''Safe Schools & FERPA'' Web page: *http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/index.html.*

Outside police officers or other non-employees to whom the school has outsourced its safety and security functions do not qualify as ''school officials'' under FERPA unless they meet each of the requirements of § 99.31(a)(1)(i)(B). If these police officers or other outside parties do not meet the requirements for being a school official under FERPA, they may not have access to students' education records without consent, unless there is a health or safety emergency, a lawfully issued subpoena or court order, or some other exception to FERPA's general consent requirement under which the disclosure falls.

With respect to our amendment to the ''school officials'' exception, we note that § 99.32(d) excludes from the recordation requirements disclosures of education records that educational agencies and institutions make to school officials. This exclusion from the recordation requirement will apply as well to disclosures to contractors, consultants, volunteers, and other outside parties to whom an agency or institution discloses education records under § 99.31(a)(1)(i)(B). The Department has long recognized that FERPA does not prevent schools from outsourcing institutional services and functions; to require schools to record disclosures to these outside parties serving as school officials would be overly burdensome and unworkable.

An educational agency or institution that complies with the notification requirements in § 99.7(a)(3)(iii) by specifying its policy regarding the disclosure of education records to contractors and other outside parties serving as school officials provides legally sufficient notice to parents and students regarding these disclosures. We have posted model notifications on our Web site, one for postsecondary institutions and one for LEAs. See *http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html* and *http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html.*

Changes: None.

(b) Direct Control

Comment: Some commenters asked the Department to clarify what the term ''direct control'' means as used in § 99.31(a)(1)(i)(B)(*2*). This section provides that in order to be considered a ''school official'' an outside party must be under the direct control of the agency or institution. Some commenters asked if this term means that the school must monitor the operations of the outside party, and how it affects an agency's or institution's relationship with subcontractors or third- or fourth-party database hosting companies. One commenter stated that the regulations should not distinguish between whether the education records are hosted in a vendor's offsite network or within the institution's local network servers, while another commenter asked for clarification of how § 99.31(a)(1)(i)(B) applies to outsourcing electronic mail (e-mail) services to third parties such as Microsoft or Google.

One commenter stated that institutions should be required to verify that parties to whom they outsource services have the necessary resources to safeguard education records provided to them.

A commenter suggested that, instead of the proposed ''direct control'' standard, the Department adopt language similar to the safeguarding standard found in the Gramm-Leach-Bliley Act (GLB) (Pub. L. 106–102, November 12, 1999). The commenter suggested that, as adapted in FERPA, the standard would require that for an outside party, acting on behalf of an educational institution, to be considered a ''school official,'' the institution would have to: (1) Take reasonable steps to select and retain contractors, consultants, volunteers, or other outside parties that are capable of maintaining appropriate safeguards with respect to education records; and (2) mandate by contract that the outside party implement and maintain such safeguards.

Discussion: The term ''direct control'' in § 99.31(a)(1)(i)(B)(*2*), is intended to

ensure that an educational agency or institution does not disclose education records to an outside service provider unless it can control that party's maintenance, use, and redisclosure of education records. This could mean, for example, requiring a contractor to maintain education records in a particular manner and to make them available to parents upon request. We are revising the regulations, however, to provide this clarification.

Neither the statute nor the FERPA regulations specifically requires that educational agencies and institutions verify that outside parties to whom schools outsource services have the necessary resources to safeguard education records provided to them. However, as discussed in the NPRM, educational agencies and institutions are responsible under FERPA for ensuring that they themselves do not have a policy or practice of releasing, permitting the release of, or providing access to personally identifiable information from education records, except in accordance with FERPA. This includes ensuring that outside parties that provide institutional services or functions as ''school officials'' under § 99.31(a)(1)(i)(B) do not maintain, use, or redisclose education records except as directed by the agency or institution that disclosed the information.

The ''direct control'' requirement is intended to apply only to the outside party's provision of specific institutional services or functions that have been outsourced and the education records provided to that outside party to perform the services or function. It is not intended to affect an outside service provider's status as an independent contractor or render that party an employee under State or Federal law.

We believe that the use of the ''direct control'' standard strikes an appropriate balance in identifying the necessary and proper relationship betw tDylwA. This

agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the ''legitimate educational interest'' requirement.

One commenter who supported the proposed regulations expressed concern that not all districts and institutions have the financial or technological resources to create or purchase an electronic system that provides fully automated access control and that an institution using only administrative controls would be required to demonstrate that each school official who accessed education records possessed a legitimate educational interest in the education records to which the official gained access. According to the commenter, the regulations seem to omit the ''reasonable methods'' concept for those schools that utilize administrative controls rather than physical or technological controls. The commenter was concerned that smaller schools that lack resources to create or purchase a system that fully monitors record access would be disadvantaged by having to meet a higher standard of ensuring a legitimate educational interest on the part of the school officials that access the records.

One commenter expressed concern that the standard in § 99.31(a)(1)(ii) is too restrictive and asked whether the Department would use flexibility and deference in taking into consideration an institution's efforts in compliance with the requirement.

Another commenter requested that we include in the regulations a requirement that contractors hosting data at offsite locations must institute effective access control measures. The commenter stated that many schools and contractors are uncertain as to whether the school or the contractor is responsible for ensuring that access controls are applied to data hosted by contractors.

One commenter stated that the regulations created an unnecessary burden, as school districts already do their best to comply with FERPA and an occasional mistake should be excused. The commenter, however, was pleased that the regulations do not require the use of technological controls. The commenter was concerned that schools are unable to pre-assign risk levels to categories of records in order to determine appropriate methods to mitigate improper access. The commenter supported the use of effective administrative controls as determined by a district to ensure that information is available only to those with a legitimate educational interest.

One commenter expressed concern that the requirement to use reasonable methods to ensure appropriate access was not sufficiently restrictive, because under the regulations, all volunteers would be designated as school officials. The commenter believed that the regulations would enable volunteers to gain access more easily to confidential and sensitive information in education records.

A commenter who is a parent of a special education student also expressed concern that the language in the regulations was not adequate. The commenter described a software package used by her district that permits all school officials unrestricted access to the IEPs of all special education students.

Discussion: Section 99.30 requires that a parent or eligible student provide written consent for a disclosure of personally identifiable information from education records unless the circumstances meet one of the exceptions to consent, such as the release of information to a school official with a legitimate educational interest. Thus, a district or institution that makes a disclosure solely on the basis that the individual is a school official violates FERPA if it does not also determine that the school official has a legitimate educational interest. The regulations in § 99.31(a)(1)(ii) are designed to clarify the responsibility of the educational agency or institution to ensure that access to education records by school officials is limited to circumstances in which the school official possesses a legitimate educational interest.

We believe that the standard of ''reasonable methods'' is sufficiently flexible to permit each educational agency or institution to select the proper balance of physical, technological, and administrative controls to effectively prevent unauthorized access to education records, based on their resources and needs. In order to establish a system driven by physical or technological access controls, a school would generally first determine when a school official has a legitimate educational interest in education records and then determine which physical or technological access controls are necessary to ensure that the official can access only those records. The regulations require a school that uses only administrative controls to ensure that its administrative policy for controlling access to education records is effective and that the school is in compliance with the legitimate educational interest requirement in § 99.31(a)(1)(i)(A). However, the ''reasonable methods'' standard applies whether the control is physical, technological, or administrative.

The regulations permit the use of a variety of methods to protect education records, in whatever format, from improper access. The Department expects that educational agencies and institutions will generally make appropriate choices in designing records access controls, but the Department reserves the right to evaluate the effectiveness of those efforts in meeting statutory and regulatory requirements.

The additional language that one commenter requested concerning outsourcing is already included in the regulations in § 99.31(a)(1). That section specifically provides that contractors are subject to the same conditions governing the access and use of records that apply to other school officials. As long as those conditions are met, the physical location in which the contractor provides the service is not relevant.

Because the regulations permit the use of a variety of methods to effectively reduce the risk of unauthorized access to education records, we do not believe the requirement to establish ''reasonable methods'' for controlling access is unduly burdensome. Schools have the flexibility to decide the method or methods best suited to their own circumstances. For the many schools, districts, and institutions that already meet the standard, no operational changes should be necessary.

The regulations do not designate all volunteers as school officials. Rather, the regulations clarify that schools may designate volunteers as school officials who may be provided access to education records only when the volunteer has a legitimate educational interest. Schools can and should carefully assess and limit access by any school official, including volunteers. This issue is discussed in more detail previously in this preamble under the section entitled *Outsourcing.*

With regard to the parent who expressed concern that the language in the regulations was not adequate to address the problem of software that permits all school officials to access the IEPs of all special education students, we believe that the language in § 99.31(a)(1)(ii) is sufficient. As previously noted, FERPA prohibits school officials from having access to education records unless they have a legitimate educational interest. The commenter's point illustrates the need for educational agencies and institutions to ensure that adequate controls are in

place to restrict access to education records only to a school official with a legitimate educational interest.

Changes: None.

Transfer of Education Records to Student's New School (§§ 99.31(a)(2) and 99.34(a))

Comment: All of the comments we received on proposed §§ 99.31(a)(2) and 99.34(a) supported the clarification that an educational agency or institution may disclose a student's education records to officials of another school, school system, or institution of postsecondary education not just when the student seeks or intends to enroll, but after the student is already enrolled, so long as the disclosure is for purposes related to the student's enrollment or transfer. Some commenters noted that this clarification reduces legal uncertainty about how long a school may continue to send records or information to a student's new school; other commenters noted that this clarification will be helpful in serving students who are homeless or in foster care because these students are often already enrolled in a new school system while waiting for records from a previous enrollment.

A few commenters asked us to clarify the requirement that the disclosure must be for purposes related to the student's enrollment or transfer. The commenters asked whether this meant that only records specifically related to the new school's decision to admit the student or records related to the transfer of course credit could be disclosed, or whether the agency or institution could also disclose information about previously undisclosed disciplinary actions related to the student's ongoing attendance at the new institution. One commenter suggested that we remove the requirement that the disclosure must be for purposes of the student's enrollment or transfer because it was confusing and unnecessary. Some commenters asked the Department to provide guidance about the types of records that may be sent under the regulations to a student's new school, noting that the preamble to the NPRM stated that the regulations allow school officials to disclose any and all education records, including health and disciplinary records, to the new school (73 FR 15581).

One commenter asked us to clarify that any school, not just the school the student attended most recently, may disclose information from education records to the institution that the student currently attends. Another commenter asked whether the amended regulations would permit the disclosure of education records to an institution in which a student seeks information or services but not enrollment, such as when a charter school student requests an evaluation under the IDEA from the student's home school district.

Two commenters asked whether mental health and other treatment records of postsecondary students, which are excluded from the definition of *education records* under FERPA, could be disclosed to the new school. Other commenters asked whether FERPA places any limits on the transfer of information about student disciplinary actions to colleges and universities and what information a postsecondary institution may ask for and receive regarding a student's disciplinary actions. A few commenters asked us to address the relationship between these regulations and guidance issued by the Department's Office for Civil Rights (OCR) prohibiting the pre-admission release of information about a student's disability under section 504 of the Rehabilitation Act of 1973, as amended, and Title II of the Americans with Disabilities Act of 1990, as amended.

Discussion: The regulations are intended to eliminate uncertainty about whether, under § 99.31(a)(2), an educational agency or institution may send education records to a student's new school even after the student is already enrolled and attending the new school. The requirement that the disclosure must be for purposes related to the student's enrollment or transfer is not intended to limit the kind of records that may be disclosed under this exception. Instead, the regulations are intended to clarify that, after a student has already enrolled in a new school, the student's former school may disclose any records or information, including health records and information about disciplinary proceedings, that it could have disclosed when the student was seeking or intending to enroll in the new school.

These regulations apply to any school that a student previously attended, not just the school that the student attended most recently. For example, under § 99.31(a)(2), a student's high school may send education records directly to a graduate school in which the student seeks admission, or is already enrolled. Section 99.34(b), which explains the conditions that apply to the disclosure of information to officials of another school, school system, or postsecondary institution, allows a public charter school or other agency or institution to disclose the education records of one of its students in attendance to the student's home school district if the student receives or seeks to receive services from the home school district, including an evaluation under the IDEA. We note, however, that the confidentiality of information regulations under Part B of the IDEA contain additional consent requirements that may also apply in these circumstances.

Under section 444(a)(4)(B)(iv) of FERPA, 20 U.S.C. 1232g(a)(4)(B)(iv), medical and psychological treatment records of eligible students are excluded from the definition of *education records* if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment, including treatment providers at the student's new school. (While the comment concerned records of postsecondary students, we note that the treatment records exception to the definition of *education records* applies also to any student who is 18 years of age or older, including 18 year old high school students.) An educational agency or institution may disclose an eligible student's treatment records to the student's new school for purposes other than treatment provided that the records are disclosed under one of the exceptions to written consent under § 99.31(a), including § 99.31(a)(2), or with the student's written consent under § 99.30. If an educational agency or institution discloses an eligible student's treatment records for purposes other than treatment, the treatment records are no longer excluded from the definition of *education records* and are subject to all other FERPA requirements, including the right of the eligible student to inspect and review the records and to seek to have them amended under certain conditions. In practical terms, this means that an agency or institution may disclose an eligible student's treatment records to the student's new school either with the student's written consent, or under one of the exceptions in § 99.31(a), including § 99.31(a)(2), which permits disclosure to a school where a student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

FERPA does not contain any particular restrictions on the disclosure of a student's disciplinary records. Further, Congress has enacted legislation to ensure that schools transfer disciplinary records to a student's new school in certain circumstances. In particular, section 444(h) of the statute, 20 U.S.C. 1232g(h), and the implementing regulations in § 99.36(b) provide that nothing in FERPA prevents an educational agency

also include other information from a student's education records, such as campus of attendance. A second commenter expressed appreciation that the regulations clarify that school districts are not required or encouraged to collect or maintain information on registered sex offenders and that these disclosures are permissible but not required.

Discussion: The Campus Sex Crimes Prevention Act (CSCPA) amendments to FERPA allow educational agencies and institutions to disclose any information concerning registered sex offenders provided to the agency or institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, commonly known as the Wetterling Act. Since publication of the NPRM, we have determined that the proposed regulations were confusing, because they limited these disclosures to information that was obtained and disclosed by an agency or institution in compliance with a State community notification program. In fact, the CSCPA amendments to FERPA cover any information provided to an educational agency or institution under the Wetterling Act, including not only information provided under general State community notification programs, which are required under subsection (e) of the Wetterling Act, 42 U.S.C. 14071(e), but also information provided under the more specific campus community notification programs for institutions of higher education, which are required under subsection (j), 42 U.S.C. 14071(j).

The Wetterling Act requires States to release relevant information about persons required to register as sex offenders that is necessary to protect the public, including specific State reporting requirements for law enforcement agencies having jurisdiction over institutions of higher education. The exception to the consent requirement in FERPA allows educational agencies and institutions to make available to the school community any information provided to it under the Wetterling Act. We interpret this to also include any additional information about the student that is relevant to the purpose for which the information was provided to the educational agency or institution—protecting the public. This could include, for example, the school or campus at which the student is enrolled.

The proposed regulations included a sentence stating that FERPA does not require or encourage agencies or institutions to collect or maintain information about registered sex offenders. We have determined through further review, however, that this sentence could be confusing and should be removed. Participating institutions are required under section 485(f)(1) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1092(f)(1), to advise the campus community where it may obtain law enforcement agency information provided by the State under 42 U.S.C. 14071(j) concerning registered sex offenders. Further, the Department does not wish to discourage educational agencies and institutions from disclosing relevant information about a registered sex offender in appropriate circumstances.

Changes: We have revised the regulations to remove the reference to the disclosure of information obtained by the educational agency or institution in compliance with a State community notification program. The regulations now simply allow disclosure without consent of any information concerning registered offenders provided to an educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines. We also have removed the sentence stating that neither FERPA nor the regulations requires or encourages agencies or institutions to collect or maintain information about registered sex offenders.

Redisclosure of Education Records and Recordkeeping by State and Local Educational Authorities and Federal Officials and Agencies (§§ 99.31(a)(3); 99.32(b); 99.33(b); 99.35(a)(2); 99.35(b))

(a) Redisclosure

Comment: We received a number of comments on the proposed changes in § 99.35(b) that would permit State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) to redisclose personally identifiable information from education records on behalf of educational agencies and institutions without parental consent under the existing

asked us to clarify the role of the SEA

institution as a means of relieving any administrative burdens associated with recording disclosures of education records. One commenter urged the Department not to delegate responsibility for recordkeeping to State and local educational authorities and Federal agencies and officials that redisclose education records under § 99.33(b). Another said that if a State or local educational authority or Federal agency or official rediscloses information ''on behalf of'' an educational agency or institution under § 99.35(b), these further disclosures should be included in the student's record at the educational agency or institution. All other comments on this issue supported revising the regulations to allow State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) to record any redisclosures they make under § 99.33(b).

Several commenters suggested that the recordation requirements in § 99.32(b) would place an undue burden on State and local officials when State educational authorities redisclose education records because the State authority would need to return to each original source of the records to record the redisclosure. Some commenters noted that compliance with § 99.32(b) is practically impossible if an LEA or postsecondary institution is required to record all authorized redisclosures at the time of the initial disclosure of information to the State or Federal authority. Two commenters suggested that we eliminate the recordation problem by redefining the term *disclosure* so that it does not include disclosing information under § 99.31(a)(3) for audit, evaluation, or compliance and enforcement purposes. Another commenter suggested that we define ''*educational agency* or *institution*'' to include State educational authorities so that disclosures to State educational authorities would not be considered a *disclosure* under FERPA.

One commenter said that the regulations should permit State educational authorities to record redisclosures as they are made and without having to identify each student by name. Another commenter asked for clarification whether the recordation requirements apply to redisclosures that SEAs make to education researchers and other parties that are not authorized to make any further disclosures, and what level of detail is required in the record regarding who accessed the data and what specific information was viewed.

One commenter stated that if State educational authorities and Federal officials are authorized to record their own redisclosures of information, then the educational agency or institution should be required to retrieve these records in response to a request to review education records by parents and eligible students who would otherwise not know about the redisclosures. Other commenters suggested that the State educational authority or Federal official could either make the redisclosure record available directly to parents and students or send it to the LEA or postsecondary institution for this purpose.

Discussion: We agree with commenters that in order to facilitate the operation of State data systems and ease administrative burdens on all parties, the regulations should allow State educational authorities and Federal officials and agencies to record further disclosures they make on behalf of educational agencies and institutions under § 99.33(b). We are revising the provisions of § 99.32 to address commenters' concerns and ensure that these changes will not expand the redisclosure authority of a State or local educational authority or Federal official or agency under § 99.35(b) and that parents and students will have notice of and access to any State or Federal record of further disclosures that is created.

In response to the commenter's suggestion that we define ''educational agency or institution'' and the term *disclosure* to address recordation issues associated with the new redisclosure authority in § 99.35(b), we note that an educational agency or institution is required by statute to maintain with each student's education records a record of each request for access to and each disclosure of personally identifiable information from the education records of the student, including the parties who have requested or received information and their legitimate interests in the information. 20 U.S.C. 1232g(b)(4)(A); 34 CFR 99.32(a). This includes each disclosure of personally identifiable information from education records that an educational agency or institution makes to an SEA or other State educational authority and to Federal officials and agencies, including the Department, for audit, evaluation, or compliance and enforcement purposes under §§ 99.31(a)(3) and 99.35, and under most other FERPA exceptions, such as the financial aid exception in § 99.31(a)(4). (Regulatory exceptions to the statutory recordation requirements, which are set forth in § 99.32(d), cover disclosures that a parent or eligible student would generally know about without the recordation or for which notice is prohibited under court order; the exceptions do not include disclosures made to parties outside the agency or institution for audit, evaluation, or compliance and enforcement purposes.)

An educational agency or institution is required under FERPA to record its disclosures of personally identifiable information from education records even when it discloses information to another educational agency or institution, such as occurs under § 99.31(a)(2) when a school district transfers education records to a student's new school. See 20 U.S.C. 1232g(b)(4)(A); 34 CFR 99.32(a). Therefore, even if a State educational authority were considered an ''educational agency or institution'' under § 99.1, a school district or postsecondary institution would still be required to record its own disclosures to that State educational authority; defining a State educational authority as an educational agency or institution would not eliminate this requirement.
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applicability of the studies exception and requested clarification on some of the proposed changes, particularly with regard to the provisions relating to written agreements.

Discussion: We address commenters' specific concerns about the key portions of these regulations in the following sections.

Changes: None.

(a) Scope and Applicability of § 99.31(a)(6)

Comment: Several commenters stated that the proposed regulations did not clearly indicate that the studies exception applies to State educational authorities. Some commenters, assuming that § 99.31(a)(6) applied to State educational authorities, noted that the proposed regulations did not provide clear authority for State educational authorities such as an SEA, or a State longitudinal data system using State generated data (such as State assessment results), to enter into research agreements on behalf of educational agencies and institutions. One commenter stated that § 99.31(a)(6) should not be interpreted to require that research agreements be entered into by individual schools or that any resulting redisclosures be recorded by the individual schools.

One commenter asked for clarification regarding whether § 99.31(a)(6) permitted a school to disclose a student's education records to his or her previous school for the purpose of evaluating Federal or State-supported education programs or for improving instruction.

Another commenter stated that the Department should further revise the regulations to provide that only individuals in the organization conducting the study who have a legitimate interest in the information disclosed be given access to the information. The commenter also stated that the Department should specifically limit § 99.31(a)(6) to bona fide research projects by prohibiting organizations conducting studies under this exception from using record-level data for other operational or commercial purposes. The commenter also expressed concern about the duration of research projects, noting that significantly more restrictive access should be required for studies that track personally identifiable information for long periods of time. The commenter stated further that the Department should consider imposing a time limit on how long information obtained through longitudinal studies can be retained.

Discussion: FERPA permits an educational agency or institution to disclose personally identifiable information from an education record of a student without consent if the disclosure is to an organization conducting studies for, or on behalf of, the educational agency or institution to (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. 20 U.S.C. 1232g(b)(1)(F); 34 CFR 99.31(a)(6). Disclosures made under the studies exception may only be used by the receiving party for the purposes for which the disclosure was made and for no other purpose or study. As such, § 99.31(a)(6) is not a general research exception to the consent requirement in FERPA but an exception for studies limited to the purposes specified in the statute and regulations.

We first note that it may not be necessary or even advantageous for State educational authorities to use the studies exception in order to conduct or authorize educational research because of the limitations in § 99.31(a)(6). In contrast, § 99.31(a)(3)(iv), under the conditions set forth in § 99.35, allows educational agencies and institutions, such as LEAs and postsecondary institutions, to disclose education records without consent to State educational authorities for audit and evaluation purposes, which can include a general range of research studies beyond the more limited group of studies specified under § 99.31(a)(6). Also, as explained more fully elsewhere in this preamble, while a State educational authority must have the underlying legal authority to audit or evaluate the records it receives from LEAs or postsecondary institutions under § 99.35, the LEA or postsecondary institution is not required to enter into a written agreement for the audit or evaluation as it is required to do under § 99.31(a)(6). (*See Redisclosure of Education Records and Recordkeeping by State and Local Educational Authorities and Federal Officials and Agencies.*) The absence of an explanation of the authorized representatives exception (§ 99.31(a)(3)) in the NPRM created confusion, especially with regard to how State departments of education may utilize education records for evaluation purposes. Therefore, we have included that explanation here.

The conditions for disclosing education records without consent under §§ 99.31(a)(3)(iv) and 99.35 are discussed in the Department's Memorandum from the Deputy Secretary of Education (January 30, 2003) available at *http://www.ed.gov/policy/gen/guid/secletter/030130.html.* The Deputy Secretary's memorandum explains that under this exception an ''authorized representative'' of a State educational authority is a party under the direct control of that authority, *e.g.*, an employee or a contractor.

In general, the Department has interpreted FERPA and implementing regulations to permit the disclosure of personally identifiable information from education records, without consent, in connection with the outsourcing of institutional services and functions. Accordingly, the term ''authorized representative'' in § 99.31(a)(3) includes contractors, consultants, volunteers, and other outside parties (*i.e.*, non-employees) used to conduct an audit, evaluation, or compliance or enforcement activities specified in § 99.35, or other institutional services or functions for which the official or agency would otherwise use its own employees. For example, a State educational authority may disclose personally identifiable information from education records, without consent, to an outside attorney retained to provide legal services or an outside computer consultant hired to develop and manage a data system for education records.

The term ''authorized representative'' also includes an outside researcher working as a contractor of a State educational authority or other official listed in § 99.31(a)(3) that has outsourced the evaluation of Federal or State supported education programs. An outside researcher may conduct independent research under this provision in the sense that the researcher may propose or initiate research projects for consideration and approval by the State educational authority or other official listed in § 99.31(a)(3) either before or after the parties have negotiated a research agreement. Likewise, the State educational authority or official does not have to agree with or endorse the researcher's results or conclusions. In so doing, an outside researcher retained to evaluate education programs by a State educational authority or other official listed in § 99.31(a)(3) as an ''authorized representative'' may be given access to personally identifiable information from education records, including statistical information with unmodified small data cells. However, the term ''authorized representative'' does not include independent researchers that are not contractors or other parties under the direct control of an official or agency listed in § 99.31(a)(3).

While an educational agency or institution may not disclose personally identifiable information from students' education records to independent researchers, nothing in FERPA prohibits

them from disclosing information that

several statutory exceptions to FERPA's general consent rule, one of which is § 99.31(a)(6), an exception that permits disclosure of records for studies limited to the purposes specified in the statute and regulations. However, a written agreement, a memorandum of understanding, or a contract is not a justification for disclosure of education records. Rather, a disclosure must meet the requirements in § 99.31(a)(6) or the other permitted disclosures under § 99.31. If a disclosure meets the conditions of § 99.31(a)(6), the disclosure may be made, and the written agreement sets forth the requirements that must be followed when entering into such an agreement.

As noted in our earlier discussion of the scope and applicability of the studies exception, the Secretary concurs that the regulations should be revised to require that a written agreement expressly include the purpose, scope, and duration of the agreed upon study, as well as the information to be disclosed. We also agree with commenters that the regulations should specifically limit any disclosures of personally identifiable information from students' education records to those individuals in the organization conducting the study that have a legitimate interest in the information. This requirement is consistent with § 99.32(a)(3)(ii), which requires that an educational agency or institution record the ''legitimate interests'' the parties had in obtaining information under FERPA.

The Secretary strongly recommends that schools carefully limit the disclosure of students' personally identifiable information under this and the other exceptions in § 99.31 and reminds educational agencies and institutions that disclosures without consent are subject to § 99.33(a)(2), which states: ''The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.'' The recordation requirements in § 99.32 also apply to any disclosures of personally identifiable information made under the studies exception. (We note that a school does not have to record the disclosure of information that has been properly de-identified.)

Although FERPA permits schools to disclose personally identifiable information under § 99.31(a)(6) to organizations conducting studies for or on its behalf, the Secretary recommends that educational agencies and institutions release de-identified information whenever possible under this exception. Even when schools opt not to release de-identified information in these circumstances, we recommend that schools reduce the risk of unauthorized disclosure by removing direct identifiers, such as names and SSNs, from records that don't require them, even though these records may still contain some personally identifiable information. This is especially important when a school also discloses sensitive information about students, such as type of disability and special education services received by the students.

We agree with commenters that § 99.31(a)(6) should be revised to indicate that an educational agency or institution is not required to initiate a study. Additionally, we have revised § 99.31(a)(6) to include the word ''studies'' so that an educational agency or institution may utilize one written agreement for more than one study, so long as the requirements concerning information that must be in the agreement are met.

While we do not have the authority under FERPA to officially certify agreements between educational agencies and institutions and organizations conducting studies, FPCO does provide technical assistance to educational agencies or institutions on FERPA. As such, if school officials have questions about whether an agreement meets the requirements in § 99.31(a)(6), they may contact FPCO for assistance.

With regard to the comments that we include in the regulations a specific time period by which information provided under the studies exception must be destroyed, we believe that the parties entering into the agreement should decide when information has to be destroyed or returned to the educational agency or institution. As we have discussed, we have revised § 99.31(a)(6) to require that the written agreement include the duration of the study and the time period during which the organization must either destroy or return the information to the educational agency or institution.

With regard to the comment that a written agreement with the organization conducting the study should be sufficient for an educational agency or institution to retain control over information from education records once the information is given to an organization conducting a study, we agree that a written agreement required under the regulations will help ensure that the information is used only to meet the purposes of the study stated in the written agreement and that all applicable requirements are met. However, similar to the requirement that an outside service provider serving as a school official is subject to FERPA's restrictions on the use and redisclosure of personally identifiable information from education records, educational agencies and institutions must ensure that organizations with which they have entered into an agreement to conduct a study also comply with FERPA's restrictions on the use of personally identifiable information from education records. (See pages 15578–15580 of the NPRM.) That is, the school must retain control over the organization's access to and use of personally identifiable information from education records for purposes of the study or studies, including access by the organization's own employees and subcontractors, as well as any school officials whom the organization permits to have access to education records.

An educational agency or institution may need to determine that the organization conducting the study has reasonable controls in place to ensure that personally identifiable information from education records is protected. We note that it is common practice for some data sharing agreements to have a ''controls section'' that specifies required controls and how they will be verified (*e.g.*, surprise inspections). We recommend that the agreement required by § 99.31(a)(6) include a section that sets forth similar requirements. If a school is unable to verify that these controls are in place, then it should not disclose personally identifiable information from education records to an organization for the purpose of conducting a study.

In this regard, it should be noted that educational agencies and institutions are responsible for any failures by an organization conducting a study to comply with applicable FERPA requirements. FERPA states that if a third party outside the educational agency or institution fails to destroy information in violation of 20 U.S.C. 1232g(b)(1)(F), the studies exception in FERPA, the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years. See 20 U.S.C. 1232g(b)(4)(B).

Changes: We have revised § 99.31(a)(6) to: (1) Retain § 99.31(a)(6)(ii)(A) and (B); (2) amend § 99.31(a)(6)(ii)(A) to provide that the study must be conducted in a manner that does not permit personal identification of parents or students by anyone other than representatives of the organization that have legitimate interest in the information; (3) amend § 99.31(a)(6)(ii)(C) to require that the written agreement specify the purpose,

scope, and duration of the study and the information to be disclosed; require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; limit any disclosures of information to individuals in the organization conducting the study who have a legitimate interest in the information; and require the organization to destroy or return to the educational agency all personally identifiable information when the information is no longer needed for the purposes of the study and specify the time period during which the organization must either destroy or return the information to the educational agency or institution; and (4) amend § 99.31(a)(6) in new paragraph (iii) to provide that an educational agency or institution is not required to initiate a study.

Disclosure of Education Records to Non-Educational State Agencies

Comment: Several commenters stated that the proposed amendments did not specifically address whether an educational agency or institution is permitted to disclose education records to non-educational State agencies, such as State health or labor agencies, as part of an agreement with those agencies, without first obtaining consent. One commenter said that because the Department has taken the position that education records may be shared with State auditors who are not educational officials and who are not, by definition, under the control of a State educational authority, there is no legal basis to prohibit the disclosure of education records to other non-educational State and local agencies.

Some officials representing State health agencies commented that FERPA should be more closely aligned with the disclosure provisions of the HIPAA Privacy Rule. One commenter noted that there was a critical need for public health researchers to be able to access, without consent, personally identifiable information contained in student health records to allow for analyses, public health studies, and research that will benefit school-aged children, as well as the general population. One organization representing school nurses noted that public health officials need access to education records for the purposes of public health reporting, surveillance, and reimbursement.

Several commenters recommended that SEAs be authorized to share data from education records with State social services, health, juvenile, and employment agencies, to serve the needs of students, including special needs, low-income, and at-risk students. One SEA commented that it did not support extending access to student data to non-education State agencies, except to State auditors, as specified in proposed § 99.35(a)(3). This commenter asserted that access to and use of information from students' education records should be controlled by a limited number of education officials who are sensitive to the intent of FERPA and well acquainted with its safeguards.

Discussion: There is no specific exception to the written consent requirement in FERPA that permits the disclosure of personally identifiable information from students' education records to non-educational State agencies. Educational agencto aT*ot, by definition,

information at intake time so that the agency can receive necessary information from schools. In 1993, we amended the FERPA regulations to help facilitate this practice. In final regulations published in the **Federal Register** on January 7, 1993 (58 FR 3188), we removed the previous requirement in the regulations that schools ''obtain'' consent from parents and eligible students so that parents and eligible students may ''provide'' a signed and dated consent to third parties in order for the school to disclose education records to those parties.

Therefore, parents can provide consent at intake time to State and local social services and other non-educational agencies serving the needs of students in order to permit their children's schools (or the SEA) to disclose education records to the agency. For example, parents routinely provide consent to the Medicaid agency that permits that agency to collect information from other agencies on the family being served. In many cases those consents are written in a manner that complies with the consent requirement in § 99.30, and the student's school may disclose information to the Medicaid agency necessary for reimbursement purposes for services provided the student.

Changes: None.

Disclosure of Education Records to Student's Former Schools (§§ 99.31(a)(3), 99.31(a)(6), and 99.35(b))

Comment: One commenter asked for clarification whether a school could disclose a student's education records to the student's previous school for the purpose of evaluating Federal or State supported education programs or for improving instruction. Several commenters said that there is a critical need for school districts to be able to access the records of their former students from the student's new district or postsecondary institution so that the previous institution can evaluate the effectiveness of its own education programs. Some commenters said that § 99.35(a) clearly allows a K–12 data system to use postsecondary records to evaluate its own programs, and that a K–12 system does not need to have legal authority to evaluate postsecondary programs for the disclosure to be valid under the audit or evaluation exception.

Discussion: Section 99.31(a)(2) allows an educational agency or institution to disclose personally identifiable information from education records, without consent, to a school where the student seeks or intends to enroll or is already enrolled if the disclosure relates to the student's enrollment or transfer. There is no specific authority in FERPA for an educational agency or institution, or a State or local educational authority, to disclose or redisclose personally identifiable information from education records to a student's former school without consent.

As discussed above, §§ 99.31(a)(3) and 99.35 allow educational agencies and institutions to disclose personally identifiable information from education records without consent to State and local educational authorities that are legally authorized to audit or evaluate the disclosing institution's programs or records. We encourage State and local authorities to take advantage of this exception and establish or modify State or local legal authority, as necessary, to allow K–12 and postsecondary educational authorities to audit or evaluate one another's programs. As noted above, the Department will generally defer to a State Attorney General's interpretation of State or local law on these matters.

Section 99.31(a)(6) allows an educational agency or institution to disclose personally identifiable information from education records without consent to an organization conducting a study for, or on behalf of, the agency or institution that discloses its records. The ''for, or on behalf of'' language from the statute and regulations, however, does not allow the educational agency or institution to disclose personally identifiable information from education records under this exception so that the receiving organization can conduct a study for itself or some other party. Further, the Secretary does not as a policy matter support expanding the studies exception to permit such a disclosure because it would result in a vast increase in the number of parties gaining access to and maintaining personally identifiable information on students. As discussed below, educational agencies and institution and other parties, including State educational authorities, may always release information from education records to a student's former school, without consent, if all personally identifiable information has been removed.

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practice, if four students are involved in an altercation, the school redacts all personally identifiable information with regard to students 2 through 4 when releasing the statement without parental consent to student 1, but under the proposed regulations, student 1's request would violate the requirements in paragraph (g) because of the student's knowledge of the identity of the other students to whom the record relates. This commenter said that the regulations should not be adopted if they do not address these due process concerns.

Several commenters said they appreciated the addition of a student's date of birth and other indirect identifiers in the definition of *personally identifiable information*. Another commenter said that a comprehensive list of indirect identifiers would be helpful. One commenter asked us to define the concept of indirect identifiers. Another commenter asked us to clarify which personally identifiable data elements may be released without consent. A commenter asked us to define the term biometric record as used in the definition of *personally identifiable information*.

Discussion: The Joint Statement explains that the purpose of FERPA is two-fold: to assure that parents and eligible students can access the student's education records, and to protect their right to privacy by limiting the transferability of their education records without their consent. 120 Cong. Rec. 39862. As such, FERPA is not an open records statute or part of an open records system. The only parties who have a right to obtain access to education records under FERPA are parents and eligible students. Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office. Nonetheless, as explained in the preamble to the NPRM, 73 FR 15584–15585, we believe that the regulatory standard for defining and removing personally identifiable information from education records establishes an appropriate balance that facilitates school accountability and educational research while preserving the statutory privacy protections in FERPA.

The simple removal of nominal or direct identifiers, such as name and SSN (or other ID number), does not necessarily avoid the release of personally identifiable information. Other information, such as address, date and place of birth, race, ethnicity, gender, physical description, disability, activities and accomplishments, disciplinary actions, and so forth, can indirectly identify someone depending on the combination of factors and level of detail released. Similarly, and as noted in the preamble to the NPRM, 73 FR 15584, the existing professional literature makes clear that public directories and previously released information, including local publicity and even information that has been de-identified, is sometimes linked or linkable to an otherwise de-identified record or data set and renders the information personally identifiable. The regulations properly require parties that release information from education records to address these situations.

We removed the ''easily traceable'' standard from the definition of *personally identifiable information* because it lacked specificity and clarity. We were also concerned that the ''easily traceable'' standard suggested that a fairly low standard applied in protecting education records, *i.e.*, that information was considered personally identifiable only if it was easy to identify the student.

The removal of the ''easily traceable'' standard and adoption of the standards in paragraphs (f) and (g) will not affect a parent's right under FERPA to inspect and review his or her child's education records. Records that teachers and other school officials maintain on students that use only initials, nicknames, or personal descriptions to identify the student are education records under FERPA because they are directly related to the student.

Further, records that identify a student by initials, nicknames, or personal characteristics are personally identifiable information if, alone or combined with other information, the initials are linked or linkable to a specific student and would allow a reasonable person in the school community who does not have personal knowledge about the situation to identify the student with reasonable certainty. For example, if teachers and other individuals in the school community generally would not be able to identify a specific student based on the student's initials, nickname, or personal characteristics contained in the record, then the information is not considered personally identifiable and may be released without consent. Experience has shown, however, that initials, nicknames, and personal characteristics are often sufficiently unique in a school community that a reasonable person can identify the student from this kind of information even without access to any personal knowledge, such as a key that specifically links the initials, nickname, or personal characteristics to the student.

In contrast, if a teacher uses a special code known only by the teacher and the student (or parent) to identify a student, such as for posting grades, this code is not considered personally identifiable information under FERPA because the only reason the teacher can identify the student is because of the teacher's access to personal knowledge of the relevant circumstances, *i.e.*, the key that links the code to the student's name.

In response to the commenter who stated that a school should not be prevented from releasing information when the subject of the record has informatciith reell-only b

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institution should use to determine whether statistical information or a redacted record will identify a student, even though certain identifiers have been removed, because of a well-publicized incident or some other factor known in the community. For example, as explained in the preamble to the NPRM, 73 FR 15583, a school may not release statistics on penalties imposed on students for cheating on a test where the local media have published identifiable information about the only student (or students) who received that penalty; that statistical information or redacted record is now personally identifiable to the student or students because of the local publicity.

Paragraph (f) in the proposed definition provided that the agency or institution must make a determination about whether information is personally identifiable information not with regard to what someone with personal knowledge of the relevant circumstances would know, such as the principal who imposed the penalty, but with regard to what a reasonable person in the school or its community would know, *i.e.*, based on local publicity, communications, and other ordinary conditions. We agree with the comment that the ''school or its community'' standard was confusing because it was not clear whether just the school itself or the larger community in which the school is located is the relevant group for determining what a reasonable person would know.

We are changing this standard in paragraph (f) to the ''school community'' and by this change we mean that an educational agency or institution may not select a broader ''community'' standard when the information to be released would be personally identifiable under the narrower ''school'' standard. For example, it might be well known among students, teachers, administrators, parents, coaches, volunteers, or others at the local high school that a student was caught bringing a gun to class last month but generally unknown in the town where the school is located. In these circumstances, a school district may not disclose that a high school student was suspended for bringing a gun to class last month, even though a reasonable person in the community where the school is located would not be able to identify the student, because a reasonable person in the high school would be able to identify the student. The student's privacy is further protected because a reasonable person in the school community is also presumed to have at least the knowledge of a reasonable person in the local community, the region or State, the United States, and the world in general. The ''school community'' standard, therefore, provides the maximum privacy protection for students.

We do not agree that the reference to ''reasonable person'' should be changed to ''ordinary person.'' ''Reasonable person'' is a legally recognized standard that represents a hypothetical, rational, prudent, average individual. It would be confusing and inappropriate to introduce a new term ''ordinary'' in this context.

The standard in paragraph (f) excludes from the ''reasonable person in the school community'' standard persons who have personal knowledge of the ''relevant circumstances,'' which one commenter considered vague. Under this standard, an agency or institution is not required to take into consideration when releasing redacted or statistical information that someone with special knowledge of the circumstances could identify the student. For example, if it is generally known in the school community that a particular student is HIV-positive, or that there is an HIV-positive student in the school, then the school could not reveal that the only HIV-positive student in the school was suspended. However, if it is not generally known or obvious that there is an HIV-positive student in school, then the same information could be released, even though someone with special knowledge of the student's status as HIV-positive would be able to identify the student and learn that he or she had been suspended.

The provisions in paragraph (g) regarding targeted requests do not require an educational agency or institution to ascertain or guess a requester's motives for seeking information from education records or what a requester intends to do with the information. This paragraph addresses a situation in which a requester seeks what might generally qualify as a properly redacted record but the facts indicate that redaction is a useless formality because the subject's identity is already known.

An educational agency or institution is not required under paragraph (g) to make any special inquiries or otherwise seek information about the person requesting information from education records. It must use information that is obvious on the face of the request or provided by the requester, such as when a requester asks for the redacted transcripts of a particular student. Paragraph (f) also requires an agency or institution to use information known to a reasonable person in the school community, such as when a requester asks for the redacted transcripts of all basketball players who were expelled for accepting bribes after the local newspaper published a story about the matter. Paragraphs (f) and (g) do not require an educational agency or institution to inquire whether a requester has special knowledge not available generally in the school community that would make the subject of the record identifiable. We disagree with the comment that paragraph (f) is sufficient and paragraph (g) should be removed. Paragraph (g) addresses the problem of targeted requests, which is not addressed under paragraph (f).

We agree with the comment that the provision in paragraph (g) under which an agency or institution must determine whether the information requested is personally identifiable information based on its reasonable belief that the requester has ''direct, personal'' knowledge of the identity of the student to whom the record relates is ambiguous and confusing, especially in relation to what might be considered indirect knowledge. Therefore, we have modified this provision so that an educational agency or institution must simply have a reasonable belief that the requester knows the identity of the student to whom the record relates.

In reviewing a complaint that an educational agency or institution disclosed personally identifiable information from an education record in response to a targeted request, the Department would examine the request itself, the facts on which the agency or institution based its decision to release the information, as well as any information known generally in the school community that the agency or institution failed to take into account. The Department would also counsel an agency or institution about the nature of the violation in connection with the Department's responsibility for seeking voluntary compliance with FERPA before initiating any enforcement action under § 99.67.

With regard to the comment that the standard in paragraph (g) will impair due process in student discipline cases, it is unclear what the commenter means by releasing redacted witness statements under its current practice. *Education records* are defined in FERPA as records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 20 U.S.C. 1232g(a)(4)(A); 34 CFR 99.3. Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement

contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.

For example, parents of both John and Michael would have a right to inspect and review the following information in a witness statement maintained by their school district because it is directly related to both students: ''John grabbed Michael's backpack and hit him over the head with it.'' Further, in this example, before allowing Michael's parents to inspect and review the statement, the district must also redact any information about John (or any other student) that is not directly related to Michael, such as: ''John also punched Steven in the stomach and took his gloves.'' Since Michael's parents likely know from their son about other students involved in the altercation, under paragraph (g) the district could not release any part of this sentence to Michael's parents. We note also that the sanction imposed on a student for misconduct is not generally considered directly related to another student, even the student who was injured or victimized by the disciplined student's conduct, except if a perpetrator has been ordered to stay away from a victim.

In order to provide maximum flexibility to educational agencies and institutions, we did not attempt to define or list all other ''indirect identifiers''. We believe that the examples listed in paragraph (3) of the definition of *personally identifiable information*—date of birth, place of birth, and mother's maiden name—indicate clearly the kind of information that could identify a student. Race and ethnicity, for example, could also be indirect identifiers. It is not possible, however, to list all the possible indirect identifiers and ways in which information might indirectly identify a student. Further, unlike the HIPAA Privacy Rule, these regulations do not attempt to provide a ''safe harbor'' by listing all the information that may be removed in order to satisfy the de-identification requirements in § 99.31(b). We have also added a definition of *biometric record* that is based on National Security Presidential Directive 59 and Homeland Security Presidential Directive 24.

Changes: We added a definition of *biometric record,* which provides that the term means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics, and handwriting.

We also have revised paragraph (f) in the definition of *personally identifiable information* to change the reference ''school or its community'' to ''school community.'' In paragraph (g) of the definition of *personally identifiable information,* we removed the requirement that the requester have ''direct, personal knowledge.'' As revised, paragraph (g) provides that personally identifiable information means information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the record relates.

(b) De-Identified Records and Information

Comment: We received a number of comments on § 99.31(b)(1), which would allow an educational agency or institution, or a party that has received personally identifiable information from education records, to release the records or information without parental consent after the removal of all personally identifiable information, provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable because of unique patterns of information about the student, whether through single or multiple releases, and taking into account other reasonably available information. In order to permit ongoing educational research with the same data, § 99.31(b)(2) allows an educational agency or institution or other party that releases de-identified, non-aggregated data (also known as ''microdata'') from education records to attach a code to each record, which may allow the recipient to match information received from the same source, under three conditions—(1) the educational agency or institution does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code; (2) the record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and (3) the record code is not based on a student's social security number or other personal information.

Several commenters supported these proposed regulations and said that they will help facilitate valuable educational research. One of these commenters said that the provisions for de-identification of education records create clear standards that will allow researchers to conduct necessary research without compromising student privacy. One commenter appreciated being able to attach a code or linking key to records to facilitate matching students across data sets while preserving student confidentiality.

One commenter stated that de-identified data do not support appropriate analytical research that will lead to improved educational outcomes. Further, according to this commenter, complete de-identification of systematic, longitudinal data on every student may not be possible.

Two commenters expressed concern that agencies and institutions redact too much information from education records and said that the Department should err on the side of disclosure of disaggregated data so that journalists and researchers can obtain accurate information about how students in every accountability subgroup are performing. These commenters said that the regulations should take into account the real track record of journalists and researchers in maintaining the confidentiality of information from education records.

One commenter said that many institutions and individuals have the ability to re-identify seemingly de-identified data and that it is generally much easier to do than most people realize because 87 percent of Americans can be identified uniquely from their date of birth, five-digit zip code, and gender. This commenter said that the regulations need to take into account that re-identification is a much greater risk for student data than other kinds of information because FERPA allows for the regular publication of student directories that contain a wealth of personal information, including address and date of birth, that can be used with existing tools and emerging technology to re-identify statistical data, even by non-experts.

Another commenter said that because the de-identification process is so resource-intensive, the regulations should allow the research entity to de-identify education records as a contractor under § 99.31(a)(1) of the regulations.

We explained in the preamble to the NPRM (73 FR 15585) that educational agencies and institutions should monitor releases of coded, de-identified microdata from education records to ensure that overlapping or successive releases do not result in data sets in which a student's personally identifiable information is disclosed. One commenter said that this monitoring requirement was too burdensome given the vast number of

data requests it receives and asked us to limit the monitoring requirement to single or multiple releases it makes to the same party. An SEA asked specifically for clarification in the regulations regarding what steps, if any, it must take to ensure that multiple

for dealing with a situation in which all students in a particular subgroup scored at the same achievement level. One solution, referred to as ''masking'' the data, is to use the notation of >95% when all students in a subgroup score at the same achievement level.

See *www.ed.gov/programs/titleiparta/reportcardsguidance.doc* on page 3. Likewise, LEAs and SEAs must adopt a strategy for ensuring that they do not disclose personally identifiable information about low-performing students when they release information about their high-performing students.

provide the requisite protection. Thus, for example, an educational institution that reasonably believes that a student poses a threat of bodily harm to any person may disclose information from education records to current or prior peers of the student or mental health professionals who can provide the institution with appropriate information to assist in protecting against the threat. Moreover, the institution may disclose records to persons such as law enforcement officials that it determines may be helpful in providing appropriate protection from the threat. An educational agency or institution may also generally disclose information under § 99.36 to a potential victim and the parents of a potential victim as ''other individuals'' whose health or safety may need to be protected.

Similarly, in order to obtain information that would inform its judgment on how to address the threat, the student's current institution may disclose information from education records to other schools or institutions which the student previously attended. In that regard, the same set of facts underlying the current institution's determination that an emergency existed would also permit former schools and institutions attended by the student to disclose personally identifiable information from education records to the student's current institution. That is, a former school would not need to make a separate determination regarding the existence of an articulable and significant threat to the health or safety of a student or others, and could rely instead on the determination made by the school currently attended by the student in making the disclosure.

In the discussion on page 15589 of the NPRM, we noted that the ''health or safety emergency'' exception does not permit a local school district to routinely share its student information database with the local police department. This example was meant to clarify that FERPA's health or safety provisions would not permit a school to disclose without consent education records to the local police department unless there was a health or safety emergency and the disclosure of the information was necessary to protect the health or safety of students or other individuals. This does not prevent schools from having working relationships with local police authorities and to use local police officers in maintaining the safety of their campuses.

In response to the comment about which school official should be permitted to disclose information under § 99.36, an educational agency or institution will need to make its own determination about which school officials may access a student's education records and disclose information to parents or other parties whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. Under § 99.31(a)(1), an educational agency or institution may disclose education records, without consent, to school officials whom the agency or institution has determined have legitimate educational interests in the information. It may be helpful for schools to have a policy in place concerning which school officials will have access to and the responsibility for disclosing information in emergency situations.

We understand that some educational agencies and institutions may need assistance in determining whether a health or safety emergency exists for purposes of complying with these regulations. The Department encourages schools to implement a threat assessment program, including the establishment of a threat assessment team that utilizes the expertise of representatives from law enforcement agencies in the community. Schools can respond to student behavior that raises concerns about a student's mental health and the safety of the student and others that is chronic or escalating by using a threat assessment team, and then make other disclosures under the health or safety emergency exception, as appropriate, when an ''articulable and significant threat'' exists. Information on establishing a threat assessment program and other helpful resources for emergency situations can be found on the Department's Web site: *http://www.ed.gov/admins/lead/safety/edpicks.jhtml?src=ln*.

An educational agency or institution may disclose education records to threat assessment team members who are not employees of the district or institution if they qualify as ''school officials'' with ''legitimate educational interests'' under § 99.31(a)(1)(i)(B), which is discussed elsewhere in this preamble. To receive the education records under the ''school officials'' exception, members of the threat assessment team must be under the direct control of the educational agency or institution with respect to the maintenance and use of personally identifiable information from education records. For example, a representative from the city police who serves on a school's threat assessment team generally could not redisclose to the city police personally identifiable information from a student's education records to which he or she was privy as part of the team. As noted above, however, the institution may disclose personally identifiable information from education records when and if the threat assessment team determines that a health or safety emergency exists under §§ 99.31(a)(10) and 99.36.

We believe that § 99.36 does not need to be expanded to permit a school to contact whomever an eligible student has listed as his or her emergency contact, nor is there authority to do so. FERPA does not preclude institutions from contacting other parties, including parents, in addition to the emergency contacts provided by the student, if the school determines these other parties are ''appropriate parties'' under this exception. (An eligible student may provide consent for the institution to notify certain individuals in case of an emergency, should an emergency occur.)

The regulations would not prevent an institution from having a policy of seeking prospective consent from eligible students for the disclosure of personally identifiable information or from having a policy for obtaining consent for disclosure on a case-by-case basis. However, FERPA does not require that a postsecondary institution disclose information to any party except to the eligible student, even if the student has consented to the disclosure. Thus, the Secretary does not have the statutory

records so that they may be disclosed under the health and safety emergency exception. A commenter asked that the Department clarify that college health and mental health records are not education records under FERPA and must be treated like other health and mental health records in other settings.

Discussion: While we have carefully considered the comments concerning ''treatment records,'' the Secretary does not believe that it is necessary to amend the regulations to provide clarification on the handling of health and medical records. The Departments of Education and Health and Human Services have issued joint guidance that explains the relationship between FERPA and the HIPAA Privacy Rule. The guidance addresses this issue for these records at the elementary and secondary levels, as well as at the postsecondary level. The joint guidance, which is on the Web sites of both agencies, addresses many of the questions raised by school administrators, health care professionals, and others as to how these two laws apply to records maintained on students. It also addresses certain disclosures that are allowed without consent or authorization under both laws, especially those related to health and safety emergency situations. The guidance can be found here: *http://www.ed.gov/policy/gen/guid/fpco/index.html.*

As discussed elsewhere in this preamble with respect to § 99.31(a)(2), while ''treatment records'' are excluded from the definition of *education records* under FERPA, if an eligible student's treatment records are used for any purpose other than the student's treatment, or if a school wishes to disclose the treatment records for any purpose other than the student's treatment, they may only be disclosed as education records subject to FERPA requirements. Therefore, an eligible student's treatment records may be disclosed to any party, without consent, as long as the disclosure meets one of the exceptions to FERPA's general consent rule. *See* 34 CFR 99.31. One of the permitted disclosures under this section is the ''health or safety emergency'' exception.

Changes: None.

Identification and Authentication of Identity (§ 99.31(c))

Comment: Several commenters supported our proposal to require educational agencies and institutions to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records. One commenter supported the provision but advocated requiring the use of two-factor identification for information that could be used to commit identity theft and financial fraud. (Two-factor identification requires the use of two methods to authenticate identity, such as fingerprint identification in addition to a PIN.)

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school officials, officials in other schools, or by the media. It is important that the Office have authority to investigate allegations of non-compliance in these situations. Consistent with its current practice, a notice of investigation issued by the Office will provide sufficient and specific factual information to permit the agency or institution to adequately investigate and respond to the allegations, whether or not the investigation is based on a complaint by a parent or eligible student.

We do not agree that allowing the Office to initiate its own investigations of possible FERPA violations will lead to abuses of the process by persons seeking to redress other grievances with an institution. The Office will continue to be responsible for evaluating the validity of the information and allegations that come to its attention by means other than a valid complaint and determining whether to initiate an investigation. We do not anticipate that the Office will initiate an investigation of every allegation or information it receives. We believe, however, that it is important that the Office be able to investigate any violation of FERPA for which it receives notice. As stated in the NPRM, 73 FR 15591, the Department is not seeking to expand the scope of FERPA investigations beyond the current practices of the Office.

Changes: None.

(c) § 99.66

Comment: We received one comment on the proposed change to § 99.66(c), which allows but does not require FPCO to make a finding that an educational agency or institution has a policy or practice in violation of a FERPA requirement when the Office issues a notice of findings in § 99.66(b). The commenter stated that its review of FERPA and the Supreme Court decision in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002) (*Gonzaga*), indicates that the Office may not issue a finding of a violation of FERPA and require corrective action or take any enforcement action without also finding that the violation constituted a policy or practice of the agency or institution.

Discussion: We explain in the discussion of the changes to § 99.67 that there are circumstances in which the Office would be required to find that an educational agency or institution has a policy or practice in violation of a FERPA requirement before taking certain enforcement actions, such as an action to terminate funding for a violation of the non-disclosure requirements, 20 U.S.C. 1232g(b)(1) and (b)(2) and 34 CFR 99.30. However, the Office is not required to find a policy or practice in violation of FERPA before issuing a notice of findings or taking other kinds of enforcement actions.

Changes: None.

(d) § 99.67

Comment: One commenter supported the clarification in proposed § 99.67 that the Office may not seek to withhold payments, terminate eligibility for funding, or take certain other enforcement actions unless it determines that the educational agency or institution has a policy or practice that violates FERPA. Another commenter expressed general support for the proposed change, including the clarification that the Secretary may take any legally available enforcement action, in addition to those specifically listed in the current regulations. The commenter expressed concern, however, that the penalties are not severe enough to effectively discourage unintentional or willful violations by third parties, particularly in areas of research and data sharing with outside parties.

Another commenter expressed concern that the proposed amendment would unnecessarily broaden the enforcement options available to the Secretary. The commenter stated that educational agencies and institutions will not be able to assess the risks and consequences associated with their actions without a limitation on the range of enforcement actions available to the Department when a violation of FERPA is found.

One commenter asked the Department to clarify that all methods of enforcing FERPA that are contained in the current regulations will be retained in the final regulations. The commenter said that the proposed regulations in the NPRM (73 FR 15602) appear to remove the Secretary's ability to terminate funding.

Discussion: We explained in the preamble to the NPRM (73 FR 15592) that there were two reasons for the proposed changes to § 99.67(a). One was the need to clarify that the Secretary may take any enforcement action that is legally available and is not limited to those specified under the current regulations, *i.e.*, withholding further payments under any applicable program; issuing a complaint to compel compliance through a cease-and-desist order; or terminating eligibility to receive funding under any applicable program. Other actions the Secretary may take to enforce FERPA include entering into a compliance agreement under 20 U.S.C. 1234f and seeking an injunction.

This change to § 99.67(a) does not broaden the Secretary's enforcement options, as suggested by one commenter. The General Education Provisions Act (GEPA) provides the Secretary with the authority to take certain enforcement actions to address violations of statutory and regulatory requirements, including general authority to ''take any other action authorized by law with respect to the recipient.'' 20 U.S.C. 1234c(a)(4). The change to § 99.67(a) simply includes, for purposes of clarity, the Secretary's existing authority under GEPA to take any legally available action to enforce FERPA requirements. (We note that before taking enforcement action the Office must determine that the educational agency or institution is failing to comply substantially with a FERPA requirement and provide it with a reasonable period of time to comply voluntarily. See 20 U.S.C. 1234c(a); 20 U.S.C. 1232g(f); and 34 CFR 99.66(c).)

We also proposed to amend § 99.67(a) to clarify that the Office may issue a notice of violation for failure to comply with specific FERPA requirements and require corrective actions but may not seek to terminate eligibility for funding, withhold payments, or take other enforcement actions unless the Office determined that an agency or institution has a policy or practice in violation of FERPA requirements (73 FR 15592). Upon further review, we have decided not to adopt this particular change because we believe it limits the Secretary's enforcement authority in a manner that is not legally required.

In support of its holding in *Gonzaga* that FERPA's non-disclosure provisions do not create rights that are enforceable under 42 U.S.C. 1983, the Court observed that FERPA provides that no funds shall be made available to an educational agency or institution that has a policy or practice of disclosing education records in violation of FERPA requirements. 536 U.S. at 288; see also 20 U.S.C. 1232g(b)(1) and (b)(2); 34 CFR 99.30. As such, the statute and Gonzaga decision suggest that with respect to violations of FERPA's non-disclosure requirements, the Secretary must find that an educational agency or institution has a policy or practice in violation of FERPA requirements before taking actions to terminate, withhold, or recover funds for those violations. However, there is no requirement under the statute (or the *Gonzaga* decision) for the Secretary to find a policy or practice in violation of FERPA requirements on the part of an educational agency or institution before taking other kinds of enforcement actions for violations of the non-disclosure requirements, such as

This analysis is based on data from the most recent *Digest of Education Statistics* (2007) published by the National Center for Education Statistics (NCES), which projects total enrollment for Fall 2008 of 49,812,000 students in public elementary and secondary schools and 18,264,000 students in postsecondary institutions; and a total of 97,382 public K–12 schools; 14,166 school districts; and 6,463 postsecondary institutions. (Excluded are data from private institutions that do not receive Federal funding from the Department and, therefore, are not subject to FERPA.) Based on this analysis, the Secretary has concluded that the changes in these regulations will not impose significant net costs on educational agencies and institutions. Analyses of specific provisions follow.

Alumni Records

The regulations in § 99.3 clarify the current exclusion from the definition of *education records* for records that only contain information about an individual after he or she is no longer a student, which is intended to cover records of alumni and similar activities. Some institutions have applied this exclusion to records that are created after a student has ceased attending the institution but that are directly related to his or her attendance as a student, such as investigatory reports and settlement agreements about incidents and injuries that occurred during the student's enrollment. The amendment will clarify that this provision applies only to records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

We believe that most of the more than 103,845 K–12 schools and postsecondary institutions subject to FERPA already adhere to this revised interpretation in the regulations and that for those that do not, the number of records affected is likely to be very small. Assuming that each year one half of one percent of the 68.1 million students enrolled in these institutions have one record each affected by the change, in the year following issuance of the regulations institutions will be required to try to obtain written consent before releasing 350,380 records that they would otherwise release without consent. We estimate that for the first year contacting the affected parent or student to seek and process written consent for these disclosures will take approximately one-half hour per record at an average cost of $32.67 per hour for a total cost of $5,562,068. (Compensation for administrative staff time is based on published estimates for 2005 from the Bureau of Labor Statistics' National Compensation Survey of $23.50 per hour plus an average 39 percent benefit load for Level 8 administrators in education and related fields.)

In terms of benefits, the change will protect the privacy of parents and students by clarifying the intent of this regulatory exclusion and help prevent the unlawful disclosure of these records. It will also provide greater legal certainty and therefore some cost savings for those agencies and institutions that may be required to litigate this issue in connection with a request under a State open records act or other legal proceeding. For these reasons, we believe that the overall benefits outweigh the potential costs of this change.

Exclusion of SSNs and ID Numbers From Directory Information

The proposed regulations in § 99.3 clarified that a student's SSN or student ID number is personally identifiable information that may not be disclosed as directory information under FERPA. The final regulations allow an educational agency or institution to designate and disclose student ID numbers as directory information if the number cannot be used by itself to gain access to education records, *i.e.* , it is used like a name. SSNs may never be disclosed as directory information.

The principal effect of this change is that educational agencies and institutions may not post grades by the student's SSN or non-directory student ID number and may not include these identifiers with directory information they disclose about a student, such as a student's name, school, and grade level or class, on rosters, or on sign-in sheets that are made available to students and others. (Educational agencies and institutions may continue to include SSNs and non-directory student ID numbers on class rosters and schedules that are disclosed only to teachers and other school officials who have legitimate educational interests in this information.)

A class roster or sign-in sheet that contains or requires students to affix their SSN or non-directory student ID number makes that information available to every individual who signs in or sees the document and increases the risk that the information may be improperly used for purposes such as identity theft or to find out a student's grades or other confidential educational information. In regard to posting grades, an individual who knows which classes a particular student attends may be able to ascertain that student's SSN or non-directory student ID number by comparing class lists for repeat numbers. Because SSNs are not randomly generated, it may be possible to identify a student by State of origin based on the first three (area) digits of the number, or by date of issuance based on the two middle digits.

The Department does not have any actual data on how many class or test grades are posted by SSN or non-directory student ID number at this time, but student
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Standards for Privacy of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA Privacy Rule) published by the Department of Health and Human Services (HHS) on December 28, 2000, which estimated that the initial per-hospital cost of software upgrades to track the disclosure of medical records would be $35,000 (65 FR 82768). We assume that costs will be comparable for education records, and, as discussed above, software that tracks disclosure history can also be used to control or restrict access to electronic records. Based on these assumptions, if 1,619 small K–12 districts and postsecondary institutions decide to purchase student information software rather than rely on administrative policies to comply with the regulations, they will incur estimated costs of $56,665,000. We estimate that the remaining 9,174 small districts and institutions will not purchase new software because they do not make education records available electronically and rely instead on less costly administrative and physical methods to control access to records by school officials. Those that provide school officials with open access to hard copy education records may incur new costs to track actual disclosures to help ensure that they remain in compliance with legitimate educational interests requirements. We assume that these districts and institutions may devote some additional administrative staff time to procedures such as keeping logs of school officials who access records. However, no reliable estimates exist for the average number of teachers and other school officials who access education records or the number of times access is sought, so we are unable to estimate the cost of restricting or

no longer in attendance. We have insufficient information to estimate the number of institutions affected and the additional costs involved in changing systems to maintain opt-out flags on education records of former students.

Paperwork Reduction Act of 1995

Following publication of the NPRM, we provided, through a notice published in the **Federal Register** (73 FR 28810, May 19, 2008) opportunity for the public to comment on information collections in the current regulations, and indicated in that notice the pendency of the NPRM. Additionally, based on comments received in response to the NPRM, we have identified several information collection requirements associated with these regulations. We describe these information collections in the following paragraphs and will be submitting these sections to OMB for review and approval. We note that the Paperwork Reduction Act of 1995 does not require a response to these information collection requirements unless they display a valid OMB control number. A valid OMB control number will be assigned to the information collection requirements at the end of the affected sections of the regulations.

(1) § 99.31(a)(6)(ii)

FERPA permits an educational agency or institution to disclose personally identifiable information from education records, without consent, to organizations conducting studies for or on behalf of the agency or institution for purposes of testing, student aid, and improvement of instruction. In the NPRM, we proposed to add § 99.31(a)(6)(ii) to require that an educational agency or institution to disclose personally identifiable information under § 99.31(a)(6)(i) only if it enters into a written agreement with the organization specifying the purposes of the study. Under these final regulations, this written agreement must specify the purpose, scope, and duration of the study or studies and the information to be disclosed; require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; require the organization to conduct the study in a manner that does not permit personal identification of parents and students by individuals other than representatives with legitimate interest of the organization that conducts the study; require the organization to destroy the information or return to the educational agency or institution when it is no longer needed for the purposes for which the study was conducted; and specify the time period for the destruction or return of the information.

The Department did not identify in the NPRM the requirement in § 99.31(a)(6)(ii) as an information collection requirement under the Paperwork Reduction Act of 1995 and did not realize this would be an information collection requirement until a commenter brought this matter to our attention. The commenter pointed out that, while this change created another paperwork burden for school districts, the commenter did not object to the written agreement requirement because putting the requirements regarding the use and destruction of data in writing may improve compliance with FERPA. The Department agrees with the comment.

(2) § 99.32(a)(1)

Under FERPA, an educational agency or institution is required to record its disclosures of personally identifiable information from education records, even when it discloses information to its own State educational authority. This statutory requirement is reflected in the current FERPA regulations. The final regulations permit the State and local educational authorities and Federal officials listed in § 99.31(a)(3) to make further discloses of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b) and require them to record these further disclosures of § 99.33(b) if the educational agency or institution does not do so. We have included provisions in the final regulations that require educational agencies and institutions to maintain a listing in each student's record of the State and local educational authorities and Federal officials and agencies that may make further disclosures of the student's education records without consent so that parents and eligible students will be made aware of these further disclosures.

(3) § 99.32(a)(4)

Under this new provision, parents and eligible students will be able to inspect and review any further disclosures that were made by any of the parties listed under § 99.31(a)(3) by asking the educational agency or institution to obtain a copy of the record of further disclosures. We believe that this is only a minor paperwork burden for schools because it would involve asking officials to whom they have disclosed education records for the record of further disclosure or, in the case of some SEAs, accessing the State database for this information. Also, we do not expect that a large number of parents and eligible students will ask to see the record of further disclosures.

(4) § 99.32(a)(5)

During the development of the final regulations, we identified another

further disclosures on behalf of the agency or institution. In response to these comments, we are revising § 99.32 to require the State and local educational authorities and Federal officials listed in § 99.31(a)(3) to maintain the record of further disclosures if the educational agency or institution does not do so and make it available to the educational agency or institution upon request. We agree that by requiring State and Federal authorities and officials to record their redisclosures in these circumstances school districts will have less total paperwork burden because schools will not have to comply with the recordkeeping requirement in these instances.

Assessment of Educational Impact

In the NPRM, and in accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

* * * * *

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.

(Authority: 20 U.S.C. 1232g)

* * * * *

■ 4. Section 99.5 is amended by redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2) to read as follows:

§ 99.5 What are the rights of students?

(a)(1) * * *

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

* * * * *

■ 5. Section 99.31 is amended by:

■ A. Redesignating paragraph (a)(1) as paragraph (a)(1)(i)(A) and adding new paragraphs (a)(1)(i)(B) and (a)(1)(ii).

■ B. Revising paragraph (a)(2).

■ C. Redesignating paragraphs (a)(6)(iii) and (a)(6)(iv) as paragraphs (a)(6)(iv) and (a)(6)(v), respectively.

■ D. Revising paragraph (a)(6)(ii).

■ E. Adding a new paragraph (a)(6)(iii).

■ F. In paragraph (a)(9)(ii)(A), removing the word ''or'' after the punctuation ''; ''.

■ G. In paragraph (a)(9)(ii)(B), removing the punctuation ''.'' and adding in its place the word ''; or''.

■ H. Adding paragraph (a)(9)(ii)(C).

■ I. Adding paragraph (a)(16).

■ J. Revising paragraph (b).

■ K. Adding paragraphs (c) and (d).

■ L. Revising the authority citation at the end of the section.

The additions and revisions read as follows:

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) * * *

(1)(i)(A) * * *

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(*1*) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(*2*) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(*3*) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

Note: Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(6)(i) * * *

(ii) An educational agency or institution may disclose information under paragraph (a)(6)(i) of this section only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution enters into a written agreement with the organization that—

(*1*) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(*2*) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(*3*) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests;

and

(*4*) Requires the organization to destroy or return to the educational agency or institution all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed.

(iii) An educational agency or institution is not required to initiate a study or agree with or endorse the conclusions or results of the study.

* * * * *

(9) * * *

(ii) * * *

(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.

* * * * *

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution.

* * * * *

■ 15. Section 99.65 is revised to read as follows:

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies the complainant, if any, and the educational agency or institution in writing if it initiates an investigation under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the allegations against the educational agency or institution; and

(2) Directs the agency or institution to submit a written response and other