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Comments on Proposed Regulations for the Family Educational Rights and Privacy Act

§99.2. **What is the purpose of these regulations?** CLE supports the revised note that expressly references the requirements regarding the confidentiality of information accorded by IDEA Part B and Part C to eligible children with disabilities and their families.

§99.3 **What definitions apply to these regulations?**
Attendance. By expanding the definition of the term attendance to include attendance of individuals by videoconference, satellite, Internet, or other electronic information and telecommunication technologies, the protections of FERPA are extended to distance learners who are taught through the use of electronic information and telecommunication technologies. CLE supports this proposed change that updates and makes FERPA more relevant.

Directory Information. Similarly CLE supports the common sense approach and concern for student safety exercised by the Department of Education in proposing regulatory additions that expressly preclude educational agencies or institutions from designating a student's Social Security number (SSN) or student identification number (ID) as directory information that generally would not be considered harmful or an invasion of privacy if disclosed. As the Department notes, SSNs and other student ID numbers are personal identifiers that are typically used for identification purposes to gain access to or to confirm private information and services that warrant protection. Nor shall directory information that may be disclosed without consent after a specified notice and opt out conditions are met, include a student's user ID or other unique identifier if the electronic identifier can be used by itself to authenticate identify or gain access to education records.

On the other hand, CLE is concerned with the Department's proposed regulations allowing other electronic unique identifiers (user names, id #s, etc, so long as the identifier cannot be used by itself to get access to personal records (e.g., without a password) – saying that they're necessary for log-ons to various portals etc. Query whether that a reason for counting them as "directory information" which can be published anywhere (albeit with opt-out provisions)? Or should/could use of such identifiers be handled in a different way?

Disclosure. The proposed regulation that would exclude from the definition of "disclosure" the release or return of an education record or personally identifiable information from an education record to the party that provided and may or may not have created the record or the information contained therein is not consistent with the statute. The statute requires prior consent before release of an education record or personally identifiable information from an education record except in certain limited instances. 20 U.S.C. §1232g (a)(5)(A), (b)(1). The statute authorizes disclosure without prior consent to "officials of other schools or school systems in which the student seeks or intends to enroll, but only upon the condition and

with the explicit safeguard that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record…" Nowhere does the statute include among its exemptions releasing or returning an education record or personally identifiable information from a student's education record to the provider of the record or of the personally identifiable information without prior consent. Moreover, even when limited disclosure is authorized without consent, the statute requires with few expressed exceptions notification of access in the student's record and notification of the duty not to re-disclose. Alternative ways exist to address the Department's concerns about ensuring veracity of documents, including e.g., recipient school could directly request that the sending school resend the document in question.

If the Department declines to adopt CLE's position, clarify that any access through this method must be limited to only the information originally provided by the original sender – not to other information with which it may have been combined.

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Education Records. The proposed regulation repeats a problem in the existing regulations. Under (b)(5) of the definition of "education records" the term does not include "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 attendance as a student." This exemption is not found in the statute, is without authority, and is potentially damaging. A school could collect information about a student after he graduated, dropped out or was expelled, including, e.g., negative information about the individual's personal life, or allegations of criminal activities, and the information would not be treated as part of the individual's "record" and thus, the individual would be denied access to it, deprived of the opportunity to challenge its accuracy and to stop its release to third parties. Although the definition of student properly includes former students, this exemption in the definition of "education record" undermines the former student's ability to exercise his rights under the statute.

Personally Identifiable Information. CLE supports the addition of biometric record to this term that includes but is not limited to name, parent/family name, student or family address, a personal identifier, such as the student's SSN, student number, and the inclusion of "Other information that, alone or in combination, is linked or likable to a specific student" that can lead to private student information (such as mother's maiden name and information).

Further clarification is necessary for amending the definition to include subsection (g) which reads: "Information requested by a person who the educational agency or institution believes has direct, personal knowledge of the identity of the student to whom the education directly relates." This proposed language appears to create an unenforceable standard, transferring to the holder of the records responsibility for making a subjective determination of what is in the mind of the inquirer at the time of the request. Moreover, there would be less need to question the motivation of the party requesting information from a student's education record if access to student's education record or personally identifiable information in such record without prior consent remained restricted only to those expressly authorized by the statute. See 20 U.S.C. § 1232g(b)-(j). See comment to proposed regulation §99.31(a)(1)(i)(B).

§ 99.5 What are the rights of students? As written, the language captured in the last sweeping clause –"*or any other provision in §99.31(a)*" - of proposed regulation §99.5(a)(2) is inconsistent with and exceeds the scope of statutory authorization found at 20 U.S.C. §1232g(b)(1)(H), (I), and §1232g(i). The cited statutory provisions authorize an educational agency or institution to disclose education records or personally identifiable information from education records to a parent without the prior written consent of an eligible student in very limited circumstances, i.e., if the disclosure meets the conditions in §99.31(a)(8) [student is classified as a federal tax dependent of parent], §99.31(a)(10) [health or safety emergency regardless of student's age], §99.31(a)(15) [student under 21 years violates law or rule re/use or possession of alcohol or drugs]. The proposed language authorizing such disclosure to parents without

a student's prior written consent based on "or any other provision in §99.31(a)" is without authority. The catch-all phrase should be deleted or, in the alternative, after the phrase "or any other provision in §99.31(a)" ADD: "within which an eligible student's parent independent of their parent status falls within the explicit exception."

§99.31 **Under what conditions is prior consent not required to disclose information?** In the commentary preceding the proposed regulations the Department cogently explains the enhanced level of protection and care required by educational agencies and institutions maintaining education records that are increasingly in electronic format. The Department recognizes and describes the need to maintain electronic and paper files separately, the importance of being able to shield them from unintended disclosure to persons who may have a legitimate educational interest, for example, in seeing a student's transcript, but not in seeing a student's referral for mental health services or disciplinary charges for substance abuse. It is disappointing first that despite this recognition the Department offers no guidance or timelines for an educational agency or institution to ensure that affirmative steps are taken to ensure protection for unintended and improper disclosures. See discussion below of proposed §99.31(a)(1)(ii).

Despite the Department's expressed and warranted concern for unintended disclosure of personally identifiable information –information especially vulnerable because it is maintained in electronic files – proposed regulation §99.31(a)(1)(i)(B) expands significantly authorization for access without prior consent to education records or personally identifiable information contained therein. The plain language of the *statute* at 20 U.S.C. §1232g(b)(1)(A) expressly limits disclosure without prior consent to "any individual, agency, or organization, other than to the following: *other school officials, including teachers* within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required." (emphasis added). In sharp contrast to the statutory language, subsection (B) of the proposed regulation expands the exception for "other school officials," to include "a contractor, consultant, *volunteer*, or other party to whom an agency or institution has outsourced institutional services or function" provided three conditions are met. These conditions are that the outside party: (1) "[p]erforms 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; and (3) Is subject to the requirements of §99.33(a) governing the use and redisclosure of personally identifiable information from education records."

Under this exception "volunteers" and "contractors" and "other outside parties fulfilling tasks otherwise performed by school employees, would now be treated the same as those "school officials, including teachers…determined by [the] agency or institution to have legitimate education interests" including in the educational interests of the child who would otherwise be entitled to consent prior to disclosure. The Department's use of the above-mentioned qualifying criteria (1) – (3) fails to offset the impact of undermining the plain language of the statute that limits disclosure without prior written consent. 20 U.S.C. §1232g(b)(1)(A). This overly broad exception makes no distinction between outsourced institutional services or function work related to electronic recordkeeping, data entry or maintenance being done by a disinterested third party employed off-site by a data management or storage contractor under contract with a major urban school system or an institution of higher education, and the same services requiring access to personally identifiable information in students' education records being performed by parent volunteers at a school which their own children attend in the district where they live and are likely to be familiar with other students and their families.

Given the volume of records being maintained electronically and off-site, there is undoubtedly a growing need to address this matter while continuing to ensure the protection of personally identifiable information in students' education records. Redefining by regulation the statutory term "school officials" to include "contractors" and "volunteers" and others who perform functions that could be done by school employees

does nothing to address either concern–even if these individuals are under the "direct control of the agency or institution" and subject to the proposed and weakened "redisclosure of personally identifiable information" limitation. §99.31(a)(1)(i)(B)(2), (3).

In identifying instances in which prior consent is not required to disclose information, subsection (ii) of proposed regulation §99.31(a)(1) explicitly states that "[a]n educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have a legitimate educational interests." The proposed regulation further states: "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 99.31(a)(1)(i)(A). Through this language the Department acknowledges that not every agency or institution possesses the resources to establish physical or technological access controls to establish a system capable of ensuring compliance with the requirement that disclosure is restricted to those authorized persons with "legitimate educational interests." What may have been previously possible to monitor based on the plain language and intent of the statute that limits disclosure to a narrowly defined "school officials, including teachers" who were determined by the educational agency or institution to have "legitimate educational interests" would seem much more difficult to monitor and ensure compliance based on the proposed regulations that have opened the door to disclosure.

Regardless of the definition of "school officials" the Department should proactively require educational agencies and institutions to demonstrate that both electronic and paper files containing personally identifiable information are maintained separately to prevent personally identifiable information from being inadvertently disclosed. Each agency and institution should adopt a system for limiting disclosure of personally identifiable information to authorized individuals who fall within the definition of "school officials," who are determined through a process adopted by the agency or institution and subject to review by the US Department of Education, to have legitimate educational interests in accessing the specifically requested information. For example, agencies and institutions might choose to designate different files within each student's education record as "confidential" based on their containing personally identifiable information, and depending upon the nature of the personally identifiable information, identify who among the broad definition of "school officials" has been determined through the agency's process to have "legitimate educational interests" in that portion of the student's education record being accessed. Proposed regulations alos ought to require affirmative monitoring by the Department to ensure that agencies and institutions have such a process/system of protections in place with respect to disclosure of students' education records and, in particular, personally identifiable information kept in electronic format that are especially vulnerable to unintended disclosure.

Disclosure when the student is already enrolled. Proposed subsection (3) of §99.31(a)(2) revises current regulation to authorize disclosure without prior consent by school officials [as redefined to include contractor, consultant, volunteer or other party to whom an institution or agency has outsourced institutional services or functions] "to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll" "*or,*" based on the proposed regulation, "*where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.*" [The proposed regulation cites as authority Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. §7165(b), requiring each state to assure the Secretary that it has a procedure in place to facilitate transfer of disciplinary records of a student who was suspended or expelled 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. Fed. Reg. 15600] The Department should clarify through proposed regulation §99.34 that eligible students or parents are entitled to notice of any such disclosure so as to enable the eligible student or parents an opportunity to request a copy of the information disclosed and to a hearing to challenge the disclosure. As proposed, regulation

§99.34(a)(1)(ii) that sets forth the annual notification requirements of the agency or institution, including an obligation to make a reasonable effort to notify the parents or eligible student that the agency or institution forwards education records to other agencies or institutions that have requested the records *and* in which the student seeks to enroll, is silent as to the eligible student's or parents' right to reasonable notice when the agency or institution forwards information from a student's record when that student is "already enrolled." This is a protection that should be provided the "already enrolled student."

Enhanced protections for disclosure to organizations conducting studies. With the clarifying amendment to §99.31(d) that makes explicit that no educational agency or institution or any other party is required to disclose education records or information from records to any party under paragraphs (a) and (b) of this section, CLE supports the proposed additions to §99.31(a)(1)(ii) and (b). Section 99.31(a)(6)(ii) provides enhanced protection for students whose personally identifiable information may be disclosed to certain organizations conducting studies for, or on behalf of, educational agencies or institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction. Such protections include disclosure of personally identifiable information only if the education agency or institution enters into a written agreement with the organization specifying the purpose of the study so as to ensure that that purpose is consistent with the above described requirements of §99.31(a)(6)(i) and ensuring that information from education records "is used only to meet the purpose or purposes of the student stated in the written agreement"; "…the study …does not permit personal identification of parents and students…by individuals other than representatives of the organization that conducts the study; and …the information is destroyed or returned to the educational agency or institution when it is no longer needed for the purposes for which the study was conducted."

(b)(1) *De-identified records and information.* With a shared goal to learn from data and to improve teaching and learning, CLE supports the Department's proposed amendments at section (b) of §99.31 regarding de-identified records and information.

§99.36 What conditions apply to disclosure of information in health and safety emergencies? Under section 1232g(b)(1)(I) of Title 20 an educational agency or institution may disclose personally identifiable information from education records without prior written consent in connection with an emergency to appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons. New proposed regulation at §99.36(a) expressly acknowledges "parents" as among those who might be considered "appropriate persons" to whom disclosure of personally identifiable information from an education record may be disclosed in an emergency if such information is necessary to protect the health or safety of the student or other individuals.

The proposed regulation §99.36(c) sets forth a multi-prong test for determining in connection with an emergency if knowledge of such personally identifiable information from a student's education record is necessary to protect the health and safety of the student or other individuals. See 20 U.S.C. §1232g(b)(1)(I). Under proposed subsection (c) an educational agency or institution may first take into account the "*totality of the circumstances* pertaining to a threat to the safety or health of a student or other individuals." Then, if there is "*articulable and significant threat to the health or safety* of a student or other individuals," the educational agency or institution may disclose information from education records to "any person *whose knowledge of the information is necessary* to protect the health and safety of the student or other individuals."

It is important that the Department does not send the wrong message to educational agencies and institutions which are responsible for protecting students' personally identifiable information in their education records. It is not in the interest of health or safety if individuals in need of mental health support services or a heightened level of psychiatric intervention do not seek the kind of assistance they need because of either a rational or irrational fear that their health records will be accessed by

"volunteers" or will be disclosed without their consent to "any person" considered "necessary" to protect the student from self or others. The health and safety emergency exception to release of personally identifiable information must not be perceived as permitting educational agencies or institutions to share personally identifiable information routinely with parents, police, or others.

Rather, it is important that the Department underscore the importance of educational agencies and institutions responsibly applying the Department's thoughtful multi-prong test and the process for doing so. The test requires educational agencies or institutions to consider the context or the "totality of the circumstances pertaining to a *significant threat* to health or safety." The test requires persons responsible for the educational agencies and institutions to ask whether a student poses both an "*articulable and significant* threat to the safety or health" of self or others – i.e., whether the threat is real (though not necessarily immediate) and can be described in words and whether the threat is significant as in capable of causing serious harm to self or others –not property damage. If the response to these two questions is affirmative, then school authorities must inquire further as to whether there is a person or persons whose knowledge of personally identifiable information about the student *is necessary to protect the health and safety* of the student or other individuals. If yes, i.e., such individual(s) exist and possession of personally identifiable information in the student's education record is necessary to protect the health and safety of the student, then the agency or institution may disclose the student's education record or the personally identifiable information in the record to the appropriate person(s).

It is necessary for us to be mindful of the law of unintended effects. Many tragedies are averted because individuals seek help, knowing that they are protected by confidentiality. On the other hand, if individuals are concerned that information will be shared, even in a "preventive" way, they will stop seeking help. Through the proposed regulations, and in particular, those addressing the "emergency health or safety" exception, CLE urges the Department to reiterate the stated purpose and intent of FERPA as an Act designed to protect students' broadly defined education records and in particular, personally identifiable information from being disclosed without prior consent except in very limited circumstances. Confidentiality is important for individuals with mental illness to seek assistance from the mental health system. This is especially true for vulnerable students in need of assistance who are attending educational agencies or institutions. In addition, the proposed regulations should require that students be notified in advance that threats of direct harm to others will not be kept confidential, giving fair warning not to make such threats. Finally, CLE opposes the overly broad safety net for an educational agency or institution that would appear to undermine the multi-prong test established by the Department that is consistent with the plain language and intent of FERPA. This proposed regulation merely requires an agency to be able to show a rational basis for making the determination of an articulable and significant threat based on information available to it when it made the determination. The proposed regulation further has the effect of eliminating the Department's responsibility, oversight and accountability for effectively implementing and enforcing this statute by expressly allowing that upon any agency or institution's putting forth a rational basis for its determination, the Department "will not substitute its judgment for the educational agency or institution in evaluating the circumstances and making the determination."