

May 7, 2008

LeRoy S. Rooker
U.S. Department of Education
400 Maryland Avenue, S.W., Room 6W243
Washington, DC 20202-5920

RE: Docket ID ED-2008-OPEPD-0002

Dear Mr. Rooker:

On behalf of the Software & Information Industry Association (SIIA) and our member high-tech companies, we write to comment on the U.S. Department of Education's March 24, 2008 notice of proposed rulemaking, proposing to amend the regulations governing the Family Educational Rights and Privacy Act (FERPA; 20 U.S.C. § 1232g; 34 CFR Part 99). SIIA commends the Department for taking steps to update and clarify the regulations, and appreciates the opportunity to share our perspective, further clarify several provisions, and help avoid unintended consequences.

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital content industry, representing more than 500 leading high-tech companies. SIIA's members include many providers of educational products and services, including the leading publishers and innovative developers of instructional materials, educational software, enterprise applications, web-based services, and related technologies and services for use in schools, institutions, and educational agencies. SIIA appreciates that the Department's proposed amendments to the regulations were motivated, in part, by the need to respond to changes in information technology and the uses of such technologies by education institutions and agencies.

SIIA's comments will focus on two goals:

- First, SIIA encourages further clarification aimed at enhancing the public-private research partnerships necessary to improve education; and
- Second, SIIA encourages further clarifications aimed at avoiding unintended consequences that would provide barriers to the delivery by third party vendors of educational products and services.

Research

Many SIIA members providing instructional, curricular, testing, and data management products and services to educational entities also partner with these entities to evaluate such products and services. Through these partnerships, products and services are enhanced in order to serve the goal of better instruction. In many cases, FERPA is, or is perceived to be, a barrier to an education agency or institution otherwise willing to participate in such a study.

SIIA supports the Department's goal of clarifying Section 99.31 regulating the circumstances under which an educational agency or institution may disclose information from education records, without consent, for research purposes. Our Association believes the proposed changes will provide some assistance to facilitate research partnerships between SIIA members and education agencies and institutions. However, SIIA believes the proposed changes do not go far enough, and therefore seeks the following modifications to the proposed amendments.

- In Section 99.31(a)(6)(i) and (a)(6)(i)(C): Clarify “on behalf of” and “improve instruction” to explicitly include a broader array of studies which the educational agency or institution certifies as in their interest and that of their students. There is evidence that agencies and institutions may now be overly-narrowly interpreting these provisions and excluding research simply because it involves third-party products and services, is initiated by third-party providers, or is formative/developmental rather than summative in nature.

Instead, SIIA asks that Section 99.31(a)(6) be further amended in the following two ways to read:

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

(i) “(C) Improve *learning and* instruction, *either directly or indirectly, including studies that will improve their, or other, educational agencies or institutions*”

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

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

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

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

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

The actual process of de-identification is often too resource intensive for educational institutions and agencies to conduct for certain research purposes, especially in cases where such studies require data to be assembled from multiple education records. We therefore ask that the regulations be further amended to allow the entity conducting the research to “de-identify” the

education records under terms of a written agreement. To achieve this objective, SIIA suggests that the regulations explicitly allow that the research entity may be treated as a “contractor” as defined by the proposed regulations in Section 99.31(a)(1)(i)(B).

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

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

Product and Service Providers

Many SIIA members provide products and services to educational agencies and institutions, including in the areas of instruction, curriculum, assessment, data management, and enterprise management, among others. Many of these products and services are technology-based – e.g., software, web-based content, web-delivered services, data systems, etc. – and involve the collection, warehousing, and management of student data.

In most cases, personally identifiable information is either not collected, or if collected, is maintained in such a way that the vendor may not access the data. For example, in some cases, a software application – e.g., assessment, gradebook, student information system, etc. – is licensed that enables schools to build their own files or databases and host them on local computers or servers. The vendor would have no means to access such data. In other cases, the vendor is merely providing a platform that the educational entity is solely able to utilize and that also has controls for data access.

In most instances, both a unique student identifier and student authentication is required to enable students to sign-on and access these systems. In nearly all these cases, SIIA members have a contract with the institution or agency through, for example, either a software license agreement or a web-based subscription services agreement.

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

- Social Security Number (SSN). SIIA supports the proposed amendment to the regulation that would prohibit an educational agency or institution from designating as directory information a student’s Social Security Number (SSN). SIIA recognizes this as an important step to enact the recommendations of the President’s Identity Theft Task Force, and SIIA members serving education agencies and institutions are committed to minimize the use of SSNs as unique student identifiers.
- Unique Identifier. The proposed regulation would allow inclusion as directory information of another unique student identifier (ID) – not SSN – as needed by the student to access or communicate in electronic systems, but only if a password or personal identification number (PIN) known only by the student is needed for authentication purposes to gain access to education

records. In principle, SIIA supports this proposed regulation, but in practice, SIIA wants to ensure that other FERPA regulations do not create barriers to the use of that student ID and Student PIN or password to access vendor products or services through electronic systems.

- Location of Data Hosting. In the case of electronic data, SIIA wants to ensure that the regulations make clear that FERPA does not discriminate based upon where data is hosted. In other words, it should not matter under the regulations whether the data is: (a) hosted in a vendors' offsite network and delivered over the Internet, or (b) hosted within the institution's local network servers or on its computers. SIIA therefore asks for the addition of explicit clarification regarding the physical location of student education records to counter the misperceptions among some education agencies and entities that: (a) such data may not be hosted offsite under FERPA; or (b) at least that this would automatically trigger FERPA disclosure and consent requirements.
- Opt-Out. SIIA wants to ensure that other FERPA regulations are explicitly understood NOT to allow students and parents to opt out of participation in education activities just because they require sign-on access to products and services through electronic systems. There appears to be some contradiction in the March 24 NPRM in this regard. In the second paragraph on page 15576, the Department appears to recognize the right of students to opt out of "services, such as portals for class registration, academic records, etc., provided solely through the electronic communications or software." However, in Section 99.37(c), the proposed regulation would provide that a parent or student "may not use their right . . . to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, electronic identifier, or institutional e-mail address in a class in which the student is enrolled." If not conflicting, these two statements appear at least to create ambiguity and confusion.

In light of the increasing use of electronic systems for both instructional and administrative activities, SIIA suggests that the Department can not and should not differentiate between these types of activities nor in the degree to which students may opt out. The allowances for students to opt out on this basis could have great unintended consequences by undermining the use of products and services accessed through electronic systems. SIIA, therefore, asks that the proposed amendment be clarified to ensure that student's may NOT opt out of participation in all manner of classroom, institutional or agency activities simply because they employ sign-on access through electronic systems. SIIA further requests that the regulations be amended to explicitly state that education agencies and institutions may, in all cases, allow the use of both the student ID and authenticating PIN or password as necessary to access such products and services.

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

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

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

- First, SIIA asks that the Department further amend the proposed condition that the contractor “performs an institutional service or function for which the agency or institution would otherwise use employees.” It is our view that this test is inconsistent with the stated purpose. A test based solely on use of employees is likely to prove impractical. We would recommend, instead, the test of performance based on whether the service or function would otherwise be performed by the agency or institution. The proposed test could otherwise exclude a contractor simply because their service or function had never been, or could not be, performed by a school employee, which could especially be a barrier for software and other new and innovative services of functions.

In Section 99.31 . . . (B)(1) as proposed, further amend to read: “(1) Performs an institutional service or function otherwise provided by the agency or institution,”

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

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

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

Sincerely,

A handwritten signature in black ink that reads "Mark Schneiderman". The signature is fluid and cursive, with the first name "Mark" and last name "Schneiderman" clearly legible.

Mark Schneiderman
Director of Education Policy