



October 9, 2013

The Honorable Tom Harkin
Chairman
Committee on Health, Education, Labor,
and Pensions
U.S. Senate
731 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Lamar Alexander
Ranking Member
Committee on Health, Education, Labor,
and Pensions
U.S. Senate
455 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable John Kline
Chairman
Education and the Workforce Committee
U.S. House of Representatives
2439 Rayburn House Office Bldg.
Washington, DC 20515

The Honorable George Miller
Ranking Member
Education and the Workforce Committee
U.S. House of Representatives
2205 Rayburn House Office Bldg.
Washington, DC 20515

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Re: Student Privacy, FERPA Changes, and EPIC v. ED

Dear Chairman Harkin, Ranking Member Alexander, Chairman Kline, and Ranking Member Miller:

The Electronic Privacy Information Center (“EPIC”) is writing to call your attention to a recent court decision concerning the Family Educational Rights and Privacy Act (“FERPA”). EPIC had opposed the 2011 changes in the agency rule that weakened privacy safeguards for student data. Although the court ruled against us, we believe the issues raised in the case are vitally important. We urge your Committees to look more closely at the issue of student privacy and the risk of student data commercialization.¹

In 2011, the Education Department loosened the privacy safeguards for student records by modifying key FERPA statutory terms. The revised regulations defined “education program,” a term that was previously undefined under FERPA, to include a wide range of activities unrelated to improving academic performance.² The modified regulations also defined for the first time the term “authorized representative.” Under the revised regulations, authorized representatives are no longer entities over which educational authorities have “direct control, such as an employee or a contractor of the

¹ Natasha Singer, *Deciding Who Sees Students’ Data*, N.Y. TIMES, Oct. 5, 2013, at BU1.

² Family Educational Rights and Privacy Regulations, 76 Fed. Reg. 75,604, 75,614 (Dec. 2, 2011).

authority.”³ Now, authorized representatives can be any individual or entity that educational authorities select as an authorized representative.⁴ As a consequence, data is now flowing to private companies that operate far outside the direct control of school systems.

By redefining these key terms, the Education Department has allowed private student data to be made much more widely available than the Congress that enacted FERPA intended.

In 2011, EPIC submitted extensive comments on the substantial risks to student privacy and security that would result from the proposed rule change. Only after the Education Department failed to address our concerns did we challenge the revised rule in court. Recently, a federal district court dismissed *EPIC v. Department of Education* on technical grounds.⁵ The court therefore never addressed the substantive questions about whether the agency had the authority to make the rule change nor the risk to student privacy that resulted from the adoption of the revised rule.⁶

That is unfortunate. Because of the recent changes to FERPA, students and families are losing control over sensitive information. Private companies are becoming the repositories of student data and even the data maintained by the schools is far more extensive than ever before. Congress and the Education Department should work to strengthen student privacy protection.


As the Education Department falls within the purview of your Committees, we urge you to investigate the impact that the revised FERPA rule has had on student privacy. Among the questions you may wish to explore:

- (1) Who now has access to student data subject to FERPA and for what purposes?
- (2) Are any of the third parties using the data for commercial purposes?
- (3) Are these third parties subject to mandatory security standards?
- (4) Are families and students able to limit the use of data held by third parties?
- (5) What would prevent the use of this student data in the future for employment, insurance, or credit determinations?

Student privacy is a vitally important issue to millions of parents and students. We look forward to working with you on this critical issue.

Sincerely,


Marc Rotenberg
EPIC President & Executive Director


Khaliah Barnes
EPIC Administrative Law Counsel

³ Family Educational Rights and Privacy Regulations Notice of Proposed Rulemaking, 76 Fed. Reg. 19,726, 19,734 (Apr. 8, 2011).

⁴ 34 C.F.R. § 99.3 (2012).

⁵ *EPIC v. U.S. Dep't of Educ.*, ___ F.Supp.2d ___, CV 12-0327 (ABJ), 2013 WL 5377827 (D.D.C. Sept. 26, 2013).

⁶ *Id.*

cc: The Honorable Arne Duncan, Secretary, U.S. Department of Education
Kathleen Styles, Chief Privacy Officer, U.S. Department of Education

Enclosures

Comments from EPIC to the Educ. Dep't on FERPA Notice of Proposed Rulemaking (May 23, 2011), *available at* http://epic.org/privacy/student/EPIC_FERPA_Comments.pdf.

EPIC v. U.S. Dep't of Educ., __F.Supp.2d__, CV 12-0327 (ABJ), 2013 WL 5377827 (D.D.C. Sept. 26, 2013), *available at* <http://epic.org/apa/ferpa/EPIC-FERPA-Opinion.pdf>.

Natasha Singer, *Deciding Who Sees Students' Data*, N.Y. TIMES, Oct. 5, 2013, at BU1, *available at* <http://www.nytimes.com/2013/10/06/business/deciding-who-sees-students-data.html>.