



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

April 2, 2008\*

### **MEMORANDUM TO STATE DIRECTORS OF MIGRANT EDUCATION**

**SUBJECT:** Family Educational Rights and Privacy Act and MSIX

This memorandum responds to several questions received by the Office of Migrant Education (OME) of the U.S. Department of Education (ED) regarding the applicability of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, to the collection and transmission of migrant student data as part of the Migrant Student Information Exchange (MSIX). The MSIX is authorized by section 1308(b) of the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act of 2001 (20 U.S.C. § 6398(b)). This memorandum reflects the position of both ED's Family Policy Compliance Office (FPCO), which is responsible for the interpretation of FERPA for the Department, and OME.

Following a brief overview of FERPA, this memorandum will explain why, for purposes of implementing MSIX, FERPA permits without parental consent: (1) local educational agencies (LEAs) and other local operating agencies (LOAs) that provide educational services to migrant students to provide minimum data elements on migrant students to their respective State educational agency (SEA) or State migrant student data system; (2) SEAs or State migrant student data systems to redisclose this information to MSIX, as operated by ED and its contractor; and (3) MSIX to be used to exchange minimum data elements on migrant students among SEAs and LEAs and LOAs on an interstate or intrastate basis.

#### **The Family Educational Rights and Privacy Act (FERPA)**

FERPA applies to educational agencies or institutions to which funds have been made available under any program administered by ED. In general, an educational agency or institution subject to FERPA may not have a policy of denying and may not effectively prevent parents from inspecting and reviewing their children's education records and must provide the parents with the opportunity to seek to have the education records amended in certain circumstances. See 34 CFR Part 99, Subparts B and C. Additionally, an educational agency or institution subject to FERPA may not have a policy or practice of disclosing education records, or personally identifiable information from education records, without the written consent of the parent, except as permitted by FERPA. See 34 CFR §§ 99.30 and 99.31. These rights transfer to the student when he or she turns 18 years of age or enters a postsecondary educational institution at any age ("eligible student"). FERPA broadly defines the term "education records" 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. 34 CFR § 99.3 ("Eligible student" and "Education records").

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*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

One of the exceptions to FERPA's general consent requirement permits educational agencies and institutions, such as LEAs and their constituent schools, to disclose education records under certain conditions to authorized representatives of their SEA or other State educational authorities without prior written consent subject to the requirements in 34 CFR § 99.35. See 34 CFR §§ 99.31(a)(3)(iv) and 99.35. 34 CFR § 99.35(a) requires, as a condition of such a disclosure, that it be made in connection with:

- An audit or evaluation of Federal or State supported education programs; or
- The enforcement of or compliance with Federal legal requirements relating to such programs.

In addition, under 34 CFR § 99.35(b), information collected by State officials under 34 CFR § 99.35(a) must be:

- Protected so that information is not disclosed to anyone other than the authorized representatives of the State educational authority; and
- Destroyed when no longer needed for the purposes listed above.

These provisions governing the disclosure of personally identifiable information from a student's education records by an educational institution or agency to an authorized representative of a State educational authority (which would include an SEA) apply to disclosure to any statewide records system that a State educational authority maintains – either on its own or via contract with an authorized representative that maintains the statewide record system for the State educational authority.

FERPA also provides that if the collection of personally identifiable information is specifically authorized by Federal law, the prohibitions on redisclosure and destruction of information requirements in § 99.35(b) do not apply. See 34 CFR § 99.35(c). In this regard, if another Federal law specifically authorizes the collection of personally identifiable information, then the provisions in that law govern the redisclosure and destruction of information.

### **Exchange of Migrant Student Records through MSIX**

ED developed the MSIX in response to Federal law, *i.e.*, section 1308(b)(2) of the ESEA, which specifically requires the Department to “ensure the linkage of migrant student record systems for the purpose of electronically exchanging, among the States, health and educational information regarding all migratory students.” That law also requires the Department to publish proposed minimum data elements that each State must collect for purposes of electronic transfer of migratory student information.

## **Applicability of FERPA to MSIX**

LEAs and other LOAs that provide educational services to migrant children are “educational agencies and institutions” subject to FERPA, and thus may disclose, without parental consent, personally identifiable information from students’ education records to authorized representatives of their SEA for the purpose of “compliance with Federal legal requirements which relate to” the Migrant Education Program (MEP). 34 CFR §§ 99.31(a)(3)(iv) and 99.35(a).

As explained above, the disclosure of the minimum data elements as part of the MSIX pursuant to § 99.35(a) is not subject to the prohibition against redisclosure in § 99.35(b) because MSIX’s “collection of personally identifiable information” is “specifically authorized by Federal law.” See § 99.35(c)(2). We believe that the authority in section 1308(b)(2) of the ESEA for States and the MSIX to collect and maintain the minimum data elements, coupled with the general responsibility of SEAs under section 1304(b)(3) of the ESEA to “promote interstate and intrastate coordination of services for migratory children, including ... educational continuity through the timely transfer of pertinent school records,” constitute specific authority for:

- (1) The LEAs and (LOAs where applicable) to collect and disclose minimum data elements of migrant students to their SEA or State migrant student data systems (SDEAs) without parental consent.
- (2) SDEAs to redisclose this information without parental consent to MSIX, as operated by ED and its contractor, in order to comply with the requirement in section 1308(b)(2) that “the Secretary, in consultation with the States, shall ensure the linkage of migrant student records systems.”
- (3) MSIX to redisclose this information to SEAs, LEAs and other LOAs without parental consent in order to comply with the mandate in section 1308(b)(2) for “ensur[ing] the linkage of migrant student records systems.”

To comply with sections 1304(b)(3) and 1308(b)(2) of the ESEA, FERPA permits an SEA to transfer, without parental consent, minimum data elements of the migratory student to MSIX, and to use the MSIX to transfer, without parental consent, the minimum data elements of the migratory student to another LEA or other LOA within the State, or to another SEA, LEA, or other LOA in another State that requests the information in order to meet the educational needs of the migratory student.

Section 1308 of the ESEA does not include specific provisions addressing the protection of education records as it relates to the MSIX information system, and, as mentioned above, the protections in § 99.35(b) regarding redisclosure do not apply to records in the MSIX. However, the Privacy Act applies to MSIX, and the Department has published a system of records notice to cover this system of records, which includes routine uses that indicate what disclosures from MSIX can be made without the student’s or his/her parent’s consent. See 72 Fed. Reg. 68572-76 (Dec. 5, 2007). Further, the Department will insist that as a

condition of State use of MSIX, each SEA agree that the minimum data elements received through MSIX and records within MSIX will only be used for the purposes set forth in routine use one in the above system of records notice, which allows disclosure to facilitate a student's: (i) participation in the MEP; (ii) enrollment in school; (iii) grade or course placement; (iv) credit accrual; and (v) unique student match resolution.

We hope this information is helpful to you. For specific questions about FERPA, you may send an email to: [FERPA@ED.Gov](mailto:FERPA@ED.Gov). Information regarding the general provisions of FERPA can be located at: <http://www.ed.gov/policy/gen/guid/fpc/index.html>. If you have additional questions regarding MSIX, please contact Jennifer K. Dozier at (202) 205-4421 or [Jennifer.Dozier@ed.gov](mailto:Jennifer.Dozier@ed.gov).

Sincerely,

/s/

Lisa Ramirez  
Acting Director  
Office of Migrant Education

/s/

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

cc: MSIX State and Technical Leads

\*In March 2020, this memorandum was retyped to make the document more suitable for posting on our respective websites. Please note that, since the issuance of this joint memorandum, the name of the office that administers FERPA was changed from the Family Policy Compliance Office (FPCO) to the Student Privacy Policy Office (SPPO). Also, we note that some citations in the FERPA regulations have changed due to amendments of the regulations in both 2008 and 2011. While we did not make changes to the citations, we did correct some typographical errors in the document. Also, on July 10, 2019, the Department published a notice of a modified system of records. See 84 Fed. Reg. 32895-99 (July 10, 2019). Any questions about FERPA may be directed to [FERPA@ed.gov](mailto:FERPA@ed.gov). Questions regarding MSIX may be directed to the MSIX Help Desk at [MSIXsupport@deloitte.com](mailto:MSIXsupport@deloitte.com).