



May 5, 2008

Civil Rights and Human Dignity

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Reference: 34 CFR Part 99
RIN 1855-AA05
[Docket ID ED-2008-OPEPD-0002]

Dear Sir:

The Judge David L. Bazelon Center for Mental Health Law—a national legal advocacy organization concerned about the rights of adults and children with serious mental disorders—is pleased to submit the following comments on the proposed rule (34 CFR Part 99) regarding the Family Educational Rights and Privacy Act, published in the Federal Register on March 24, 2008.

Overall, we believe the Department's proposed regulations provide meaningful clarification on important aspects of FERPA regarding permissible disclosures to parents and the conditions that apply to disclosures in health and safety emergencies. Much of these clarifications is consistent with existing law. However, in light of the importance of safeguarding student privacy and ensuring that information is disclosed only in emergency situations, we have set forth the following recommendation to Proposed 34 CFR 99.36(c) ("If, based on the information available at the time of the determination there is a rational basis for the determination, [DOE] will not substitute its judgment for that of the [school] in evaluating the circumstances and making its determination.").

34 CFR 99.36(c) –Review of Disclosures

The proposed change in the review of disclosures in connection with emergencies (whereas the Department would examine whether there was a "rational basis" for the school's determining the disclosure was proper based upon the information available at the time) is of significant concern.

This "rational basis" determination by the Department could potentially weaken FERPA enforcement in that it is uncertain how much leeway schools would have to make questionable disclosures, including of sensitive mental health information. We believe such a hands-off approach will likely erode privacy and

place at risk the confidentiality of students' mental health information. As such, we recommend that *the Department ask whether the school legitimately believed there was a health or safety risk, not whether, after the fact, the school can offer a "rational basis" for the disclosure. The school should be required to show that it made an individualized assessment and, based on that assessment, believed there was an emergency that warranted disclosure.*

Thank you for the opportunity to comment on this proposed rule.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen Bower", followed by a horizontal line.

Karen Bower
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