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May 8, 2008

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

Re: Docket ID ED-2008-OPEPD-0002

Dear Mr. Rooker:

We appreciate the opportunity to provide comments on the U. S. Department of Education's proposed rule to amend the regulations governing education records maintained by educational agencies and institutions under the Family Educational Rights and Privacy Act, as amended.

Our members are pleased that the proposed rule includes efforts to clarify that state auditors may have access, without prior written consent, to personally identifiable information from education records in connection with an audit of federal or state supported education programs. However, there is much concern that the definition of audit contained in the proposed rule is unnecessarily limited and should be expanded to include performance audits and other audit-like activities required by state statute.

Section 99.35(a)(3) of the proposed rule currently reads:

"State auditors that are not authorized representatives of State and local educational authorities may have access to education records in connection with an audit of Federal or State supported education programs. For purposes of this provision, an audit is limited to testing compliance with applicable laws, regulations and standards."

Because the proposed rule limits an audit to testing compliance with applicable laws, regulations and standards, it would prevent state auditors from fully carrying out their responsibilities, functions, and authority. As called for by state law, legislative direction, and state policy, the work of many state auditors includes performance audit work that addresses effectiveness and efficiency issues. Conducting effectiveness or efficiency audit work in the education area could require access to educational records that are covered by the Family Educational Rights and Privacy Act, but would not involve testing compliance with laws, regulations, or standards. In such cases, the proposed regulations would deny state auditors access to key education records necessary to conduct that performance audit work.

This limitation seems inappropriate because performance auditing, along with financial auditing and conducting attestation engagements, is a form of auditing that is explicitly recognized and covered by *Government Auditing Standards*. These standards, promulgated by the U.S. Government Accountability Office, are recognized throughout the auditing profession as the appropriate standards for government audit work. Further, these standards, which are adhered to by a large number of state audit offices, address how auditors should handle the reporting of confidential or sensitive material (generally by omitting it or including it in a limited-distribution report shown only to those with a legal right to see it). State auditors have long had access to confidential material, including HIPAA and Medicaid data, taxpayer records, etc. Appropriate handling of such information is central to state auditors' ability to perform their work.

We do recognize that the proposed rule addresses activities outside the scope of an audit (as defined in the proposed rule) by allowing access to restricted information by entering into a contractual relationship with the organization in possession of the educational records. However,

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requiring state auditors to enter into a contact with the state educational authority, etc., in order to obtain the data needed to conduct a performance audit or evaluation is not acceptable because it potentially could prevent the state auditor from obtaining the information, and in many cases could be contrary to the authority granted to state auditors by their respective state laws. In addition, an auditor's independence can be impeded if the ability to conduct a performance audit or evaluation is dependent upon achieving a contractual agreement with educational entities; and the educational entities might be resistant to reaching such agreements given the nature of oversight provided by the work of state auditors.

It seems that in an attempt to define when state auditors can receive personally identifiable information without obtaining written consent, the Department has focused on the types of audits a state auditor conducts. Instead, we believe the regulations should focus on the *functions, responsibilities, and authority* that the state auditor has for audit and audit-like activities. We believe that, regardless of whether the state auditor's work is an audit, examination, evaluation, investigation, or review, the state auditor who has authority to examine those records in carrying out his or her responsibilities, and who provides for the appropriate protection of personally identifiable information from education records, should be exempted from the consent provision.

We recommend proposed Sec. 99.35(a)(3) be revised to focus on audits conducted under *Government Auditing Standards* or other comprehensive professional auditing standards, or audits or evaluations conducted to fulfill a state auditor's statutory authority to audit and evaluate programs. We respectfully suggest the following wording:

State auditors that are not authorized representatives of State and local educational authorities may have access to education records in connection with an audit of Federal or State supported education programs. For purposes of this provision, an audit is limited to those audits conducted in accordance with Government Auditing Standards or other comprehensive professional auditing standards, or conducted to fulfill state statutory requirements. State auditors shall protect such education records from unauthorized disclosure.

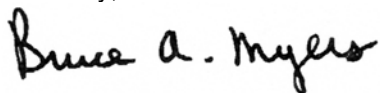
We believe the suggested wording change for Sec 99.35(a)(3) meets the goals of the proposed rule change, which in part include, "*to provide the greatest flexibility to State and local governments and schools while ensuring that personally identifiable information about students remains protected from unauthorized disclosure.*"

In summary, we strongly support the recognition of state auditors as a group that may be granted access to education records for the purposes of audits, but believe the definition of audits should be expanded to include all types of audits conducted in accordance with *Government Auditing Standards* and other audit-like activities required by state statutes. As noted in the cover letter of the July 2007 revision to *Government Auditing Standards*,

"Government audits also provide key information to stakeholders and the public to maintain accountability; help improve program performance and operations; reduce costs; facilitate decision making; stimulate improvements; and identify current and projected crosscutting issues and trends affecting government programs and the people those programs serve."

We appreciate the opportunity to comment on this proposed rule. We look forward to your consideration of our recommended changes that we believe will enable us to continue to provide the aforementioned valuable services. If you have any questions, please contact me at (410) 946-5900 or Sherri Rowland at (859) 276-1147.

Sincerely,



Bruce Myers
President, NSAA