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Dear Ms. Seastrom:

We the undersigned researchers and civil rights advocates write to strongly object to the recommendations made by the National Center for Education Statistics in its technical brief for states on protecting personally identifiable information when reporting education data. We embrace the importance of protecting the privacy rights of individual students, and appreciate the concerns raised by NCEC regarding re-identification of students' personal information. None of our objection is to the underlying emphasis on protecting the personally identifiable information of students. Yet we believe that the recommendations made by NCEC extend far beyond what may be considered personally identifiable information. Therefore, if adopted, the NCEC technical brief recommendations would lead to the unwarranted suppression of key civil rights and education data that are necessary for the public and policymakers to make informed decisions about the state of our nation's schools.

On April 8, 2011, the U.S. Department of Education issued a notice of proposed rulemaking in the Federal Register. *See* Family Educational Rights and Privacy Act, 76 Fed. Reg. 19726. The notice included a reference to the Statewide Longitudinal Data Systems "SLDS" Technical brief entitled, "Statistical Methods for Protecting Personally Identifiable Information in Aggregate Reporting" ("Technical Brief" or "Brief"). (See December 2010, Brief 3, NCEC 2011-603). We write in response to your invitation to provide input that was included at the end of the Technical Brief. We appreciate this opportunity to comment on the recommendations contained in the Technical Brief that is intended to guide policy on suppression of otherwise publicly reported aggregate data for consideration by states developing Statewide Longitudinal Data Systems.

It is imperative that members of the public and policymakers have an understanding of the state of education in our nation, and in particular information on students who continue to disproportionately experience lower achievement and graduation rates; namely children living in poverty, children of color, children with disabilities, and English learners. Therefore it is critically important that when educational agencies report data to the public, such data be disaggregated by the performance of all subgroups of students. Whenever possible these data should be cross-tabulated by gender and made available to the public in a manner that is easy for community and parent groups, as well as policymakers, to understand.

Unfortunately, implementation of NCEC's recommended "best practices" would undoubtedly and unjustifiably impair the flow of this critically important information to the public. NCEC's recommendations



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are contrary to Congress' mandate that the disaggregated data are included in school, district and state level reports. As a result, dissemination of this Technical Brief, calling for data suppression in numerous circumstances, would weaken accountability structures for school systems and restrict the public's access to data needed to understand the state of education at the school, district, state and national levels.

Before explaining in greater detail our concerns with the Brief, we first want to recognize that we agree with the Technical Brief's summary of the regulatory requirements and the regulatory definition of personally identifiable information: "Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." (See Technical Brief at 2; 34 C.F.R. 99.3 (2009)).

Yet we have three primary concerns about the Technical Brief's interpretation and recommended implementation of this standard. First, the Technical Brief fails to make a distinction between a reasonable expert and a reasonable person. Second, the Technical Brief makes erroneous assumptions about what can be known with reasonable certainty based on observation and lacking "personal knowledge of the relevant circumstances." Finally, the suggested "best practices" for suppressing the reporting of data are built on faulty assumptions about what constitutes a disclosure of personally identifiable information under the Family Educational Rights and Privacy Act (FERPA).

Therefore, we respectfully request that this Technical Brief be substantially modified to (1) reflect best practices that are based on the intent and proper interpretations of the regulations governing the reporting of education data to the public, and (2) give proper weight to the great benefits of reporting the data when compared to remote risks for indirect disclosure.

a. The Technical Brief Fails to Distinguish between a Reasonable Expert and a Reasonable Person in the School Community

The Technical Brief relies on numerous examples that demonstrate how an expert's manipulation of several data sets could *possibly* lead to a disclosure; however, none of the examples portray how a "reasonable person in the school community without personal knowledge of the circumstances" would come to know personally identifiable private information about a particular student by looking at the data sets.

The standard relied on throughout the Brief quite easily could surpass not only that of a reasonable person, but that of a reasonable statistician, expert, or even a person with exceptionally advanced understanding who might think to apply a complex multi-step data recovery formula. (See Technical Brief at 2). The reporting limits set forth in the Technical Brief really do not pertain to what a reasonable person would do, but rather to what an expert could do if one devoted significant time and energy and analyzed data from one report or multiple reports and applied complex formulas.



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For example, in the section on “Counts for overall and reported subgroups”, the Technical Brief assumes that a “reasonable person in the school community” will apply a six-step analysis using a combination of data sets for the overall group and the non-suppressed data from some of the subgroups in order to ascertain personally identifiable data. (See Technical Brief at 9). The Brief shows how this six-step process could be used to recover “suppressed data,” and acknowledges that, “the recovery of suppressed results does not always pose a serious threat to students’ personally identifiable information, but in some instances it does—the risk of identifying an individual student is a function of the distribution of students across the recovered categories.” (See Technical Brief at 9). The Technical Brief fails to explain, however, how an expert sifting through the data, applying formulas, and extracting information that might lead to a disclosure of personal information could possibly count as a “reasonable person in the school community?”¹

Another example of how the Technical Brief addresses what an expert could uncover rather than what a reasonable person in the school community could uncover is found in Example 4. (See Technical Brief at 12). This example illustrates how an expert could use a number of formulas to unpack information about the reading scores of 10 third-grade females in a school. The author concludes that the public will learn that all 10 scored at or above proficiency in reading. The author is implying that anytime we can possibly “recover” enough data to draw a conclusion about the performance of 100% of a subgroup, even when the group has 10 or more members, then the information reported to the public would disclose personally identifiable information shielded by FERPA. This is perhaps the best example of the over-zealous approach taken by the Technical Brief.

Following the Brief’s recommendations, if indeed, all schools met the goals of NCLB, which are 100% proficiency in reading and math, FERPA would forbid this information from being publicly reported. The Brief has inadvertently turned any characteristic attributable to 100% of a subgroup, even one with at least 10 members in it, into an unlawful disclosure and states that the “best-practice” would be to suppress that information from the public. We argue that if the information cannot tell the observer something distinct about an individual student, something that distinguishes him or her from the nine other males or females, it is no longer personally identifiable the way his or her name, address, Social Security number and birth date would be.

FERPA is not concerned with whether an expert can use a series of mathematical steps to recover information that applies to the proficiency level of every student in a subgroup. Rather, it is concerned with whether a member of the community, without personal knowledge, can deduce something specific about an individual student that is unique to that student, and thus “personally identifiable.” If scoring proficient or above does not enable a person to distinguish an individual student from any other proficient student in a particular

¹ Example 5 in the Technical Brief illustrates another highly complex technique that an expert could use to disclose otherwise suppressed data. (See Technical Brief at 13). The author shows how she/he was able to learn that seven 3rd-grade students with IEPs in a given school scored below proficient in reading. This disclosure concern rests on a series of assumptions. First, it assumes that a reasonable person would go to these extreme lengths to find out the information. Second, it assumes that the students or parents would know, based solely on observation, who has an IEP and who doesn’t, even though that information is confidential. Third, it assumes that the observations made about students in the prior year’s class are clear enough that when the report comes out a year later, the students may be identified with “reasonable certainty.” Finally, it assumes that knowing a characteristic shared equally by seven students reaches the “personally identifiable” threshold that FERPA was meant to protect against.



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grade, it may provide an individual some information about the student that would otherwise be private, but it is not a “personally identifiable” characteristic of that individual student.

b. The Technical Brief Erroneously Assumes Reasonable Certainty based on Mere Observation

The text of the Technical Brief is filled with examples meant to show that many public reporting practices disclose personally identifiable information, and it advises a great deal of data suppression to avoid FERPA violations. In fact, when ascertaining risks for *unlawful* disclosure, each of the examples relied on to demonstrate the risk of disclosure include erroneous assumptions about what constitutes “reasonable certainty” or about the relevance of “personal knowledge.” The policy recommendations fail to mention that disclosures that reveal personally identifiable information only to those who already possess additional “personal knowledge of the relevant circumstances” do not violate FERPA. The FERPA rule governs only those circumstances where a reasonable person without “personal knowledge” can “identify the student with reasonable certainty.”

One such assumption is the failure of the brief to acknowledge the growing uncertainty about forming observation-based conclusions about a given student’s racial and ethnic identity. Information about how a student self-identified his or her race or ethnicity is private and protected by FERPA, yet the Technical Brief erroneously assumes that this information will be accurately ascertained by mere observation. Furthermore, under the new U.S. Department of Education public reporting regulations, any Hispanic person of any race is only reported to the public as Hispanic. Hispanics who consider themselves to be Black and self-identify as a Black Hispanic are only reported to the public as Hispanic. White Hispanics are also only reported as Hispanic. Similarly, multi-racial students who check off membership in each group they belong to are now reported publicly as belonging to a category called “two or more races,” with no reference to the specified racial groups. With so many students of Hispanic origin and/or students of multiple races listed as part of their identity, and considering the way these data are reported, the race or ethnicity of an individual student cannot be “identified” with any certainty by mere observation, or “without personal knowledge of the relevant circumstances.”

Similarly, the Brief fails to acknowledge that the status of English learners, students eligible for free and reduced price lunch, and students with disabilities are not identifiable by observation, in part because they are highly unstable categories. Most English learners become English proficient and exit the category. In fact, many English learner students enter the category and exit the category on an annual basis, and this exit can occur within the academic year. Likewise, some students lose special education eligibility when they no longer need special education or related services; and a student’s eligibility for free or reduced price lunch may change as household income fluctuates.

The Technical Brief is riddled with examples that do not take these facts into consideration. For example, the Brief states, “Assuming that other students in the class know who among their peers have individualized education plans, this is a disclosure...” (See Technical Brief at 5). In fact, whether a student has an Individualized Education Program (IEP) is **not** “observable.” There are several reasons why, to the extent



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that a student might think that a classmate might have an IEP, they could not know it with “reasonable certainty” based on observations unless they had “personal knowledge.” There are many students who receive “observable” special services, such as tutoring and extra time on tests, the telling indicators the Technical Brief relies upon. It is not uncommon for students to receive such accommodations under a Section 504 plan and not be reported as special education students. Students with 504 plans do *not* have IEPs. Moreover, with early intervening services and Response to Intervention, programs that provide extra support for students in classrooms *before* they are referred for special education evaluation, it is inaccurate to say that students receiving “observable services” are necessarily students with IEPs. Further, not all the students with IEPs are tested because some are exempt and their scores are not included. So, even if one assumed that an observer could tell with “reasonable certainty” that one or two students had IEPs, that observer could not know whether that student actually took the test in question. To constitute a violative FERPA disclosure based on the inferences in the Technical Brief’s example, one would have to know not only which of the students had IEPs, but who among them took the test and had their scores reported. Someone who had this sort of information would have “personal knowledge” and therefore FERPA would not apply.

Similar faulty logic is evident in Example 2 of the Technical Brief which discusses a scenario where the public learns that one Hispanic student scored “advanced” in a certain category. (See Technical Brief at 8). The example states, “Anyone who is able to identify the Hispanic child with a high score then knows that the other Hispanic children in the same grade failed to reach the same level.” But the author does not say how “anyone” will “know” this information without personal knowledge of the relevant circumstances. The parent of the high scoring Hispanic child would not count because the disclosure would be based on the parent’s “personal knowledge of the relevant circumstances.” Once again, the Brief incorrectly assumes that the high-scorer is observable, and that all those without personal knowledge know which students self-identify as Hispanic.

A similarly flawed assumption about low-income students is made in Example 3 of the Technical Brief which states, “If an individual student is known to be from a low-income family, the information in this table discloses that student’s test score.” (See Technical Brief at 10). Since information about who receives free and reduced price lunch is kept confidential, and is protected by FERPA, the researcher assumes that students or parents know from observation which students are low-income. Not only does this fail to meet the standard of “reasonable certainty,” but this inference also neglects the fact that at any point in a school year a child’s eligibility for free or reduced price lunch might change. Example 3 ends with similarly faulty inferences drawn about English learners. As noted above, this group has the most mobility of any subgroup because the goal is to become English proficient and exit the group. Changes can and do occur within a given year, and data reports about a given academic year are typically released during the next academic year. Given the volatility of English learner status, even if a reasonable person applied these methods, it is unlikely that personally identifiable data would be disclosed. In other words, if there is reasonable uncertainty about a student’s status in a group, the information in the referenced table would not disclose that student’s test score.

c. The Recommended Best Practices are Built on Faulty Assumptions



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The assumptions contained in and the omissions from the Technical Brief lay the foundation for an analysis that is not only erroneous under FERPA, but also will hamper the ability of civil rights advocates, researchers, the general public and policymakers to access crucial information.

A number of practices that would lead to the suppression of information that the law otherwise requires to be publicly reported are outlined on page 14 of the Brief. One such recommended approach discourages the reporting of enrollment data because that information might be used in the complex recovery formulas that the Brief assumes will result in discoverable information. The second approach suggests the further suppression of details about outcomes for subgroups. The third “best practice” supports the suppression of information about subgroups other than those with the minimum reporting size to thwart someone from applying even more complex data recovery techniques that might lead to discoverable information. The Technical Brief recommends that all three forms of suppression be used together. Remarkably, the Brief does not recognize the significant impact that these recommendations would have on the ability of the public and policymakers to evaluate the performance of our nation’s schools.

The Technical Brief describes even more complicated methods for data recovery, and based on the risks for disclosure, goes on to make increasingly restrictive recommendations. These include, collapsing data across outcome categories, suppressing published schools counts, and suppressing district counts. The Brief states, “To protect results that are suppressed at the district level, the same precautions must be taken across the district and state results. To protect suppressed results from recovery, if the results are suppressed for a specific subgroup in one district, the results for that subgroup must be suppressed for a second district in the state. Care must be taken to ensure that the suppressed results for a subgroup in a single school or single district cannot be recovered using reported data for other schools in the district or other districts in the state.” The Brief’s recommendations here would lead to extensive suppression of data that are currently reported and are built on multiple misunderstandings about what a reasonable person “in the school community” could glean from reading such reports lacking expertise or personal knowledge.

Perhaps the best representations of the Technical Brief’s misinterpretation of FERPA’s intended privacy protections are the recommendations to suppress data whenever the ends of the distribution are 0% or 100%. The recommended data suppression would obscure what the public knows about the degree of success and failure because they would prevent the public from knowing that 100% of any group belongs or doesn’t belong in a certain category. If indeed all schools met the goals of NCLB, which are 100% proficiency in reading and math, and states followed these recommendations, they would obscure this information about success in all public reports. The Technical Brief has turned information attributable to 100% of a subgroup into a prohibited disclosure of “personally identifiable” information. The Brief confuses information that could be used to identify a specific student with information that is usually private but is knowable about every member of the group because the reported characteristic is the same for all members of the group. Additionally, group membership is private and protected by FERPA, once again raising the issue of whether one can assume



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knowledge with “reasonable certainty” of race, ethnicity, socio-economic status, disability status or English learner status.

Conclusion

For the above reasons, the policy brief should be substantially modified to reflect best practices that are based on the intent and proper interpretations of the regulations governing the reporting of education data to the public, and give proper weight to the great benefits of reporting the data when compared to remote risks for indirect disclosure.

It is critically important that when educational agencies report data to the public, that such data be disaggregated by the performance of subgroups of students, and be made available to the public in a manner that is easy for community and parent groups, as well as policymakers and researchers, to understand. A reasonable person is unlikely to know even one of the complex formulas that might be used to recover the data which heightens the risk of disclosure. Moreover, based on our review of case law, to the best of our knowledge not one of the risk disclosure scenarios in the policy brief has ever been the cause of a FERPA violation complaint.

Unfortunately, we find that the policy recommendations contained in this Brief would allow even the remotest risks ascertainable only by statisticians and other experts to trump the public benefits of access to performance information and civil rights protections. It is vital that the information on the performance of our nation’s schools, including on the educational achievements of and opportunities afforded to historically disadvantaged student populations be made available to the public. Global percentages are not enough; the public must have access to information about subgroups, which should be reported unless there are five or fewer students from a subgroup in a given category.²

The Technical Brief recommends the suppression of important public data anytime personally identifiable information might possibly be discovered by any method, including methods that rely on expert analysis, a degree of personal knowledge, or on flawed assumptions about what others can know about a student’s status from observation. The National Center for Education Statistics should significantly amend this guidance to ensure that it fully and accurately contemplates the purpose and boundaries of FERPA, while promoting access to critical data that informs best practices and holds schools and districts accountable.

Please contact Daniel Losen of The Civil Rights Project at UCLA for further discussion or if you have any questions. Thank you for considering this request.

² For example, the U.S. Department of Education follows this policy in its recently released public reporting of data from the Civil Rights Data Collection. Available at <http://ocrdata.ed.gov/>



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NAACP Legal Defense & Educational Fund, Inc.

National Disabilities Rights Network

National Economic and Social Rights Initiative (NESRI)

National Women's Law Center

Parents United for Responsible Education

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Southern Poverty Law Center

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