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William Holloway

Catholic University of America Columbus School of Law

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MARKET TRANSPARENCY: HOW CONGRESS CAN REFORM POST-SECONDARY STUDENT DATA TO EXPAND CONSUMER CHOICE, BENEFIT INSTITUTIONS, AND MAKE HIGHER EDUCATION MORE TRANSPARENT

William Holloway⁺

The federal investment in students is significant.¹ In 2015, the Federal Government spent over \$157 billion on federal student aid.² Around 62% of the federal share of student aid, roughly \$60 billion, consists of spending on student loans.³ Furthermore, Federal Student Aid (FSA), the office within the Department of Education that manages the Federal Government's student lending operations, reported having \$1.136 trillion in total liabilities and net position on its balance sheets.⁴

Despite the substantial federal investment in giving students access to higher

⁺ J.D. Candidate, May 2019, The Catholic University of America, Columbus School of Law; B.A. 2011, Sewanee: The University of the South. The Author would like to thank Dr. Mark Schneider for his assistance, support, criticism, and generosity in the research and writing of this comment. He would also like to thank Senator Orrin Hatch for providing the inspiration for this Comment, and his steadfast service to the country. Finally, the Author would like to thank his friends and family for their support, as well as the associates and editors of the *Journal of Law and Technology* for their hard work on the preparation of this comment.

¹ See *Trends in Student Aid 2017*, COLLEGEBOARD.ORG (2017), https://trends.collegeboard.org/sites/default/files/2017-trends-student-aid_0.pdf (stating postsecondary students received \$125.4 billion in grant money for education in 2016-2017).

² *Id.*

³ *Id.*

⁴ FED. STUDENT AID, U.S. DEP'T OF EDUC., FEDERAL STUDENT AID FY 2016 ANNUAL REPORT 30 (2016), https://studentaid.ed.gov/sa/sites/default/files/FY_2016_Annual_Report_508.pdf.

education, students are having an increasingly difficult time paying back loans.⁵ The average debt per borrower has increased from \$24,400 in 2005-2006 to \$28,400 in 2015-2016 in constant dollars.⁶ Students defaulting on federal student loans increased by over 10% in the last decade, and default rates are significantly higher among students who borrowed, but failed to complete a college degree.⁷

This comment will examine the various legal and policy considerations associated with improving student data transparency and discuss the arguments in support of a student-level data network.⁸ This comment will argue that Congress should pass legislation to expand access to data by consumers, policymakers, and institutions of higher education, and support policies to expand consumer choice, access and transparency in higher education.⁹ Specifically, policymakers should focus on measures of student success, which may include student completion, retention, workforce outcomes, and ability to pay for the costs of education.¹⁰ This comment will begin with a discussion of the legislative and administrative history of student data collection, and will discuss the potential legal ramifications of lifting the prohibition on a student unit record system and federal database of student data contained in §1015(c) of the Higher Education Act of 1965 (HEA).¹¹ This comment will discuss the Constitutional basis for collecting student-level data, and examine how a student data network can be implemented within the confines of existing privacy law.¹² Lastly, this comment will examine the College Transparency Act and Foundations for Evidence-Based Policymaking Act of 2017, and recommend that Congress pass legislation to improve access to and dissemination of student data.¹³

A. Existing Problems in Higher Education Transparency

Students and policymakers have difficulty quantifying the return on

⁵ See *Trends in Student Aid 2017*, COLLEGEBOARD.ORG (2017), https://trends.collegeboard.org/sites/default/files/2017-trends-student-aid_0.pdf (stating the borrowing amounts have dramatically increased along with repayment rates declining).

⁶ *Id.*; see also *Constant Dollar*, INVESTOPEDIA.COM, <https://www.investopedia.com/terms/c/constantdollar.asp> (last visited May 24, 2018) (defining constant dollar as “an adjusted value of currency used to compare dollar values from one period to another.”).

⁷ *Five-Year Federal Student Loan Default Rates by Institution Type over Time*, COLLEGEBOARD.ORG (Feb. 11, 2018), https://trends.collegeboard.org/sites/default/files/2017-trends-student-aid_0.pdf.

⁸ *Infra* Part II.

⁹ *Infra* Part IV.

¹⁰ *Infra* Part III.

¹¹ *Infra* Part III.A.

¹² *Infra* Part II.B.

¹³ *Infra* Part IV.

investment in higher education.¹⁴ The current system of data reporting does not give students the tools they need to choose a college that is best for them or provide them with the level of success they hope to get from pursuing higher education.¹⁵ Increasingly, students choose to pursue education at a specific institution in hopes of obtaining a degree that will result in a good job after they graduate.¹⁶ However, it is extremely difficult for students across the country to comprehensively research institutions and see how similarly positioned students have performed.¹⁷ The Integrated Postsecondary Education Data System (IPEDS), the nation's most significant attempt to produce data on student performance, requires institutions to report aggregate-level data through a series of surveys.¹⁸ Unfortunately, IPEDS provides an inaccurate picture of student performance because it does not capture a complete view of the student population, and only recently measures success of students who transferred to an institution or may be attending part time.¹⁹ Therefore, since an increasing number of the current student population is choosing to transfer schools or attend part time, more and more students are left out of federal student data measurements.²⁰

Students' choice in their educational pathways has shown to make a difference on student outcomes like graduation rates and future earnings.²¹ The Federal Government does not have any way to adequately organize and present information that is already collected on wages or post-college earnings in conjunction with other data elements relevant to student performance.²² Due to

¹⁴ See U.S. SENATE COMM. ON HEALTH, EDUC., & LABOR, FEDERAL POSTSECONDARY DATA TRANSPARENCY AND CONSUMER INFORMATION: CONCEPTS AND PROPOSALS 5 (Mar. 23, 2015), https://www.help.senate.gov/imo/media/Consumer_Information.pdf [hereinafter WHITE PAPER] (discussing the lack of information available to students related to salaries of graduates which is usually a factor used by prospective students when deciding on an institution to attend).

¹⁵ MAMIE VOIGHT, ALEGNETA A. LONG, MARK HUELSMAN & JENNIFER ENGLE, INSTIT. FOR HIGHER EDUC. POL'Y, MAPPING THE POSTSECONDARY DATA DOMAIN: PROBLEMS AND POSSIBILITIES TECHNICAL REPORT 3 (Mar. 2014), www.ihep.org/sites/default/files/uploads/docs/pubs/mapping_the_postsecondary_data_domain_-_main_report_revised.pdf.

¹⁶ Valerie J. Calderon & Preeti Sidhu, *Americans Say Graduates' Jobs Status Key to College Choice*, GALLUP NEWS, (June 28, 2013), <http://www.gallup.com/poll/163268/americans-say-graduates-jobs-status-key-college-choice.aspx>.

¹⁷ See WHITE PAPER, *supra* note 14, at 6 (explaining it is "little wonder" students do not use government sources for information because the information is scattered over 13 different portals).

¹⁸ *IPEDS Survey Components: Outcome Measures*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/ipeds/InsidePages/SurveyComponent/outcome-measures> (last updated 2016).

¹⁹ *Id.*

²⁰ *Characteristics of Postsecondary Students*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/indicator_csb.asp (last updated Apr. 2017).

²¹ WHITE PAPER, *supra* note 14, at 5.

²² *Id.* (stating that information on students' post-grad is not available to data collectors)

this lack of organization and information, students are prevented from seeing accurate information that provide an estimation of their expected return on their investment in a particular college or university.²³

Institutions of higher education are also disadvantaged by current data reporting requirements.²⁴ Under current federal requirements for reporting student data, institutions themselves are required to collect large amounts of information, much of which is unnecessary, burdensome, and not useful to the Federal Government or consumers.²⁵ According to a congressionally mandated report by the Advisory Committee on Student Financial Assistance on regulations in higher education, a majority college of administrators and financial aid officers answered that federal regulations under the Higher Education Act of 2008 were either “burdensome” or “overly burdensome.”²⁶ Specifically, respondents targeted “Reporting and Consumer Disclosure Requirements: Overlapping and Inconsistent timeframes” and “Reporting and Consumer Disclosure Requirements: Volume and Scope” as being “in need of streamlining, improvement, or elimination.”²⁷ Valid questions remain as to what extent consumers, institutions, researchers, higher education accreditation bodies, and states, should be able to view and use data that is currently available and other data that may become available at some point in the future.²⁸

It is reasonable to question whether the federal investment in students has paid off.²⁹ If expanding access to higher education were the only goal of federal financial aid programs, an argument could be made that the Federal Government

or aggregators); Megan Rogers, *Job Placement Confusion*, INSIDE HIGHER EDUC. (Dec. 17, 2013), <https://www.insidehighered.com/news/2013/12/17/colleges-report-job-outcomes-results-are-limited-value>.

²³ WHITE PAPER, *supra* note 14, at 6; Rogers, *supra* note 22.

²⁴ WHITE PAPER, *supra* note 14, at 5; Rogers, *supra* note 22.

²⁵ WHITE PAPER, *supra* note 14, at 5; Wesley Whistle, *How Higher Education Data Reporting is Both Burdensome AND Inaccurate*, THIRD WAY (Nov. 1, 2017), <http://www.thirdway.org/report/how-higher-education-data-reporting-is-both-burdensome-and-inadequate>.

²⁶ ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, HIGHER EDUCATION REGULATIONS STUDY FINAL REPORT 11 (Nov. 2011), <http://www.chronicle.com/items/biz/pdf/HERS%20Final%20Report.pdf>. Respondents were asked to report the level of burden based on a five-point scale, which defined “overly burdensome” as “the overall burden level for the HEA regulations exceeds the value of protection the regulations provide,” and “burdensome” as “the burden level for *most of* the HEA regulations exceeds the value of protection the regulations provide.” *Id.* at 9.

²⁷ *See id.* at 55, 57 (stating that compliance with IPEDS reporting requirement add to the overall regulatory burden consumer reporting has on institutions of higher education, which results in duplication, overlap, confusion and an overwhelming volume of compliance measures).

²⁸ *See* WHITE PAPER, *supra* note 14, at 6.

²⁹ *Id.* at 5.

has achieved its goal.³⁰ However, it would be erroneous for policymakers and researchers to assume that higher default rates and higher student loan debt are merely a result of more students attaining access to postsecondary education.³¹ Rather, the Federal Government, as a whole, should have an interest in the return on its investment in both students and institutions that benefit from federal funding.³² Otherwise, policymakers are doing a disservice to taxpayers for inefficient use of public funds, and to the student for failing to provide public metrics and transparency of how well students perform in both college and the job market having attended an institution of higher education.³³

This is not to say the Federal Government has not attempted to measure student performance at Title IV eligible institutions or to give prospective students a picture of what schools are the best bang for the buck.³⁴ The Federal Government has sought to measure return on investment through the College Scorecard,³⁵ federal databases³⁶ and accountability proposals.³⁷ In addition,

³⁰ See *Total fall enrollment in all postsecondary institutions participating in Title IV programs and annual percentage change in enrollment, by degree-granting status and control of institution: 1995 through 2014*, https://nces.ed.gov/programs/digest/d15/tables/dt15_303.20.asp?current=yes (last visited May 24, 2018) (showing that enrollment has increased consistently through 2014).

³¹ William Elliott & Melinda Lewis, *The Student Loan Problem in America: It Is Not Enough to Say, "Students Will Eventually Recover"*, ASSETS & EDUC. INITIATIVE 27 (2014), <https://www.researchgate.net/publication/265702183> (stating that the goal should not just be increased enrollment but financial preparedness).

³² *Id.*

³³ WHITE PAPER, *supra* note 14, at 7, 9-10.

³⁴ See Paul Fain, *Time to Change the Rules?*, INSIDE HIGHER EDUC. (Nov. 1, 2013), <https://www.insidehighered.com/news/2013/11/01/calls-washington-streamlined-regulation-and-emerging-models> (discussing the various legislative proposals that have been made).

³⁵ See generally U.S. DEPT. OF EDUC., EDUCATION DEPARTMENT RELEASES NEW GRADUATE EARNINGS DATA FOR CAREER COLLEGE PROGRAMS (Nov. 17, 2016), <https://www.ed.gov/news/press-releases/education-department-releases-new-graduate-earnings-data-career-college-programs>. The "College Scorecard" is an interactive online data tool established by the Obama Administration and currently housed and operated by the Department of Education that allows students and families to view and compare information on colleges, including location, size, cost, graduation rate, average loan amount borrowed, and employment outcomes. U.S. DEP'T. OF EDUC., EDUCATION DEPARTMENT RELEASES COLLEGE SCORECARD TO HELP STUDENTS CHOOSE BEST COLLEGE FOR THEM (Feb. 13, 2016), <https://www.ed.gov/news/press-releases/education-department-releases-college-scorecard-help-students-choose-best-college-them>. See generally *College Scorecard*, U.S. DEP'T OF EDUC., <https://collegescorecard.ed.gov/> (last visited May 24, 2018).

³⁶ WHITE PAPER, *supra* note 14, at 6. A database is defined as "a comprehensive collection of related data organized for convenient access generally in a computer." DATABASE, WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 2001). An example of such a database at the federal level and in the context of education is the National Student Loan Data System, which is a federal data system designed to "permit borrowers to use the system to identify the current loan holders and servicers of such borrower's loan." 20 U.S.C. § 1092b(a) (2009).

³⁷ WHITE PAPER, *supra* note 14, at 12. Congress and the U.S. Department of Education

third-party organizations have developed college rankings systems and institutions themselves have even made attempts to communicate measures of success to prospective students.³⁸ Despite federal and private efforts to give students access to more data, college students do not take advantage of existing efforts to provide measures of student outcomes.³⁹ Due to Congressionally imposed limitations on the Federal Government's ability to collect data at the student level, institutions are left with burdensome reporting requirements.⁴⁰ Additionally, consumers and policymakers are left with inaccurate and incomplete measures of student completion, retention, and workforce outcomes, much less any breakdown of performance based on a student's demographics, program of study, or credential level.⁴¹

A solution to this problem for some policymakers is the development of a student-level data network, by which consumers may view data tracked and reported at the student level, rather than the institution level.⁴² A student-level data network would be a mechanism to track student information, retention, employment outcomes, graduation, or any other relevant information related to each student attending a postsecondary institution.⁴³ A student-level data network would primarily give institutions, states, and students access to better information that could be used for institutional improvement, market transparency, and improve existing efforts to calculate a student's potential

have generally considered "accountability" in the higher education context to mean academic quality and assurance, consumer protection, and oversight of the federal financial aid programs, and has generally been accomplished through states, accrediting agencies, and the federal government in the form of cohort default rates, 90/10 rules, and gainful employment. *See* U.S. SENATE COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, HIGHER EDUCATION ACCOUNTABILITY 2-3 (Feb. 2, 2018), https://www.alexander.senate.gov/public/_cache/files/cfd3c3de-39b9-43dd-9075-2839970d3622/alexander-staff-accountability-white-paper.pdf.

³⁸ WHITE PAPER, *supra* note 14, at 9–10.

³⁹ *Id.* at 3, 6 (stating that most students rely on an internet search engine when gathering information on potential schools); *see also Best Colleges*, U.S. NEWS AND WORLD REPORT (2018), <https://www.usnews.com/best-colleges> (providing an example of searching through internet search engines).

⁴⁰ WHITE PAPER, *supra* note 14, at 6; *see also* Nathaniel B. Custer, *Failed Justifications: Why Privacy and Federalism Do Not Support the Ban on a Federal Unit-Record System*, 100 GEO. L.J. 2225, 2244 (2012) (addressing the ramification of such limitations).

⁴¹ WHITE PAPER, *supra* note 14, at 4–5, 9.

⁴² Emily Wilkins, *Debate Over Collecting Specific College Student Data Gathers Steam*, EDUC. FIN. COUNCIL (Dec. 5, 2016), <http://www.efc.org/news/356413/CQ-Roll-Call.htm>; U.S. DEP'T OF EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION (2006), <https://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/pre-pub-report.pdf>.

⁴³ *See* Custer, *supra* note 40, 2226–29 (stating the benefits of a student level data network).

return on their investment.⁴⁴

While this Comment will argue that increased transparency and data reporting via a student-level data network will result in a net gain for students, families, and institutions, there are significant challenges that must be addressed when Congress examines a re-write of the Higher Education Act.⁴⁵ First, federal law bans the creation of “a Federal database of personally identifiable information . . . including a student unit record,” or “any other system that tracks individual students over time.”⁴⁶ Therefore, for Congress to instruct the Department of Education or any other federal agency to develop a student-level data network, it should amend or repeal 20 U.S.C. §1015(c).⁴⁷

The second challenge concerns the proper role of the Federal Government in education policy.⁴⁸ Persons who assert that the Federal Government is over-extending its role in students’ education, and that data collection should be done at the state and local levels, rather than at the federal level likely will criticize any effort to expand the reach of data collection, reporting, or consumer transparency.⁴⁹ A section of the Higher Education Act titled “Database of student information prohibited” explicitly allows states to develop their own databases of student information, track individual students, or implement a state-based “unit record.”⁵⁰ Therefore, a state-centric argument against a federal network of student information could be two-fold 1) that the States should take the lead in developing a student unit record; and 2) that the Federal Government does not have a role to play in tracking student data because education is a local function in line with the Tenth Amendment.⁵¹

Amending the Higher Education Act to establish a federal student-level data network could raise concerns related to protecting student privacy and

⁴⁴ AMANDA JANICE ROBERSON, JAMEY RORISON, MAMIE VOIGHT, INSTIT. FOR HIGHER EDUC. POL’Y, *A BLUEPRINT FOR BETTER INFORMATION: RECOMMENDATIONS FOR A FEDERAL POSTSECONDARY STUDENT-LEVEL DATA NETWORK 1* (Oct. 2017), http://www.ihep.org/sites/default/files/uploads/docs/pubs/a_blueprint_for_better_information_ihep.pdf.

⁴⁵ Custer, *supra* note 40, at 2244–45.

⁴⁶ 20 U.S.C. § 1015a (e)(1)(iii) (2008); 20 U.S.C. § 1015c(a) (2008).

⁴⁷ *Id.*

⁴⁸ Custer, *supra* note 40, at 2244. *See generally* U.S. DEPT. OF EDUC., *THE FEDERAL ROLE IN EDUCATION* (May 25, 2017), <https://www2.ed.gov/about/overview/fed/role.html>.

⁴⁹ Custer, *supra* note 40, at 2247.

⁵⁰ 20 U.S.C. § 1015c (c) (2008).

⁵¹ In fact, many states have developed their own student unit records, and track measures of student outcomes through statewide longitudinal databases. Ironically, the federal government funds the development of state longitudinal databases through a competitive grants program. The American Recovery and Reinvestment Act Authorized \$250 million for the development of such systems. *See Statewide Longitudinal Data Systems*, U.S. DEPT. OF EDUC., <https://www2.ed.gov/programs/slids/factsheet.html> (last updated July 30, 2009).

compliance with federal privacy laws.⁵² Congress passed The Family and Educational Rights Act (FERPA), in 1974, and intended it to both protect student records and provide students with the right to access their own records.⁵³ The Privacy Act of 1974 covers records that executive branch agencies hold in a database and would therefore apply to databases compiled under a student unit record law.⁵⁴ The Confidential Information Protection and Statistical Efficiency Act (CIPSEA) may also govern educational records to the extent they are stored at a statistical agency such as the National Center for Education Statistics.⁵⁵ Other laws intended to secure data and protect privacy should be taken into account when considering expanding the reach and functionality of federal data systems.⁵⁶

As Congress considers reauthorizing the Higher Education Act, debate is likely to develop around central areas including transparency and accountability.⁵⁷ Legislative proposals to re-orient higher education data on the student level and repeal laws that prevent the Federal Government from doing so, and legislation intended to boost evidence-based policy making through better use of data have emerged and gained traction on and off Capitol Hill.⁵⁸

⁵² See Custer, *supra* note 40, at 2233–44 (highlighting concerns such as protecting student privacy and complying with federal privacy laws).

⁵³ 20 U.S.C. § 1232g (2013); Lynn Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 60 (2008).

⁵⁴ 5 U.S.C. § 552(a) (2014).

⁵⁵ 13 U.S.C. § 402 (2002); see also ROBERSON ET AL., *supra* note 44, at 7 (stating that a student level data network would best be housed at a statistical agency because certain laws that would help protect data security apply only at statistical agencies).

⁵⁶ ROBERSON ET AL., *supra* note 44, at 7 (providing a comprehensive list of laws intended to protect data at statistical agencies).

⁵⁷ See Press Release, U.S. SENATE COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, ALEXANDER SEEKS INPUT FROM HIGHER ED COMMUNITY ON ACCREDITATION, RISK SHARING, AND CONSUMER INFORMATION (Mar. 23, 2015), <https://www.help.senate.gov/chair/newsroom/press/alexander-seeks-input-from-higher-ed-community-on-accreditation-risk-sharing-and-consumer-information> (discussing key issues on which Congress seeks feedback).

⁵⁸ See Fain, *supra* note 34 (discussing the various legislative proposals that have been made); see Michael Stratford, *Alexander's Higher Ed Act Agenda*, INSIDE HIGHER EDUC. (Mar. 24, 2015), <https://www.insidehighered.com/news/2015/03/24/alexander-weighing-new-accountability-tools-better-data-higher-ed-act-rewrite> (stating that proposals concerning tracking student financial information from college to the workforce are being proposed for legislation); see also Michael Stratford, *'Modernizing' Federal Regulation*, INSIDE HIGHER EDUC. (Oct. 6, 2014), <https://www.insidehighered.com/news/2014/10/06/federal-government-needs-revamp-its-oversight-higher-education-says-conservative> (discussing additional legislative proposals that have been made). Libby A. Nelson, *Idea Whose Time Has Come?*, INSIDE HIGHER EDUC. (May 13, 2013), <https://www.insidehighered.com/news/2013/05/13/political-winds-shift-federal-unit-records-database-how-much> (describing bill introduced by Senators Warner, Rubio, and Wyden that would track students from college and into the workforce).

Indeed, many policy analysts and spectators view efforts to increase transparency and organization of student data as a key to unlock many of the challenges facing students, educators, and policymakers' in their understanding of education policy in the twenty-first century.⁵⁹

B. Congressional Solutions

Congress has shown an interest in exploring how to improve student data and the potential for collecting and disseminating data in a way that is more transparent and outcomes-driven.⁶⁰ Policymakers, researchers, and business associations have all advocated for better transparency among student data and advocate for a focus on the collection of data at the student-level via a student-level data network.⁶¹ Since Congress may reauthorize the Higher Education Act in the 115th session, it is possible that efforts to streamline student data collection or changing IPEDS may soon become law.⁶² Committees in the House and Senate have held hearings exploring the issue of student data transparency, consumer information, and ways to protect student privacy in an ever-evolving technological landscape.⁶³

As such, Members of Congress in both parties have proposed legislation in the 115th Congress to address the issue. Specifically, the "College Transparency Act," introduced by Senator Orrin Hatch (R-UT) is bi-partisan, bi-cameral

⁵⁹ VOIGHT ET AL., *supra* note 15, at 7.

⁶⁰ See WHITE PAPER, *supra* note 14, at 7 (refocusing data collection to be more useful for potential college students).

⁶¹ Letter from Postsecondary Nat'l Data Collaborative to U.S. Senate Comm. on Health, Educ., Labor, & Pensions (Apr. 24, 2015), http://www.ihep.org/sites/default/files/uploads/postsecdata/docs/resources/postsecdata_collaborative_help_response.pdf.

⁶² See *A Better Way: Our Vision for a Confident America*, BETTER.GOP (June 7, 2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Poverty-PolicyPaper.pdf (stating, "[s]treamlining information will empower students and families with the knowledge they need to make smart college decisions . . . Existing transparency efforts at the federal level should be simplified to reduce confusion for students.").

⁶³ S. 749, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/115/bills/s749/BILLS-115s749is.pdf>; S. 1121, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/115/bills/s1121/BILLS-115s1121is.pdf>; Press Release, House Comm. on Educ. & Workforce, Subcommittee on Early Childhood, Elementary, and Secondary Education Discusses Balance between Education Research and Student Privacy (June 28, 2017), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401813>; *Empowering Students and Families to Make Informed Decisions on Higher Education: Hearing Before the Subcomm. On Higher Educ. & the Workforce*, 115th Cong. 3 (2017) (statement of Mamie Voight, Vice President of Pol'y Res. Inst. of Higher Educ. Pol'y), https://edworkforce.house.gov/uploadedfiles/voight_written_testimony_final.pdf; *Reauthorizing the Higher Education Act: The Role of Consumer Information in College Choice: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 114th Cong. (2015) (testimony of Mark Schneider, Ph.D) (arguing consumer information must include sub baccalaureate credentials).

legislation that calls for lifting the federal ban on “a student unit record system, and education bar code system, or any other system that tracks individual students over time,” and establishes a data system to evaluate student enrollment patterns, outcomes, costs, analyze federal aid programs, reduce burdens on higher education institutions, and provide consumers with aggregate statistical information to compare schools.⁶⁴ Leaders on both sides of the Capitol have also introduced the “Foundations for Evidence-Based Policymaking Act of 2017,” which promotes evidence-based policymaking by establishing better data transmission and protection, updating privacy laws, and requiring federal agencies to evaluate programs through open use of statistical data.⁶⁵

II. DEFINITION OF A STUDENT-LEVEL DATA NETWORK AND WHY IT IS NEEDED

For purposes of this Comment, a “student-level data network” means a privacy-protected federal system which may collect, maintain, report, or organize raw data related to the enrollment, academic progression, student outcomes, or other variables of individual students enrolled in higher education.⁶⁶ The network would acquire information by technological means through data sharing and statistical reporting efforts.⁶⁷ Most of this information is already collected and is available among institutions of higher education, states, and federal agencies such as the Office of Federal Student Aid (FSA), the National Center for Education Statistics, the Internal Revenue Service.⁶⁸ Such a network would not contain personally identifiable information such as grades, academic records, disciplinary reports, and health information or citizenship status.⁶⁹ This network would adhere to strict privacy and security protocols, which would protect students’ identity and limit data usage to statistical purposes only.⁷⁰

⁶⁴ 20 U.S.C. §§ 1051c (a) (2017); College Transparency Act, S. 1121, 115th Cong. (2017) (introduced into the Senate and referred to the Committee on Health, Education, Labor, and Pensions on May 15, 2017).

⁶⁵ Foundations for Evidence-Based Policymaking Act, H.R. 4147, 115th Cong. (2017) (enacted).

⁶⁶ U.S. DEP’T OF EDUC., FEASIBILITY OF A STUDENT UNIT RECORD SYSTEM WITHIN THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 23 (2005).

⁶⁷ *Id.* at 50.

⁶⁸ *Id.* at 6–8.

⁶⁹ *Id.* at 24–25 (describing the network to include student identifiers, enrollment, attainment, financial aid, and price of attendance variables); *see also* Elana Zeide, *Student Privacy Principles for the Age of Big Data: Moving Beyond FERPA and FIPPS*, 8 DREXEL L. REV. 339, 387 (2016) (urging for reform that keeps student information protected and only uses information to serve educational interests).

⁷⁰ U.S. DEP’T OF EDUC., NCES 2005-160, FEASIBILITY OF A STUDENT UNIT RECORD

A student-level data network would organize existing student-level data collections and enable college consumers, policymakers, institutions, and researchers to access information related to the academic careers of cohorts, groups, or individual students, and therefore guide better decision-making.⁷¹ The FSA, which houses the National Student Loan Data System (NSLDS), already collects student-level data at the federal level.⁷² The IRS requires institutions to report student-level data on scholarships and awards for claiming tax write-offs, and the Department of Education maintains records on direct grant receipts under federal programs such as Upward Bound.⁷³ Forty-seven states also collect data at the student-level as part of a unit-record system, but suffer from limitations of a non-federalized system.⁷⁴ Most institutions of higher education, in turn, use computerized software to maintain student-level data used to comply with aggregate and student-level reporting requirements by the Federal Government or states.⁷⁵

Since institutions are only required to report data on first time, full-time

SYSTEM WITHIN THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 26–27 (2005), <https://nces.ed.gov/pubs2005/2005160.pdf>.

⁷¹ See Custer, *supra* note 40, at 2226–28 (explaining how a “unit record system” compiles information on each student regarding their cost, their performance, and when they graduate); Lynn M. Daggett & Dixie S. Huefner, *Recognizing Schools’ Legitimate Education Interests: Rethinking FERPA’s Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 16 (2001) (explaining the government’s ability to select and compile certain types of student information collected from schools).

⁷² Manuel S. Gonzalez Canche, *Financial Benefits of Rapid Student Loan Repayment: An Analytic Framework Employing Two Decades of Data*, 671 AM. ACAD. OF POL. & SOC. SCI. 154, 165 (2017) (studying two decades of student loan repayments nationwide, reported from the student level); see Paul Combe & Julie R. Lammers, *Missing Data: Focusing on the Wrong Factors Could Contribute to Student Loan Distress*, 48 SUFFOLK U.L. REV. 599, 600–01 (2015) (explaining that the U.S. Department of Education, a federal level entity, already collects student debt information, nationwide). See generally Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, N.Y.U. J. OF LEGIS. & PUB. POL’Y 11, 52–53 (2011) (defining the “NSLDS” as a database for the Department of Education that collects financial information on borrowers).

⁷³ Alexander L. Reid & Caroline W. Waldner, *New Standards for Collecting and Reporting Student Information on Form 1098-T*, 27 TAX’N EXEMPTS 11, 12–13 (2016); U.S. DEP’T OF EDUC., NCES 2005-160, FEASIBILITY OF A STUDENT UNIT RECORD SYSTEM WITHIN THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 7 (2005), <https://nces.ed.gov/pubs2005/2005160.pdf>.

⁷⁴ U.S. DEP’T OF EDUC., NCES 2005-160, FEASIBILITY OF A STUDENT UNIT RECORD SYSTEM WITHIN THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 8 (2005), <https://nces.ed.gov/pubs2005/2005160.pdf> (reporting from thirty-nine states, including New York, California, and Florida, which show at least one unit-record system suffering from limitations when students cross state lines to attend out of state schools, as it can no longer track the student).

⁷⁵ *Id.* at 6.

students, graduation rates and measures of student mobility are often times an incomplete measure of the student population.⁷⁶ Furthermore, the lack of organized student-level data and incomplete aggregate statistics leaves policymakers with few reliable ways to hold schools accountable for the education received by students.⁷⁷ A more complete view of student-level data would provide policymakers and consumers with the information needed to make determinations of the return on investment in higher education.⁷⁸

III. BACKGROUND INFORMATION

Traditionally, educational decision-making has been left in the hands of state and local authorities, and the Federal Government's role has been limited.⁷⁹ The limited federal role in education policy has been justified by the precise language of The Tenth Amendment.⁸⁰ Since the Constitution makes no mention of education, it is therefore reasonable to argue that the Tenth Amendment reserves it to the States.⁸¹

Congress may, however, use its spending powers to condition states and institutions' receipt of federal funds on compliance with the law, even if the Federal Government may not otherwise impose such regulations.⁸² The Federal Government's role in higher education has expanded from what it was in the early half of the twentieth Century into what it is today, in part, because of the federal investment in student aid through federal grants and loans, which provide individuals with increased access to college.⁸³

⁷⁶ *Id.* at 18 (discussing the current IPEDS framework, which does not capture student transfer in the calculation of graduation rates).

⁷⁷ *Id.* at 3 (discussing issues related to accountability systems were priorities for policymakers).

⁷⁸ See Michael Simkovic, *A Value-Added Perspective on Higher Education*, 7 U.C. IRVINE L. REV. 123, 126 (2017) (discussing the optimal level of investment in education).

⁷⁹ U.S. DEP'T OF EDUC., THE FEDERAL ROLE OF EDUCATION (May 25, 2017), <https://www2.ed.gov/about/overview/fed/role.html> (last updated May 25, 2017). See generally *President Trump Signs Executive Order Limiting Federal Role Education*, C-SPAN (Apr. 26, 2017), <https://www.c-span.org/video/?427595-1%2Fpresident-trump-signs-executive-order-limiting-federal-role-education> (discussing President Donald Trump signing Executive Order limiting the federal governments involvement in education).

⁸⁰ NOEL EPSTEIN, INTRODUCTION TO WHO'S IN CHARGE HERE?: THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 6 (2006), https://www.brookings.edu/wpcontent/uploads/2016/07/whosinchargehere_chapter.pdf.

⁸¹ U.S. CONST. amend. X; Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories That Inspire Them*, 85 MISS. L.J. 327, 332 (2016).

⁸² U.S. CONST. art. 1 § 8; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (citation omitted).

⁸³ Brendan Pelsue, *When it Comes to Education, the Federal Government is in Charge*

The Higher Education Act (HEA) authorizes much of the Federal Government's investment in higher education, and is therefore an example of Congress exercising its spending powers.⁸⁴ Congress has conditioned rules and regulations on institutions participating in federal programs, either by accepting federal student aid through Title IV of HEA, direct funding through Title III institutional grants, or federal funding for research and development that it gives directly to institutions.⁸⁵

The Federal Government has gathered statistical data on student performance throughout history.⁸⁶ Early iterations of the Department of Education focused on the collection of information to measure student performance and satisfaction.⁸⁷ There is evidence that the Federal Government collected higher education data as early as 1867; that mission remained a component of federal education policy up until the official founding of the Department of Education in 1979.⁸⁸ The National Center for Education Statistics (NCES) was officially established in 1974, and was charged with collecting educational statistics and making information available to the public, though its mission traces back to 1867.⁸⁹

of ... Um, What?, HARVARD GRADUATE SCH. OF EDUC. (2017), <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what>; see Jake A. Kasser, *Professional Integrity: Why The DOE Should Apply Debt Measures to Law Schools*, 43 U. MEM. L. REV. 805, 813 (2013) (discussing the history of the federal government's role in higher education and the development of student financial aid programs under the Higher Education Act of 1965); Adrienne Anderson, *Education Reform Policies: How the Canadian Government's Role in Education Can Influence the United States' Education System*, 24 MICH. ST. INT'L L. REV. 545, 549–50 (2016) (discussing the Federal Governments role in education over the past decade).

⁸⁴ See H.R. REP. NO. 110-500, SEC. 111–35 (2007) (discussing numerous sections authorizing appropriations for federal programs throughout the legislation including Title IV, authorizing spending on federal student aid programs and Title III “Minority Serving Institutions” which allows for funding directly to institutions); see Julee T. Flood & David Dewhirst, *Shedding the Shibboleth: Judicial Acknowledgment that Higher Education Accreditors Are State Actors*, 12 GEO. J.L. & PUB. POL'Y 731, 743–44 (2014) (providing examples of the expansion of the federal governments investments in higher education).

⁸⁵ 20 U.S.C. §§ 1051-1069, 1070-1099 (2017).

⁸⁶ *The Federal Role of Education*, U.S. DEP'T OF EDUC. (May 25, 2017), <https://www2.ed.gov/about/overview/fed/role.html>.

⁸⁷ NAT'L POSTSECONDARY EDUC. COOPERATIVE, NPEC 2012-833, THE HISTORY AND ORIGINS OF SURVEY ITEMS FOR THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 5 (Oct. 2011), <https://nces.ed.gov/pubs2012/2012833.pdf>.

⁸⁸ *Id.* (quoting P.L. 103-382, Title IV, §402(a)). See generally Joan E. Van Tol, *Crisis in Higher Education Governance: One State's Struggle for Excellence*, 91 W. VA. L. REV. 1 (1988).

⁸⁹ NAT'L POSTSECONDARY EDUC. COOPERATIVE, NPEC 2012-833, THE HISTORY AND ORIGINS OF SURVEY ITEMS FOR THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 5 (Oct. 2011), <https://nces.ed.gov/pubs2012/2012833.pdf>.

A. Legislative History

In 1992, Congress sought to better collect data on graduation rates and the rising costs of college in relation to an increase in citizens' spending power.⁹⁰ Congress also put in place "Right to Know" legislation at this point, which required institutions to report graduation rates for the first time.⁹¹ The 1998 amendments also required IPEDS to link its data with accountability requirements to measure institutions' impact on student success.⁹²

In 2005, the Department of Education, under the leadership of Secretary of Education Margaret Spellings, commissioned a feasibility study to explore whether the Federal Government could and should create a "unit record" system in which the public may gain better access to student-level data.⁹³ The higher education community, researchers, and consumer advocates generally supported the proposal as a result of rising college costs, and a demand for increased institutional accountability.⁹⁴ However, instead of adopting the results of the 2005 NCES feasibility study, Congress outright rejected it.⁹⁵ During consideration of the College Access and Opportunity Act of 2005, the House Committee on Education and the Workforce approved an amendment offered by Congresswoman Virginia Foxx (R-NC) that placed a prohibition on a database of student information, including a student unit record, or any other system that tracks student data over a period of time.⁹⁶ The Committee intended the measure to ensure privacy in student's postsecondary educational information.⁹⁷ The bill

⁹⁰ U.S. DEP'T OF EDUC., NCES 2005-160, FEASIBILITY OF A STUDENT UNIT RECORD SYSTEM WITHIN THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 3 (2005), <https://nces.ed.gov/pubs2005/2005160.pdf>.

⁹¹ *Id.*

⁹² *Id.* at 4; NCES HANDBOOK OF SURVEY METHODS, INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM (IPEDS) (2017).

⁹³ U.S. DEP'T OF EDUC., NCES 2005-160, FEASIBILITY OF A STUDENT UNIT RECORD SYSTEM WITHIN THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM 5 (2005), <https://nces.ed.gov/pubs2005/2005160.pdf>.

⁹⁴ Elia Powers, *Wrangling Over Unit Records*, INSIDE HIGHER EDUC. (July 7, 2016), <https://www.insidehighered.com/news/2006/07/07/unitrecord>.

⁹⁵ H.R. REP. NO. 109-231, at 125 (2005) (stating "Representative Foxx offered an amendment to prohibit the Department of Education from implementing the proposed student unit record database.").

⁹⁶ H.R. REP. NO. 109-231, at 180-81.

⁹⁷ *See id.* at 162-63 (stating that the amendment is a means of protecting student privacy, a right, it says, that students do not give up as a result of attending an institution of higher education). It is also clear that the Committee saw the student unit record as an accountability mechanism. Accountability is among the core principles identified by the Committee to help guide higher education reform, and the Committee believes accountability will be achieved by placing more information about colleges and universities into the hands of students—not by placing information about students into a massive new database that could compromise fundamental privacy protections. H.R. REP. NO. 109-231, at

passed the House, but was not taken up by the Senate.⁹⁸

In 2006, The Department of Education established a Commission to study and report the future of education and set out goals for the improvement of the country's higher education system.⁹⁹ The Commission remarked on the lack of transparency and accountability in higher education and specifically advocated for information to be "made available to students, and reported publicly in aggregate form to provide consumers and policymakers an accessible, understandable way to measure the relative effectiveness of different colleges and universities."¹⁰⁰ The report recommended "the creation of a consumer-friendly information database on higher education with useful, reliable information on institutions, coupled with a search engine to enable students, parents, policymakers and others to weigh and rank comparative institutional performance."¹⁰¹

When the time came to reauthorize HEA, the House of Representatives chose to put in place the same prohibitions around a student database and student unit record.¹⁰² The House passed by voice vote an amendment to the College Opportunity and Affordability Act that prohibited a student "unit record" and any database that would measure data at the student level.¹⁰³ The prohibition passed Congress as part of the Higher Education Opportunity Act of 2008, and was signed into law by President George W. Bush under Section 1015(c) of HEA—"Database of student information prohibited."¹⁰⁴

However, Congress's decision to put in place the ban on databases and student unit records has not deterred subsequent Administrations from developing new ways to measure student success and outcomes.¹⁰⁵ In 2013, during a State of the Union address, President Obama announced a plan to establish a system for

162–63.

⁹⁸ H.R. 609, 109th Cong. (2006).

⁹⁹ See U.S. DEP'T OF EDUC., A TEST OF LEADERSHIP CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 30 (Sept. 2006), <https://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/pre-pub-report.pdf> (authorizing the commission of the report setting out the goals for the country's higher education system).

¹⁰⁰ See *id.* at vii (remarking that "compounding all of these difficulties is a lack of clear, reliable information about the cost and quality of postsecondary institutions, along with a remarkable absence of accountability mechanisms to ensure that colleges succeed in educating students.").

¹⁰¹ *Id.* at 20.

¹⁰² 20 U.S.C. § 1015(c) (2008).

¹⁰³ H.R. REP. NO. 110–500 § 111–135 (2007); H.R. REP. NO. 110–803 § 113 (2008).

¹⁰⁴ H.R. REP. NO. 110–500 § 110 (2007).

¹⁰⁵ See COMM. ON MEASURES OF STUDENT SUCCESS, A REPORT TO SECRETARY OF EDUCATION ARNE DUNCAN 10 (Dec. 2011) <https://www2.ed.gov/about/bdscomm/list/cmss-committee-report-final.pdf> (recognizing the need for the federal government to improve data on student records).

consumers to compare and contrast schools based on graduation rates, earnings data, and other factors.¹⁰⁶ His plan developed into The College Scorecard, which marked a substantial attempt at economic empowerment through better information.¹⁰⁷ However, the College Scorecard initially fell short mostly because it measured schools using IPEDS aggregate-level data, which resulted in an inaccurate tool for both students and colleges.¹⁰⁸

The prohibition on a federal student database did not, however, forbid states from putting in place their own systems of student-level data.¹⁰⁹ Existing state longitudinal databases measure student outcome and enrollment, and report data on student earnings after college, transfer status, and graduation rates.¹¹⁰ Although state longitudinal database systems have been relatively non-controversial, there is still not an unanimous agreement that amending federal law to allow for data collection at the student level is the best path forward to effectively measure student outcomes data.¹¹¹ Concerns over a student-level data network still include privacy, federalism, and accountability.¹¹²

B. Current Student Data Systems and Why They Are Not Sufficient

1. IPEDS

IPEDS is currently the closest thing the American education system has to a

¹⁰⁶ Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013).

¹⁰⁷ *Id.*

¹⁰⁸ See Peter McPherson & Andrew P. Kelly, *The College Scorecard Strikes Out*, WALL ST. J. (Mar. 16, 2016), <https://www.wsj.com/articles/the-college-scorecard-strikes-out-1458168611> (finding that federal policy has prevented Americans from being accurately informed on institutions' statistics).

¹⁰⁹ See 20 U.S.C. § 1015(c) (2008) (stating that the Commissioner of Education Statistics shall conduct a national study of expenditures at institutions of higher education).

¹¹⁰ U.S. DEP'T OF EDUC., STATEWIDE LONGITUDINAL DATA SYSTEMS (2009).

¹¹¹ Wilkins, *supra* note 42. See generally Anya Kamenetz, *What Parents Need To Know About Big Data And Student Privacy*, NPR (Apr. 28, 2014, 11:58 AM), <https://www.npr.org/sections/alltechconsidered/2014/04/28/305715935/what-parents-need-to-know-about-big-data-and-student-privacy> (stating “[s]tates and schools for the first time could centralize, organize, search and analyze information on millions of students, in the ways that corporations have been doing for decades.”).

¹¹² See Letter from Parent Coalition for Student Privacy to the Commission on Evidence-Based Policymaking (Nov. 14, 2016), <https://www.studentprivacymatters.org/wp-content/uploads/2016/11/letter-to-CEP-w-signers-final-11.14.16-pdf.pdf> (urging members of the Commission to consider the threats to privacy that overturning the ban on a federal student unit - record clearinghouse would create); see also Custer, *supra* note 40, at 2227.

comprehensive set of higher education data,¹¹³ and IPEDS is the best source of data collected on postsecondary institutions.¹¹⁴ IPEDS was initially phased in between 1985-1986 as a way for the Federal Government to manage data on students at institutions that accept federal financial aid.¹¹⁵ In order to comply with federal requirements for participating in Title IV financial aid programs, institutions are required to complete a number of IPEDS surveys by aggregating relevant information on student cohorts.¹¹⁶ Specifically, participating schools are required to report data on fall enrollment, program completions,¹¹⁷ student financial aid, and graduate rates, and disclose retention rates to current and prospective students.¹¹⁸ Researchers and the general public can currently access IPEDS data through NCES in a number of ways, including through the College Scorecard and the NCES hosted College Navigator.¹¹⁹

¹¹³ Sam Barbett, *Integrated Postsecondary Education Data System*, NCES.ED.GOV (Aug. 2017), <https://nces.ed.gov/statprog/handbook/pdf/ipeds.pdf>.

¹¹⁴ See U.S. DEP'T OF EDUC., *THE HISTORY AND ORIGINS OF SURVEY ITEMS FOR THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM*, EF-1 (2011); 20 U.S.C. § 1094(a)(17); Barbett, *supra* note 113.

¹¹⁵ See U.S. DEP'T OF EDUC., *THE HISTORY AND ORIGINS OF SURVEY ITEMS FOR THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM*, EF-1 (2011).

¹¹⁶ See ALISA F. CUNNINGHAM, JOHN MILAM & CATHY STATHAM, NAT'L CTR. FOR EDUC. STAT., *FEASIBILITY OF A STUDENT UNIT RECORD SYSTEM WITHIN THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM* iii-iv (Mar. 2005), <https://nces.ed.gov/pubs2005/2005160.pdf> (stating that institutions receiving Title IV funds are required by statute to report institution-level data, which is limited in comparison to unit-record data because it provides an aggregate level view of student success which does not show academic success of individual students).

¹¹⁷ Graduation rates are calculated by calculating the measure of students in a cohort who completed a program of study within a certain time period. However, at some institutions including 2 year institutions and community colleges, a successful outcome might include a program completion or a transfer out. In an attempt to capture such information and credit institutions for a successful outcome, the Department of Education has encouraged institutions to report to IPEDS a count of students who have achieved a successful outcome (such as: "earned an award," "transferred to a 4-year institution without an award," or "substantially prepared to transfer") within 100%, 150%, or 200% time to completion. Thus, depending on how it is reported by an institution, a completion could mean a student successfully transferred or earned an award without being factored into an official graduation rate. See U.S. DEP'T OF EDUC., *REPORT AND SUGGESTIONS FROM IPEDS TECHNICAL REVIEW PANEL #37 SELECTED OUTCOMES OF THE ADVISORY COMMITTEE ON MEASURES OF STUDENT SUCCESS* 6 (Dec. 2011), https://edsurveys.rti.org/IPEDS_TRP_DOCS/prod/documents/Report%20and%20Suggestions%20from%20IPEDS%20TRP%2037%20-%20FINAL.pdf.

¹¹⁸ U.S. DEP'T OF EDUC., *THE HISTORY AND ORIGINS OF SURVEY ITEMS FOR THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM* EF-1-2 (2011).

¹¹⁹ *Id.* at 8, EF-1, GR-1-2 (2011). See generally *College Navigator*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/collegenavigator/> (last visited May 24, 2018); see also *College Scorecard*, U.S. DEP'T OF EDUC., <https://collegescorecard.ed.gov/> (last visited May 24, 2018). In 1999, the IPEDS Redesign Task Force recommended the creation of a webpage with basic information for students and parents. Disclosure requirements were first created under the Student Right to Know and Campus Security Act of 1990, and amended in

While IPEDS data does provide a measure of graduation rates, it has historically only collected data on first-time, full-time students, which are defined as students attending any postsecondary institution for the first time, on a full-time basis.¹²⁰ The 2008 amendments to HEA established the Committee on Measures of Success in an attempt to improve data reporting on outcomes measures.¹²¹ The Committee's efforts lead to amendments to the IPEDS surveys, which in turn resulted in the release of new information on the outcomes of part-time and transfer students, as well as students receiving a Pell Grant beginning in 2016-2017.¹²² A new "Outcome Measures" survey will require schools to provide measures of "completion," "still enrolled," "enrolled at another institution," and enrollment unknown, for student cohort groups in an attempt to measure data that is representative of today's student population.¹²³ Roughly 60% of students attending a community college do so on a part-time basis, therefore, the survey amendment is likely to capture a more complete picture of today's students.¹²⁴

Current data systems such as IPEDS are still unable to paint an accurate picture of: (1) how well institutions are preparing students, (2) how well students fare in the workforce or (3) how well institutions measure student retention.¹²⁵ The Federal Government already maintains data records on individuals' employment outcome through tax information, census data, and workforce reporting by the Bureau of Labor Statistics.¹²⁶ However, without clear rules on ways to link data that the Federal Government collects across the several agencies, there is no easy way to determine how well an individual's postsecondary education pays off in the job market.¹²⁷

2008 as part of the Higher Education Opportunity Act to include disaggregated information on students receiving Pell Grants and Stafford Loans. See U.S. DEP'T OF EDUC., THE HISTORY AND ORIGINS OF SURVEY ITEMS FOR THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM GR-1-2 (2011).

¹²⁰ VOIGHT ET AL., *supra* note 15, at 7.

¹²¹ See COMM. ON MEASURES OF STUDENT SUCCESS, A REPORT TO SECRETARY OF EDUCATION ARNE DUNCAN 4 (Dec. 2011), <https://www2.ed.gov/about/bdscomm/list/cmss-committee-report-final.pdf>.

¹²² Doug Lederman, *The New, Improved IPEDS*, INSIDE HIGHER EDUC. (Oct. 12, 2017), <https://www.insidehighered.com/news/2017/10/12/new-federal-higher-ed-outcome-measures-count-part-time-adult-students>.

¹²³ *IPEDS Survey Components: Outcome Measures FAQ*, NAT'L CTR. FOR EDUC. STAT., <https://surveys.nces.ed.gov/IPEDS/VisFaqView.aspx?mode=reg&id=14&show=all#1059> (last visited May 24, 2018).

¹²⁴ See McPherson & Kelly, *supra* note 108.

¹²⁵ VOIGHT ET AL., *supra* note 15, at 7.

¹²⁶ *Id.*

¹²⁷ JENNIFER MA, MATEA PENDER & MEREDITH WELCH, COLLEGEBOARD, EDUCATION PAYS 2016: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY (2016), <https://trends.collegeboard.org/sites/default/files/education-pays-2016-full-report.pdf>; NAT'L

The IPEDS's new "Outcome Measures" survey helps provide a more accurate measure of student completion for part time and transfer students, but it does not solve the problem.¹²⁸ "Outcome Measures" does not report wages or other measures of success once the individual has entered the workforce.¹²⁹ Furthermore, the "Outcomes Measures" section could create a burden on institutions because of the new survey requirements.¹³⁰ Additionally, the new changes do not fix the limitations on measuring outcomes of students who find work out of the state in which they attended college.¹³¹ IPEDS data remains limited because it captures data reported at the institution level rather than the student level.¹³² The result of institution-level data collection is an incomplete federal data system, and skewed picture of graduation, rate of program completion, and measures of success.¹³³

2. The State Approach

Although Congress enacted the ban on a federal student unit record, it did not prohibit states from tracking student information at the state level or developing a database to measure student progress.¹³⁴ In fact, the Federal Government explicitly endorsed the idea of states measuring educational progress at the student level under the American Recovery and Reinvestment Act and

GOVERNOR'S ASS'N, TRACKING GRADUATES INTO THE WORKFORCE: CONNECTING EDUCATION AND LABOR MARKET DATA 7 (Aug. 2015).

¹²⁸ Lederman, *supra* note 122.

¹²⁹ *IPEDS Outcome Measures FAQ*, NAT'L CTR. FOR EDUC. STAT., <https://surveys.nces.ed.gov/ipeds/VisFaqView.aspx?mode=reg&id=14&show=all> (last visited May 24, 2018).

¹³⁰ *Higher Education Regulations Study Final Report*, ADVISORY COMM. ON STUDENT FIN. ASSISTANCE (Nov. 2011), <http://www.chronicle.com/items/biz/pdf/HERS%20Final%20Report.pdf> (stating "[t]he overarching finding is that the higher education community perceives the regulations under the HEA to be unnecessarily burdensome."); Whistle, *supra* note 25 (stating that the reporting process and filling out multiple surveys in IPEDS is duplicative).

¹³¹ *Outcome Measures FAQ*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/ipeds/pdf/2015OutcomeMeasures_FAQs.pdf (last visited May 24, 2018).

¹³² *Outcome Measures Overview*, NAT'L CTR. FOR EDUC. STAT. (Nov. 14, 2017), https://surveys.nces.ed.gov/ipeds/downloads/forms/package_13_101.pdf.

¹³³ CUNNINGHAM ET AL., *supra* note 116, at iv.

¹³⁴ See 20 U.S.C. § 1015(c) (2008) (stating "[n]othing in this chapter shall prohibit a State or consortium of States from developing, implementing, or maintaining State-developed databases that track individuals over time, including student unit record systems that contain information related to enrollment, attendance, graduation and retention rates, student financial assistance, and graduate employment outcomes."); *Student Unit Record Data System*, NEW AM., <https://www.newamerica.org/education-policy/policy-explainers/higher-ed-workforce/higher-education-data/student-unit-record-data-system> (last visited May 24, 2018).

authorized \$250 million directly to states to implement such systems.¹³⁵

If a federal student-level data network were to exist, the Federal Government could use existing state longitudinal education information to streamline its approach to data collection.¹³⁶ Forty-seven states are already taking advantage of the federal grants to establish their own student unit record systems.¹³⁷ Rather than requiring institutions to report to both states and the Federal Government, a federal student-level network could provide a single instance of data collection for states and the Federal Government, and thus reduce the reporting burden on institutions.¹³⁸

While state systems have proven effective, unifying the data in a single federal database would allow tracking of students outcomes when they move to another state.¹³⁹ Universities and states therefore fail to make the best use of their own investments because their systems are not as expansive or operative as they otherwise could be. Many state systems also do not include data on students attending private institutions in state-longitudinal database systems, leaving them with a large unreported swath of the student population.¹⁴⁰

3. *The College Scorecard*

The College Scorecard was initially an effort to capitalize on President Obama's State of the Union promise to develop a system to provide consumers with more information on prospective colleges and workforce outcomes.¹⁴¹ It is essentially an online web-portal intended to accomplish many of the goals discussed herein—giving consumers a view of the quality of higher education and potential return on their investment.¹⁴² By combining information from

¹³⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 183-84 (Feb. 17, 2009); *The American Recovery and Reinvestment Act of 2009: Saving and Creating Jobs and Reforming Education*, U.S. DEP'T OF EDUC. (Mar. 7, 2009), <https://www2.ed.gov/policy/gen/leg/recovery/implementation.html>.

¹³⁶ *Statewide Longitudinal Data Systems*, U.S. DEP'T. OF EDUC., <https://www2.ed.gov/programs/slds/factsheet.html> (last visited May 24, 2018).

¹³⁷ *Id.* (showing that while the original act appears to have authorized \$250 million for the development of such systems, it is reported that the federal government has, in total, spent nearly \$600 million on their development to date).

¹³⁸ Agency Information Collection Activities; Comment Request; State Longitudinal Data System (SLDS) Survey 2017-2019, 81 Fed. Reg. 69803-04 (Oct. 7, 2016).

¹³⁹ Custer, *supra* note 40, at 2230-31.

¹⁴⁰ CUNNINGHAM ET AL., *supra* note 116, at iii.

¹⁴¹ Arne Duncan, *Obama Admin. Launches C. Scorecard*, OBAMAWHITEHOUSE.GOV (Feb. 23, 2013), <https://obamawhitehouse.archives.gov/blog/2013/02/13/obama-administration-launches-college-scorecard>.

¹⁴² U.S. EXECUTIVE OFF. OF THE PRESIDENT COUNCIL OF ECON. ADVISORS, USING FEDERAL DATA TO MEASURE AND IMPROVE THE PERFORMANCE OF U.S. INSTITUTIONS OF

IPEDS, the National Student Loan Data System (NSLDS), the Free Application for Federal Student Aid (FAFSA), and tax records, the College Scorecard gives students' measures of "average annual cost," "graduation rate," and salary after attending.¹⁴³

While the College Scorecard represents the Federal Government's most significant and useful effort at giving students a measure of return on investment, it is not without its flaws.¹⁴⁴ First, by using information from NSLDS, the College Scorecard only counts students who participate in Title IV loan and grant programs.¹⁴⁵ Therefore it only captures a percentage of the student population—students not receiving federal grants or loans may not find the College Scorecard useful because it fails to present data on students like them.¹⁴⁶ Furthermore, The College Scorecard is unable to differentiate between students who may have attended an institution but did not graduate, and those who transferred to another institution.¹⁴⁷ Thus, the College Scorecard's measure of "graduation rates" and its measure of salary after attending is skewed to give more or less credit to institutions in certain circumstances.¹⁴⁸ The College Scorecard is also unable to distinguish between earnings based on an institution, and earnings that may be more attributable to field of study, program, or major, because it shows a picture of aggregate institutional data rather than outcomes based on individuals.¹⁴⁹ It has also been historically controversial among the higher education community after past Administrations attempted to use it as a tool to hold schools accountable.¹⁵⁰ The Obama Administration, for example,

HIGHER EDUCATION 5–6 (2015) (updated Jan. 2017), <https://collegescorecard.ed.gov/assets/UsingFederalDataToMeasureAndImprovePerformance.pdf>.

¹⁴³ *College Scorecard Data*, U.S. DEP'T OF EDUC. 2, 3, 14 (Dec. 2017), <https://collegescorecard.ed.gov/assets/FullDataDocumentation.pdf>.

¹⁴⁴ Adam Looney, *A Comparison Between the College Scorecard and Mobility Report Cards*, TREASURY NOTES BLOG (Jan. 19, 2017), <https://www.treasury.gov/connect/blog/Pages/A-Comparison-between-the-College-Scorecard-and-Mobility-Report-Cards.aspx>.

¹⁴⁵ *College Scorecard Data*, U.S. DEP'T OF EDUC. (Dec. 2017), <https://collegescorecard.ed.gov/assets/FullDataDocumentation.pdf>.

¹⁴⁶ McPherson & Kelly, *supra* note 108; Jonathan Rothwell, *Understanding the College Scorecard*, BROOKINGS INST. (Sept. 28, 2015), <https://www.brookings.edu/opinions/understanding-the-college-scorecard>.

¹⁴⁷ *College Scorecard Data*, U.S. DEP'T OF EDUC. (Dec. 2017), <https://collegescorecard.ed.gov/assets/FullDataDocumentation.pdf>.

¹⁴⁸ Grover J. (Russ) Whitehurst & Matthew M. Chingos, *Deconstructing and Reconstructing the College Scorecard*, 1:4 BROOKINGS INST. 1, 1 (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/Deconstructing-and-Reconstructing-the-College-Scorecard.pdf>; *College Scorecard Data*, U.S. DEP'T OF EDUC. (Dec. 2017), <https://collegescorecard.ed.gov/assets/FullDataDocumentation.pdf>.

¹⁴⁹ Whitehurst & Chingos, *supra* note 148; *College Scorecard Data*, U.S. DEP'T OF EDUC. (Dec. 2017), <https://collegescorecard.ed.gov/assets/FullDataDocumentation.pdf>.

¹⁵⁰ McPherson & Kelly, *supra* note 108; Li Zhou, *Obama's New College Scorecard*

initially suggested prioritizing federal funding for institutions that performed highly according to The College Scorecard, but quickly rescinded their efforts after significant backlash from institutions.¹⁵¹ Institutions opposed a federal ratings system based on the College Scorecard, in part because it portrayed incomplete or distorted information.¹⁵²

IV. ARGUMENT

A. The Legality of a Student-Level Data Network

Collection of student-level data undoubtedly raises a number of privacy concerns.¹⁵³ As technology that enables data reporting and aggregation has evolved, so have the threats of cyber breach and hacks of sensitive information.¹⁵⁴ Therefore, privacy considerations are a primary concern with any increased collection of postsecondary data, especially if that data is collected at the student-level, rather than institution-level.¹⁵⁵ Any discussion related to tracking student performance raises fundamental questions about students right to privacy, and how much of that right they waive when they attend an institution of higher education.¹⁵⁶

Flips the Focus of Rankings, THE ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/education/archive/2015/09/obamas-new-college-scorecard-flips-the-focus-of-rankings/405379/>.

¹⁵¹ Jodi Wood Jewell, *Legislating Higher Education: Applying the Lessons of No Child Left Behind to Post-Secondary Education Reformation Proposals*, 50 IDAHO L. REV. 53, 72–73 (2013).

¹⁵² Paul Fain, *Performance Funding Goes Federal*, INSIDE HIGHER EDUC. (Aug. 23, 2013), <https://www.insidehighered.com/news/2013/08/23/higher-education-leaders-respond-obamas-ambitious-ratings-system-plan>.

¹⁵³ See generally Jon Marcus, *How Much Does the Government Really Need to Know About College Students in America?*, ATLANTIC (Oct. 24, 2017), <https://www.theatlantic.com/education/archive/2017/10/should-the-government-monitor-students-college-progress/543735> (highlighting the privacy concerns of all American student's academic history being collected and stored by the government).

¹⁵⁴ See Julie Hirschfeld Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html>; see also Yuki Noguchi, *After Equifax Hack, Consumers Are on Their Own. Here Are 6 Tips to Protect Your Data*, NPR (Sept. 14, 2017), <https://www.npr.org/2017/09/14/550949718/after-equifax-data-breach-consumers-are-largely-on-their-own> (showing the personal and financial fallout of big data breaches).

¹⁵⁵ See Davis, *supra* note 154; see also Noguchi, *supra* note 154 (showing the personal and financial fallout of big data breaches).

¹⁵⁶ Letter Advocating Student Privacy to The Commission on Evidence Based Policymaking, Parent Coal. for Student Priv. (Nov. 14, 2016) (on file with author).

It is important to note at the outset that data collection at the student-level should place clear restrictions around ways in which personally identifiable information would be protected under such a system.¹⁵⁷ It should be contingent upon data that is collected being de-identified prior to being shared via a consumer portal or among federal agencies if data is personally identifiable.¹⁵⁸ Potential legislation should also specify the uses of student data, and employ security measures to ensure that collected data could not be used for purposes not explicitly allowed by the law or prohibited by existing privacy laws. Congress has an opportunity to make necessary reforms to data security and data transmission by considering the “Foundations for Evidence-Based Policymaking Act of 2017,” which was introduced based on recommendations from the Commission on Evidence Based Policymaking, and encourages secure and accessible data shared across federal agencies.¹⁵⁹ Congress has gone to great lengths to protect student privacy by instituting FERPA and other laws related to individual data collection.¹⁶⁰ The §1015(c) ban on databases and the student unit record system was even imposed in the name of protecting student privacy.¹⁶¹

1. Constitutional Privacy

The Supreme Court has recognized an individual’s Constitutional right to privacy emanates from the Bill of Rights and the Fourteenth Amendment.¹⁶² Constitutional privacy protections can be broken into two categories: those dealing with the individual’s interest in keeping private matters to themselves, and those dealing with the individual’s interest in independent decision-

¹⁵⁷ *A Parent’s Guide to Student Data Privacy*, FERPASHERPA.ORG (Sept. 2015), https://ferpasherpa.org/wp-content/uploads/2015/09/parents_guide.pdf (“Schools have always held a wide range of data about our children and families: Name, address, names of parents or guardians, date of birth, grades, attendance, disciplinary records, eligibility for lunch programs, special needs and the like are all necessary for basic administration and instruction.”).

¹⁵⁸ See *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*, PRIV. TECH. ASSISTANCE CTR. (Feb. 2014), <https://tech.ed.gov/wp-content/uploads/2014/09/Student-Privacy-and-Online-Educational-Services-February-2014.pdf> (detailing procedures, protocols, and guidelines for protecting student’s personally identifiable information).

¹⁵⁹ H.R. REP. NO. 115-411, at 2 (2017).

¹⁶⁰ 20 U.S.C. § 1232g (2013); *e.g.*, 13 U.S.C. § 402 (2002) (providing limitation on Bureau of the Census to share business data).

¹⁶¹ 20 U.S.C. § 1015(c) (2008).

¹⁶² *Griswold v. Connecticut*, 361 U.S. 479, 483 (1965) (Goldberg, J., concurring); see *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (providing that the privacy rights embodied in the Fourth Amendment of the Constitution have been made applicable to the states through the Fourteenth Amendment).

making.¹⁶³ Without clear statutory guidelines and protections, concerns related to a student-level data network could arise based on an individual's interest in non-disclosure of personal information.¹⁶⁴

A person's expectation of privacy garners constitutional protection if it is of a highly personal or intimate nature.¹⁶⁵ Constitutionally protected information does not include that which is readily available to the public.¹⁶⁶ Courts have found that education records, generally those which are maintained under FERPA protections, are not the type that contain highly sensitive information that would trigger constitutional protections.¹⁶⁷ Further, much of the information that would be incorporated into a student-level data network is already available to the public, albeit not organized in such a way that the public can trace any information back to the individual, or make inferences related to how institutions prepare students for entry into the workforce.¹⁶⁸

A complaint that a student-level data network violates an individual's right to privacy would have to show that a valid privacy interest has been implicated.¹⁶⁹ The most vulnerable data element could be the "student outcomes" requirement,¹⁷⁰ which could imply relevant workforce information such as employment status, earnings data, or further education.¹⁷¹ In such cases,

¹⁶³ See *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977) (citing *Olmstead v. United States*, 277 U.S. 438, 472 (1928)) (discussing the right to privacy against governmental interference); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (discussing "zones of privacy" as it pertains to private decisions affecting the individual); see also *Borucki v. Ryan*, 827 F.2d 836, 839 (1st Cir. 1987) (providing that privacy rights have been established with regards an individual's right to make decisions with respect to certain personal matters).

¹⁶⁴ *Whalen*, 429 U.S. at 599–600.

¹⁶⁵ *Nilson v. Layton City*, 45 F.3d 369, 372 (1995).

¹⁶⁶ *Id.* at 233–34.

¹⁶⁷ *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1209 (2000); e.g., *Commonwealth v. Buccella*, 751 N.E.2d 373, 387 (Mass. 2001) (discussing that student assignments held for a limited period of time for grading purposes are not accorded privacy protections under FERPA).

¹⁶⁸ CUNNINGHAM ET AL., *supra* note 116. See generally *About Us*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/about/> (last visited May 24, 2018) (describing objective of the National Center for Education Statistics to collect and analyze educational data).

¹⁶⁹ See *Nilson*, 45 F.3d at 372 (stating the information, itself, a plaintiff seeks to protect must be of a nature where one has a legitimate expectation of privacy).

¹⁷⁰ Cf. Michael B. Goldstein, *STUDENT DATA PRIVACY LAWS AND THEIR IMPACT ON SCHOOLS AND COLLEGES* at *3 (2016), 2016 Westlaw 1595366 (noting that data in these networks are valuable in that they may also improve student outcome and prove to be valuable); cf. *Privacy and Data Sharing*, PROTECTING STUDENT PRIVACY: DEPT. OF EDU. (Feb. 5, 2018), <https://studentprivacy.ed.gov/privacy-and-data-sharing> (stating FERPA allows certain data, including student outcomes to be shared with permitted third parties or those whom the institution has a written agreement designed to protect the privacy of students).

¹⁷¹ Cf. Press Release, Congressman Paul Mitchell, Mitchell and Polis Introduce the College Transparency Act of 2017 (May 17, 2017) (noting that there is valuable information

Courts have balanced the privacy interest of the individual against the government's need for such data.¹⁷² The Ninth Circuit in *U.S. v. Westinghouse* outlined factors to weigh when comparing privacy and governmental interests to include:

[T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.¹⁷³

Applying these factors to a student-level data network, the government's interest in collecting student-level data outweighs the privacy interest in not collecting such data.¹⁷⁴ The government has a clear need for access to this information so it may institute federal policies related to transparency and consumer protection in higher education.¹⁷⁵ Further, should Congress pass legislation, it must provide a statutory mandate specifically stating the public policy interest of Congress and steps it plans to take to provide safeguards to prevent disclosure and mitigate injury from potential unauthorized disclosure.¹⁷⁶

Although some Courts have expressed caution toward the collection of individuals' earnings data, they have found no Constitutional right to privacy in one's income.¹⁷⁷ Given that a student-level data network would only require the data sharing, rather than explicit new collections, it is unlikely that access to information FSA, IRS, or any other domestic federal agency collected would be

in reporting student outcomes provided that personally identifiable information has been scrubbed).

¹⁷² See *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 749 (2011) (holding that even if an individual has a legitimate privacy interest in the data, the government may retain the scope of the information is reasonable with respect to the government's interest); *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 457 (1977).

¹⁷³ *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).

¹⁷⁴ Custer, *supra* note 40, at 2236.

¹⁷⁵ See George Ashenmacher, *Indignity: Redefining the Harm Caused by Data Breaches*, 51 WAKE FOREST L. REV. 1, 56 (2016) (noting that through the Federal Trade Commission, the government has an interest in personally identifiable information to enforce consumer protection laws).

¹⁷⁶ Custer, *supra* note 40, at 2236.

¹⁷⁷ *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 114–15 (3d Cir. 1987) (explaining that while the district court felt that earnings data should be protected, it did not rise to the level of other sensitive data that Courts have been clear is intrusive).

in violation of the Constitution.¹⁷⁸

2. *Applicable Data Security and Privacy Statutes Already in Law*

i. The Privacy Act

Generally, the Privacy Act of 1974 governs the protection of statistical information such as information that would be a part of a student-level data network NCES or any other agency maintains.¹⁷⁹ The Act prohibits federal agencies from disclosing records to any other person or another federal agency without written request or consent by the individual.¹⁸⁰ The Privacy Act contains twelve exceptions for when data may be disclosed without violating the Act.¹⁸¹ This includes exceptions for Congressional use, and for researchers to use the information exclusively for statistical research or reporting purposes so long as the statistical information is not individually identifiable.¹⁸² In the context of a student-level data network, the Privacy Act would allow for the sharing of data for statistical purposes for both research and for policymaking, so long as the information is not individually identifiable.¹⁸³ However, Congress may need to amend the Privacy Act if it determines that transferring limited individually information between agencies is necessary to complete a student-level data network.¹⁸⁴

ii. The Confidential Information Protection and Statistical Efficiency Act (CIPSEA)

It is important to consider where to house or administer a student-level data network to evaluate privacy protections.¹⁸⁵ NCES is a statistical agency that the

¹⁷⁸ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1197 (4th Cir. 1976) (stating that information sharing not protected by the Freedom of Information Act may generally be disclosed at the agency's discretion).

¹⁷⁹ *See* 5 U.S.C. § 552a (2014) (providing that statistical records shall be protected from data breach as to not cause harm to the individual).

¹⁸⁰ *Id.*

¹⁸¹ *See id.* (providing that exceptions to the Privacy Act are set forth in "sections 3(b), 6, 7 and 8" of the statute).

¹⁸² *Id.*

¹⁸³ *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000).

¹⁸⁴ COMM'N ON EVIDENCE-BASED POLICYMAKING, *THE PROMISE OF EVIDENCE-BASED POLICYMAKING* 5 (2017).

¹⁸⁵ *See* Kenneth M. Siegel, *Protecting the Most Valuable Corporate Asset: Electronic Data, Identity Theft, Personal Information, and the Role of Data Security in the Information Age*, 111 PENN ST. L. REV. 779, 787 (2007) (discussing that in order to safeguard data,

Confidential Information Protection and Statistical Information Act (CIPSEA) governs.¹⁸⁶ CIPSEA strictly limits access to identifiable data and sets high penalties for disclosures by researchers, federal agency employees, and parties who may have access to information held by statistical agencies.¹⁸⁷ It ensures that any identifiable data that an agency acquires under a pledge of confidentiality, is only used for statistical purposes and is not shared or disclosed in an identifiable way.¹⁸⁸ Furthermore, if the agency used the data for any other purpose, it must first provide public notice outlining potential uses of the information outside of their statistical purposes.¹⁸⁹ The Act also outlines fines and penalties for those who unlawfully disclose covered information.¹⁹⁰ Assuming that a student-level data network would be governed by CIPSEA, this provides an extra layer of incentive for the protection of student-level data, as violators will be fined \$250,000 and could face up to five years of imprisonment.¹⁹¹

iii. The Family Educational Rights and Privacy Act of 1974 (FERPA)

The Family Educational Rights and Privacy Act of 1974 (FERPA) is the guiding statute for safeguarding student information and educational records at the federal level.¹⁹² For institutions of higher education maintaining student records, FERPA requires them to follow procedures that student information from disclosure, allow parental access to student records, and permit parents to contest educational records.¹⁹³ The scope of FERPA includes directory information such as names, addresses, extensive student records, criminal history, and student disciplinary history.¹⁹⁴ However, there is no mention of employment outcome or enrollment information.¹⁹⁵

privacy and security factors must be examined, including management from an organizational perspective and maintaining property IT systems).

¹⁸⁶ 44 U.S.C. § 3501 (2002); *see* 13 U.S.C. § 402 (2002) (stating designated agencies may receive data protected under the Privacy Act for statistical purposes).

¹⁸⁷ Confidential Information Protection and Statistical Efficiency Act, 116 Stat. 2962 (codified as amended at 13 U.S.C. § 402, 44 U.S.C. § 3501 (2002)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² John E. Theuman, Annotation, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)* (20 U.S.C. §1232(g)), 112 A.L.R. Fed. 1, §2 (1993).

¹⁹³ 20 U.S.C. §1232g(a) (2013).

¹⁹⁴ 34 C.F.R. § 99.37 (2010) (discussing the limits of FERPA regarding Social Security Numbers and limited disclosure with and without parental consent).

¹⁹⁵ *See* 20 U.S.C. § 1232g(a)(4)(A) (2013) (stating the Statutory Language of FERPA defines “education records” as any records, files, documents, and other materials, which

Furthermore, FERPA contains some exceptions that allow the collection of student data if it is related to financial aid and school performance audits that ensure compliance with federal programs.¹⁹⁶ FERPA may also allow the collection of student data in the form of nonconsensual disclosure to “organizations conducting studies for . . . educational agencies or institutions for the purpose of . . . improving instruction.”¹⁹⁷ Courts have also been generous to higher education institutions’ disclosure to third parties so long as institutions follow data-minimization protocols to protect private information covered by FERPA.¹⁹⁸ Data-minimization may include deleting names or presenting data in statistical form.¹⁹⁹

A student-level data network could require privacy procedures that govern other NCES data collections.²⁰⁰ Currently, NCES imposes security protocols that make it a felony to share any data collected in coordination with NCES.²⁰¹ Violation of the NCES data security protocol carries a fine up to \$250,000 or five years in prison.²⁰² Further, all contractors and NCES staff are required by law to pledge not to release any individually identifiable data prior to viewing such data.²⁰³ NCES also requires a number of other practices designed to eliminate the possibility that data may escape.²⁰⁴

Some members of Congress and privacy advocates have raised concerns about reporting data on students who do not participate in federal loan programs.²⁰⁵ Despite these concerns, there are good reasons for data systems to

contain information directly related to the student; and “students” as any person with respect to an educational agency or institution that maintains education records).

¹⁹⁶ 34 C.F.R. § 99.37 (2010).

¹⁹⁷ 20 U.S.C. § 1232g(a)(3)–(4) (2013).

¹⁹⁸ Theuman, *supra* note 192.

¹⁹⁹ *Id.*

²⁰⁰ Letter from Postsecondary Nat’l Data Collaborative to U.S. Senate Comm. on Health, Educ., Labor, & Pensions (Apr. 24, 2015), http://www.ihep.org/sites/default/files/uploads/postsecdata/docs/resources/postsecdata_2collaborative_help_response.pdf.

²⁰¹ U.S. DEP’T OF EDUC., TESTING INTEGRITY SYMPOSIUM, ISSUES AND RECOMMENDATIONS FOR BEST PRACTICES 4 (2013), <https://nces.ed.gov/pubs2013/2013454.pdf>.

²⁰² Confidential Information Protection and Statistical Efficiency Act, 116 Stat. 2962 (codified as amended at 13 U.S.C. § 402, 44 U.S.C. § 3501 (2002)).

²⁰³ *Processing and Editing of Data: Maintaining Confidentiality*, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/statprog/2002/std4_2.asp (last visited May 24, 2018).

²⁰⁴ *Id.*

²⁰⁵ Andrew Kreighbaum, *As House panel prepares to debate Higher Ed Act, drafters add study on student-level data*, INSIDE HIGHER EDUC. (Dec. 12, 2017), <https://www.insidehighered.com/news/2017/12/12/house-panel-prepares-debate-higher-ed-act-drafters-add-study-student-level-data>. See generally Rachel Strickland, *Press Release: The Parent Coalition for Student Privacy Supports the Prosper Act’s Commitment to a Federal Student-Unit Record Ban*, PARENT COALITION FOR STUDENT PRIVACY (Dec. 12,

be able to access information on all students.²⁰⁶ Although students may not use federal loans, the students and the higher education institutions they attend are likely beneficiaries of federal support in other ways.²⁰⁷ Many students participate in programs like 529 savings accounts, which allow tax benefits for saving towards college, and higher education institutions benefit from a tax-exempt status.²⁰⁸ Further, the higher education institutions benefit from receiving Title IV funds from students, and therefore all students who attend participating colleges benefit indirectly from improved facilities and other services.²⁰⁹ A Title IV eligible institution is an institution that has met certain criteria which enables it to accept federal financial aid money from students wishing to attend the institution of higher education.²¹⁰ Failure to not account for graduation rates, retention, transfers, and IPEDS of students who do not receive federal aid results in incomplete overall data.²¹¹

Some have suggested that a federal student unit record may require amendments to FERPA to comply with its restrictions related to data sharing among federal agencies and the public.²¹² Others, however, have suggested that the Privacy Act, not FERPA would be the guiding statute protecting student information should a federal student unit record come to fruition.²¹³ Regardless, given the nature of the data that would potentially be collected, it is reasonable to assume that both laws would govern a student-level data network. .²¹⁴

It is important to note that FERPA itself is an example of Congress using its spending powers because it establishes conditions placed upon institutions of higher education receiving federal aid.²¹⁵ The penalty for violating FERPA,

2017), <https://www.studentprivacymatters.org/press-release-the-parent-coalition-for-student-privacy-supports-the-prosper-acts-commitment-to-a-federal-student-unit-record-ban/>.

²⁰⁶ Epstein, *supra* note 80, at 9.

²⁰⁷ *Trends in Student Aid 2016*, COLLEGEBOARD.ORG (2016), https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid_0.pdf.

²⁰⁸ CUNNINGHAM ET AL., *supra* note 116.

²⁰⁹ *Id.*

²¹⁰ CONG. RESEARCH SERV., INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS 2 (June 2017). Institutions wishing to accept Title IV financial aid by students attending their institution must meet the following basic criteria: 1) the institution must be licensed by a state in which it is physically located; 2) accredited by an accrediting body recognized by the U.S. Department of Education; and 3) the Department of Education must certify an institution's eligibility. *Id.*

²¹¹ CUNNINGHAM ET AL., *supra* note 116.

²¹² See Custer, *supra* note 40, at 2238 (explaining the process of how to identify the anonymization of an individual based solely on records).

²¹³ Daggett, *supra* note 53, at 102; FLA DEP'T OF EDUC., FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA), <http://www.fldoe.org/core/fileparse.php/7674/urlt/0064538-ferpa.pdf>.

²¹⁴ Daggett, *supra* note 53, at 113.

²¹⁵ U.S. CONST. art. I § 8 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and

therefore, is that an institution would lose access to federal funds; the Act does not create a private right of action to individuals against the Federal Government for failure to comply or protect data from breaches or violations.²¹⁶ While a student-level data network would inherently instruct higher education institutions to share student-level data with the Federal Government, higher education institutions would not be out of compliance with FERPA for doing so.²¹⁷

The type of data contained in a student-level data network would contain is not the type that FERPA seeks to protect.²¹⁸ FERPA protects “education records” against non-consensual disclosure.²¹⁹ FERPA does not protect “directory information,” e.g. students’ names, addresses, telephone number, outside of disclosing to students that the institution maintains directory information and students or parents have the opportunity to object to such collections.²²⁰ The statute defines “education records” broadly as “those records, files, documents, and other materials, which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”²²¹ There are exceptions for data collection related to conditions for an individual receiving federal aid, and allows the Federal Government to use “educational records” to develop accountability measures like the cohort default rate.²²² FERPA defines

general Welfare of the United States.”); 20 U.S.C. § 1232g (a) (2013) (“Conditions for availability of funds to educational agencies or institutions.”); *Legislative History of Major FERPA Provisions*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html> (last visited May 24, 2018).

²¹⁶ *See* *Gonzaga University v. Doe*, 536 U.S. 273, 283–84 (2002) (citing *Touche & Ross Co. v. Redington*, 442 U.S. 560, 576 (1979) (finding that if the “statute by its terms grants no private rights to any identifiable class” then there is no private right of action).

²¹⁷ *FERPA Exceptions Summary*, PRIV. TECH. ASSISTANCE CTR. (Apr. 2014), <https://studentprivacy.ed.gov/resources/ferpa-exceptions-summary-apr-2014-2-page-standard-size>.

²¹⁸ *See* Dagggett, *supra* note 53, at 76 (“Some courts continue to hold that FERPA is not violated by the disclosure of information known independently from its inclusion in education records because it has been publicly observed.”).

²¹⁹ 20 U.S.C. § 1232g (b)(1) (2013).

²²⁰ *Id.* at § 1232g (a)(5)(A) (2013); *see also* Theuman, *supra* note 192 (“Even the release of students’ names, addresses, telephone numbers, and the like has been held not to violate FERPA where the institutions involved have designated such records as ‘directory information,’ which is specifically exempted from the statute’s disclosure restrictions; but this exemption applies only if those institutions have complied with federal regulations requiring that affected students and parents receive prior notice of the institution’s intention to designate specified information as ‘directory’ and are given time to object.”).

²²¹ 20 U.S.C. § 1232g (4)(A) (2013).

²²² Custer, *supra* note 40, at 2238; *see also* CONG. RESEARCH SERV., INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS 16 (June 2017) (explaining that the cohort default rate is one of several ways institutions of higher

“directory information” as “the student’s name, address...major field of study...dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.”²²³

Much of the information that the data network would collect, and use in determining graduation numbers, student retention, student employment outcome measures and the like, would fall in the category of “directory information,” and therefore would not be the type of “education record” that FERPA seems to intend to keep from being disclosed.²²⁴ FERPA states:

Any [higher education] institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent’s prior consent.²²⁵

Therefore, the primary requirement embedded in FERPA, if any, related to the type of information covered as “directory information” would be that the parent of a student may request that an institution not report on information on their child to the Federal Government.²²⁶ Therefore, depending on the breadth of information covered by a student unit record, and since “directory information” does not garner the same expectation of privacy as “education records” under FERPA, it is unlikely the Act would need to be amended to establish a student-level data network.²²⁷

education are held accountable for accepting Title IV funds; it is calculated by identifying the number of graduates at an institution that enter loan repayment in a fiscal year and default on their loan payments within a given time period, divided by the total number of borrowers who enter repayment in that same fiscal year).

²²³ 20 U.S.C. § 1232g (a)(5)(A) (2011).

²²⁴ Custer, *supra* note 40, at 2238.

²²⁵ 20 U.S.C. § 1232g (a)(5)(B) (2011).

²²⁶ *FERPA Exceptions Summary*, PRIV. TECH. ASSISTANCE CTR. (Apr. 2014), <https://studentprivacy.ed.gov/resources/ferpa-exceptions-summary-apr-2014-2-page-standard-size>.

²²⁷ *See* Daggett, *supra* note 53, at 104 (stating that a student unit record would presumably be regulated by the Privacy Act, not FERPA). *Contra* Custer, *supra* note 40, at 2239 (arguing that FERPA would need to be amended to accommodate a student unit record, although Custer bases this argument on the assumption that a student unit record would collect more sensitive data than has been proposed in modern iterations of a similar student-level data network).

B. Legislative Action Should Be Taken

1. *The College Transparency Act and the Foundations for Evidence-Based Policymaking Act*

In the 115th Congress, members have introduced two pieces of legislation, the College Transparency Act (CTA) and the Foundations for Evidence-Based Policymaking Act (FEBPA), that could lead to the creation of a student level data network.²²⁸ These two acts would substantially improve the process by which the Federal Government acquires student information and makes that data available to the public.²²⁹ The CTA would authorize the development of a student-level data network.²³⁰ FEBPA would improve data transferability, security, access across federal agencies and streamline federal protocols for such a network.²³¹

The CTA would repeal §1015(c).²³² Lifting the ban on a student unit record would present higher education institutions with the opportunity to report data at the student-level, thus presenting a more complete view of student access to college, student retention, and student success than under the current systems.²³³ The bill also instructs the Commissioner of NCES, under the discretion of the Secretary of Education, to develop a privacy protected, secure student data network of postsecondary student information.²³⁴ The purpose of such a data system would be to promote student data transparency, institutional improvement, and analyze federal programs, establish a consumer-facing college data tool, and minimize data reporting burdens on institutions of higher education.²³⁵ If passed by Congress and signed into law, CTA would authorize the Commissioner of NCES to establish a student-level data network such as

²²⁸ Kreighbaum, *supra* note 205; Press Release, Speaker Ryan, Senator Murray Introduce Evidence-Based Policymaking Legislation (Nov. 1, 2017), <https://www.speaker.gov/press-release/speaker-ryan-senator-murray-introduce-evidence-based-policymaking-legislation>.

²²⁹ Wilkins, *supra* note 42.

²³⁰ Kreighbaum, *supra* note 205.

²³¹ Nick Hart & Sandy Davis, *FACT SHEET: Foundations for Evidence-Based Policymaking Act*, BIPARTISAN POL'Y CTR. (Nov. 30, 2017), <https://bipartisanpolicy.org/blog/fact-sheet-foundations-for-evidence-based-policymaking-act/>.

²³² S. 1121 § 3; H.R. 4147.

²³³ See Custer, *supra* note 40, at 2228 (“Such a system would provide a range of benefits to schools and students in the postsecondary landscape. A unit-record system would allow researchers to study student performance, graduation rates, and college costs both ‘across institutions as well as . . . within institutions.’”); CUNNINGHAM ET AL., *supra* note 116.

²³⁴ S. 1121.

²³⁵ *Id.* The data points required of the “System” described in the bill include enrollment patterns, progression, completion, and post collegiate outcomes, and higher education costs and financial aid at the student level. *Id.*

that described in this comment.²³⁶

2. Data Sharing Across Agencies

Improved data sharing agreements and Federal Government oversight and transferability of data that is already collected by federal agencies is critical to ensuring consumers, institutions, and policymakers have a complete view of student performance.²³⁷ In order to protect student data and avoid hacks, the data collected should be de-identified and made anonymous by NCES prior to being distributed outside of the agency.²³⁸

However, in order to portray a complete view of student performance, some data matching is necessary within NCES, which would require the use of unique identifiers to match student information.²³⁹ For example, FSA uses social security numbers as a unique identifier.²⁴⁰ A unique identifier is necessary to track student progress, but it also ensures that the data is secure and is not associated with something identifiable for students.²⁴¹ A policy judgment must be made regarding the balance between student privacy and the utility of the data collected.²⁴²

The CTA would codify the collection of certain student-level data elements “necessary to calculate the information within the student-related surveys in the Integrated Postsecondary Education Data System . . . [and] necessary to allow for reporting student enrollment, persistence, retention, transfer, and completion measures for all credential levels.”²⁴³ In addition, the CTA requires those data elements to be disaggregated by status as a first-time student, status as a part-time or full-time student, credential level, race or ethnicity, age, gender, program of study, military status, and Pell Grant recipient status.²⁴⁴ Equally important, the CTA calls for “linking” the data collected under this network with other federal data systems by coordinating sharing agreements with the Office of

²³⁶ *Supra* Part IV.A.

²³⁷ Clare McCann & Amy Laitinen, *Bipartisan Group in Congress Seeks to End the College Blackout*, NEW AM. (May 15, 2017), <https://www.newamerica.org/education-policy/edcentral/college-transparency-act/>.

²³⁸ Simson L. Garfinkel, *De-Identification of Personal Information*, NAT’L INST. OF STANDARDS & TECH. (Oct. 22, 2015), <http://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8053.pdf>.

²³⁹ *See* Custer, *supra* note 40, at 2242 (explaining the process of how to identify the anonymization of an individual based solely on personal records).

²⁴⁰ CUNNINGHAM ET AL., *supra* note 116.

²⁴¹ *Id.*

²⁴² Letter from Postsecondary Nat’l Data Collaborative to U.S. Senate Comm. on Health, Educ., Labor, & Pensions (Apr. 24, 2015), http://www.ihep.org/sites/default/files/uploads/postsecdata/docs/resources/postsecdata_2collaborative_help_response.pdf.

²⁴³ S. 1121.

²⁴⁴ *Id.*

Federal Student Aid (FSA), the Department of Treasury, the Department of Defense, the Department of Veterans Affairs, the Social Security Administration, and the Bureau of the Census.²⁴⁵

To protect the security of data transfers and avoid an unaccountable, continuous flow of private data between agencies, the CTA calls on the commissioner to “ensure that linkages are not always connected,” and minimize duplicate reporting across agencies.²⁴⁶ This would also prevent one of the aforementioned agencies, such as the IRS, census bureau, or state longitudinal databases from holding onto data that only NCES should have.²⁴⁷ To avoid centralization of data within one specific agency, the CTA would require the Commissioner of NCES to ensure the bill “does not result in the creation of a single Federal database at the Department of Education that maintains the information reported across other Federal agencies.”²⁴⁸ Since institutions of higher education and the federal agencies already collect much of the information specified in the “data elements” section it does not garner Constitutional protection as “highly personal or intimate” information.²⁴⁹ Further, since the CTA establishes linkages to facilitate data sharing by federal agencies, rather than prescribing new collection requirements, the bill does not trigger Constitutional problems related to organizing wage data.²⁵⁰ Ostensibly, the Federal Government has already weighed the benefits of collecting such data against the privacy concerns of individuals.²⁵¹

Title II of FEBPA, though not isolated to education data, would create a Chief Data Officer at each federal agency, and outline ways that federal agencies could make existing data the government collects more open and transferrable.²⁵² Title II instructs the Director of the Office of Management and Budget to issue guidance to make data “open by default,” and would require federal agencies to establish protocols for making data “open” while taking into account the need for security and privacy protocols for personally identifiable and confidential

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See Falvo*, 233 F.3d at 1209 (citing *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (“Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution... Any disclosed information must itself warrant protection under constitutional standards.”)).

²⁵⁰ S. 1121.

²⁵¹ *See Nixon*, 433 U.S. at 456-58 (stating that Courts will weigh a person’s interest in their right to privacy against a compelling government interest in having that information made available to the public).

²⁵² H.R. 4174, 115th Cong. § 202(e) (2017).

information.²⁵³ In sum, agencies would also have to provide mechanisms by which the public and others may access the catalogue of federal data.²⁵⁴ Such a system would benefit a student-level data network because it would prompt agencies to consider the data they already make openly available, and which data they may make available in the future.²⁵⁵

The Office of Federal Student Aid (FSA) is required by law to maintain student-level data on federal student loans and grants for the purposes of assessing loan eligibility and tracking disbursements and repayment.²⁵⁶ Furthermore, the IRS already collects wage data on individuals who file a W-2 form, which provides data needed to calculate measures of student outcomes.²⁵⁷

FEBPA and the CTA charge federal agencies with considering how they would make such information available under a federal framework.²⁵⁸ The network the CTA envisions would thereafter benefit from data sets that are already in existence, which would be used to paint a clearer picture of the measures of completion, progression, and other outcomes, that the bill intends to capture without creating excessive new reporting burdens.²⁵⁹

3. Better Data For Consumers, Institutions, and Policymakers

Development of the CTA network would have a better way to measure the return on investment of federal programs and consumers' money.²⁶⁰ The CTA does not specify how to develop the network infrastructure.²⁶¹ It merely specifies

²⁵³ *Id.* at § 202(c).

²⁵⁴ *Id.* at § 201.

²⁵⁵ *Id.*

²⁵⁶ WHITE PAPER, *supra* note 14 (stating federal law explicitly exempts the collection of personally identifiable student data in order to operate and evaluate federal programs related to federal student aid).

²⁵⁷ *Empowering Students and Families to Make Informed Decisions on Higher Education, Before the Subcomm. on Higher Education and Workforce Development of the H. Comm. on Education and the Workforce, 115th Cong. 10-11 (2017)* [hereinafter *Hearings*] (statement of Mark Schneider, Vice President and Institute Fellow, American Institutes of Research), https://edworkforce.house.gov/uploadedfiles/schneider_written_testimony_-_final.pdf.

²⁵⁸ *See* S. 1121 § 2(a)(2) (stating certain data elements like measures of student access, admissions selectivity, and enrollment should be reported on and made publicly available); *see also* H.R. 4174 § 303(a).

²⁵⁹ *See* S. 1121 § 2(a)(2) (stating that the Commissioner shall enter into sharing agreements with relevant agencies to create secure linkages with relevant data systems of the Office of Federal Student Aid, The Department of the Treasury, the Department of Defense, the Department of Veterans Affairs, the Social Security Administration, and the Bureau of the Census).

²⁶⁰ *Hearings, supra* note 258 (statement of Mark Schneider, Vice President and Institute Fellow, American Institutes of Research).

²⁶¹ S. 1121 §2(a)(2) (stating in subsection (C) "Development Process" certain parameters which the Commissioner should focus on and data elements to be included, but puts the

that it should collect the aforementioned data points, take into account the needs of the users and institutions reporting data, meet guidelines established by the U.S. Digital Service, ensure data privacy and security standards of the National Institute of Standards and Technology (NIST), and be frequently updated.²⁶²

The CTA gives the Commissioner of NCES discretion of how to build out the network.²⁶³ The required components of a data system are not dissimilar from the goals of IPEDS, and the bill does not prevent the Department from making changes to the existing IPEDS infrastructure, federalizing the National Student Clearinghouse, or making changes to improve the College Scorecard to make better use of the research developed from the student unit record.²⁶⁴ The bill also requires the Commissioner to make summary aggregate level data publicly available via a consumer-facing website.²⁶⁵ This would give prospective students considering college an outlet to find information on how well universities are preparing students for the workforce, and what their potential return on the investment might be.²⁶⁶ Further, individuals' personally identifiable information would be protected by NCES because presenting data in aggregate form eliminates the need for de-identification or anonymization.²⁶⁷

In addition to coordinating cross-agency use of federal data, Title II of FEBPA, the "Open Government Data Act" would have a significant impact on making data available to entities outside of the Federal Government.²⁶⁸ Specifically, the bill tasks agencies with engaging with stakeholders such as

burden on NCES to develop the actual system).

²⁶² *Id.*

²⁶³ *Id.* (stating that the Commissioner shall develop a network and "take into consideration, to the extent practicable" certain privacy benchmarks and standards. The bill does not exclusively state how the data system should be organized or built).

²⁶⁴ *See id.* (stating the Commissioner of NCES must "develop and maintain a secure, privacy-protected postsecondary student data system in order to- (i) accurately evaluate student enrollment patterns, progression, completion, and postcollegiate outcomes, and higher education costs and financial aid at the student level; (ii) assist with transparency, institutional improvement, and analysis of Federal aid programs; (iii) provide more accurate, complete, and customizable information for students and families" which does not preclude the Commissioner from reconditioning an existing program like IPEDS or the College Scorecard).

²⁶⁵ *Id.* (stating "the Commissioner shall make the summary aggregate information described in subparagraph (C), at a minimum, publicly available through a user-friendly consumer information website.").

²⁶⁶ Adam Harris, *Here's How a Student 'Unit Record' System Could Change Higher Ed*, CHRON. OF HIGHER EDUC. (May 25, 2017), <https://www.chronicle.com/article/Here-s-How-a-Student-Unit/240165>.

²⁶⁷ S. 1121 § 2(a)(2); *see also* Custer, *supra* note 40, at 2242 (discussing the need to anonymize data in a federal student unit record, however, the CTA approach, by presenting aggregate-level data to states, institutions, and the public, does not run into the same problems as Custer's proposed system).

²⁶⁸ H.R. 4174 § 202(b).

private entities, researchers, and the general public, to determine how open data could be of best use.²⁶⁹ Agencies would also authorize an agency employee to assist the public with data usage and maintenance.²⁷⁰ In coordination with developing an information resources management plan, the bill also requires agencies to provide the public with specific ways to access statistical data, outline procedures by which the public can access data, and weigh the costs and benefits of providing open data sources to the public.²⁷¹

4. Legislation Should Promote Privacy and Data Security

Privacy and data security are priorities woven throughout both statutes.²⁷² When the Commission on Evidence-Based Policymaking's reported to Congress—a requirement under the Evidence-based Policymaking Commission Act of 2016—it recommended that Congress amend CIPSEA and the Privacy Act to require new privacy qualifications should any additional data be collected or made available for statistical purposes.²⁷³ Applying the Commission's recommendations, Title III of FEBPA would require agencies to weigh which data assets should not be available based on risks of disclosure of personally identifiable information, potential security risks, and the monetary and substantive costs and benefits of establishing such a system.²⁷⁴ Any data that is collected by NCES for statistical purposes would require researchers or government personnel to make a pledge of confidentiality not to willfully disclose personally identifiable information.²⁷⁵ Furthermore, an agency using data for evidence-based policy-making would have to balance their use of data based on the costs and benefits to the public and weigh privacy and security as primary factors.²⁷⁶

The CTA also goes to great lengths to ensure it protects the systems and

²⁶⁹ *Id.*

²⁷⁰ H.R. 4147 § 101(c).

²⁷¹ *Id.* at § 202(c)(1)(A) (2017).

²⁷² *See* S. 1121 § 2(a)(2) (stating the Director should make efforts to protect personally identifiable information and use the highest federal standards to protect private data); *see also* H.R. 4174 § 101(a)(1) (stating the Commissioner should make efforts to protect privacy and develop a panel of 10 members to determine how best to protect individuals' personal information).

²⁷³ COMMISSION ON EVIDENCE-BASED POLICYMAKING, THE PROMISE OF EVIDENCE-BASED POLICYMAKING 5 (2017), <https://www.cep.gov/content/dam/cep/report/cep-final-report.pdf>.

²⁷⁴ H.R. 4147 § 301(a).

²⁷⁵ *Id.* at § 302(a).

²⁷⁶ H.R. 4174 § 202(c)(1)(A); *see also* Andrew Reamer, *The Evidence-Based Policymaking Commission Act: An Opportunity for Improved Regulatory Assessment?*, GEO. WASH. U. REG. STUD. CTR. (Apr. 6, 2016), <https://regulatorystudies.columbian.gwu.edu/evidence-based-policymaking-commission-act-opportunity-improved-regulatory-assessment>.

associated private student data.²⁷⁷ The CTA places explicit prohibitions around what data the Commissioner may not include.²⁷⁸ The data points prohibited are generally those that courts have found to be especially sensitive and protected under FERPA.²⁷⁹ By referencing specific instances where courts have found that FERPA protections apply, the bill attempts to avoid running into problems where it would run counter to FERPA protected categories and specific criticisms of a student-level data network.²⁸⁰ Further, the bill requires the Commissioner of NCES to consult with privacy experts routinely as they consider ways to make the data it collects more private and secure.²⁸¹ It also includes the statutory requirements for maintaining secure data set forth by NCES, including penalties for disclosure of such data.²⁸² The bill also provides guidance to NCES on increased data minimization and when it may or may not withhold student data.²⁸³

Since Congress expressed concerns relating to accountability during the 2008 debate over a student unit record, it is logical to assume there will push back

²⁷⁷ S. 1121 § 2(a)(2).

²⁷⁸ *Id.*

²⁷⁹ See Theuman, *supra* note 192 (stating Courts have found that FERPA protects much of this data under either the definition of “education record” or “directory information,” and a student’s psychological records would be protected under FERPA while a teacher evaluation, disciplinary reports, or criminal activity would not); see also, S. 1121 § 2(a)(2) (prohibiting “health data, student discipline records or data, elementary and secondary education data,” as part of a post-secondary system specifically, and “exact address, citizenship or national origin status, course grades, individual postsecondary entrance exam results, political affiliation, or religion.”).

²⁸⁰ See *id.* (stating that health data and other similar personal information is prohibited); see Letter Advocating Student Privacy to The Commission on Evidence Based Policymaking, Parent Coal. for Student Priv. (Nov. 14, 2016) (on file with author) (stating one of the criticisms was that sensitive information, such as citizenship status could be revealed or used by law enforcement by citing a version of the student unit record in England called the National Pupil Database, which was used by law enforcement to crack down on illegal immigration, which doesn’t apply because the College Transparency Act also creates protections from the information getting into the hands of law enforcement); see also Theuman, *supra* note 192.

²⁸¹ S. 1121 § 2.

²⁸² *Id.*; see also Harris, *supra* note 267 (stating that the student data system would not have “identifying data and ‘health data, student discipline records or data, elementary and secondary education data, exact address, citizenship or national origin status, course grades, religion,’ and more.”).

²⁸³ See Hatch Senate Gov’t, *Hatch Introduces Bipartisan College Transparency Act to Improve Reporting of Student Outcomes*, HATCH SENATE (May 18, 2017), <https://www.hatch.senate.gov/public/index.cfm/2017/5/hatch-introduces-bipartisan-college-transparency-act-to-improve-reporting-of-student-outcomes> (explaining how “NCES would be responsible for securely storing student information, working with relevant federal agencies to generate post-college outcomes reports, and presenting the summary information on a user-friendly website for students and families).

against these two bills being used for that purpose.²⁸⁴ The CTA makes clear that it would not intend to use information it collects by means of the development of a data system for any federal ranking or summative ratings system.²⁸⁵ Furthermore, the bill language is clear that it does not preclude the data from being used to calculate the cohort default rate which is an important distinction, as policymakers have explicitly expressed concerns related to federal college ranking systems.²⁸⁶

Although not explicitly made during the debate surrounding the prohibition of a student unit record, there is an argument that required data to collect is overly expansive and could be burdensome on higher education institutions.²⁸⁷ Criticisms that there is no precedence for the collection of this type of data is unfounded for a number of reasons.²⁸⁸ Primarily, it is not new to collect educational data for research purposes as displayed by the existence of IPEDS, the national student clearinghouse, and other sources.²⁸⁹ Furthermore, there are a number of sources of data collection that may not garner the same level of scrutiny as educational data collected under these bills.²⁹⁰ The benefits of these bills outweigh any outstanding concerns, and should be included when Congress reauthorizes the Higher Education Act.

V. CONCLUSION

At its core, establishing a student-level data network should promote

²⁸⁴ H.R. REP. NO. 109-231 at 162-63 (2005).

²⁸⁵ S. 1121 § 2.

²⁸⁶ *Id.*; see Ass'n of Priv. Sector C. & U. v. Duncan, 930 F. Supp. 2d 210, 221 (D.D.C. 2013) (explaining how the Department of Education put in place data measurements similar to a student unit record, however the Court found that 1015(c) controlled and the rule was too similar to a student unit record thus striking it down).

²⁸⁷ Carole H. Haynes, *Congress' Latest Police-State Bill*, WND.COM (Nov. 11, 2017, 7:33 PM), <http://www.wnd.com/2017/11/congress-latest-police-state-bill/print> (stating the opposition's concerns about the College Transparency Act is that "[a]ll college students would be entered into a massive federal database without their consent or knowledge or ability to opt out.").

²⁸⁸ See Gabriella DeBenedictis, *Student Loan Debt Projected to Increase with New Bill Authorization*, DAILY CAMPUS (Dec. 5, 2017), <http://dailycampus.com/stories/2017/12/5/student-loan-debt-projected-to-increase-with-new-bill-authorization> (stating how data on how much graduates earn is "essential" to promoting students' best interests).

²⁸⁹ Dian Schaffhauser, *Revamp of IPEDS Widens View on Student Outcomes*, CAMPUS TECH. (Oct. 16, 2017), <https://campustechnology.com/Articles/2017/10/16/Revamp-of-IPEDS-Widens-View-on-Student-Outcomes.aspx>; see e.g., Laura W. Perna, *Keeping the National Center for Educational Statistics Independent*, HILL (Sept. 28, 2014, 7:30 AM), <http://thehill.com/blogs/pundits-blog/education/216101-keeping-the-national-center-for-education-statistics-independent> (explaining how The Strengthening Education through Research Act passed in May 2014 and allows the Institute of Education Sciences to conduct research "on all levels of education.").

²⁹⁰ Harris, *supra* note 267.

principles of transparency for consumers, reduce burdensome compliance requirements for colleges, and protect student privacy.²⁹¹ Laws related to student privacy provide ample protection to do this, and the policy benefits of a student-level data should outweigh the risks.²⁹² The CTA is an example of a balanced approach that Members of Congress should give thoughtful consideration.²⁹³

The legislation provides a mechanism that solves many of the problems associated with today's current landscape of student data reporting.²⁹⁴ It lifts the ban on a student unit record, streamlining the Federal Government's ability to measure student progress and gain a better, more easily quantifiable sense of how well higher education institutions are making use of taxpayer funding.²⁹⁵ It also gives policymakers a greater depth of information upon which to enact education policies.²⁹⁶ With increased transparency on students' performance in higher education and through increased data sharing and open data policies FEBPA suggests, policymakers could more easily identify where problems exist in the the postsecondary landscape.²⁹⁷

²⁹¹ Sarah Schultz, *Young Invincibles Expresses Support for College Transparency Act of 2017*, YOUNG INVINCIBLES (May 16, 2017), <http://younginvincibles.org/press-releases/young-invincibles-take-prosper-act/>.

²⁹² See Christopher Sadler, *Protecting Privacy in a Postsecondary Student Data System*, NEW AM. (May 16, 2017), <https://www.newamerica.org/oti/blog/protecting-privacy-postsecondary-student-data-system/> (explaining “[t]he bill also limits the use of the data, particularly for law enforcement purposes, further protecting the whole system from abuse.”).

²⁹³ R. Craig Wood, “Big Data” and Student Privacy Create Tensions for Lawmakers and Educators, LEXOLOGY (June 26, 2017), <https://www.lexology.com/library/detail.aspx?g=02949669-722e-4c05-a5f5-e68634041329>.

²⁹⁴ Gonzalez Weekly Citizen, *Cassidy, Hatch, Warren, and Whitehouse Introduce Bipartisan College Transparency Act*, WKLY. CITIZEN (May 24, 2017, 3:20 AM), <http://www.weeklycitizen.com/news/20170524/cassidy-hatch-warren-whitehouse-introduce-bipartisan-college-transparency-act> (explaining how students who “are deciding which college to attend. . . need access to the most reliable information.”).

²⁹⁵ American Educational Research Association, *House GOP Takes First Step in Rewriting Higher Education Act*, AERA (Dec. 2017), <http://www.aera.net/Newsroom/AERA-Highlights-E-newsletter/-em-AERA-Highlights-em-December-2017/House-GOP-Takes-First-Step-in-Rewriting-Higher-Education-Act>.

²⁹⁶ See Michelle Asha Cooper, *In Overhauling the Federal Higher-Education Law, Congress Must Make Sure All Students Count*, WASH. POST (Jan. 23, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/01/23/in-overhauling-the-federal-higher-education-law-congress-must-assure-that-all-students-count/?utm_term=.cc7b528359de (explaining how in order “to promote equitable outcomes, we must count all students and measure how low-income students . . . fare compared with their wealthier peers who can afford college without aid.”).

²⁹⁷ Jeffrey Stockdale, *House Passes the Foundations for Evidence-Based Policymaking Act of 2017*, COUNCIL OF ST. GOV'T (Nov. 16, 2017, 2:30 PM), <http://knowledgecenter.csg.org/kc/content/house-passes-foundations-evidence-based-policymaking-act-2017> (explaining how “[n]o matter what side of the aisle you're on, we

Furthermore, the CTA's proposed instruction to the Department of Education to develop an outward facing tool for students to compare and contrast higher education institutional performance would empower prospective students to choose the school that best fits their needs and goals.²⁹⁸ It would also eliminate the need for the current student portals that present inaccurate and incomplete information on higher education institutional performance.²⁹⁹ Finally, better data reporting practices both bills envision would lessen burden on higher education institutional reporting, and allow higher education institutions to focus on educating students instead of exhausting resources on compliance mandates.³⁰⁰ The CTA could eliminate the need for IPEDS, and likely save higher education institutions critical funding in the long run—much of which is now passed onto students in the form of higher tuition.³⁰¹

So long as the Federal Government plays a role in higher education by doling out billions of dollars each year in federal aid, it should have the ability to see how funds benefit students and give them the tools needed to calculate return on investment.³⁰² Although the current ban on a student unit record was likely a well intended legislative objective to ensure that it protects student data, it is time for Congress to reconsider what information is available on student performance and outcomes.³⁰³ Should Congress choose to reauthorize the

should all agree that government should work as efficiently as possible for the people it serves.”); *see, e.g.*, S. 1121 § 2 (stating that in addition to reducing reporting burden on education institutions, the Act provides more accurate and complete information for students and families who are deciding where to apply for school).

²⁹⁸ Hatch Senate Gov't, *supra* note 284.

²⁹⁹ Kari Travis, *McCrorry Signs College Transparency Act*, CAROLINA J. (July 1, 2016, 3:22 PM), <https://www.carolinajournal.com/news-article/mccrorry-signs-college-transparency-act/>.

³⁰⁰ Jenni White, *Congress Considers Three Bills Aimed at National Student Data Collection*, HEARTLAND INST. (Nov. 15, 2017), <https://www.heartland.org/news-opinion/news/congress-considers-three-bills-aimed-at-national-student-data-collection>. *Cf.* Anthony P. Carnevale, *House Republicans Got This Right: Colleges Should Tell Students How Much Bang Their Buck Will Buy*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/12/08/house-republicans-promise-major-advances-in-college-transparency/?utm_term=.e98632ed15df (explaining how the bill “focus[es] on the earnings outcomes of academic programs and colleges majors.” Consumers would get “to compare cost and earning returns in the same major at different colleges.”).

³⁰¹ Schaffhauser, *supra* note 291.

³⁰² *See* Letter from Postsecondary Nat'l Data Collaborative to U.S. Senate Comm. on Health, Educ., Labor, & Pensions (Apr. 24, 2015), http://www.ihep.org/sites/default/files/uploads/postsecdata/docs/resources/postsecdata_collaborative_help_response.pdf (including “[n]on-federally-aided students must be included in a student unit record system to ensure data [is] comprehensive and representative of all students and all institutions.”).

³⁰³ *See* Sadler, *supra* note 294 (“Promising new encryption technology could allow for computations to be performed on the data while it remains encrypted.”); *see e.g.*, Hatch

Higher Education Act, lifting the ban on a student unit record should be at the forefront of the conversation.³⁰⁴ Emerging technology in conjunction with a well thought out approach to protecting personally identifiable information can ensure the protection of student data.³⁰⁵ Congress owes it to consumers, institutions of higher education, and policymakers, to develop more transparency around college students and the Federal Government's investment in higher education. Congress should act immediately to pass the College Transparency Act and the Foundations for Evidence-Based Policymaking Act.

Senate Gov't, *supra* note 284 ("accurately reporting on student outcomes such as enrollment, retention, completion, and post-college success across colleges and majors" while ensuring the privacy of the individual student is securely protected).

³⁰⁴ See Lauren Camera, *House Republicans Finalize Overhaul of Higher Education Act*, U.S. NEWS (Dec. 13, 2017, 11:24 AM), <https://www.usnews.com/news/education-news/articles/2017-12-13/house-republicans-finalize-overhaul-of-higher-education-act> (stating how the Higher Education Act "chooses clear winners and losers" and "every student must have the opportunity, regardless of income.").

³⁰⁵ See Kreighbaum, *supra* note 205 (explaining how students like Sammy Geisinger, an executive director of the Association of Big 10 Students, is "curious about job prospects and . . . want[s] to know how other graduates from [her] school are doing in the work force.").