

State Data Systems and FERPA

Ready By 21, Credentialed By 26

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I. BASIC PROPOSITIONS

- ❑ Family Educational Rights and Privacy Act (FERPA) permits linking of P-12 and postsecondary data systems without written parent (or student) consent.
- ❑ Full and effective linking of these data systems with workforce data systems is not authorized under current law. Also, FERPA has been rigidly interpreted to prevent legally supportable data sharing. Nevertheless, there are practical steps that states can take to promote linking of these systems.

II. FERPA OVERVIEW

Applicability and Scope

- ❑ FERPA applies to educational agencies and institutions (postsecondary institutions, schools, and school districts) that receive grant funds from the U.S. Department of Education (USED).
- ❑ FERPA prohibits educational agencies and institutions from disclosing students' education records without written parental consent, unless the disclosure comes within one or more of a list of authorized disclosures in the law.
- ❑ Once a student reaches 18 years of age or is attending a postsecondary institution, the consent required of and the rights accorded to parents under FERPA accrue to the student. ("Eligible Student")

II. FERPA OVERVIEW (cont.)

- ❑ FERPA prohibits disclosure of personally identifiable information in students' education records.
- ❑ FERPA does not prohibit the disclosure of anonymous or de-identified data that cannot easily be traced to individual students.
- ❑ New FERPA regulations define "personally identifiable information" to include:
 - Information that alone or in combination would allow a reasonable person in the school community to identify the student with reasonable certainty, and
 - Information requested by a person who the education agency or institution reasonably believes knows the identity of the student to whom the education record relates.
- ❑ "Education records" subject to FERPA are broadly defined to include records, files, and other materials directly related to a student and maintained by an educational agency or institution or by a person acting for it.

II. FERPA OVERVIEW (cont.)

Enforcement

- ❑ Under a 2002 decision of the U.S. Supreme Court in *Gonzaga University v. Doe*, parents and others may not sue a postsecondary institution, school, or school district for alleged violations of FERPA.
- ❑ The potential sanction for a violation of FERPA is a cut-off of federal funds to the postsecondary institution, school, or school district, but —
 - That sanction may be applied only for a "policy or practice" of making unauthorized disclosures of education records.
 - The law requires USED to seek voluntary compliance before seeking any funding remedy.
- ❑ A state education agency that violates FERPA's non-disclosure provisions is not subject to a cut-off of federal funds, but could be debarred from receiving further education records from the postsecondary institution, school, or school district involved for a period of not less than five years.

II. FERPA OVERVIEW (cont.)

New Regulations

- ❑ USED issued new, amended FERPA regulations on December 9, 2008. The regulations address issues that implicate the functions of SLDSs, including some positive changes. The regulations—
 - Authorize states to redisclose education records to recipients and for purposes covered in FERPA-authorized disclosures.
 - Include provisions on recording redisclosures that facilitate a state's ability to make redisclosures.
 - Permit sharing of data between P-12 and postsecondary data systems, but include confusing preamble language that may be read to limit such sharing.
 - Provide what appears to be a narrow window for state disclosure of education records to research organizations for studies to improve instruction.
 - Appear to rule out disclosures of education records to a student's former school for evaluation or accountability purposes.
 - Include flexible guidance on de-identified data.
 - Fail to provide flexibility to share education records with workforce or social service agencies.

II. FERPA OVERVIEW (cont.)

Implications for State Longitudinal Data Systems (SLDSs)

- ❑ Although USED has never withheld federal funds based on a FERPA violation, the law has had a significant chilling effect on the development of robust SLDSs.
- ❑ There has been considerable misunderstanding about what the law forbids.
 - Rather than seeking to balance privacy protections with the need to use student data to improve education, USED has historically made the most restrictive interpretations of FERPA although the new regulations reflect some movement towards balance.
 - USED generally has interpreted FERPA to lodge control and decision-making authority in individual postsecondary institutions, schools, or school districts, not in state educational agencies.
 - New USED leadership is taking a fresh look at these issues.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs

De-identified Data

- ❑ Without parental or eligible student consent, a SLDS may disclose de-identified student data without restriction.

- ❑ New FERPA regulations provide guidance on when information is de-identified and on coding student data for research purposes.
 - Data are de-identified if a reasonable determination is made that the student's identity is not personally identifiable - whether through single or multiple releases, taking into account other reasonably available information.

 - Data from education records may be used for research by attaching a code to each record that permits matching of information, provided information on how the code is created or that would allow identification of the student is not disclosed, the code is not used for other purposes, and the code is not based on a student's social security number or other personal information.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Directory Information

- ❑ "Directory information" is defined to mean information in an education record that would not generally be considered harmful or an invasion of privacy if disclosed.
- ❑ A postsecondary institution, school, or school district may elect to designate (through a public notice) for public disclosure "directory information."
- ❑ Parents or eligible students may opt out of having their directory information released.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Program Evaluations and Audits

- ❑ FERPA authorizes state education authorities (including the SLDS) to use personally identifiable information from student education records at all levels of education in order to evaluate or audit federal and state programs and to meet federal requirements related to those programs.
- ❑ Personally identifiable information provided to the SLDS may be reviewed and analyzed for these purposes by state education employees, or by contractors who are engaged by the SLDS to administer the data warehouse or to assist in performing these functions.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Authority of SLDS to Disclose Education Records to Other Recipients & to Link Separate P-12 and Postsecondary Data Systems

- ❑ The American Recovery and Reinvestment Act of 2009 requires every state, as a condition to receiving state fiscal stabilization funds, to assure that it will establish a state data system that links student data across all levels of education, from pre-K through postsecondary programs.
 - It is vital that information be shared up and down the pipeline from pre-K to postsecondary education in order to provide feedback at all levels to promote continuous improvement and alignment.
- ❑ Under prior USED interpretations, SLDSs could disclose education records only to their own employees or contractors; disclosures between separate P-12 and postsecondary data systems would not be permitted.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Authority of SLDS to Disclose Education Records to Other Recipients & to Link Separate P-12 and Postsecondary Data Systems (cont.)

- ❑ New FERPA regulations authorize state education agencies (including the SLDS) to redisclose education records they receive from postsecondary or P-12 schools and from school districts to other authorized recipients and to share data between P-12 and postsecondary data systems.
- ❑ The new FERPA regulations also facilitate these redisclosures by clarifying that states that make the redisclosures:
 - May record the redisclosures themselves;
 - May maintain the recordations by groupings such as by district, school, or class; and
 - Need to provide the recordations back to the postsecondary institution or P-12 school or school district only upon request.
- ❑ However, language in the preamble suggests a possible USED view that a postsecondary data system may disclose education records to a P-12 system only if the P-12 system has authority under state law to evaluate postsecondary programs (and vice versa). This restriction is unsupported by the law or the terms of the regulations.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Authority to Disclose Education Records for Research Studies

- ❑ FERPA authorizes use of education records to organizations that will conduct research studies "for or on their behalf" to improve instruction.
- ❑ USED previously interpreted this authority very narrowly to apply only to studies initiated by the educational agency or institution, not by research organizations.
- ❑ The new FERPA regulations reverse this position, providing instead that the educational agency or institution must enter into an agreement with the research organization specifying the purpose of the study and safeguards to protect the information. The problem is that "educational agency or institution" is defined in FERPA regulations not to include state agencies.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Authority to Disclose Education Records for Research Studies (cont.)

- ❑ The preamble to the new regulations indicates USED's position that a state may enter into a research agreement under these provisions if it has authority under state law to enter into agreements for or on behalf of educational agencies and institutions. This is an overly narrow interpretation of FERPA's language.
- ❑ Alternatively, the preamble encourages states to use the separate FERPA provision for evaluating state and federal programs in order to disclose education records to research organizations for research studies. However, USED has narrowly interpreted that provision to require direct contractual control of the outside organization by the state.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Sharing Student and Workforce Data

- ❑ Postsecondary institutions, secondary schools, school districts, and workforce agencies need to be able to share education and workforce data for evaluation and accountability purposes, and to collaborate in meeting the needs of individuals who are both students and workforce clients.
- ❑ However, FERPA does not authorize disclosures of education records to workforce (or other non-education) agencies for the purpose of strengthening workforce (or other) services. A statutory change is needed to authorize disclosures for these purposes.
- ❑ Also, USED—in letters and in the preamble to the new regulation—has interpreted FERPA as not permitting disclosures of education records to workforce agencies for the purpose of evaluating education programs on the theory that the education agency does not control the workforce agency and, therefore, the workforce agency may not be an authorized representative of the education agency. This interpretation is unsupported by law or facts.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Sharing Student and Workforce Data (cont.)

- ❑ The FERPA problem may be avoided (but only if the purpose is to evaluate education programs) in the following ways:
 1. Have the workforce agency provide its data to the SLDS or to a SLDS contractor which may match the education and workforce data and report aggregate de-identified results to the workforce agency;
 2. Detail workforce agency employees responsible for reviewing education records and matching them with workforce data to the state education agency for purposes of performing these functions.
 - The detailed employee would be subject to supervision by education officials in performing these functions.
 - The detail need be in effect only for the time during which these functions are performed, and the detailed employee(s) would be barred from sharing education records with other workforce agency employees; or

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Sharing Student and Workforce Data (cont.)

3. Through state law (statute, regulation, or executive order) designate the workforce agency as the authorized representative of the state education agency for purposes of using education records to evaluate education programs, subject to oversight by the state education agency in using and safeguarding these records.

(The preamble to the new FERPA regulation suggests including an appropriate consent form to authorize disclosure of education records to the workforce agency for parents or an eligible student to sign as part of the registration process for workforce services. However, most of the useful workforce data are provided by employers for employees who do not register for workforce services.)

- ❑ Federal law does not bar disclosure of appropriate workforce data to the SLDS. The Workforce Investment Act includes a provision making FERPA applicable, but the Department of Labor (DOL) interprets this provision not to extend FERPA coverage to non-education agencies. Also, DOL regulations regarding confidential unemployment compensation information authorize disclosures of that information to state and local public officials for use in their performance of their official duties, including program assessment.

III. Permissible Uses and Disclosures of Student Data Related to SLDSs (cont.)

Sharing Data Between SLDSs and Workforce Agencies

Data	From	To	Purpose	OK?
PI Workforce Data	Workforce Agency	SLDS/schools/education agencies	Any	Yes
De-identified Student Data	SLDS	Workforce Agency	Any	Yes
PI Student Data	SLDS	Workforce Agency	Match education records and workforce data to evaluate/improve workforce programs	No*
PI Student Data	SLDS	Workforce Agency	Match education records & workforce data to evaluate/audit education programs	No, unless (a) written consent by parent or eligible student; (b) workforce employees who review education records detailed to education agency for that purpose; or (c) state law designates workforce agency as authorized representative of education agency for this purpose, subject to oversight of state education agency in using/safeguarding records. †
PI Student Data	SLDS	Contractor to SLDS (the entity may also contract with Workforce Agency)	Match education records & workforce data to evaluate/audit education programs	Yes†
* PI Student Data † PI Student Data	SLDS	SLDS/education agency employee disclosure by Workforce Agency, use of the education records by a SLDS employee or contractor for the purpose of evaluating workforce programs would likely not be authorized education programs	Match education records & workforce data to evaluate/audit education programs	Yes†

IV. NEXT STEPS FOR STATES

States that have or are planning to establish a unified P-16 SLDS or separate P-12 and/or postsecondary data systems and to pursue sharing of education and workforce data should take the following steps to ensure consistency with FERPA:

- ❑ Review state laws and policies and gaps and, as appropriate, develop and adopt state laws or regulations that — —
 - Authorize SLDSs to redisclose education records for FERPA-authorized purposes and recipients.
 - Authorize SLDSs to enter agreements for research studies to improve instruction for or on behalf of postsecondary institutions, schools, and LEAs.
 - In the case of states with separate P-12 and postsecondary data systems, authorize each system to receive education records from the other system for purposes of evaluating, auditing, or ensuring compliance with the requirements of state and federal education programs.
 - Authorize postsecondary institutions and data systems to disclose education records to a student's former school district or secondary school for the purpose of evaluating the education programs of that school district or school.
 - Designate the workforce agency as an authorized representative of the state education agency for the purpose of receiving education records to evaluate/audit education programs.
 - For purposes of evaluating education programs, define "education" broadly to include job training programs.

IV. NEXT STEPS FOR STATES (cont.)

- ❑ Review state privacy laws to determine that the collection and disclosure of personally identifiable information from student education records by the SLDS complies with these laws as well as FERPA.
- ❑ If there are separate P-12 and postsecondary SLDSs, enter into agreements between them to share data for evaluation/studies. If there is a SLDS only for P-12, enter into such agreements with particular postsecondary institutions.
- ❑ Subject to state law/regulation, develop policies, procedures, and an agreement for authorizing studies to improve instruction.
 - Policies should encompass studies that would benefit instruction in postsecondary institutions or schools (or school districts) in the state at either the P-12 or postsecondary levels, not just studies to improve instruction at a particular school.

IV. NEXT STEPS FOR STATES (cont.)

- ❑ Develop and issue procedures for recording redisclosures and for transmitting recordations to postsecondary institutions, schools, or school districts upon request.
- ❑ Ensure that education records maintained in the SLDS on behalf of a postsecondary institution, school, or school district are properly linked to that institution, school, or school district, with "firewalls" that bar access to those records by any other agency, institution, or person, except pursuant to an authorized FERPA disclosure or as otherwise consistent with FERPA.
- ❑ Develop appropriate standards and a process to determine whether data are de-identified and to code data for research purposes, as appropriate.
- ❑ Consider using a contractor to match workforce and education data.

V. CONCLUSION

- ❑ Federal law supports and requires state longitudinal data systems, which are intended to facilitate more effective use of data for improving education and meeting the academic needs of students, goals that are consistent with core state and federal policy and law.
- ❑ Through state longitudinal data systems, states, educators, and researchers should be able to use student data to meet these purposes and to collaborate with workforce and social service agencies to meet the needs of children and adults without violating FERPA or the privacy protections of students and their parents that FERPA is designed to secure.
- ❑ For this to happen, FERPA needs to be interpreted or, as necessary, amended to harmonize these state and federal policies; not, in effect, to thwart core functions of state longitudinal data systems.

CONTACT INFORMATION

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