

# Federal and State Laws Impacting Data Sharing

## Education

### Federal Laws

**20 U.S.C. §1232g**

**34 CFR §99**

The confidentiality requirements regarding education data are contained in Section 444 of the General Education Provisions Act commonly referred to as the Family Educational Rights and Privacy Act (FERPA),<sup>1</sup> and its implementing regulations.<sup>2</sup> FERPA sets out requirements for the protection of students' education records and provides parents and eligible students<sup>3</sup> (a student who reaches the age of 18 years or attends a school beyond the high school level) certain rights with respect to the student's education records, including the right to maintain the confidentiality of the education information. This law applies to an educational agency or institution to which funds have been made available under any federally-administered Department of Education program if: (1) the educational institution provides educational services or instruction, or both, to students; or (2) the educational agency is authorized to direct and control public elementary or secondary, or post-secondary educational institutions.<sup>4</sup> ("Educational agencies or institutions" that receive funds from programs administered by the U.S. Department of Education generally include public schools, school districts (or "local education agencies (LEAs)), and postsecondary institutions, such as colleges and universities. They can also include pre-K programs if the program receives federal Department of Education funds. If private and parochial schools receive such funding, they are also subject to FERPA.)

FERPA requires that all "personally identifiable information" (PII) remain confidential unless the disclosure is pursuant to one of the enumerated exceptions to the rule. PII includes information that can be used to distinguish or trace an individual's identity either directly or indirectly through linkages with other information.<sup>5</sup> "Disclosure" is defined as permitting "access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record."<sup>6</sup> On an annual basis, the educational agency or institution must establish criteria of FERPA rights and disclosure conditions and provide such written notice to all parents and eligible children.<sup>7</sup>

Basically, FERPA states that personally identifiable information (PII) contained in education records cannot be disclosed without the consent of the child's parent or eligible student. The requirements of a consent must include the following:

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<sup>1</sup> 20 U.S.C. 1232g

<sup>2</sup> 34 CFR Part 99.

<sup>3</sup> An eligible student is one to whom the rights accorded to parents under FERPA are transferred. 34 CFR §99.5(a)(1). An eligible student is 18 years of age or older or attends a postsecondary education institution. 34 CFR §99.3.

<sup>4</sup> 34 CFR §99.1

<sup>5</sup> 34 CFR §99.3

<sup>6</sup> 34 CFR §99.3

<sup>7</sup> 34 CFR §99.7(a)(2) and (a)(3)

1. Name of student,
2. Specify the records that may be disclosed,
3. State the educational agency or institution disclosing the information,
4. Identify the party or class of parties to whom the disclosure may be made,
5. Purpose of the disclosure,
6. Signature of parent or individual with authority to consent (electronic signature must identify and authenticate a particular person as the source of the electronic consent and indicate approval of the electronic consent), and
7. Date of signature.<sup>8</sup>

When a disclosure is made by the school or educational institution pursuant to a consent, if a parent or student who is 18 years old or in a post-secondary education program, the educational agency or institution shall provide such person with a copy of the disclosed records.<sup>9</sup>

There are a number of exceptions to the FERPA rule of confidentiality requiring an individual consent from the parent or eligible student. An exception to the FERPA confidentiality rule requiring consent is the disclosure of “Directory Information.”<sup>10</sup> An educational agency or institution must have a written policy of the information designating the data contained in the directory information and such information may only include PII that is generally not considered harmful or an invasion of privacy if disclosed. The policy must clearly detail the categories of PII that have been designated as directory information, the parent’s or eligible student’s right to refuse to let any or all of these types of PII be designated as directory information, and the period of time that the parent or eligible student has to “opt out” of such a disclosure of directory information.

Typically, “directory information” includes but is not limited to, student’s name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, grade level, enrollment status (e.g., full-time or part-time, undergraduate or graduate), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, most recent educational agency or institution attended, and dates of attendance.<sup>11</sup> An educational agency or institution must give prior public notice to parents of attending students prior to disclosing directory information. But the school does not have to notify a parent or eligible student individually.<sup>12</sup> And there are a number of conditions where parents or eligible students do not have the right to “opt out” of the disclosure of directory information.<sup>13</sup> Last, FERPA does not require educational agencies or institutions to record disclosures of appropriately designated directory information.<sup>14</sup>

Another exception under FERPA is disclosure of confidential education information to a school official<sup>15</sup>, including but not limited to teachers within the educational agency or institution, whom the agency or institution has determined to have legitimate educational interests.<sup>16</sup> School officials with legitimate

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<sup>8</sup> 34 CFR §§99.30(a) and (b); 99.33

<sup>9</sup> 34 CFR §99.30(c)

<sup>10</sup> 34 CFR §99.3

<sup>11</sup> 34 CFR §99.3

<sup>12</sup> 34 CRR §99.37

<sup>13</sup> 34 CFR §§99.31(a)(11); 99.37

<sup>14</sup> 34 CFR §99.32(d)(4)

<sup>15</sup> 34 CFR §99.31(a)(1)

<sup>16</sup> 34 CFR §99.31(a)(1)(i)(A)

educational interests may also include a contractor, consultant, volunteer, or other party to whom an educational agency or institution has outsourced services or functions, provided the outside party:

1. Performs an institutional service or function for which the educational agency or institution would otherwise use employees;
2. Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
3. Complies with the requirements of FERPA governing the use, maintenance, and re-disclosure of PII from education records.<sup>17</sup>

If an educational agency or institution has a policy of disclosing education records to school officials, the educational agency or institution must include in its annual notification of FERPA rights the criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.<sup>18</sup> An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those educational records in which they have legitimate educational interests. Additionally, an educational agency or institution that does not use physical or technological access controls must ensure that it has an effective administrative control for access to the education records and that it remains in compliance with the legitimate educational interest requirement.<sup>19</sup> Finally, FERPA does not require educational agencies and institutions to record re-disclosures of PII from education records to school officials.<sup>20</sup>

For research purposes, there is a studies exception requiring individual consents to share education information. FERPA permits the disclosure of PII to organizations conducting studies for, or on behalf of, educational agencies or institutions to develop, validate, or administer predictive tests, administer student aid programs, or improve instruction.<sup>21</sup> The educational agency or institution may disclose PII if the disclosing educational entity enters into a required written agreement<sup>22</sup> (including but not limited to a memorandum of understanding or data sharing) with the organization conducting the study, the study does not permit identification of individual parents and students by anyone other than representatives of the organization with legitimate interests in the information, and the information is destroyed when no longer needed for the study.<sup>23</sup>

In addition to the above, another exception is for audit or evaluation purposes. The disclosure from education records must be to: (a) audit or evaluate a Federal or State-supported education program; or (b) enforce or comply with Federal legal requirements related to the program. The receiving entity must be a State or local educational authority or other FERPA-permitted entity or must be an authorized representative of a State or local educational authority or other FERPA-permitted entity. The party disclosing the personally identifiable information (PII) from education records must enter into a written agreement to designate anyone other than its employee or its authorized representative (each new audit, evaluation, or enforcement effort requires an agreement) and is responsible for using reasonable methods to ensure to the greatest extent practicable that the authorized representative: (1) uses the PII

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<sup>17</sup> 34 CFR §99.31(a)(1)(i)(B)

<sup>18</sup> 34 CFR §99.7(a)(3)(iii)

<sup>19</sup> 34 CFR §99.31(a)(1)(ii)

<sup>20</sup> 34 CFR §99.31(a)(1)

<sup>21</sup> 34 CFR §99.31(a)(6)

<sup>22</sup> 34 CFR §99.31(a)(6)

<sup>23</sup> 34 CFR §99.31(a)(6)(iii)(C)

only for the authorized purpose; (2) protected the PII from further unauthorized disclosures or other uses; and destroys the PII when no longer needed for the authorized purpose and in accordance with any specified time period set forth in the written agreement.<sup>24</sup>

In addition to the above, there are a number of exceptions where education record information may be disclosed without prior consent, including:

1. Other school officials within the agency/institution whom the agency/institution has determined to have legitimate educational interests;
2. Contractor, consultant, volunteer, or other party whom an agency/institution has outsourced institutional services or functions may be considered a school official;
3. Educational agency/institution where student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for the purposes related to the student's enrollment or transfer;
4. Particular authorized government officials;
5. In connection with financial aid;
6. Juvenile justice system and the system's ability to effectively serve the student whose records are released;
7. Organizations conducting studies for, or on behalf of, educational agencies/institutions to:  
(a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (improve instruction);
8. Accrediting organizations to carry out their accrediting functions;
9. Parents of a dependent child or a student who is not an eligible student;
10. Comply with a judicial order or lawfully submitted subpoena;
11. Health or safety emergency;
12. To victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense; and
13. De-identified records and information (removal of all personally identifiable information).<sup>25</sup>

On January 14, 2013, the Uninterrupted Scholars Act (USA), Pub. L. No 112-278, was signed into law creating another FERPA exception to general requirement of individual consent and permitting the educational agency or institution to disclose education records of students to a state or local child welfare agency or tribal organization (child welfare agency) authorized to access a student's case plan when such child welfare agency is legally responsible for the care and protection of the student. There were many studies issued and convenings held to discuss the educational outcomes for children in foster care, resulting in the passage of this federal legislation amending FERPA and adding another exception. While not mandatory, this FERPA exception was enacted to permit, encourage and assist educational agencies or institutions to share PII education information and work together with child welfare agencies to improve the educational outcomes of children in foster care.

The USA exception also amended a notice requirement that generally applies when a disclosure is made pursuant to a lawfully issued subpoena or judicial order. Specifically, when an educational agency or institution must provide written notice to a parent or eligible student before complying with the subpoena or judicial order, such notice requirement is not applicable when the parent is a party to a state court proceeding regarding child abuse and neglect (as defined in the Child Abuse Prevention and

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<sup>24</sup> 34 CFR §99.35

<sup>25</sup> 34 CFR §99.31

Treatment Act (CAPTA)<sup>26</sup>) or dependency matters and the judicial order or subpoena is issued in the context of such proceeding. With the passage of the USA, in conjunction with the FERPA studies exception, jurisdictions throughout the county now have the legal ability to share educational information with child welfare agencies.

## **State Laws**

**C.G.S.A. § 10-15b**

**C.G.S.A. § 10-234bb**

**C.G.S.A. § 10-234cc**

**C.S.G.A. § 10-234dd**

**C.S.G.A. § 10-10a(b)**

**C.S.G.A. § 19a-581**

**C.S.G.A. § 10-154a**

**C.S.G.A. § 1-210(b)(17)**

Any exchange of student information, student records, or student-generated content between a local or regional board of education and a contractor requires a written agreement. The law requires that the contract contain elements including a statement that the student data is not the property of or under the control of the contractor, a provision where the board of education may request the deletion of data in the contractor's possession, procedures by which a student or parent could correct any erroneous information, the contractor must ensure the security and confidentiality of data, procedures by which the contractor must notify the board of any unauthorized release, disclosure or acquisition of data, and that the contractor must abide by the Family Educational Rights and Privacy Act.<sup>27</sup> Contractors are also required to implement and maintain certain security protocols, practices and technical safeguards to protect student data consistent with federal guidance related to protected health information.

In addition to education and school records, state law discussed other types of information obtained by schools and teachers. HIV information is strictly confidential and imposes significant responsibilities on school districts. When school officials become aware of a student's HIV status, they may not share that information with other school personnel as they do with other educational records.<sup>28</sup> Communications concerning drug or alcohol abuse or problem made in confidence by a student to a school professional (e.g. teacher, nurse) need not be disclosed by the professional employee.<sup>29</sup> Any document that is confidential under FERPA is not subject to the Freedom of Information Act.<sup>30</sup>

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<sup>26</sup> 42 U.S.C. §§5101, section 3

<sup>27</sup> C.G.S.A. § 10-234bb

<sup>28</sup> C.S.G.A. § 19a-581

<sup>29</sup> C.S.G.A. § 10-154a

<sup>30</sup> C.S.G.A. § 1-210(b)(17)