Data Sharing Under FERPA
An update on the latest guidance from the U.S. Department of Education

October 2013
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Where is the latest guidance???
FERPA
Exceptions
Privacy Considerations of Teacher/Student Linkages
Contracting with IT Vendors
Delayed: Government Shutdown

Overview

- FERPA Rules Governing Education Data
- Confidentiality Protections of Wage Data
- Frameworks for Linking Education and Wage Data
- Additional Resources
FERPA Rules Governing Education Data

- The Family Educational Rights and Privacy Act (FERPA) requires prior written consent before personally identifiable information (PII) from education records can be disclosed to a third party;
- A number of exceptions to this consent requirement exist;
- FERPA’s “Audit and Evaluation” Exception provides one mechanism for linking education and wage data without consent.

FERPA’s Audit and Evaluation Exception

A state or local educational authority may designate a third party as their “authorized representative” and then disclose PII from education records to them for the purposes of conducting an audit or evaluation of a federal or state-supported education program.
FERPA's Audit and Evaluation Exception - Requirements

- Disclosing entity must be a state or local educational authority;
- Must be for the evaluation of a federal or state-supported education program;
- Must use a written agreement to designate the recipient as the authorized representative;
- The written agreement must include a number of required elements;

*(see “Guidance on Reasonable Methods and Written Agreements”)*

FERPA's Audit and Evaluation Exception - Requirements (cont’d)

The recipient must:

- Comply with the terms of the written agreement;
- Use the PII only for the authorized purpose;
- Protect the PII from further disclosure or other uses;
- Destroy the PII when no longer needed for the evaluation.
Confidentiality Protections of Wage Data

- Federal regulations require each state to have laws for maintaining the confidentiality of the state’s unemployment compensation (UC) records;
- Specific requirements of these laws vary from state to state;
- Two types of disclosures:
  - Required
  - Permissive

Frameworks for Linking Education and Wage Data

Disclosures of PII from wage data to educational entities would be considered “permissive” disclosures, and must satisfy the following criteria:

- The educational entity must meet the definition of “public official”
- The disclosure must be to support the performance of the public official's official duties
- The state UC agency must enter into a written agreement with the public official that meets the requirements of §603.10
Option 1: Aggregate Wage Data

- SEA designates State UC agency as its authorized representative
- SEA provides UC agency with PII (name, date of birth, SSN) on graduates, along with program/cohort information
- UC agency matches the education data to wage records, and produces aggregate results for each program/cohort
- UC agency returns the matched, aggregate data to the SEA, and destroys the PII used for the match.

Aggregate data is not subject to the UC data confidentiality protections as long as individuals cannot be identified in the data (e.g., in small cells).

Option 2: Individual Wage Data

- SEA designates State UC agency as its authorized representative
- SEA provides UC agency with PII (name, date of birth, SSN) on graduates;
- UC agency matches the education data to wage records, and produces a linked, individual-level file;
- UC agency returns the linked file (containing PII) to the SEA under the “public official” provision.

The SEA would be required to adhere to the §603.10 confidentiality and disclosure rules, as specified in the written agreement.
Option 3: Aggregate Education Data

- The State UC agency discloses PII on all wage earners to the SEA, under the “public official” provision.
- The SEA matches the UC data to the individual education records, and generates aggregate results by program/cohort;
- The SEA then returns the aggregate results by program/cohort to the UC agency

Aggregate data is not subject to FERPA protections as long as individuals cannot be identified in the data (e.g., in small cells).

Other Options

Other data-sharing options exist, and other data flows (including cross-state data-sharing) are also possible, depending on the specific circumstances and the program or programs being evaluated.

Alternatives to consider include:
- Wage Record Interchange System (WRIS)
- Wage Record Interchange System 2 (WRIS 2)
- Multi-state Agreements or Memoranda of Understanding
Additional Resources

- Guidance on Reasonable Methods and Written Agreements
- Joint ED/DOL Guidance on Education and Wage Record Sharing (forthcoming)

Key Points to Remember

- Properly de-identified data can be shared without any FERPA considerations and should be your FIRST option as it limits the risk of unauthorized PII disclosure.
- In most cases, consent is the best approach for sharing PII with non-profit organizations.
- Directory Information is often misunderstood. Opt-out provisions do not prevent data from being shared under the Audit/Evaluation or School Official exceptions.
School Official Exception

Schools or LEAs can use the School Official exception under FERPA to disclose education records to a third party only if the outside party:

- Performs a service/function for the school/district for which the educational organization would otherwise use its own employees.
- Is under the direct control of the organization with regard to the use/maintenance of the education records.

School Official Exception (cont’d)

- Uses education data in a manner consistent with the definition of the “school official with a legitimate educational interest,” specified in the school/LEA’s annual notification of rights under FERPA.
- Does not re-disclose or use education data for unauthorized purposes.
Audit/Evaluation

- Data can only be shared in order to
  - Audit or evaluate a Federal- or State-supported education program, or
  - Enforce or comply with Federal legal requirements that relate to those education programs.
- Education program – broad, but not limitless.

Written Agreements: Audit/Evaluation Exception

- Written agreements must
  - Designate an authorized representative.
  - Specify what PII will be disclosed and for what purpose.
  - Describe the activity to clarify that it falls under the Audit/Evaluation exception.
Written Agreements: Audit/Evaluation Exception

- Written agreements **must**
  - Require an authorized representative to destroy PII upon completion of the evaluation and specify the time period in which the information must be destroyed.
  - Establish policies and procedures, consistent with FERPA and other Federal and State confidentiality and privacy laws, to protect PII from further disclosure and unauthorized use.

Non-Profit Scenarios #1 & #2

- Ray Marshall Center & Austin ISD
- Midwest school district & large non-profit
**Other than consent...**

Requirements for consent forms:
(1) Specify the records that may be disclosed
(2) State the purpose of the disclosure; and
(3) Identify the party or class of parties to whom the disclosure may be made.

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**Written Agreements: Best practices**

“FERPA represents the floor for protecting privacy, not the ceiling.”

- Bind individuals to the agreement
- Specify points of contact/data custodians
- Mention Institutional Review Board review and approval
- State ownership of PII
- Identify penalties
Written Agreements: Best practices

- Include funding terms
- Maintain right to audit
- Identify and comply with all legal requirements
- Have plans to handle a data breach
- Review and approve reported results
- Define terms for conflict resolution
- Specify modification and termination procedures
- Inform the public about written agreements
  - In some cases, a separate confidential IT Security Plan may be appropriate

Audit & Evaluation Written Agreement Example

- State of Connecticut multi-agency project.
  - Includes non-educational agencies
Background

- MOA to enable data linkages for P20W system
  - Goal:
    - Create a solid template for participating agency attorneys to modify
  - Challenges:
    - Agency attorneys lack of familiarity with new FERPA guidelines
    - Wary State Assistant Attorney Generals
    - Lack of in-house counsel

MOA for P20W system

- UCHC data matching process & software located on Main Server at BEST**
  - unit level data without key identifiers for audit/evaluation of educational programs

- Remote Server
  - State Department of Education (K-12)
  - Board of Regents (Community Colleges & State Universities)
  - Department of Labor (DOL)
  - CCIC***
  - UConn

* UCHC: University of Connecticut Health Center
** BEST: Bureau of Enterprise Systems and Technology (DOIT)
*** Connecticut Conference of Independent Colleges (C-CIC)
Process for P20W system MOA – phase 1

- Read relevant FERPA sections
- Utilized the PTAC document Guidance for Reasonable Methods & Written Agreements
- Gathered example MOU’s
- Created a draft
- Asked PTAC for review
- PTAC read and provided feedback through conference call
- Made adjustments
- Circulated to participating agency attorneys
- Meeting scheduled to review/adjust … finalize …

Process for P20W system MOA – phase 2

- Agency attorneys reviewed & developed own versions
- UCHC Assistant Attorney General got involved and raised larger issues regarding impact of FOIA
- Discussions revealed that our model was not entirely accurate in its representation of where PII would flow
- More questions to PTAC
- More revisions to data sharing agreements
- Communicated changes among agency attorneys and Data Governing Board members
- Bundled documents for review by State Attorney Generals Office
**P20 WIN Data sharing agreements**

Main Memorandum of Agreements (MOAs):
- One MOA for each participating agency
- Each MOA includes the participating agency, UCHC & BEST
- Enables the participating agency to participate in the system and share PII only for the purpose of conducting a data match based upon approved data queries
- Meets written requirements under FERPA for ‘Audit/Evaluation’ exception

Query Management Document/Agreement (QMD):
- One QMD for each data request/query
- Each QMD will meet the written requirements under FERPA for data sharing agreements that use the ‘Audit or Evaluation’ exception
- Identifies the ‘Authorized Representative’ to conduct evaluation using the matched data
- Each agency whose data would be included must sign that they approve before the request can be fulfilled.

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**Let’s look at the language in the agreement…**

- Authority:

3. Purpose of the Agreement [99.35(a)(3)(i) and 99.35(a)(3)(iii)(B)]

Purpose: audit and evaluation

WHEREAS, the purpose of the agreement is to enable and support the audit and evaluation of education programs offered by the [X Education Authority] including evaluation of the degree to which education programs are preparing students for post-secondary education and for success in the workforce; and
Sample Language

- Clearly articulate the purpose:

3. Purpose of the Agreement [99.35(a)(3)(i) and 99.35(a)(3)(iii)(B)]

Purpose: audit and evaluation
WHEREAS, the purpose of the agreement is to enable and support the audit and evaluation of education programs offered by the [X Education Authority] including evaluation of the degree to which education programs are preparing students for post-secondary education and for success in the workforce; and

Sample Language

- Designating the Authorized Representative:

FERPA allows designation of authorized rep
WHEREAS, FERPA allows an educational agency or institution to disclose personally identifiable information from education records without the consent required by §99.30 if the disclosure meets one or more of the conditions under §99.31, and FERPA allows disclosures to authorized representatives of state and local educational authorities for the purpose of conducting an audit or evaluation of educational programs or for the compliance with Federal legal requirements that relate to those program §99.31(3)(iv) & §99.35; and
Sample Language

- Restrict usage outside of the agreement:

Data used for the purpose of this agreement only
The Authorized Representative shall only utilize PII from education records of [X Education Authority] sufficient to meet the purposes of this Agreement. Approval given to the Authorized Representative.

Specify PII to be shared

<table>
<thead>
<tr>
<th>Data for Matching</th>
<th>Data Disclosed by CSBE</th>
<th>Data Disclosed by BOR</th>
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</thead>
<tbody>
<tr>
<td>Name: first, middle, last, suffix*</td>
<td>Name: first, middle, last, suffix*</td>
<td>Name: first, middle, last, suffix*</td>
</tr>
<tr>
<td>Date of birth*</td>
<td>Date of birth*</td>
<td>Date of birth*</td>
</tr>
<tr>
<td>Gender*</td>
<td>Gender*</td>
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<tr>
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<td>Graduating high school code (ACT/CEEB)</td>
<td>Graduating high school code (ACT/CEEB)</td>
</tr>
<tr>
<td>EASID</td>
<td>EASID (where available)</td>
<td>EASID (where available)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CSBE</th>
<th>Institution Information</th>
<th>BOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facility code (district, school, institution)</td>
<td>Institution IPEDS code &amp; name</td>
<td>Institution IPEDS code &amp; name</td>
</tr>
<tr>
<td>Gender*</td>
<td>Gender*</td>
<td>Gender*</td>
</tr>
<tr>
<td>Race / Ethnicity*</td>
<td>Race / Ethnicity</td>
<td>Race / Ethnicity</td>
</tr>
<tr>
<td>Federal Free / Reduced Lunch status</td>
<td>Food Stamp recipient</td>
<td>Free / Reduced Lunch status</td>
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<tr>
<td>English Language Learner status</td>
<td>Pell eligibility</td>
<td>English Language Learner status</td>
</tr>
<tr>
<td>Gifted and talented status</td>
<td>Veteran Code</td>
<td>Gifted and talented status</td>
</tr>
<tr>
<td>Special Education status (ID: Yes or No)</td>
<td>Permanent Address (state, country)</td>
<td>Special Education status (ID: Yes or No)</td>
</tr>
<tr>
<td>Transfer status (In and out)</td>
<td></td>
<td>Transfer status (In and out)</td>
</tr>
<tr>
<td>Placement</td>
<td></td>
<td>Placement</td>
</tr>
<tr>
<td>Test scores (AP, CMT, CAPT, SAT, ACT) = all subjects</td>
<td>Placement test scores (Accuplacer) SAT</td>
<td>Test scores (AP, CMT, CAPT, SAT, ACT) = all subjects</td>
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<tr>
<td>Academic Experience</td>
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<tr>
<td>Graduation date</td>
<td>Enrollment status (full, part-time, withdrew)</td>
<td>Graduation date</td>
</tr>
<tr>
<td>High school courses completed</td>
<td>Enrollment dates (initial &amp; term dates)</td>
<td>High school courses completed</td>
</tr>
<tr>
<td>Course grades</td>
<td>Credits attempted (term &amp; cumulative)</td>
<td>Course grades</td>
</tr>
</tbody>
</table>
Written Agreement Best Practice Examples

All necessary precautions – safeguard confidential info
The Authorized Representative agrees to take all necessary precautions to safeguard confidential student information and shall comply with all state and federal laws concerning the safeguarding and disclosure of such student information.

Data ownership
Authorized Rep understands that the Agreement does not convey ownership of any shared data.

Data Storage
The Authorized Representative agrees to store all confidential data obtained from [X Education Authority] on secure computers and in secure files to which access is restricted to authorized persons.

Frequently Asked Question #1

Q: If we go the consent route for sharing data with a non-profit, can the non-profit or the SEA get the consent from the parents?

A: FERPA does not address where the consent comes from, so yes, the non-profit or SEA can obtain the consent. Remember, even with consent the school/agency is not required to provide the information.
Non-Profit Scenario #3

South Mason County School District (LEA) wishes to enter into an agreement with a coalition of outside non-profit organizations that are running various afterschool programs in the community. The LEA would like to view these coalition members as its “agents” in continuing its education program and wishes to create an agency relationship that would allow the programs to have PII from education records.

Q: Would FERPA permit the LEA to enter into an agreement with the coalition members for purposes of disclosing PII from education records of the students who participate in one or more of the afterschool programs?

Answer to Scenario #3

- No.
  - Generally, FERPA requires written consent before PII from students’ education records may be disclosed to organizations running afterschool programs.
  - “School Official” exception: Because these organizations are not performing a service or function for which the LEA would otherwise use its employees, this would not apply.
  - FERPA would permit the LEA to disclose properly designated directory information on those students whose parents have not opted out of the disclosure of their directory information, in compliance with the school’s or school district’s directory information policy.
  - Best Practice: Build consent into the program enrollment process to permit data sharing and increase transparency.
Contracting IT Services

Remember: Use the Appropriate FERPA Exception

Schools/LEAs: IT contractors must meet criteria under the School Official exception discussed earlier.

SEAs: Cannot use the School Official exception; therefore, must designate IT service providers as “authorized representatives” under the Audit/Evaluation exception.
What about Cloud Services?

- FERPA allows the use of cloud services, but the arrangement must meet the School Official exception requirements:
  - Service/function that school/district would otherwise use its employees to perform, direct control over the provider’s data use, & data use consistency with annual notification, incl. legitimate educational interest requirement.
- Best practices: See FAQ on Cloud Computing from PTAC/ED

FAQ: Ownership of Data

Q: When schools share data with a 3rd party IT provider, who “owns” the data?

A: Schools are always responsible for the data, even when they share it!

The IT provider must comply with both FERPA and the terms of the contract. The provider never “owns” the data, and can only act at the direction of the school.

Other terms depend on the specific agreement between the school and the provider.
Discussion: 3rd Party Use of Data

Q: What are cloud providers (or other 3rd party providers) allowed to do with student data?

A: IT providers can only use student data at the direction of the school or district, and in accordance with FERPA and the terms of their contract or written agreement.

FAQ: 3rd Party Use of Anonymized/De-identified Data

Q: Can cloud providers keep and use anonymized or de-identified student data for other purposes?

A: It depends on how and why the data were de-identified.
SEA-Provided IT Systems

Q: Can SEAs offer centralized IT services (such as student information systems) to the LEAs in their state?

A: Yes, but the same FERPA requirements would apply to the SEA as if it were any other IT provider (direct control, authorized use, etc.)

Discussion: Teacher Use of Free Services & “Apps”

Q: Can teachers elect to use free services and apps in their classes?