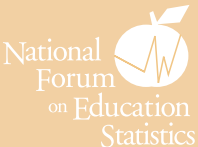
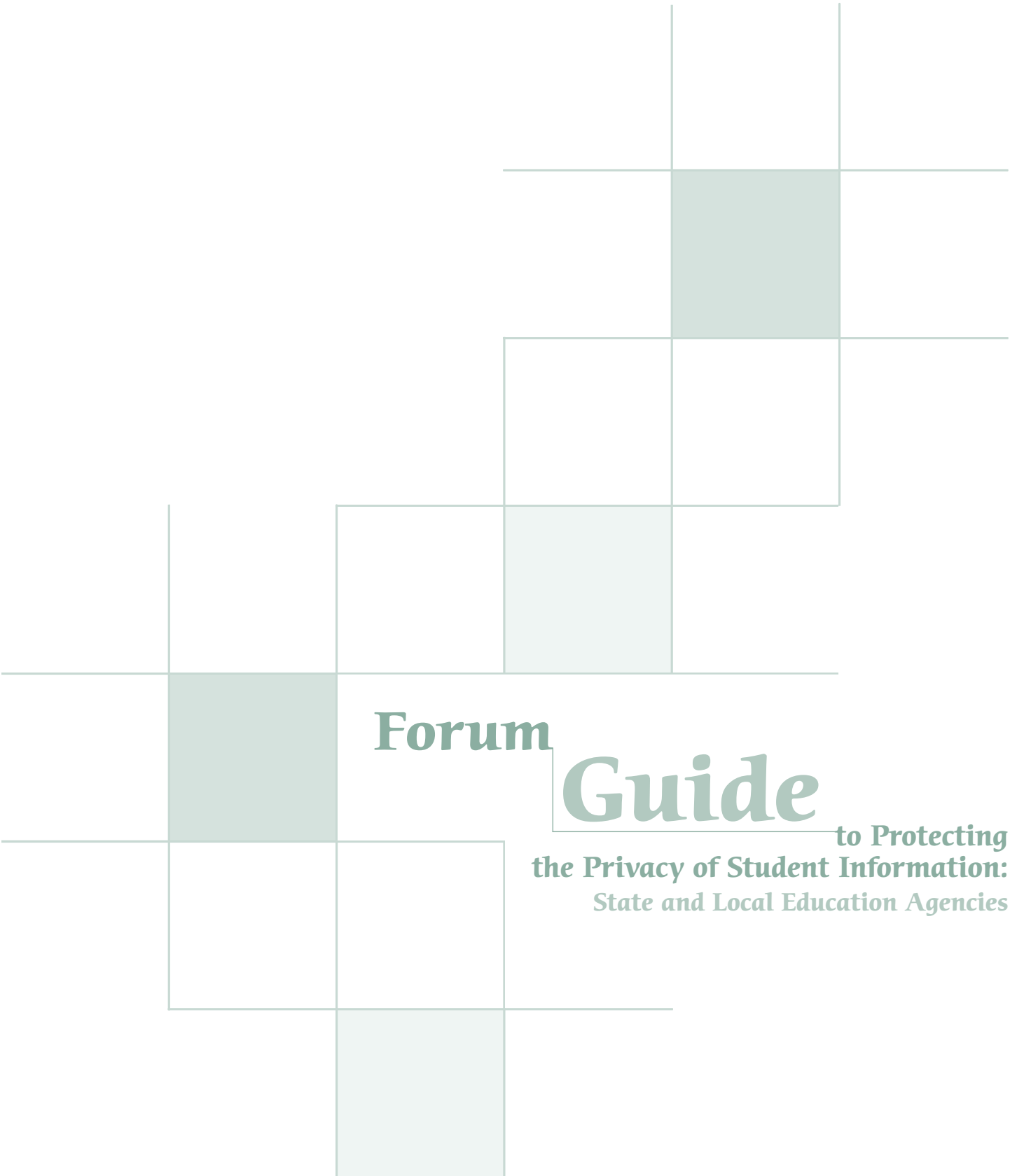


# Forum Guide

to Protecting  
the Privacy of Student Information:  
State and Local Education Agencies





**Forum**

**Guide**

**to Protecting  
the Privacy of Student Information:  
State and Local Education Agencies**

## **National Cooperative Education Statistics System**

The National Center for Education Statistics established the National Cooperative Education Statistics System (Cooperative System) to assist in producing and maintaining comparable and uniform information and data on early childhood education and elementary and secondary education. These data are intended to be useful for policymaking at the federal, state, and local levels.

The National Forum on Education Statistics, among other activities, proposes principles of good practice to assist state and local education agencies in meeting this purpose. The Cooperative System and the National Forum on Education Statistics are supported in these endeavors by resources from the National Center for Education Statistics.

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March 2004

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Melinda Fowler of the Texas Education Agency and Mary Ann Merano of the Illinois State Board of Education reviewed the draft manuscript from the perspective of its potential audiences.

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Finally, the Task Force wishes to thank the Policy, Programs and Implementation Committee of the National Forum on Education Statistics for its continuing support and guidance throughout the development of this report.





# Preface

The primary purpose of this document is to help state and local education agencies and schools develop adequate policies and procedures to protect information about students and their families from improper release, while satisfying the need for school officials to make sound management, instructional, and service decisions. The document was developed under the direction of the National Forum on Education Statistics (Forum).<sup>1</sup>

The Forum is part of the National Cooperative Education Statistics System (Cooperative System) that was established by the Hawkins-Stafford Education Amendments of 1988 (Public Law 100–297) to “produce and maintain, with the cooperation of the States, comparable and uniform education information and data” and retains this responsibility under the mandate of the Education Sciences Reform Act of 2002 (Public Law 107–279). To assist in meeting this goal, the National Center for Education Statistics (NCES) established the Forum to improve the collection, reporting, and use of elementary and secondary education statistics.

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<sup>1</sup>Full Forum members consist of federal, state, and local education representatives whose agencies have major responsibility for collecting and reporting state and national elementary and secondary data through the National Cooperative Education Statistics System (Cooperative System). Associate Forum members consist of national-level agencies or organizations that collect and/or use elementary and secondary education data. In addition, meetings are open to the general public, and experts may be invited to participate in Forum activities and to offer their expertise during Forum deliberations.

The Forum recognized the significance of such security issues and raised concerns about the privacy of student data being collected, used, and released at all levels. In 1994, the Forum completed a report entitled *Education Data Confidentiality: Two Studies*. The Data Confidentiality Task Force was then established to identify ways to help state education agencies, school districts, and schools ensure the privacy of education records and to clarify the laws that exist for these agencies and the general public.

Under the Task Force’s direction, *Protecting the Privacy of Student Records: Guidelines for Education Agencies* was first published in 1997. A companion brochure, *Protecting the Privacy of Student Education Records*, was developed to help educators and the general public understand the Family Educational Rights and Privacy Act (FERPA). The document was well received and widely used by state education agencies and local school districts. Since the publication of that document, new laws affecting the privacy issue have passed and more guidelines have been provided by the U.S. Department of Education and the U.S. Department of Agriculture. A new Task Force was formed by the Forum in 2002 to study the issue, and revision to the guidelines began in 2003. This publication is the result of collaborative efforts among various federal agencies and state and school district officials. The focus of this report has been expanded to include other types of privacy concerns in addition to education records.







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# SECTION 1

## An Overview

### OVERVIEW

Students and their parents entrust schools with their personal information with the expectation that this information will be used by the schools to serve the needs of the students effectively and efficiently. School districts maintain and use personal information for a variety of educational purposes while students are in school. To protect the privacy of students and their families, school staff are legally and ethically responsible for safeguarding the information collected about and from students.

Many federal and state laws and regulations related to maintaining and releasing student information must be followed; however, school districts and schools need additional policies and procedures to guide everyday operations. Since schools and districts vary in how they collect and maintain information about students, the types of policies and procedures also vary. This document provides examples of policies and procedures as well as guidelines for deciding what is needed to ensure the privacy of student information.

This document is intended to provide a general overview of privacy laws and professional practices related to the information collected for, and maintained in, student records. It should not be considered an authoritative interpretation of any law or policy. Specific questions about student record confidentiality should be referred to the appropriate legal or administrative agents.

Section 1 presents an overview of the principles related to the privacy of student information, explains key concepts, defines important terms,

and describes the uses and organization of this document.

### GOALS

- ✓ Explain basic concepts of privacy and their underlying assumptions
- ✓ Define key terms used in this document
- ✓ Present brief overview of this document

### KEY POINTS AND DEFINITIONS

- Strong federal statutes protect the privacy rights of students and their families. These statutes encompass education records kept in electronic and paper media.
- Agency and school personnel are legally and ethically obliged to safeguard the confidentiality of student data.
- Federal and state privacy statutes pertaining to students build on the concepts of common law and constitutional provisions that imply privacy guarantees.
- The underlying important concepts include *notification*, *disclosure*, and *informed written consent*.
- *Education records* means records, files, documents, and other materials that contain information directly related to a student and that are maintained by education agencies or institutions, or by individuals acting on behalf of the agencies.
- *Personal or individual information* refers to information about a single individual.

*The information and opinions published here are the product of the National Forum on Education Statistics and do not necessarily represent the policy or views of the U.S. Department of Education or the National Center for Education Statistics.*

- Personally or individually identifiable information reveals an individual's identity.
- *Confidentiality* refers to an obligation not to disclose or transmit information to unauthorized parties.
- *Privacy* reflects an individual's freedom from intrusion.
- *Security* refers to technical procedures that ensure only authorized and intended parties have access to data.
- *Disclosure* includes permitting access to, revealing, releasing, transferring, disseminating, or otherwise communicating all or any part of any individual record orally, in writing, or by electronic or any other means to any person or entity.
- The Family Educational Rights and Privacy Act (FERPA) defines *parent* as a natural or adoptive parent, a legal guardian, or an individual acting as a parent in the absence of the parent or guardian. The rights under FERPA transfer to the student ("eligible student") when he or she reaches 18 or attends a postsecondary education institution at any age.
- Within this publication, an *agency* or *school* refers to the entity that collects, maintains, uses, and releases information from education records.

## A. Principles Underlying Privacy Protections

To protect the privacy of families whose children are in school, states and the federal government have established legal statutes to keep private the education records that schools maintain on students. These laws frame data collection procedures, restrict information disclosure, and safeguard the quality of the information that school systems routinely collect and maintain. All education records about students, whether handwritten or computerized, are protected by the same privacy regulations.

Education personnel are responsible for protecting the integrity and accuracy of the information they gather and maintain. Therefore, data managers, their staff, and other agency and school personnel must become familiar with the laws that ensure the confidentiality of the records, as well as the legal concepts underlying those laws.

The term "*education records*" means records, files, documents, and other materials that contain information

directly related to a student and that are maintained by education agencies or institutions, or by individuals acting on behalf of the agencies. It contains the administrative reports of students' educational progress, along with any information about past or current use of school-related services, such as special education, social work services, or other supplementary educational support. The Family Educational Rights and Privacy Act (FERPA) (20 USC § 1232g; 34 CFR Part 99), a federal law, limits who can have access to an education record without the consent of the student's parent, and it provides for a parent's right to see what is kept in the records. These two basic features have broad implications for the treatment of information about students by teachers, administrators, and researchers.

In addition, schools that participate in a federally assisted school nutrition program have personal information about students' eligibility for free and reduced-price school meals or free milk. The program has regulations that are more restrictive than FERPA's regarding the disclosure and use of this information. Section 2 of this document discusses in detail how this type of information is safeguarded under federal laws.

In addition to the everyday use of student information by teachers and administrators, education records are a source of basic data used for administrative purposes and policymaking. Statistical information summarized from education records can be an important resource for monitoring programs and for evaluating the success or failure of education policies. Administrative use of computerized records means that education records are used increasingly farther from their point of origin. As a result, it has become more complicated but no less essential for school officials to be vigilant about protecting the confidentiality of records. Those who work with education records have legal and ethical obligations to observe rigorous procedures for protecting the privacy of the original information and the individuals whose records are involved.

## B. Key Concepts of Privacy Laws and Confidentiality Policies

Privacy laws lead to establishing regulations that education agencies and schools must follow so that information about children is available only to officials who are authorized to know such information. The laws were

passed by the U.S. Congress to ensure parents the right of access to information about their children, while allowing education officials the flexibility they need to use the information in making decisions that serve children well.

Federal and state privacy statutes pertaining to students in elementary and secondary schools build on concepts of common law and privacy guarantees found in the U.S. Constitution. Fundamental to the government's rulemaking about data collection, privacy, and appropriate use are three concepts—*notification*, *disclosure*, and *informed consent*.

**Notification**, according to FERPA, refers to an agency's responsibility to annually notify parents and eligible students of their rights under FERPA. Though not specified in FERPA, when school officials collect information about families or students, they should explain the legal basis for compiling data, or "give public notice," of the reasons the data are being collected.

**Disclosure** refers to access, release, or transfer of personally identifiable information about individuals. Privacy laws define appropriate or inappropriate information disclosures or releases. According to FERPA, data about students may be disclosed without parental consent only under certain conditions specified in the law and regulations. For example, FERPA permits schools to disclose information from students' education records to school officials who have a legitimate educational interest in the information. Any instance in which unauthorized individuals see or use private information about students is an inappropriate and often illegal disclosure, unless the parent or student gives consent or a law makes such access legal. FERPA regulations require that prior written consent be given by parents for the disclosure of information to persons not authorized by FERPA to have access to the records without consent.

**Informed consent**, though not specifically a FERPA requirement, involves an individual's agreement in the context of a written account of why personal information is requested and how it will be used. In general, parents should have the option, without penalty, of agreeing or declining to provide the information that an education agency or school requests. Certain information, however, is required by schools, and parents must provide the information in order for their children to be enrolled. The parents' agreement should be an informed decision, based on an understandable explanation of how the

information will be used. Once a parent's consent is given for a particular purpose or set of purposes, the information cannot be "redisclosed" (used by a third party) except as originally indicated.

## Important Terms

### **Education Record**

According to FERPA, a record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, videotape or audiotape, film, microfilm, and microfiche. An education record, sometimes referred to as a student record, may include a variety of details about a student, such as the date of birth, date of enrollment, bus route, immunization history, achievement test scores and grades, enrollment and attendance, awards, degrees achieved, and special education plans and evaluations. Personal notes by teachers or other staff, kept in the sole possession of the maker, used only as a personal memory aid, and that are not accessible or revealed to any other person except a temporary substitute, are not subject to FERPA. A record of a student may be maintained in more than one location within an agency or school (e.g., enrollment record in the school's administrative office and health information in the school health clinic).

Information included in an education record is collected primarily from the student (or family members), teachers, and other school staff. It may also be collected from other sources outside the school, such as health care providers or testing companies. Personal information about students is a vital resource for teachers and school staff in planning responsive education programs and services; designing individual education plans; scheduling students into appropriate classes; planning school bus routes; and completing reports for local, state, and federal authorities. In emergencies, the information is readily available to school officials to assist students and their families. A limited amount of this information, as defined by the school district or state, makes up a student's permanent record or transcript.

### **Confidentiality**

Confidentiality refers to a person's obligation not to disclose or transmit information to unauthorized parties. Confidentiality extends to information about either indi-



viduals or organizations. In schools, districts, or state education agencies, that usually means establishing procedures that limit access to information about students or their families. This access extends to the school officials who work directly with the students, agency representatives who serve as evaluators or auditors, or individuals who act on behalf of authorized education officials.

### **Privacy**

*Privacy* is a uniquely personal right that reflects an individual's freedom from intrusion. Protecting privacy means ensuring that information about individuals is not disclosed to unauthorized persons without the individual's consent.

A parent or eligible student's right of privacy is violated when personal information is disclosed to unauthorized third parties without consent. While confidentiality, defined above, refers to restricting disclosure of information to authorized individuals only, privacy refers to protection from personal intrusion.

### **Security**

Security refers to the process that focuses on the "confidentiality, integrity, and availability" (National Forum on Education Statistics 2003) of information systems and data. For the purpose of discussion in this document, security includes technical procedures that ensure only authorized and intended parties have access to data.

### **Parent or Eligible Student**

FERPA grants parents the rights to review, request amendment to, and consent to the release of education records. A parent means a natural or adoptive parent, a legal guardian, or an individual acting as a parent in the absence of the parent or guardian. These rights transfer to eligible students when they reach 18 or when they attend a postsecondary education institution. However, parents can still have access if the eligible student is a dependent for tax purposes. When used in this document, the term parent refers to the person who is given the rights described in FERPA. FERPA defines a student as any person, who is or has been in attendance, about whom an agency or institution maintains education records or personally identifiable information.

### **Education Agency or Institution**

In FERPA, an *education agency* typically refers to a state or local education agency that is authorized to direct and

control public elementary or secondary or postsecondary institutions. An *education institution* refers to an institution or school that provides educational services or instruction, or both, to students. FERPA also refers to *state or local education authorities*. While not defined in FERPA, the phrase generally refers to any educational entity with authority and responsibility under state or local law for the administration of educational functions at the elementary, secondary, or postsecondary level. This includes all education agencies and institutions that are the recipient of funds under any program administered by the U.S. Secretary of Education. Throughout this document, agency or institution refers to the entity that collects, maintains, uses, and releases information from education records. This entity may be a state education agency, school district, public or private school or institution, intermediate education unit, or an institution to which funds have been available to administer an educational program for students with disabilities or work-based education programs administered on behalf of an education agency.

## **D. About the Document**

Guidelines presented in this document are based on information obtained from a variety of sources and represent the best practices currently used in the relevant subjects. These include published books and reports, as well as policies and procedures adopted at the national level. This 2004 edition highlights the changes in legal requirements made in the years following the first edition published in late 1997. For example, the No Child Left Behind (NCLB) Act of 2001 requires state education agencies to have a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by a school district to any private or public school. The law also gives parents more rights with regard to the surveying of minor students, the collection of information from students for marketing purposes, and certain nonemergency medical examinations. The same law also allows the disclosure of directory-type information (students' names, addresses, and telephone listings) to military recruiters. The Patriot Act of 2001 allows the U.S. government, via an ex parte court order, to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism (domestic or international). These laws, and others

that may affect a school, district, or state education agency's handling of education records, are discussed in Section 2: Summary of Key Federal Laws.

While this document intends to sort out the very complex issues related to the privacy of student records, it is not a "one-size-fits-all" manual that provides direct and simple answers to all the questions. Users need to understand the issues presented in this document, but resolve them by developing policies and procedures pertinent to their state or district. This document is intended to provide guidance and references for this purpose.

This document will be most useful for staff in state and local education agencies who are responsible for maintaining student records. It will help them to understand the legal requirements, as well as implement proper management procedures and controls at the state or district level when they collect personally identifiable student information. Additionally, the document can help identify ways to ensure that data providers and users are informed of their rights and responsibilities when handling personally identifiable, as well as aggregate, data.

### **Organization and Format of the Document**

The document is divided into five remaining sections containing general guidelines and examples of effective practices, sample forms, and references to other sources.

### **Section 2: Summary of Key Federal Laws**

Section 2 describes federal laws protecting the privacy of students that have implications for the maintenance and release of student data by state and local education agencies. Readers are encouraged to identify relevant state laws and local regulations that also apply.

### **Section 3: Protecting the Privacy of Individuals During the Data Collection Process**

Section 3 describes appropriate procedures for collecting individual information about students.

### **Section 4: Securing the Privacy of Data Maintained and Used Within an Agency**

Section 4 describes the management controls and policies needed to maintain and use data within the agency or school. This section addresses the issue of assessing who in an agency or school has a "legitimate educational interest" in specific information about an individual student.

### **Section 5: Providing Parents Access to Their Child's Records**

Section 5 pertains to procedures for providing access to a student's education record by the eligible student or the parent.

### **Section 6: Releasing Information Outside an Agency**

Section 6 suggests procedures for handling external requests (made by the public, researchers, and other service professionals) to release information from individual student records.

Readers are encouraged to search for and include in this section their states' laws or statutes that further govern the privacy of education records.

### **Other Resources**

Other resources and tools that may help readers are provided. They include the following:

- an abbreviated topical index at the end of this document that will help readers locate topics of interest;
- highlights for each section that summarize key points for easy reference or for other uses such as training; and
- a list of commonly asked questions that will guide readers to find answers in sections 2 to 6.

There are a number of URLs cited in this guide. Every effort has been made to verify their accuracy at the time of publication. If a URL is no longer working, try using the root directory to search for a page that may have moved.

---

## **REFERENCES**

- National Forum on Education Statistics. (1994). *Education Data Confidentiality: Two Studies. Issues in Education Data Confidentiality and Access, and Compilation of Statutes, Laws, and Regulations Related to the Confidentiality of Education Data* (NCES 94–635). Washington, DC: U.S. Government Printing Office.
- National Forum on Education Statistics. (2003). *Weaving a Secure Web Around Education: A Guide to Technology Standards and Security* (NCES 2003–381). U.S. Department of Education. Washington, DC: National Center for Education Statistics.





# SECTION 2

## Summary of Key Federal Laws

### OVERVIEW

Education agency administrators and parents share a common interest in ensuring that personal information about children in elementary and secondary schools is kept confidential. Many are unaware of the protection offered by state and federal laws. In this section, we inform administrators and parents about how federal laws protect information maintained in school and education agency records. The guidelines in this section offer practical information to education agency personnel and policymakers on developing procedures that will work for families and schools.

This material reflects only the broad outline of federal privacy policy requirements. The material describes federal policy principles, many of which are supplemented by additional state statutes or local regulations. Readers should be cautioned that these descriptions are not legally binding and that they should direct specific questions either to local and state legal experts or to the appropriate federal government offices. Figure 2–1, found at the end of this chapter, summarizes federal laws that govern the privacy of education records for elementary and secondary education.

### GOALS

- ✓ Provide an overview of all federal laws that are primarily concerned with or include provisions to safeguard the privacy of student education records
- ✓ Familiarize readers with specific aspects of student records that are governed by current federal laws and regulations
- ✓ Provide resources to further understanding of federal laws

### KEY POINTS

- FERPA applies to education agencies, institutions, and schools that receive funds from the U.S. Department of Education.
- FERPA establishes broad privacy protections for education records.
- Other federal laws, such as the National School Lunch Act, affect data collection, maintenance, and disclosure procedures.
- FERPA grants parents and eligible students access to education records and restricts disclosure of this information without their consent, with some exceptions.
- Districts' written privacy policies ensure the uniform application of FERPA.
- FERPA protects most information collected by schools about students. However, sole possession records (e.g., teachers' informal notes), records of school-based law enforcement units, and employment records do not fall under the jurisdiction of FERPA.
- Directory information of individual students may be released without prior consent. However, school districts must give public notice of what is considered in this category and provide parents an opportunity to opt out.
- The U.S. Department of Education does not require local education agencies to notify parents or eligible students individually of their rights, but agencies must provide notice where it is likely to be seen.
- Parents and eligible students may inspect, review, and request to amend education records.
- FERPA prohibits record matching of students' education records and restricts which parties

may have access to personally identifiable information. It also establishes penalties for inappropriate redisclosure by third parties.

- The Protection of Pupil Rights Amendment (PPRA) was originally enacted to govern the administration to students of surveys that contain questions about certain protected information. It was amended by NCLB to generally apply to local education agencies that are the recipients of any funds from the Department of Education.
- The privacy of special education records is protected by FERPA and the Individuals with Disabilities Education Act (IDEA).
- Records pertaining to the identification, evaluation, and educational placement of children with disabilities must be available for inspection by parents.
- Any participating agency or institution that collects, maintains, or uses personally identifiable information about students with disabilities must protect the privacy of these special education records.
- Each public agency must have one official who is responsible for ensuring the confidentiality of any personally identifiable information and must train all persons who are collecting or using personally identifiable information regarding the state's policies on confidentiality and FERPA.
- Agencies must maintain, for public inspection, a list of employees who have access to personally identifiable information.
- Education records may be protected by laws administered simultaneously by other state and federal agencies, as well as by the U.S. Department of Education.
- The Children's Online Privacy Protection Act of 1998 (COPPA) also impacts student privacy. Certain web sites must obtain parental consent before collecting personal information from children under age 13. Parents can review and delete the child's personal information. The privacy notices of these web sites also have to disclose certain privacy requirements.
- The National School Lunch Act of 1994 protects the privacy of information that agencies collect from families of children who are eligible to receive free or reduced-price meals.
- Confidentiality regulations generally apply to records of students who receive assistance or treatment under laws administered by the federal Substance Abuse and Mental Health Services Administration.

- The Office of Management and Budget reviews and approves federally administered questionnaires, surveys, or forms before they are to be completed by state and local education agencies and programs that receive federal funds.
- The Privacy Act of 1974 stipulates allowable uses of social security numbers by government agencies and gives individuals the right to refuse to disclose or use their social security numbers except for the purposes defined by the social security law.
- Experts in government offices and education organizations can assist education agencies in protecting the privacy of education records.

## **A.** Privacy-Related Laws That Apply to Agencies and Schools

### **A1.** Types of organizations required to adhere to federal education privacy laws

Education agencies and institutions that receive funds from the U.S. Department of Education must adhere to federal privacy laws pertaining to education records of students. These generally include public elementary and secondary schools, school districts, intermediate education agencies, and state education agencies or their representatives. Most private and public colleges and universities are also subject to federal privacy laws because they receive federal funds from the U.S. Department of Education. However, because few private elementary and secondary schools receive federal funds directly, they are rarely subject to these privacy restrictions.

State or local education agencies that conduct programs administered by other federal agencies—the U.S. Departments of Agriculture, Health and Human Services, or Labor, for example—may also be required to meet confidentiality provisions of applicable statutes.

### **A2.** Federal laws that directly affect data collected and maintained by education agencies

A number of federal laws govern data collections by schools, districts, and state education agencies, and two of those laws apply most broadly: the Family Educational Rights and Privacy Act (FERPA) and the Protection of

Pupil Rights Amendment (PPRA). Exhibits 2–1 and 2–2 contain fact sheets describing FERPA and PPRA. Together, the two laws have far-reaching legal implications for state and local policies and procedures that guide the following three aspects of education agencies' data collection activities:

- rights of a parent to review education records maintained by state or local education agencies or their representatives;
- procedures by which education records can be released and protected; and
- rights of parents to review and, under some circumstances, provide consent for their child's participation in surveys, analyses, or evaluations that are administered by state or local education agencies or their representatives.

Privacy protection under FERPA is generally incorporated into laws authorizing federal education programs. Thus, FERPA and PPRA requirements apply to programs such as Title I, Migrant Education, Safe and Drug-Free Schools and Communities, Carl D. Perkins Vocational and Applied Technical Education Act, Education of Neglected and Delinquent Youth, Even Start, and Even Start Family Literacy. Similarly, most states include the core privacy protection of FERPA in their education legislation; in many cases, they extend and strengthen this protection.

In addition to FERPA and PPRA, other federal laws affect school, district, or state education agency data collection, maintenance, and disclosure procedures. Among them are:

- The Individuals with Disabilities Education Act (IDEA), which applies to the education records covered by this law. However, IDEA release and disclosure requirements are substantially identical to those in FERPA.
- The federal Drug and Alcohol Patient Records Confidentiality Law (42 CFR), which applies to the services and treatment of records belonging to students who receive assistance from programs administered by the Substance Abuse and Mental Health Services Administration.
- The Richard B. Russell National School Lunch Act (NSLA), which restricts the release of eligibility and services information about students and families who participate in the federal free and reduced-price lunch program.
- The Health Insurance Portability and Accountability Act (HIPAA) of 1996, which provides privacy regula-

tions to protect patients by limiting the ways that health plans, pharmacies, hospitals, and other covered entities can use patients' personal medical information. The Privacy Rule of the law, however, provides a broad exemption for personal health information maintained in education records, which is protected under FERPA.

- The Paperwork Reduction Acts of 1980 and 1995, which include rules that restrict what the federal government can ask state and local agencies to collect for the federal government.

Three other federal laws—the Freedom of Information Act (FOIA) of 1966, the Privacy Act of 1974, and the Computer Matching and Privacy Protection Act of 1988—do not apply to the education records maintained by schools, districts, or state education agencies because these federal laws pertain only to data the federal government collects. However, many states have passed their own open records laws or other privacy laws very much like the federal statutes that may apply to the information schools collect. When agencies or schools establish data policies and procedures, they should consult state statutes on these matters, as well as the federal requirements. Many state open records laws indicate that each agency make available for public inspection and duplication copies of all records, regardless of form or format, that have been released to any person and that because of their subject matter content have become the subject of request for substantially the same record. However, state open records laws do not supersede FERPA, and educational agencies and institutions subject to FERPA should seek advice from the Family Policy Compliance Office (FPCO) if any conflicts are evident. (See section 2F below for contact information.)

The federal Policy for the Protection of Human Subjects, administered by 16 federal departments and agencies, establishes procedures for protecting the rights of individuals—including students and families—who participate in federally sponsored research activities and programs. This statute establishes the preliminary rules researchers must follow when they conduct studies sponsored by federal agencies. Although these regulations may apply to data collections by schools, FERPA establishes additional basic disclosure restrictions that guide the treatment of any information collected in schools if the information either derives from education records or is maintained in those records for any period of time. These restrictions apply to activities sponsored by an education or other agency or an individual.



The No Child Left Behind (NCLB) Act of 2001 includes amendments to PPRA that give parents more rights with regard to the inclusion of minor students as survey respondents, the collection of information from students for marketing purposes, and certain nonemergency medical examinations. See section C, “U.S. Department of Education-Funded Surveys and Studies,” for detailed discussion.

In addition, the Patriot Act of 2001 allows the U.S. Attorney General or his or her deputy to apply for an ex parte court order requiring an education agency or institution to allow the Attorney General or his designee to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism (domestic or international). The Attorney General must certify that there are specific facts giving reason to believe that the records contain the required information. An education agency or institution that in good faith releases records in accordance with the court’s order is not liable to any person for releasing the records subject to confidentiality procedures developed in consultation with the Secretary of Education.

## **B. Privacy Protection Under FERPA: Responsibilities of Agencies and Schools**

The U.S. Congress passed FERPA in 1974 to protect student and family privacy. Also known as the Buckley Amendment, FERPA grants parents certain rights of access to their children’s education records and restricts disclosure of information from those records without their consent. It also allows parents and eligible students to amend records they believe to be inaccurate or misleading. The original FERPA statute and its amendments are incorporated in the U.S. Code (20 USC 1232g). The *Code of Federal Regulations* (34 CFR Part 99) contains regulations for administering the law.

In 1994, FERPA was amended in the Improving America’s Schools Act. The U.S. Department of Education published revised regulations in the *Federal Register* on November 21, 1996 (pp. 59291–59298) to ensure greater flexibility in implementing the privacy laws pertaining to student records.

The law regards as an education record most information that teachers, school administrators, and education officials maintain about students in a tangible format,

whether in electronic, photographic, or paper files. Regardless of where the information about students originates, if it is maintained by schools or education agencies, protecting its privacy is governed by FERPA or another federal statute, such as NSLA. School districts, schools, or state education agencies, if asked, must comply with parents’ or eligible students’ requests for access and review.

FERPA requires school districts—but not state education agencies—to notify parents and eligible students annually of their rights under FERPA. Among the changes in FERPA that resulted from the 1996 regulations was the removal of requirements for districts to adopt written policies pertaining to FERPA. Although local written policies are no longer required, regulations continue to encourage districts to develop privacy policies and procedures. Because state or local privacy protection laws or policies may supplement or refine FERPA, many state and local education agencies establish written policies to ensure the law will be applied uniformly.

FERPA currently permits schools to transfer any and all education records, including disciplinary records, for a student who is transferring to another school. A new provision of the NCLB Act requires state education agencies that receive funds under the Elementary and Secondary Education Act (ESEA) to provide an assurance to the U.S. Secretary of Education. The assurance stipulates that the state has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local education agencies to any private or public school for any student who is enrolled or seeks to enroll in the school.

### **B1. FERPA defines protected education records**

FERPA defines education records as information:

- directly related to a student, specifically any information recorded in any way, including but not limited to handwriting, print, computer media, videotape or audiotape, film, microfilm, and microfiche; and
- maintained by an education agency or institution, or by parties acting for the agency or institution (e.g., special education schools and health or social services institutions).

Records pertaining to special education students are subject to the same FERPA requirements as all other student records.

Education records include but are not limited to:

- family information, such as name and address of the student and parent or guardian, emergency contact information, date and place of birth, and number of siblings;
- personal information, such as an identification code, social security number, picture, and list of personal characteristics that would make it easy to identify a student;
- grades, test scores, courses taken, academic specializations and activities, and official letters about a student's status in school;
- test records, answer sheets (including written responses to performance assessments and portfolios), and records of individualized education programs;
- special education records;
- disciplinary records established and maintained by school officials;
- medical and health records that the school collects and maintains. Individually identifiable health information of students under the age of 18 created by a nurse in a primary or secondary school that receives federal funds and that is subject to FERPA is an education record, not protected health information. Privacy regulations generally applied to health records do not apply;
- documentation of schools attended, courses taken, attendance, awards conferred, and degrees earned; and
- videotapes of individuals or groups of students.

A school district may establish policies that list the types and locations of education records, with a schedule of fees (which must be reasonable) that are charged for duplicating records. Agencies may not, however, charge a fee to search or retrieve education records. The following information about students is not considered part of an education record and is not subject to access or disclosure rules under FERPA:

- notes (handwritten or typed) kept in the sole possession of the maker (teachers, supervisors, school counselors, and administrators) which are used only as a personal memory aid and are not revealed to any other person other than a temporary substitute teachers or other replacement personnel;

- records created by law enforcement units of schools or school districts, for a law enforcement purpose, that are maintained separately from education records; and
- information about individuals obtained after they are no longer students.

Another type of information is not subject to “consent” rules under FERPA. FERPA allows school systems to establish a policy that designates some types of information as directory information—the portion of the education record that would not generally be considered harmful or an invasion of privacy if disclosed. Local education agency definitions of directory information may vary, but they generally include a student's name and school activities, family members' names, address, and telephone number. Some school districts also include as directory information the biographical materials found in school yearbooks, such as videotapes and pictures of students; participation in various extracurricular activities; degrees and awards received; and names of previous schools attended. The height and weight of athletes may also be included as directory information. Once notice of directory information is given, school officials can distribute the information to anyone who requests it inside or outside the school.

If a school district has a policy for disclosing directory information, it must give public notice of what is considered in this category and indicate that parents may refuse to allow the agency to designate any or all of their child's record as directory information. The law requires the notification to specify the period of time in which parents must inform the school or district of any directory information whose release they disallow. Such notification can occur through a school newsletter, student handbook, or some other publication that parents can be expected to receive.

FERPA currently allows schools to designate and disclose without consent certain items of information as directory information. The FERPA regulations define “directory information” under § 99.3 of the regulations and set forth the requirements for implementing a directory information policy under § 99.37 of FERPA. Generally, directory information may be disclosed by a school to any party, provided the requirements of FERPA are followed.

The NCLB Act also addresses the disclosure of directory-type information (students' names, addresses, and telephone listings) to military recruiters. Congress also



included similar language in the National Defense Authorization Act for Fiscal Year 2002. Both laws, with some exceptions, require schools to provide directory-type information to military recruiters who request it. Typically, recruiters are requesting information on junior and senior high school students that will be used for recruiting purposes and college scholarships offered by the military. Upon such request, school districts are required to provide student names, addresses, and telephone listings to military recruiters unless a parent has elected to “opt out” of the public, nonconsensual disclosure of directory information or has opted out of a specific notice provided by the school regarding disclosure to the military. The laws do not permit school districts to institute a policy of *not* providing the required information unless a parent has affirmatively agreed to provide the information.

The NCLB Act makes it clear that, even if a local education agency does not have a policy of disclosing “directory information” under FERPA, the school district must still comply with a request from a military recruiter for names, addresses, and telephone listings of students. The referenced laws require an “opt-out” notification process.

Exhibit 2–3 includes a questions and answers sheet provided by the Family Policy Compliance Office (FPCO) to clarify the new provisions of access to high school students and information on students by military recruiters.

## **B2. Each of the local, state, and federal education agencies has a role in protecting the privacy of education records**

FERPA regulations require education agencies and institutions to give annual notification to parents and eligible students of their rights to review education records and to request corrections of records they perceive to be inaccurate. Exhibit 2–4 presents a model privacy notification. These regulations apply to the education records maintained in any school, education agency, or institution representing an education agency. FERPA applies to all educational institutions, defined as agencies that provide:

- educational services or instruction, or both, to students; or
- administrative control or services to public elementary or secondary schools or postsecondary institutions.

The U.S. Department of Education does not require local education agencies to notify parents or eligible students individually of their rights, but agencies must provide notice where it is likely to be seen. FERPA regulations regarding records access apply to state and local agencies, but only local agencies must give annual notification of rights under FERPA. The annual notification must inform parents that they have the right to:

- inspect and review their child’s record;
- seek to amend the record if they believe the record to be inaccurate, misleading, or otherwise in violation of their child’s rights;
- consent to disclosures of personally identifiable information in the record, with certain exceptions authorized by FERPA; and
- file a complaint with the U.S. Department of Education concerning the district’s failures to comply with the requirements of FERPA.

Parents’ access to records is limited to information about their own child. In cases where an education record contains information about more than one child, the information must be separated so that parents do not have access to the records of any child other than their own.

FERPA requires local agencies to provide their annual notification in a manner that “effectively informs” those who have a disability or who speak a primary or home language other than English. Methods for notifying parents may include either providing notice in alternative formats such as audiotape, Braille, computer diskette, or large print, or translating information into the native language of requesting parents.

Under the provisions of NCLB, the U.S. Department of Education is required to notify annually each state education agency and local education agency of their obligations under FERPA and PPR. The web site of FPCO ([www.ed.gov/policy/gen/guid/fpco](http://www.ed.gov/policy/gen/guid/fpco)) contains the annual notices to Chief State School Officers as well as district superintendents.

## **B3. Parents and eligible students may inspect and review education records**

FERPA also grants records inspection and review rights to eligible students who are over age 18 or who have graduated from high school and are attending a postsecondary education institution at any age. A student under

18 who is still in high school but is also taking college courses has access to records held by the college, but access rights to records held by the high school still belong to the parents. Parents who claim students as dependents for income tax purposes may be given access to school records, even if the rights under FERPA have transferred to the student.

Parents and eligible students may request an explanation or interpretation of their education records, whether these records are held by schools, agencies, or representatives of educational institutions. The agency must respond to requests to review education records within 45 days of the inquiry. If parents or eligible students believe a record is inaccurate or misleading, they may petition for the record to be amended or changed. The education agency must decide within a reasonable period of time if the request to change the record is consistent with the agency's own assessment of the record's accuracy. The agency cannot destroy records if there is an outstanding request to inspect or review them.

If a request to amend records is denied, the applicant can subsequently appeal the decision in a hearing conducted by the education agency. After the hearing, a parent or eligible student who continues to disagree with the contents of a record can insert an explanation of the objection into the official record, and that explanation must remain with the record as long as it is held by the agency. However, the amendment is limited to items other than school grades, assessments, placements, and "substantive" decisions.

FERPA gives either a parent or legal guardian equal rights to review an education record unless there is evidence of a court order or law revoking these rights. A "parent" refers to a natural or adoptive parent, including a noncustodial or foster parent, a legal guardian, or an individual acting in the parent's absence. The law grants parental rights to foster parents acting on behalf of the child. Agencies or schools can require parents to verify their relationship with a child before providing access to records. Further specification of eligibility requirements is not stipulated in the federal law, but can be detailed in state laws or local policies.

#### **B4. FERPA restricts release of information without prior consent**

Without consent of the parent or eligible student, education records can be disclosed to school officials desig-

nated as having a "legitimate educational interest." The law leaves to the district the authority to define the criteria for determining the legitimacy of an educational interest, which generally includes situations where officials need to review education records to fulfill their professional responsibilities. This includes access to records by teachers, counselors, and administrators who routinely work with students. The following lists some example situations in which legitimate educational interest prevails:

- to perform education- or discipline-related tasks in connection with a student;
- to provide services to a student or a student's family, such as emergency health care, counseling, or school or job placement; or
- to perform administrative or other educational responsibilities prescribed by the agency or school.

If an educational agency or institution has a policy of disclosing education records to officials considered to have a legitimate educational interest, it must include in the annual notification of FERPA rights the criteria for determining who constitutes a "school official" and the criteria for what constitutes a "legitimate educational interest." Depending on the policy defined locally, school officials might include any or all of the following:

- a school administrator, supervisor, instructor, or support staff (including health or medical staff or law enforcement unit personnel);
- a school board member with an authorized reason to review a record;
- a person or company with whom the district has contracted to perform a special task (e.g., an attorney, auditor, medical consultant, or therapist); or
- a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing required tasks.

Because these officials, acting on behalf of students, have a need to know, they can usually access information without seeking consent.

Under FERPA, disclosure of information to an individual or agency outside the school, school district, or state education agency—a third party—generally is not allowed without prior consent of a parent. Under certain circumstances (e.g., government-required audits, evaluations, or court orders), a district can release records without

approval of the parent, but it must record the disclosure, explaining the legitimate interest the party had in receiving the information. FERPA permits that records may be disclosed without consent of the parent to the following individuals and organizations:

- officials in another school, school system, or postsecondary education institution where the student intends to enroll. Such releases must be reported to the parent or eligible student unless the release either is initiated by one of them or is specified by local policy;
- the U.S. Secretary of Education, authorized representatives of the Comptroller General of the United States, and state and designated local education authorities for audit and evaluation of educational programs;
- institutions to which students apply to receive financial aid to determine eligibility, amount of aid, conditions of aid award, and enforcement of award terms and conditions;
- accrediting organizations to carry out their functions;
- organizations authorized by education agencies or institutions to conduct studies that concern the development or administration of tests, the administration of student aid programs, or the improvement of instruction; and
- appropriate parties in a health or safety emergency.

When a record is disclosed in the types of situations indicated above, the originating agency must note in the record the names of the parties who received the information and an explanation of the legitimate educational interest under which the record was disclosed. FERPA requires agencies or schools to account for all instances of education records release, indicating the reasons the information was provided and who received it. These explanations must be recorded in the student's record and maintained there until the agency destroys the record.

### **B5. Records matching and redisclosure to third parties**

FERPA generally prohibits matches of computerized education records held by local or state education agencies with data from other agencies. These prohibitions apply broadly to data sharing about special education programs, evaluating or monitoring the use of federal funds, or coordinating interagency social service assistance to students and families.

Beginning in 1994, the U.S. Congress established penalties for inappropriate release of personally identifiable information from education records by a third party when conducting studies (Improving America's Schools Act). An agency or institution cannot allow that third party access to personally identifiable information from education records for at least 5 years after the incident.

However, cross-agency cooperative use of information from education records is an area of developing law and interpretation that experts are continually reexamining. State and local government agencies, along with schools, are seeking means to reduce fragmentation and duplication across service systems. Occasionally, interagency partnerships can be formed to exchange information about individual students in a manner that provides useful information but retains the anonymity of an individual student. Those who have experimented with such interagency partnerships are overcoming legal obstacles to collaboration without threatening the confidentiality of students who receive services. This topic is addressed in greater detail in section 6.

### **B6. Implications of other FERPA regulations**

In addition to reducing the requirements for local education agencies to have written FERPA policies, the 1996 regulations implementing the 1994 Improving America's Schools Act (IASA) clarified several other components of FERPA. The regulations:

- remove certain requirements about the annual notification of privacy rights, simplifying and making it easier to understand the central requirements of FERPA;
- establish a standard for giving annual notification to parents and eligible students that strikes a balance between placing a minimal requirement on education agencies and institutions and ensuring that parents and eligible students are effectively informed of their rights under FERPA;
- maintain the previously established 45-day period for responding to requests to inspect records;
- require state education agencies to comply with the access provisions of FERPA, but not with the notification provisions;
- clarify that nothing in FERPA prevents schools from maintaining and disclosing to school officials specific information regarding disciplinary actions taken

against students for conduct that poses a risk to the safety of the student, other students, or other members of the school community; and

- allow officials to withhold information about a court order and/or disclosure from parents if a court order or subpoena related to law enforcement specifically states that its existence should not be revealed to a parent or student.

Since 1998, the U.S. Congress has enacted two additional exceptions to the statutory prior consent rule. The 2000 Campus Sex Crimes Prevention Act added a new subsection (b)(7) to the statute to ensure that an educational institution may disclose information concerning registered sex offenders provided to it under state sex offender registration and community notification programs. The Patriot Act of 2001 added a new section (j) that allows the U.S. Attorney General or his or her deputy to apply for an ex parte court order requiring an education agency or institution to allow the Attorney General (or his designee) to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism subject to confidentiality procedures developed in consultation with the Secretary of Education. (See section A2 above).

These laws should be closely reviewed by privacy experts within school districts and state education agencies for their specific applicability to individual cases.

## **C** U.S. Department of Education-Funded Surveys and Studies

The Protection of Pupil Rights Amendment (PPRA), amended in 1994 by the Goals 2000: Educate America Act, specifies that information collected from students through surveys, research, analyses, or evaluations funded by the U.S. Department of Education must be available for parents to review. If parents ask, the surveys or evaluation materials must be made available for review. Surveys administered under the auspices of federally sponsored programs that are conducted in elementary or secondary schools fall within this law.

PPRA protects the rights of students and their parents in two ways. First, it states that parents have the opportunity to review certain federal surveys or instructional

materials used in conjunction with surveys and to provide consent for their child's participation in them. Second, PPRA requires that state or local education agencies, and their contractors or representatives, obtain prior consent from the parent if they plan to collect information from students concerning the following eight items:

- political affiliation;
- mental and psychological problems;
- sexual behavior and attitudes;
- illegal or self-incriminating behavior;
- critical assessments of other individuals or family members;
- privileged information given to lawyers, physicians, or ministers;
- religious practices, affiliations, or beliefs (newly added under NCLB); and
- income (other than what is required by law for program eligibility).

Although PPRA stipulates that education agencies must give parents the right to review and consent before their children participate in surveys, the law does not require that parents be given copies of the surveys. However, they must be able to inspect the actual survey and related instructional materials.

Section 1061 of NCLB amended PPRA to give parents more rights with regard to the surveying of minor students, the collection of information from students for marketing purposes, and certain nonemergency medical examinations. PPRA has been referred to as the "Hatch Amendment" and the "Grassley Amendment" after authors of amendments to the law. Now school officials may hear the law referred to as the "Tiahrt Amendment," after Congressman Todd Tiahrt who introduced changes regarding surveys to PPRA. The statute is found in 20 USC § 1232h and the regulations (not yet updated) are found in 34 CFR Part 98.

The new provisions (contained in subsection c) apply (as does FERPA) to education agencies or institutions that receive funds from any program of the Department of Education. Thus, public elementary and secondary schools are subject to the new provisions of PPRA. Here are the new requirements:

- Schools are required to develop and adopt policies—in conjunction with parents—regarding:

1. the right of parents to inspect, upon request, a survey created by a third party before the survey is administered or distributed by a school to students.
  2. arrangements to protect student privacy in the event of the administration of a survey to students, including the right of parents to inspect, upon request, the survey, if the survey contains one or more of the same eight items of information noted above (see page 15).
  3. the right of parents to inspect, upon request, any instructional material used as part of the educational curriculum for students.
  4. the administration of physical examinations or screenings that the school may administer to students.
  5. the collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling, or otherwise providing information to others for that purpose. However, this does not apply to information collected from students for the exclusive purpose of developing, evaluating, or providing educational products or services for or to students or schools, such as:
    - college or other postsecondary education recruitment, or military recruitment;
    - book clubs, magazines, and programs providing access to low-cost literacy products;
    - curriculum and instructional materials used by elementary and secondary schools;
    - tests and assessments used by schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students;
    - the sale by students of products or services to raise funds for school-related or education-related activities; and
    - student recognition programs.
  6. the right of parents to inspect, upon request, any instrument used in the collection of information, as described in number 5.
- Local education agencies must “directly” notify parents of these policies and, at a minimum, provide the notice at least annually, at the beginning of the school year. Parents should be notified within a reasonable period of time should any substantive change be made to the policies.
  - In the notification, the local education agency must offer an opportunity for parents to opt out of (remove their child from) participation in:
    - activities involving the collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling that information, or otherwise providing that information to others for that purpose;
    - the administration of any survey containing one or more of the above-described eight items of information; and
    - any nonemergency, invasive physical examination or screening that is: 1) required as a condition of attendance; 2) administered by the school and scheduled by the school in advance; and 3) not necessary to protect the immediate health and safety of the student, or other students.
  - In the notification, the local education agency must notify parents of the specific or approximate dates during the school year when these activities are scheduled.
  - This law is not intended to preempt applicable provisions of state law that require parental notification.
  - This law does not apply to any physical examination or screening that is permitted or required by state law, including such examinations or screenings permitted without parental notification.
  - The requirements of PPRA do not apply to a survey administered to a student in accordance with the Individuals with Disabilities Education Act (IDEA).
  - These requirements do not supersede any of the requirements of FERPA.
  - The rights provided to parents under PPRA transfer from the parent to the student when the student turns 18 years old or is an emancipated minor under applicable state law. The law applies to local education agencies, but does not apply to postsecondary institutions.
  - A state education agency or local education agency may use funds provided under Part A of Title V of the Elementary and Secondary Education Act (ESEA) to enhance parental involvement in areas affecting the in-school privacy of students.



The Family Policy Compliance Office (FPCO) of the U.S. Department of Education interprets FERPA and PPRA. The office also responds to complaints about interpreting or applying the laws. Any conflicts between PPRA and state laws or local policies should be forwarded for adjudication to the FPCO within 45 days after the conflict was observed.

## **D. FERPA and Special Education Records**

### **D1. IDEA protects the privacy of students who are receiving special education services**

In addition to the requirements of FERPA, the Individuals with Disabilities Education Act (IDEA) provides additional privacy protections for students who are receiving special education and related services. The privacy protections under Part B of the IDEA are found at 34 CFR 300.560–300.577.

Part B of the IDEA incorporates and cross-references FERPA. For example, under Part B, the term “education records” means the type of records covered by FERPA as implemented by its regulations in 34 CFR Part 99. Under § 99.3 of FERPA, “education records” is broadly defined to mean those records that are related to a student and are maintained by an education agency or institution. Part C (34 CFR 303.460) permits states to adopt or develop policies that the states will follow to ensure the confidentiality of personally identifiable information. However, these policies and procedures under Part C must meet the Part B requirements of 34 CFR 300.560–300.576.

In addition to the FERPA provisions and IDEA-specific provisions that restate the FERPA requirements, the IDEA regulations also include some additional protections tailored to special confidentiality concerns for children with disabilities and their families. Public agencies must inform parents of children with disabilities when information is no longer needed and, except for certain permanent record information, that information must be destroyed at the request of the parents (34 CFR 300.573). If a state transfers the IDEA rights of parents to children at the age of majority, the parents’ rights under the IDEA regarding educational records also transfer, but the public agency

must provide any notice required under the due process procedures of the IDEA to both the student and the parent (34 CFR 300.574). The state education agency must give public notice about the collection of personally identifiable information in the state and a summary of the policies and procedures that public agencies must follow regarding storage, disclosure to third parties, and retention and destruction of personally identifiable information (34 CFR 300.561). Each public agency must have one official who is responsible for ensuring the confidentiality of any personally identifiable information, must train all persons who are collecting or using personally identifiable information regarding the state’s policies about confidentiality and FERPA, and must maintain for public inspection a current listing of the names and positions of individuals within the agency who have access to personally identifiable information (34 CFR 300.572).

### **D2. FERPA provisions apply to all students receiving special education services**

The provisions of FERPA apply to all students receiving special education and related services under the IDEA. In addition, FERPA serves as the foundation for the additional confidentiality provisions of Part B of the IDEA at 34 CFR 300.560–300.577. Moreover, Congress has stressed that the FERPA provisions apply under the IDEA. The Senate and House Committee Report on the 1997 Amendments of the IDEA state that “nothing in this bill shall supersede any parental access rights under the Family Educational Rights and Privacy Act of 1974 or foreclose access to information otherwise available to parties” [S. Rep. No. 105–17, p. 27 (1997); H. Rep. No. 105–95, p. 107 (1997)].

### **D3. OSEP and FPCO work closely to resolve possible conflicts in applicable legislation**

The Office of Special Education Programs (OSEP) and FPCO, both of the U.S. Department of Education, have worked together to ensure that the provisions of the two statutes are interpreted without conflict. In the past when issues arose and there appeared to be a possible conflict between the two statutes, the two offices have worked together to ensure that the privacy rights of parents and students receive full protection under FERPA and the IDEA, while ensuring that the other requirements of the IDEA are met.

#### **D4. IDEA privacy protections apply to private schools under special circumstances**

While the IDEA does not directly apply to private schools, the law does apply to all students with disabilities who are placed in or referred to a private school or facility by a public agency as a means of providing a free appropriate public education. In this situation, the records of such students are protected by FERPA and the placing public school district is responsible for complying with the requirements of FERPA and the IDEA relative to these students' records.

The IDEA also applies to the special education and related services that a public agency provides to students with disabilities who are enrolled by their parent in a private school or facility and who have been chosen by the public agency to receive certain special education and related services. In these situations, the education records of such students that are collected, maintained, or used by the public agency are subject to FERPA and the IDEA, and the public agency is responsible for complying with the requirements of FERPA and the IDEA relative to these records.

In addition, the child find provisions of the IDEA—provisions that require states and school districts to identify, locate, and evaluate children who may have disabilities and be in need of special education—apply to both public and private school children. The provisions of FERPA and the IDEA apply to education records of public agencies resulting from child find activities.

### **E. Other Federal Laws Affecting Information Privacy in Schools**

Student records may be protected simultaneously by laws administered by the U.S. Department of Education, as well as by other state and federal agencies. FERPA establishes a high level of privacy protection, but statutes administered by agencies within the U.S. Departments of Agriculture, Health and Human Services, and Justice also protect records privacy and may apply to the records of students in schools. Professional standards of ethical practice, under which school doctors and nurses, psychologists, and other professionals operate, may also establish privacy restrictions. Following are some examples:

- Information about students certified eligible for free and reduced-price school meals is covered by confidentiality restrictions administered by the U.S. Department of Agriculture.
- Records of drug and alcohol prevention and treatment services for students are covered by confidentiality restrictions administered by the U.S. Department of Health and Human Services.
- Some laws establish minors' rights to seek treatment for certain health and mental health conditions, including sexually transmitted diseases, HIV testing and treatment, pregnancy, and mental health counseling.
- Some state laws protect records pertaining to HIV status, medical records, child abuse, privileged communications, and state-specific records retention and destruction regulations.

Confidentiality issues may arise in schools in cases where FERPA is not the broadest protection or where the application of FERPA may be unclear. As a result, school personnel must develop an understanding of the principles underlying legal statutes and regulations and make every effort to maintain the privacy of any information they receive in the course of providing services. School officials increasingly have access to sensitive health and family information.

When uncertainty occurs about when and with whom information should be shared, individuals in schools should act with caution and understand that their fundamental obligation is to maintain confidentiality. School personnel should never share with another individual—even a professional—more than is necessary to benefit the student. Legal counsel and school officials are available to interpret matters where privacy issues are involved. Teachers, paraprofessionals, and principals should not hesitate to consult these individuals when they are uncertain about their obligations or responsibilities. The references at the end of this section contain additional contacts for guidance related to the information presented here.

Individual student records held by schools or education agencies are primarily education records and are therefore subject to FERPA regulations, even when other statutes also may apply. If officials perceive a conflict between FERPA and any state or other federal statutes or regulations, they should seek counsel from appropriate legal authorities to identify the issues involved and to

establish policies that accurately reflect applicable legal statutes. Officials should also contact the FPCO in the Department of Education regarding any apparent conflicts between FERPA and other federal or state laws.

The Children's Online Privacy Protection Act of 1998 (COPPA) also has an impact on student privacy. Teachers are increasingly using the Internet as an instructional method to enhance student learning. Effective April 2000, certain web sites must obtain parental consent before collecting personal information from children under age 13. The main goal of the Act is to protect the privacy of children using the Internet. The privacy notice of these web sites must state that the parent can review and have deleted their child's personal information, and must inform users how the information will be used and whether personal information is disclosed to third parties. Consent is verified through print forms, credit cards, digital signature, e-mail accompanied by a pass code, and so on.

### **E1. NSLA safeguards the confidentiality of students receiving free and reduced-price school meals**

The Richard B. Russell National School Lunch Act (NSLA), which has stricter privacy provisions than FERPA, restricts who may have access to records on students who are eligible for free and reduced-price meals. This includes student and household information obtained from the free and reduced-price eligibility process and the student's (free or reduced-price eligibility) status. Individuals who may be permitted access to this information under FERPA may be denied access under the more restrictive provisions of NSLA. Refer to exhibits 2–5 through 2–9 for guidance concerning the allowable use of free and reduced-price eligibility data.

The National School Lunch Program, administered by the U.S. Department of Agriculture, operates in most elementary and secondary schools. Many of these schools also participate in the School Breakfast Program. Any child at a participating school may purchase a meal under the lunch and/or breakfast program. However, students from households with incomes at or below 130 percent of the federal poverty level are eligible for free school meals, and children from households with incomes between 130 percent and 185 percent of the federal poverty level are eligible for reduced-price school meals.

For many schools and school districts, information from the lunch program is likely to be the best and maybe the only source of data available to schools on "economically disadvantaged" students.

The NSLA strictly limits how school districts may use individual student and household information obtained as part of the free and reduced-price school meals eligibility process once students are identified to receive program services. The NSLA also includes civil and criminal penalties for unauthorized disclosures and improper uses of students' school lunch eligibility information.

School officials may obtain parental consent to use students' free and reduced-price meal eligibility information for a purpose other than determining the households' eligibility for free and reduced-price meals for their children. However, the NSLA specifies that persons "directly" connected to the administration or enforcement of certain programs or activities are permitted access to children's free and reduced-price meal eligibility information without parental consent. Additionally, the statute specifies that some of these programs or activities may have access to students' eligibility status only (whether they are eligible for free meals or reduced-price meals), while other individuals and programs may have access to all eligibility information (all information from the households' free and reduced-price school meal application). Exhibits 2–5 to 2–9 provide the programs and activities that may be permitted access to and use of students' free and reduced-price meal eligibility information, the amount of information that may be disclosed, and whether parental notification and consent are required. For example, under the NSLA, federal and state education programs are eligible recipients of students' free and reduced-price eligibility status. Although a program or individual may be authorized under the NSLA to receive free and reduced-price eligibility information, there must be a legitimate "need to know" to provide a service or carry out an authorized activity. Whenever possible, aggregate data should be used rather than personally identifiable data. Additionally, the disclosure of students' school meal eligibility information should be made available only to a limited number of individuals. The agency responsible for making the free and reduced-price meal eligibility determination makes the decision on whether or not to disclose students' eligibility information. This agency will be the school food authority or school administration.



If an agency's database includes (free and reduced-price eligibility) information that is personally identifiable, database managers must impose controls on the disclosure of that information so that only eligible recipients have access to students' school meal eligibility information.

The Food and Nutrition Service of the U.S. Department of Agriculture has issued several memoranda on limited disclosure of children's free and reduced-price meal or free milk eligibility information. (See exhibits 2–5 and 2–6). School officials may contact the district's food service director or the state education office responsible for the administration of the school nutrition programs in their state for further information or for a copy of the *Eligibility Guidance for School Meals Manual* (August 2001), which includes a section on the confidentiality of students' free and reduced-price meal information.

## **E2. The Drug and Alcohol Patient Records Confidentiality Law protects drug prevention and treatment records**

Federal confidentiality laws and regulations prohibit the disclosure of information about students who apply for or receive alcohol or drug abuse treatment services. The federal Drug and Alcohol Patient Records Confidentiality Law (42 CFR) is administered by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services. The Department of Health and Human Services confidentiality regulations apply to records of any patient, even a minor student in school, who receives treatment from a federally assisted program. Under the law, patients include students who receive counseling because they are children of alcoholics or drug abusers.

The confidentiality rules, known as 42 CFR, apply to assessment, diagnosis, counseling, group counseling, treatment, or referral for treatment in most programs in which students participate, including programs sponsored by public and many private schools. They generally forbid the release of any information without a patient's consent, even when the patient is a student in school and under 18 years of age.

The 42 CFR restrictions may conflict with the obligations of school-based programs to provide parent access to the education records of their student. However, the U.S. Department of Education and the Substance Abuse and

Mental Health Services Administration issued a joint opinion in 1990 that suggests potential solutions to this conflict. One solution requires students to consent to parent access to records as a condition of receiving diagnostic, treatment, or referral services; a second solution limits the information kept in school records, recognizing that parents may have access to them. Both solutions are imperfect, however, and school officials are advised to seek information and advice about potential confidentiality conflicts from the FPCO.

## **E3. HIPAA protects the confidentiality of personal health information and access of health records**

While education records are protected under FERPA, individual health information is protected under the Health Insurance Portability and Accountability Act (HIPAA) of 1996. This mandate establishes federal standards for the privacy of individually identifiable health information. The Privacy Rule of the law:

- gives patients more control over their health information;
- sets boundaries on the use and release of health records;
- establishes appropriate safeguards that health care providers and others must achieve to protect the privacy of health information;
- holds violators accountable, with civil and criminal penalties that can be imposed if they violate patients' privacy rights; and
- strikes a balance when public responsibility supports disclosure of some forms of data—for example, to protect public health.

HIPAA affords patients rights of access to their own medical records, as well as the right to examine and obtain a copy of their own health records and request corrections. It is important to note that there is a broad exemption in HIPAA's Privacy Rule that excludes health information contained in education records as defined in FERPA. In other words, any health information that is maintained by an education agency or institution is subject to FERPA access and disclosure rules, regardless of whether the information was created and used by health professionals.

Under HIPAA, there are three different rules that apply to covered entities such as medical providers and hospitals. The three rules apply to certain entities if they meet the definition of covered entity. “Covered entities” are entities that are health plans, health care clearinghouses, or health care providers that transmit health information in electronic form in connection with a transaction for which the Secretary of Health and Human Services has adopted a standard (covered transaction).

Even if a state lead agency under Part C is a “covered entity” under HIPAA, its individually identifiable health information may not be subject to the Privacy Rule if those records are covered by FERPA, 20 USC § 1232(g) (which is administered by the U.S. Department of Education). Whether the state lead agency’s individually identifiable health information is subject to the Privacy Rule depends on whether the information is an education record under the FERPA, 20 USC § 1232(g). In short, records relating to Part C services for the child are exempt from the Privacy Rule because HIPAA’s Privacy Rule applies only to information that is “protected health information” (45 CFR 160.103). Under the Privacy Rule, education records covered by FERPA are excluded from the definition of “protected health information.”

The U.S. Department of Health and Human Services (DHHS) establishes national standards for electronic health care transactions and national identifiers for providers, health plans, and employers. The standards set forth in HIPAA also address the security and privacy of health data. The main objective is to improve the efficiency and effectiveness of the nation’s health care system by encouraging the widespread use of electronic data interchange in health care. More information about these requirements can be found at the web sites of Centers for Medicare and Medicaid Services ([cms.hhs.gov/hipaa](http://cms.hhs.gov/hipaa)) and Office for Civil Rights ([www.hhs.gov/hipaa](http://www.hhs.gov/hipaa)).

#### **E4. The Paperwork Reduction Acts monitor the paperwork burden**

The federal government monitors the paperwork burden of federal legislation through the Paperwork Reduction Acts of 1980 and 1995, which authorize the Office of Management and Budget (OMB) in the Executive Office of the President to restrict the information that agencies may collect from the public. Federal agencies and non-

education agencies receiving federal funds must obtain OMB clearance authorizing each approved data collection instrument or form. An approved information collection form is assigned a clearance number and an expiration date to confirm that it is authorized. Approved federal data collections must explain the data collection purpose prominently on the form, whether the data collection is mandated or voluntary, and the benefit(s) to be obtained from the data collection.

The clearance process also requires that plans for data collection stipulate how the data are to be used, along with provisions for ensuring the confidentiality of any personal data collected. OMB clearance is not required for the clearance of state or local forms, however. OMB clearance ensures that requests for information from student records meet the requirements of FERPA.

#### **E5. The Privacy Act governs the use of social security numbers**

Section 7(a) of the Privacy Act of 1974 addresses the use of social security numbers by federal, state, or local governments. It states that it is:

*...unlawful for any federal, state, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number...*

When government agencies collect social security numbers for reasons other than those allowed in the original law, they must specify how the numbers will be used and the limits of their use. Requests for social security numbers must be accompanied by the following notice:

*Any federal, state, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.*

State and local education agencies can minimize challenges to their use of social security numbers for student records identification by creating alternative identification numbers for students whose parents object to using social security numbers for identification.

## **F** Resources for Interpreting Federal Laws That Protect the Privacy of Education Records

A number of private and public agencies monitor federal activity on privacy and confidentiality issues. The contact information provided below is accurate as of the date of this publication:

Several federal offices can respond to questions. First, the U.S. Department of Education can assist in interpreting FERPA and PPR, and respond to complaints, on a case-by-case basis, about the interpretation or application of these laws through the:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202–5901  
(202) 260–3887 (phone)  
(202) 260–9001 (fax)  
[FERPA@ed.gov](mailto:FERPA@ed.gov) (e-mail)  
[www.ed.gov/policy/gen/guid/fpco](http://www.ed.gov/policy/gen/guid/fpco) (web site)

The Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) oversees the implementation of other federal privacy laws, such as the Privacy Act, and coordinates regulatory review, paper-work reduction, statistical policy and information policy in the federal government. The web site of OIRA is at <http://www.whitehouse.gov/omb/infoereg/regpol.html>.

The Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services address inquiries about HIPAA's Administrative Simplification provisions, including electronic transactions and code sets, security, unique identifiers, and privacy. They can be reached at:

Centers for Medicare and Medicaid Services  
7500 Security Boulevard  
Baltimore MD 21244–1850  
(866) 282–0659 (toll-free hotline)  
[askhipaa@cms.hhs.gov](mailto:askhipaa@cms.hhs.gov) (e-mail)  
[cms.hhs.gov/hipaa](http://cms.hhs.gov/hipaa) (web site)

The Office for Civil Rights of the U.S. Department of Health and Human Services addresses inquiries about HIPAA's Privacy Rule. They can be reached at:

Office for Civil Rights  
U.S. Department of Health and Human Services  
200 Independence Avenue SW

Room 509F, HHH Building  
Washington, DC 20201  
(800) 368–1019 (toll-free hotline)  
[OCRMail@hhs.gov](mailto:OCRMail@hhs.gov) (e-mail)  
[www.hhs.gov/ocr/hipaa](http://www.hhs.gov/ocr/hipaa) (web site)

Other national groups have organized to monitor and interpret privacy implications of federal laws about education, health, and social services for children. The American School Health Association, in collaboration with the National Association of School Nurses and the National Association of State School Nurse Consultants, published a document in 2000 that is a counterpart of these Privacy Guidelines in the context of school health records. The document, entitled *Guidelines for Protecting Confidential Student Health Information*, provides a wealth of recommendations specifically concerned with navigating a course through conflict obligations. They can be reached at:

American School Health Association  
7263 State Route 43  
P.O. Box 708  
Kent, OH 44240  
(330) 678–1601 (phone)  
[www.ashaweb.org](http://www.ashaweb.org) (web site)

The Council of School Attorneys, housed in the National School Boards Association, is a membership organization of affiliate state councils, consisting of over 3,000 attorneys nationwide, who work to improve the practice of school law and prevent lawsuits against public schools. They can be reached at:

Council of School Attorneys  
c/o National School Boards Association  
1680 Duke Street  
Alexandria, VA 22314  
(703) 838–6722 (phone)  
[www.nsba.org](http://www.nsba.org) (web site)

### **COMMONLY ASKED QUESTIONS**

- Q.** What agencies are subject to federal laws on the privacy of education records?
- A.** *Education agencies and institutions that collect and maintain education records are subject to federal privacy laws if they receive funds from the U.S. Department of Education. If information derives from an education record or is maintained in the record, federal as well as state and local privacy rules apply. See section 2A.*

- Q.** Do privacy assurances differ across federal education programs?
- A.** *Privacy components of laws are administered by federal agencies other than the U.S. Department of Education, and these may be applicable to programs directed in schools. However, the Family Educational Rights and Privacy Act (FERPA) is a comprehensive law that applies broadly to information collected in public agencies or schools that receive federal education funds. Thus, FERPA applies to information collected and maintained by most public elementary, secondary, and postsecondary education institutions and by some private institutions in this country. See section 2A.*
- Q.** Are individuals liable for penalties if they do not adhere to the requirements of FERPA?
- A.** *No, not typically. Institutions receiving funds from the U.S. Department of Education are legally responsible for complying with these laws and could be in jeopardy of losing federal education dollars if they are found to have a policy or practice of violating FERPA. Individual liability would depend on state laws and local policies. See section 2, A1.*
- Q.** What do state and local education agency personnel need to know about federal privacy laws pertaining to education records?
- A.** *Strong federal laws protect the privacy of education records in schools. Individuals who work with education records in agencies or schools are responsible for knowing the privacy regulations that apply to their work. Agency administrators need to understand federal and state laws, as well as local policies, that govern parental access to records and restrict inappropriate disclosure of information about students and their families. See section 2, A and B.*
- Q.** About which federal student privacy laws do school district or state education agency administrators need to be informed?
- A.** *FERPA and the Protection of Pupil Rights Amendment (PPRA) are the two major laws governing the protection of education records and student and family privacy. The other key laws with specific federal regulatory requirements pertaining to schools are the National School Lunch Act and the Individuals with Disabilities Education Act. See section 2, B–E.*
- Q.** Does FERPA prohibit education agencies and institutions from matching data on students with data from other agencies?
- A.** *FERPA generally prohibits the disclosure of personally identifiable information from students' education records to other federal and state agencies, without the consent of the parent or eligible student. However, FERPA does not prohibit an education agency or institution from receiving information from outside entities and conducting the data matching internally. While the education agency or institution may conduct internal matches, it may only disclose the results of the match in aggregate form, even to the agency that provided information for the match.*
- Q.** What are the responsibilities of state education agencies for providing parents or eligible students access to education records?
- A.** *A state education agency must provide parents and eligible students with access to education records that the agency maintains. Although these agencies are not required to establish a written policy, they are obligated to honor rights of access and to restrict disclosure of information except to authorized individuals. See section 2, B6.*
- Q.** How does the No Child Left Behind Act affect FERPA and PPRA?
- A.** *The No Child Left Behind Act impacts FERPA in the following areas: the transfer of school disciplinary records, armed forces recruiter access to students and student recruiting information, student privacy, survey information, parental access to information, and administration of certain physical examinations to minors. For more detailed information, please see the Fact Sheet: Family Educational Rights and Privacy Act of 1974 (exhibit 2–1).*
- Q.** What recent court cases address privacy issues?
- A.** *On February 19, 2002, the U.S. Supreme Court ruled in *Owasso ISD v. Falvo* that peer grading does not violate FERPA. The Department of Education is currently reviewing the Court's ruling and may issue additional guidance or regulations to further clarify the scope of the term "education records."*
- On June 20, 2002, the U.S. Supreme Court ruled in the case of *Gonzaga University v. John Doe*. The Court ruled that students and parents may not sue for damages under 42 USC § 1983 to enforce provisions of FERPA.*

## Fact Sheet: Family Educational Rights and Privacy Act of 1974

The Family Educational Rights and Privacy Act (FERPA) (20 USC § 1232g; 34 CFR Part 99) is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students." The provisions of FERPA are as follows:

- Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.
- Parents or eligible students have the right to request that a school correct records that they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.
- Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):
  - school officials with a legitimate educational interest;
  - other schools to which a student is transferring;
  - specified officials for audit or evaluation purposes;
  - appropriate parties in connection with financial aid to a student;
  - organizations conducting certain studies for or on behalf of the school;
  - accrediting organizations;
  - to comply with a judicial order or lawfully issued subpoena;
  - appropriate officials in cases of health and safety emergencies; and
  - state and local authorities, within a juvenile justice system, pursuant to specific state law.

Schools may disclose, without consent, "directory" information, such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (e.g., special letter, inclusion in a PTA bulletin, student handbook, or newspaper article) is left to the discretion of each school.

For additional information or technical assistance, call (202) 260-3887 (voice). Individuals who use TDD may call the Federal Information Relay Service at 1-800-877-8339. Or write to the following address:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202-5901

**Exhibit 2-2**

## Fact Sheet: Protection of Pupil Rights Amendment

The Protection of Pupil Rights Amendment (PPRA) (20 USC § 1232h; 34 CFR Part 98) applies to education agencies and institutions that receive funding from the U.S. Department of Education. PPRA is intended to protect the rights of parents and students in the following two ways:

- It seeks to ensure that schools and contractors make instructional materials available for inspection by parents if those materials will be used in connection with a Department of Education-funded survey, analysis, or evaluation in which their children participate.
- It seeks to ensure that schools and contractors obtain written parental consent before minor students are required to participate in any Department of Education-funded survey, analysis, or evaluation that reveals information concerning:
  - political affiliations;
  - mental and psychological problems potentially embarrassing to the student and his/her family;
  - sexual behavior and attitudes;
  - illegal, antisocial, self-incriminating, and demeaning behavior;
  - critical appraisals of other individuals with whom respondents have close family relationships;
  - legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
  - religious practices, affiliations, or beliefs of the student or student's parent; and
  - income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

For surveys not funded by the Department of Education, schools must notify parents and provide them with an opportunity to review the survey and opt their child out of participation. In addition, schools must work with parents to develop local policies regarding arrangements to protect student privacy relative to surveys, the administration of physical examinations or screenings, and the collection, disclosure, or use of personal information collected from students for marketing purposes.

Parents or students who believe their rights under PPRA may have been violated may file a complaint with the Department of Education by writing the Family Policy Compliance Office. Complaints must contain specific allegations of fact giving reasonable cause to believe that a violation of PPRA occurred.

For additional information or technical assistance, call (202) 260-3887 (voice). Individuals who use TDD may call the Federal Information Relay Service at 1-800-877-8339. Or write to the following address:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202-5901



## Access to High School Students and Information on Students by Military Recruiters Questions and Answers (October 9, 2002)

- Q.** What are the recent changes made by Congress concerning military recruitment of high school students?
- A.** *Congress has passed two major pieces of legislation that generally require local education agencies receiving assistance under the Elementary and Secondary Education Act of 1965 (ESEA)<sup>3</sup> to give military recruiters the same access to secondary school students as they provide to postsecondary institutions or prospective employers. Local education agencies are also generally required to provide students' names, addresses, and telephone listings to military recruiters, when requested.*
- Q.** Where are these statutory requirements found?
- A.** *These requirements are contained in § 9528 of the ESEA (20 USC § 7908), as amended by the No Child Left Behind Act of 2001 (P.L. No. 107-110), the education bill Congress recently passed. These requirements are also contained in 10 USC § 503, as amended by § 544 of the National Defense Authorization Act for Fiscal Year 2002 (P.L. No. 107-107), the legislation that provides funding for the nation's armed forces in fiscal year 2002.*
- Q.** What is the effective date for these military recruiter access requirements?
- A.** *While there are differences in the effective date provisions for 10 USC § 503 and § 9528 of the ESEA, both provisions apply to all local education agencies receiving ESEA funds by July 1, 2002.*
- Q.** What are the requirements of § 9528 of the ESEA?
- A.** *Each local education agency that receives funds under the ESEA must comply with a request by a military recruiter or an institution of higher education for secondary students' names, addresses, and telephone numbers, unless a parent has "opted out" of providing such information. (See below for additional information.)*
- Section 9528 also requires local education agencies that receive funds under the ESEA to provide military recruiters the same access to secondary school students as they generally provide to postsecondary institutions or prospective employers. For example, if the school has a policy of allowing postsecondary institutions or prospective employers to come on school property to provide information to students about educational or professional opportunities, it must afford the same access to military recruiters.*
- Q.** Under § 9528 of the ESEA, what notification must local education agencies provide to parents before disclosing names, addresses, and telephone numbers of secondary students to military recruiters and officials of institutions of higher education?
- A.** *Under FERPA, a local education agency must provide notice to parents of the types of student information that it releases publicly. This type of student information, commonly referred to as "directory information," includes such items as names, addresses, and telephone numbers and is information generally not considered harmful or an invasion of privacy if disclosed. The notice must include an explanation of a parent's right to request that the information not be disclosed without prior written consent. Additionally, § 9528 requires that parents be notified that the school routinely discloses names, addresses, and telephone numbers to military recruiters upon request, subject to a parent's request not to disclose such information without written consent. A single notice provided through a mailing, student handbook, or other method that is reasonably calculated to inform parents of the above information is sufficient to satisfy the parental notification requirements of both FERPA and § 9528. The notification must advise the parent of how to opt out of the public, nonconsensual disclosure of directory information and the method and timeline within which to do so.*

<sup>3</sup>If the LEA receives funds under the ESEA, all the secondary schools in that LEA are subject to the requirements in these laws.

- Q.** If a local education agency has not provided notice relating to “directory information,” may it release a student’s name, address, and telephone number when requested by a military recruiter?
- A.** *As noted above, a local education agency may provide a single notice regarding both directory information and information disclosed to military recruiters. If the agency does not disclose “directory information” under FERPA, then it must still provide military recruiters access to secondary students’ names, addresses, and telephone listings. In addition, the local education agency must notify parents that they may opt out of this disclosure. In other words, a local education agency that does not disclose “directory information” must nonetheless provide a notice that it discloses information to military recruiters. The notice must be reasonably calculated to inform parents.*
- Q.** If a parent opts out of the public, nonconsensual disclosure of directory information (or any subset of such information), must the three data elements be released to military recruiters upon their request?
- A.** *If a parent opts out of providing directory information to third parties, the opt-out relating to name, address, or telephone number applies to requests from military recruiters as well. For example, if the opt-out states that telephone numbers will not be disclosed to the public, schools may not disclose telephone numbers to military recruiters.*
- Q.** If the school does not list one or more of the three data elements (e.g., telephone number) among its directory information, may it release that information to military recruiters?
- A.** *If a school does not designate one or more of the three items as “directory information” under FERPA, it still must provide all three items to military recruiters upon request. Also, in that case, the school would have to send a separate notice to parents about the missing “directory information” item(s), noting an opportunity to opt out of disclosure of the information to military recruiters. An easier method, of course, would be for the school to designate all three items—name, address, and telephone listing—as “directory information.”*
- Q.** How are the requirements under § 9528 of the ESEA enforced?
- A.** *Schools that do not comply with § 9528 of the ESEA could jeopardize their receipt of ESEA funds.*
- Q.** How does § 544 of the National Defense Authorization Act for Fiscal Year 2002 amend the former requirements under 10 USC § 503?
- A.** *Section 544 of the National Defense Authorization Act for Fiscal Year 2002 revises Title 10, Section 503(c) in several important ways. First, the recruiting provisions now apply only to local education agencies (including private secondary schools) that receive funds under the ESEA. Second, these provisions now require access by military recruiters to students, under certain conditions, and to secondary school students’ names, addresses, and telephone listings. Third, as discussed earlier, they require local education agencies to notify parents of their right to opt out of the disclosure of their children’s names, addresses, and telephone numbers, and to comply with any such requests from parents or students.*
- Q.** How are these requirements under 10 USC § 503 enforced?
- A.** *In addition to the potential for loss of funds under ESEA noted above for failure to comply with § 9528 of the ESEA, a local education agency that denies a military recruiter access to the requested information on students after July 1, 2002, will be subject to specific interventions under 10 USC § 503.*
- In this regard, the law requires that a senior military officer (e.g., Colonel or Navy Captain) visit the local education agency within 120 days. If the access problem is not resolved with the local education agency, the Department of Defense must notify the state governor within 60 days. Problems still unresolved after 1 year are reported to Congress if the Secretary of Defense determines that the local education agency denied recruiting access to at least two of the armed forces (Army, Navy, Marine Corps, etc.). The expectation is that public officials will work with the local education agency to resolve the problem.*



*Additionally, the Department of Defense has developed a national high school database to document recruiter access. Presently, 95 percent of the nation's 22,000 secondary schools provide a degree of access to military recruiters that is consistent with current law.*

**Q.** Are private schools subject to the military recruiter requirements?

**A.** *Private secondary schools that receive funds under the ESEA are subject to 10 USC § 503. However, private schools that maintain a religious objection to service in the Armed Forces that is verifiable through the corporate or other organizational documents or materials of that school are not required to comply with this law.*

**Q.** Where can I get more information on the requirements of 10 USC § 503?

**A.** *The Office of the Secretary of Defense may be contacted for copies of the statute, or questions relating to it. Please contact the Accession Policy Directorate as follows:*

Director, Accession Policy  
4000 Defense Pentagon  
Washington, DC 20301-4000  
Telephone: (703) 695-5529

**Q.** Where can I get more information on the requirements of § 9528 of the ESEA?

**A.** *The Family Policy Compliance Office (FPCO) in the Department of Education administers FERPA as well as § 9528 of the ESEA, as amended by the No Child Left Behind Act of 2001. School officials with questions on this guidance, or FERPA, may contact the FPCO at FERPA@ed.gov or write to the FPCO as follows:*

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202-5901  
Telephone: (202) 260-3887  
Fax: (202) 260-9001  
[www.ed.gov/policy/gen/guid/fpc](http://www.ed.gov/policy/gen/guid/fpc)

A model "directory information" notification for use by local education agencies incorporating the changes under § 9528 of the ESEA and 10 USC § 503 notification may be obtained from the FPCO's web site ([www.ed.gov/policy/gen/guid/fpc](http://www.ed.gov/policy/gen/guid/fpc)).

## Exhibit 2-4

## Model Notification of Rights Under FERPA for Elementary and Secondary Schools

The Family Educational Rights and Privacy Act (FERPA) affords parents and students over 18 years of age (“eligible students”) certain rights with respect to students’ education records. These rights are:

1. The right to inspect and review the student’s education records within 45 days of the day the school receives a request for access. Parents or eligible students should submit to the school principal [or appropriate school official] a written request that identifies the record(s) they wish to inspect. The school official will make arrangements for access and notify the parent or eligible student of the time and place where the records may be inspected.
2. The right to request the amendment of the student’s education record that the parent or eligible student believes is inaccurate or misleading. Parents or eligible students may ask the school to amend a record that they believe is inaccurate or misleading. They should write the school principal [or appropriate official], clearly identify the part of the record they want changed, and specify why it is inaccurate or misleading. If the school decides not to amend the record as requested by the parent or eligible student, the school will notify the parent or eligible student of the decision and advise them of their right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the parent or eligible student when notified of the right to a hearing.
3. The right to consent to disclosures of personally identifiable information contained in the student’s education records, except to the extent that FERPA authorizes disclosure without consent. One exception, which permits disclosure without consent, is disclosure to school officials with legitimate educational interests. A school official is a person employed by the school as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel); a person serving on the school board; a person or company with whom the school has contracted to perform a special task (such as an attorney, auditor, medical consultant, or therapist); or a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks. A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility. Upon request, the school discloses education records without consent to officials of another school district in which a student seeks or intends to enroll.

[NOTE: FERPA requires a school district to make a reasonable attempt to notify the parent or eligible student of the records request unless it states in its annual notification that it intends to forward records on request.]

4. The right to file a complaint with the U.S. Department of Education concerning alleged failures by the school to comply with the requirements of FERPA. The name and address of the office that administers FERPA is:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202-5901

[NOTE: In addition, an institution may want to include its directory information public notice, as required by § 99.37 of the regulations, with its annual notification of rights under FERPA.]

**USDA Memorandum  
Concerning Limited Disclosure  
of Children’s Free and Reduced Price Meal  
or Free Milk Eligibility Information**

Date: December 7, 1998

To: State Agencies  
Child Nutrition Programs  
All States

The Healthy Meals for Healthy Americans Act of 1994, P.L. 103-448, amended Section 9(b)(2)(C) of the National School Lunch Act (NSLA) (42 USC 1751(b)(2)(C)) to allow, without consent, limited disclosure of information about free and reduced price meal or free milk eligibility. The disclosure limitations apply to all the Child Nutrition Programs. The statute also specifies a fine of not more than \$1,000 or imprisonment of not more than 1 year, or both, for unauthorized disclosures of free and reduced price meal or free milk eligibility information.

Prior to issuance of a final rule, we are authorizing determining agencies to disclose free and reduced price meal or free milk eligibility information to the extent authorized in the statute. For purposes of this memorandum, a “determining agency” means the State agency, school food authority, school (including a private school or charter school), child care institution, or Summer Food Service Program sponsor that makes the free and reduced price meal or free milk eligibility determination.

Disclosure of eligibility information about participants beyond that authorized by the statute is permitted only with consent. The entity receiving the information from the determining agency, hereafter termed the “receiving entity,” may use the information only for the purpose authorized and may not share the information further. In no case are determining agencies required to disclose eligibility information. Providing aggregate information that does not identify individuals continues to be permitted without consent.

The issues of privacy and confidentiality of personal data are complicated as well as sensitive. Therefore, prior to developing State and local disclosure policies, we recommend that determining agencies discuss the disclosure provisions with their legal counsel. At a minimum, determining agencies that decide to disclose information that identifies individuals must follow these guidelines. These guidelines apply to eligibility information regardless of the manner in which the information is maintained including, but not limited to, print, tape, microfilm, microfiche, and electronic communication. Additionally, State agencies no longer need to send requests for disclosures to USDA’s Food and Nutrition Service (FNS) for approval.

## **I. What information may be disclosed permissibly without consent?**

(The term “persons directly connected” in this section includes Federal, State, and local program operators responsible for program administration or program compliance and their contractors.)

**A. Disclosing names and eligibility status in accordance with the NSLA.** Determining agencies may disclose, without consent, participants’ names and eligibility status (whether they are eligible for free meals or free milk or reduced price meals) to persons directly connected with the administration or enforcement of the following programs:

- Federal education programs, such as Title I and the National Assessment of Educational Progress; and State health or State education programs, provided the programs are administered by a State agency or a local education agency.

- Representatives of State or local education agencies evaluating the results and compliance with student assessment programs would be covered only to the extent that the assessment program was established at the State, not local, level.
- Federal, State, or local means-tested nutrition programs with eligibility standards comparable to the NSLA (i.e., food assistance programs to households with incomes at or below 185 percent of the Federal poverty level, such as the Food Stamp Program or a State or local nutrition program).

**B. Disclosing all eligibility information in accordance with the NSLA.** In addition to names and eligibility status, determining agencies may disclose, without consent, all eligibility information obtained through the free and reduced price meal or free milk eligibility process (including all information on the application or obtained through direct certification or verification) to the following:

- Persons directly connected with the administration or enforcement of the programs authorized under the NSLA or Child Nutrition Act of 1966 (CNA) (42 USC 1771). This includes the National School Lunch Program, School Breakfast Program, Special Milk Program, Child and Adult Care Food Program (CACFP), Summer Food Service Program, and the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). This means that program eligibility information collected for any one of the Child Nutrition Programs may be shared with another Child Nutrition Program, even if the programs are sponsored by different entities. For example, a public school may disclose information from children’s free and reduced price school meal applications, without parental consent, to a Summer Food Service Program administered by Parks and Recreation.
- The Comptroller General of the United States for purposes of audit and examination.
- Federal, State, or local law enforcement officials investigating alleged violations of any of the programs under the NSLA and CNA or investigating violations of any of the programs authorized to have access to names and eligibility status discussed in paragraph A above.

**C. Recommendation for notifying households of potential disclosures.** While not a requirement, we recommend that determining agencies inform households if they plan to disclose or use eligibility information outside the originating program. The notice of potential disclosure may be in the notice/letter to households that accompanies the free and reduced price meal or free milk application, on the application, or, for participants directly certified, in the document informing households of the participants’ eligibility through direct certification. The notification should state that the participants’ names, eligibility status, and other information provided on the application or obtained through direct certification or verification may be disclosed to certain other Federal, State, or local agencies as authorized by the NSLA. A list of the specific programs is not necessary.

## II. What types of disclosures require consent?

**A. Disclosing eligibility information to individuals and programs not authorized under the NSLA.** The disclosure of participants’ names and any eligibility information that identifies them individually to programs or individuals not specifically authorized by the NSLA requires written consent. Some programs that may request names and eligibility information for which consent prior to disclosure is required include:

- Federal health programs, such as Medicaid or the Children’s Health Insurance Program (CHIP);
- local health and local education programs and other local level activities. For example, the disclosure of children’s eligibility for free and reduced price meals to determine children’s eligibility for free text books or reduced fees for summer school requires consent when these are local initiatives and not State programs; and
- any other Federal, State, or local program or individual not included in the statute.

**B. Disclosing information that goes beyond that allowed under the NSLA.** The disclosure of information other than names and eligibility status to the programs authorized only to receive participants' names and eligibility status also requires written consent. For example, determining agencies may disclose names and eligibility status to a Federal education program, but if the program requests family size, determining agencies must obtain consent prior to disclosure.

### **III. What are the requirements for consent statements?**

The consent statement must be in writing. It may be obtained at the time of application, such as on a multi-use application, or at a later time. The consent statement must conform to the following requirements:

- The consent statement must identify the information that will be shared and how the information will be used.
- The consent statement must be signed and dated. In the case of a child participant, the consent statement must be signed by the parent or guardian of the applicant household, even though the application for free and reduced price meals or free milk may be signed by any adult household member. For adult participants in the CACFP, the adult participant must sign the consent statement unless a guardian has been appointed.
- The consent statement must state that failing to sign the consent statement will not affect eligibility or participation for the program and that the information will not be shared by the receiving program with any other entity or program.
- The parent/guardian/adult must be able to limit consent to only those programs with which he or she wishes to share information. For example, the consent statement could use a check-off system under which the applicant would check or initial a box to indicate that he or she wants to have information disclosed to determine eligibility for benefits from a particular program.

### **IV. What are the requirements for disclosure of social security numbers?**

When disclosing or using the social security number provided by the household on the application for any purpose other than the program for which the number was collected, the determining agency must modify the notice required by the Privacy Act of 1974 concerning the potential uses of the social security number. The notice must inform households of the additional intended uses of the number.

### **V. Are agreements required?**

Prior to disclosing or using any information for purposes other than the program for which the information was obtained, we recommend that the determining agency enter into a written agreement with the entity requesting the information. We suggest that the agreement be signed by both the determining agency and receiving entity, identify the entity receiving the information, describe the information to be disclosed and how it will be used, describe how the information will be protected from unauthorized uses and disclosures, and describe the penalties for unauthorized disclosure.

At a minimum, the receiving entity must be informed in writing that eligibility information may only be used for the purpose for which the disclosure was made, that further use or disclosure to other parties is prohibited, and that a violation of this provision may result in a fine of not more than \$1,000 or imprisonment of not more than 1 year, or both.

An agreement is not needed for Federal, State, or local agencies evaluating or reviewing Child Nutrition Program operations. Similarly, an agreement is not necessary for disclosures to the Comptroller General. These activities are part of routine Child Nutrition Program operations and enforcement.

**VI. Are there any penalties for improper disclosure?**

The NSLA establishes a fine of not more than \$1,000 or imprisonment of not more than 1 year, or both, for publishing, divulging, disclosing, or making known in any manner or extent not authorized by Federal law, any eligibility information. This includes the disclosure of eligibility information by one entity authorized under the NSLA to receive the information to any other entity, even if that entity would otherwise be authorized to receive the information directly from the determining agency.

These guidelines are subject to change pending issuance of a final rule.

[SIGNED]

STANLEY C. GARNETT  
Director  
Child Nutrition Division

**USDA Memorandum Concerning Limited Disclosure  
of Children's Free and Reduced Price Meal  
or Free Milk Eligibility Information  
in the State Medicaid Program  
and the State Children's Health Insurance Program**

Date: July 6, 2000

To: State Agencies  
Child Nutrition Programs  
All States

This memorandum addresses disclosure of children's free and reduced price eligibility information for the State Medicaid Program (State Medicaid) and the State Children's Health Insurance Program (SCHIP). The Agricultural Risk Protection Act of 2000, enacted on June 20, 2000, amended the National School Lunch Act (NSLA) (42 USC 1751(b)(2)(C)) to add State Medicaid under title XIX of the Social Security Act (42 USC 1396 et. seq.) and the SCHIP under title XXI of that Act (42 USC 1397aa et seq.) to programs in Section 9(b)(2)(C) of the NSLA that are authorized limited access to children's free and reduced price meal or free milk eligibility information. A memorandum issued on December 7, 1998, "Limited Disclosure of Children's Free and Reduced Price Meal or Free Milk Eligibility Information (SP 99-3); (CACFP 99-2)," addresses disclosure of free and reduced price meal or free milk eligibility information to other programs and entities. The issues of privacy and confidentiality of personal data are complicated as well as sensitive.

Therefore, prior to developing State and local disclosure policies, we recommend that determining agencies discuss the disclosure provisions with their legal counsel. At a minimum, determining agencies that decide to disclose information that identifies individuals must follow these guidelines. These guidelines apply to eligibility information regardless of the manner in which the information is maintained including, but not limited to, print, tape, microfilm, microfiche, and electronic communication.

For purposes of this memorandum, a "determining agency" means the State agency, school food authority, school (including a private school or charter school), child care institution, or Summer Food Service Program sponsor that makes the free and reduced price meal or free milk eligibility determination.

### **Disclosure of Children's Eligibility Information for Health Insurance Programs**

#### **Is disclosure of children's free and reduced price meal or free milk eligibility information for State Medicaid and SCHIP required?**

Schools and institutions (determining agencies) may disclose free and reduced price meal or free milk eligibility information to identify and enroll eligible children in State Medicaid or SCHIP, provided the determining agency's State agency and determining agency elect to do so. Determining agencies are not required to disclose eligibility information. However, we encourage cooperation with State and local administrators of State Medicaid and SCHIP because studies show that many children eligible for free and reduced price meals and free milk do not have health insurance.

#### **What information may be disclosed for use by State Medicaid and SCHIP and what health agencies or health insurance programs are eligible to receive the information?**

Determining agencies may disclose names, eligibility status (whether they are eligible to receive free meals or free milk or reduced price meals), and any other eligibility information obtained through the free and reduced price meal and free milk eligibility process (including all information on the application or obtained through direct certification or verification) to persons directly connected with the administration of State Medicaid and/or SCHIP.

**Who are “persons directly connected” with the administration of State Medicaid and SCHIP?**

Persons directly connected with the administration of State Medicaid and SCHIP for purposes of disclosure of free and reduced price meal and free milk eligibility information are State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of applications or to make eligibility determinations. Check with your State Medicaid/SCHIP coordinator to determine the persons or entities in your State authorized to enroll children in Medicaid and SCHIP.

**Are there restrictions on how children’s free and reduced price eligibility information may be used by State Medicaid and SCHIP?**

State Medicaid and SCHIP agencies and health insurance program operators receiving children’s free and reduced price meal or free milk eligibility information may only use that information to enroll children in State Medicaid or SCHIP. The State Medicaid or SCHIP enrollment process may include seeking to identify and identifying children from low income households who are potentially eligible for State Medicaid or SCHIP for the purpose of enrolling them in State Medicaid or SCHIP.

**Must households be notified that their free and reduced price meal or free milk eligibility information may be disclosed?**

For any disclosures to State Medicaid and/or SCHIP, parents/guardians must be notified of the potential disclosure and given the opportunity to elect not to have their children’s information disclosed. The notification must inform the parents/guardians that they are not required to consent to the disclosure, that the information will be used to enroll children in a health insurance program, and that their decision will not affect their children’s eligibility for free and reduced price meals or free milk. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price meal or free milk application, on the application itself, or in a separate notice provided to parents/guardians. The notice must be given prior to the disclosure and parents/guardians should be given a reasonable time limit to respond. For children who are determined eligible through direct certification, the notice of potential disclosure may be in the document informing parents/guardians of their children’s eligibility for free meals through direct certification.

**Should we have an agreement with State Medicaid and/or SCHIP?**

The determining agency must have a written agreement with the State or local agency or agencies administering State Medicaid and/or SCHIP prior to disclosing children’s free and reduced price meal or free milk eligibility information. At a minimum, the agreement must identify the health insurance program or health agency receiving children’s eligibility information; describe the information that will be disclosed and specify that the information must only be used to seek to enroll children in State Medicaid or SCHIP; describe how the information will be protected from unauthorized uses and disclosures; describe the penalties for unauthorized disclosure; and be signed by both the determining agency and the State Medicaid/SCHIP program or agency receiving the children’s eligibility information.

**What are the requirements for disclosure of social security numbers?**

When disclosing or using the social security number provided by the household on the application for any purpose other than the program for which the number was collected, the determining agency must modify the notice required by the Privacy Act of 1974 concerning the potential uses of the social security number. The notice must inform households of the additional intended uses of the number.

**Are there any penalties for improper disclosure?**

The NSLA establishes a fine of not more than \$1,000 or imprisonment of not more than 1 year, or both, for publishing, divulging, disclosing, or making known in any manner or extent not authorized by Federal law, any eligibility information. This includes the disclosure of eligibility information by one entity authorized under the statute to receive the information to any other entity, even if that entity would otherwise be authorized to receive the information directly from the determining agency.



These guidelines are effective Oct. 1, 2000, and are subject to change pending issuance of a final rule addressing the disclosure provisions for State Medicaid and SCHIP.

[SIGNED]

STANLEY C. GARNETT  
Director  
Child Nutrition Division

## Exhibit 2-7

## A Summary of Disclosure of School Lunch Information

Recipient of Information	Information That May be Disclosed to Recipient	Required Notification and Consent
<i>Child Nutrition Programs</i> under the National School Lunch Act (NSLA) or Child Nutrition Act (CNA)	All eligibility information	Prior notice and consent not required
<i>Federal/State or local means-tested nutrition programs</i> with eligibility standards comparable to the National School Lunch Program	Eligibility status only	Prior notice and consent not required
<i>Federal education programs</i>	Eligibility status only	Prior notice and consent not required
<i>State education programs</i> administered by a State agency or local education agency	Eligibility status only U.S. Department of Agriculture/Food and Nutrition Service	Prior notice and consent not required
<i>Local education programs</i>	No eligibility information, unless parental consent is obtained	Must obtain parental consent
<i>Medicaid or the State Children's Health Insurance Program (SCHIP)</i> , administered by a State or local agency authorized under titles XIX or XXI of the Social Security Act to identify and enroll eligible children	All eligibility information, unless parents elect not to have information disclosed	Must give prior notice to parents and opportunity for parents to decline to have their information disclosed
<i>State health programs</i> other than Medicaid/SCHIP, administered by a State agency or local education agency	Eligibility status only	Prior consent not required
<i>Federal health programs</i> other than Medicaid/SCHIP	No eligibility information, unless parental consent is obtained	Must obtain parental consent
<i>Local health program</i>	No eligibility information, unless parental consent is obtained	Must obtain parental consent
<i>Comptroller General</i> of the United States for purposes of audit and examination	All eligibility information	Prior notice and consent not required
<i>Federal, State, or local law enforcement officials</i> investigating alleged violations of any of the programs under the NSLA and CNA or investigating violations of any of the programs that are authorized to have access to names and eligibility status	All eligibility information	Prior notice and consent not required

## USDA Guidance on Implementing the NCLB Act

*The Department of Agriculture and the Department of Education jointly issued a memorandum clarifying the requirement for disaggregating data under the No Child Left Behind Act (NCLB) and how children's school lunch eligibility status may be used for this purpose.*

December 17, 2002

Dear Colleague:

As schools across the country begin to implement the No Child Left Behind Act (NCLB), the milestone elementary and secondary education legislation signed into law by President Bush at the beginning of 2002, a number of school officials have raised questions about the use of student information collected pursuant to the National School Lunch Program in carrying out provisions of Title I of the Elementary and Secondary Education Act, as reauthorized by NCLB. The purpose of this letter is to respond to those concerns.

Educators have specifically asked whether it is permissible to use information from the school lunch program in disaggregating student assessment scores, in determining student eligibility for supplemental educational services, and, under certain circumstances, in prioritizing opportunities for public school choice.

Title I, Part A, of the Elementary and Secondary Education Act

(as reauthorized by the No Child Left Behind Act)

States and local education agencies (LEAs) receiving funding under Title I, Part A, must assess and report on the extent to which students in schools operating Title I programs are making progress toward meeting State academic proficiency standards in reading or language arts and in mathematics. Title I now requires States and LEAs to measure and report publicly on the progress of all students and of students in various population groups, including students who are economically disadvantaged. If assessment results show that any of the groups has not made adequate yearly progress toward meeting State achievement standards for two consecutive years, the LEA must identify that school as needing improvement. All students attending the school must be given the opportunity to attend other public schools that have not been identified as needing improvement, with priority given to the lowest-achieving students from low-income families. In addition, once a school has failed to make adequate yearly progress for three years, the LEA must provide economically disadvantaged students who attend that school the opportunity to obtain supplemental educational services from a nonprofit, for-profit, or public provider.

For many LEAs, information from the National School Lunch Program is likely to be the best and perhaps the only source of data available to hold schools accountable for the achievement of "economically disadvantaged" students, and also to identify students as eligible to receive supplemental educational services or to receive priority for public school choice. Moreover, in the case of the priority for public school choice and eligibility for supplemental educational services, the law specifically requires LEAs to use the same data they use for making within-district Title I allocations; historically, most LEAs use school lunch data for that purpose. After examining these new requirements, State and local officials have inquired as to whether they may use school lunch data to meet these requirements while remaining in compliance with the student privacy provisions of the National School Lunch Act.

### **National School Lunch Act**

Section 9 of the Richard B. Russell National School Lunch Act (NSLA) establishes requirements and limitations regarding the release of information about children certified for free and reduced price meals provided under the National School Lunch Program. The NSLA allows school officials responsible for determining free and reduced price meal eligibility to

disclose aggregate information about children certified for free and reduced price school meals. Additionally, the statute permits determining officials to disclose the names of individual children certified for free and reduced price school meals and the child's eligibility status (whether certified for free meals or reduced price meals) to persons directly connected with the administration or enforcement of a Federal or State education program. This information may be disclosed without parental consent.

Because Title I is a Federal education program, determining officials may disclose a child's eligibility status to persons directly connected with, and who have a need to know, a child's free and reduced price meal eligibility status in order to administer and enforce the new Title I requirements. The statute, however, does not allow the disclosure of any other information obtained from the free and reduced price school meal application or obtained through direct certification. School officials must keep in mind that the intent of the confidentiality provisions in the NSLA is to limit the disclosure of a child's eligibility status to those who have a "need to know" for proper administration and enforcement of a Federal education program. As such, we expect schools to establish procedures that limit access to a child's eligibility status to as few individuals as possible.

We urge school officials, prior to their disclosing information on the school lunch program eligibility of individual students, to enter into a memorandum of understanding or other agreement to which all involved parties (including both school lunch administrators and educational officials) would adhere. This agreement would specify the names of the individuals who would have access to the information, how the information would be used in implementing Title I requirements, and how the information would be protected from unauthorized uses and third-party disclosures, and would include a statement of the penalties for misuse of the information.

### Other Provisions

We also note that NCLB did not alter other provisions of Title I under which school officials have historically made use of National School Lunch Program data. LEAs are still required to rank, annually, their school attendance areas, by percentage of students from low-income families, in order to determine school eligibility and to make Title I within-district allocations based on the number of poor children in each school attendance area. They must also determine the amount of funds available to provide services to eligible private school students within the district, again using data on students who are from low-income families. Many LEAs have, for many years, used National School Lunch Program data in making these calculations, which do not involve the release of information on the school lunch eligibility of individual students. They may continue to do so under the new law, while respecting the limitations on the public release of those data described above.

We hope the above information clarifies what we know has been a matter of great concern in States and school districts. If you desire more detailed information about public school choice and supplemental educational services, it can be found at <http://www.ed.gov/offices/OESE/asst.html>.

We will also be providing guidance on Provisions 2 and 3 of the National School Lunch Program and the impact of NCLB on those provisions in the near future.

If we can be of further assistance, please contact one of our offices.

Sincerely,

[Signed]

Eric M. Bost  
Under Secretary  
Food, Nutrition, and Consumer Services  
U.S. Department of Agriculture

[Signed]

Susan B. Neuman  
Assistant Secretary for  
Elementary and Secondary Education  
U.S. Department of Education

## USDA Guidance on Implementing the NCLB Act in Provision 2 and 3 Schools

*This joint memorandum between the Department of Agriculture and the Department of Education provides guidance on the implementation of the new requirements of Title I of the Elementary and Secondary Education Act, authorized by the NCLB Act for schools that operate school lunch programs under Provisions 2 and 3 of the National School Lunch Program.*

Feb. 20, 2003

Dear Colleague:

This is a follow-up to our letter of December 17, 2002, in which we promised to provide guidance on the implementation of the new requirements of Title I of the Elementary and Secondary Education Act (ESEA), as reauthorized by the No Child Left Behind Act (NCLB), for schools that operate school lunch programs under Provision 2 and Provision 3 of the National School Lunch Program.

As noted in our earlier letter, States and local education agencies (LEAs) receiving funding under Title I, Part A, of the ESEA must assess and report annually on the extent to which students in schools operating Title I programs are making progress toward meeting State academic proficiency standards in reading or language arts and in mathematics. States and LEAs must also measure and report publicly on the progress of all students, and of students in various population groups, including students who are economically disadvantaged. If assessment results show that any of the groups has not made adequate yearly progress toward meeting State achievement standards for two consecutive years, the LEA must identify that school as needing improvement. All students attending the school must be given the opportunity to attend other public schools that have not been identified as needing improvement, with priority given to the lowest-achieving students from low-income families. Once a school has failed to make adequate yearly progress for three years, the LEA must provide economically disadvantaged students who attend that school the opportunity to obtain supplemental educational services from a non-profit, for-profit, or public provider.

For many LEAs, information from the National School Lunch Program is likely to be the best, and perhaps the only, source of data available to hold schools accountable for the achievement of “economically disadvantaged” students, and also to identify students as eligible to receive supplemental educational services or to receive priority for public school choice. Moreover, in the case of the priority for public school choice and eligibility for supplemental educational services, the law specifically requires LEAs to use the same data they use for making within-district Title I allocations; historically, most LEAs use school lunch data for that purpose. As we outlined in our original letter, school lunch data may be used for these purposes. However, using school lunch data in schools that have implemented Provision 2 or 3 of the school lunch program poses issues that require further explanation, because these schools do not determine free and reduced price lunch eligibility on an annual basis.

The National School Lunch Act allows schools that offer students lunches at no charge, regardless of individual students’ economic status, to certify students as eligible for free and reduced price lunches once every four years and longer under certain conditions. These alternatives to the traditional requirements for annual certification, known as “Provision 2” and “Provision 3,” reduce local paperwork and administrative burden. The school lunch regulations prohibit schools that make use of these alternatives from collecting eligibility data and certifying students on an annual basis for other purposes. This prohibition has raised issues about how such schools can obtain the data they need to disaggregate Title I assessment data, identify students as eligible for supplemental educational services, and determine which students receive priority for public school choice, all of which Title I requires be done annually.

We have determined that, for purposes of disaggregating assessment data and for identifying students as “economically disadvantaged” in implementing supplemental educational services and the priority for public school choice, school officials may deem all students in Provision 2 and 3 schools as “economically disadvantaged.” In addition, LEA officials may assume that a Provision 2 or 3 school has the same percentage of students eligible for free and reduced price lunches as the school had in the most recent year for which the school collected that information for determining the eligibility and Title I allocation of the school.

We hope this guidance clarifies this issue. For more detailed information about public school choice and supplemental educational services, please see <http://www.ed.gov/offices/OESE/asst.html>.

If we can be of further assistance, please contact one of our offices.

Sincerely,

[Signed]

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[Signed]

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**Figure 2-1**

### A Brief Review of Federal Laws Protecting the Privacy of Education Records

Federal Law	Federal Agency	Right Afforded to	Contents of Education Records	Notification Requirement	Prior Consent	Requirement of Recording Release
Family Educational Rights and Privacy Act (FERPA)	Family Policy Compliance Office	Parents and eligible students	All education records as defined in the law	Local education agency to notify annually	Required with exceptions	Recordation requirements
Protection of Pupil Rights Amendment (PPRA)	Family Policy Compliance Office	Parents	Surveys containing certain questions and data elements as defined in the law	Local education agency to notify and obtain consent prior to the survey	Required for specific questions and data elements; provide options to opt out of survey	
No Child Left Behind Act	Family Policy Compliance Office (to administer aspects related to records privacy)	Parents and eligible students	Strengthen FERPA	Used to notify state and local education agencies annually of FERPA and PPRA requirements	Required under FERPA and PPRA	
Individuals with Disabilities Education Act (IDEA)	Office of Special Education Programs	Parents and students who have reached the age of majority under state law	All education records as defined in FERPA	Local education agencies to notify annually	Required with exception	
National School Lunch Act	U.S. Department of Agriculture/ Food and Nutrition Service	Custodial parents	Name and eligibility status of students who are eligible for free meals or free milk or reduced price meals	Required for some disclosure	Required for some disclosure	
Patriot Act		U.S. Attorney General or designee	Any education records, in order to comply with a "lawfully issued subpoena or court order"		Student or parental consensus not required	Court or ex parte orders may require the institution not to disclose to anyone the existence and contents of the orders or the institution's response
Children's Online Privacy Protection Act		Parents of children ages 13 and younger	Not education records; web sites need to obtain consent from parents prior to collecting, using, and disclosing information about the children	Privacy notice on web sites	Parental consent	Report disclosure to third party required
Health Insurance Portability and Accountability Act	Office for Civil Rights of U.S. Department of Health and Human Services	Patients	Privacy Rule does not apply to records protected by FERPA and IDEA	Health care providers must provide Notice of Privacy Practices	By patient	



## SECTION 3

# Protecting the Privacy of Individuals During the Data Collection Process

### OVERVIEW

School systems must have information about their students if they are to make appropriate decisions about educational and support programs. From the time a child enters school, records begin to follow the student. Besides the information provided by the student or parent, such as basic enrollment and immunization status, school staff create a record to describe the student's educational program, extracurricular activities, and other relevant experiences. Deciding what data to gather along the record requires careful consideration of what information is needed by the school system and how best to collect it.

However, many parents are concerned about releasing personal information to a stranger, and wonder just how many people will see the responses. Parents also are concerned when their children release information about themselves unintentionally and without understanding the consequences. In addition, school systems should take into consideration the concerns of students and their families. It is important to adhere to the principles set forth in this section irrespective of who collects the data or how and why the data are collected.

### GOALS

- ✓ Outline the issues related to records privacy during the data collection process
- ✓ Recommend policies and procedures to safeguard records privacy during this process

### KEY POINTS

- Data collectors must justify the need for every item of information included in an individual education record.

- Maintaining data efficiently allows data to be used for multiple purposes. However, data collectors must justify all uses under existing policies and inform data providers of these uses.
- Data collectors should consult state and local laws, policies of school boards, and professional ethics in deciding what information to collect and maintain about students.
- Data providers should be informed about why the information is collected and if providing such information is mandatory.
- Data collectors should demonstrate that the data produced will be of sufficient value, applicability, and usefulness to justify the cost and burden of collecting them.
- When data collectors choose data elements and the procedures to collect them, they should consider the quality of the data.
- Data collectors should derive unique identification codes by a variety of methods (e.g., assigning sequential numbers or adopting algorithms to generate codes using selected characteristics).
- Using social security numbers may be helpful to agencies or schools in maintaining appropriate and accurate information about students. However, they are considered part of education records, and school officials must protect them from illegal access and unauthorized release.
- In addition to federal and state requirements, agencies or schools should establish policies to determine the length of time each type of data is maintained and how data will be expunged or replaced.



## A. Determining the Agency's Student Data Needs and Uses

Usually, data are collected because they are:

- used to aid in the placement of students;
- used to determine student progress and student needs;
- required by laws or regulations;
- used to promote the efficiency and effectiveness of the agency; and
- needed for accountability and funding decisions.

Other data about individual students are collected to determine their progress, place them into appropriate learning experiences, and otherwise assist the school in meeting the needs of the students. Still other types of data are collected to promote the efficiency and effectiveness of the agency and are justified under school board or state board of education policy.

When data about students are aggregated, information may be used for program accountability and funding decisions. Each piece of information included in an education record should represent a clear and important need for obtaining and recording that information. Schools, school districts, and state education agencies may need student data for the following major administrative purposes:

**Instruction**—Teachers and other staff members also need student-level information to ensure that students receive appropriate instruction and services. For example, teachers need to know how to contact parents, and they need information about a student's previous educational experiences and special needs to help plan instruction. Counselors need to know what courses students have taken in order to plan their educational programs. Personally identifiable data, thus, are needed for instructional decisions.

**Accountability**—Answering the questions of parents, policymakers, and other participants in the education enterprise about students' accomplishments and the effectiveness of schools has become an important function of data collected by schools. Reporting functions generally do not require personally identifiable data. However, some personally identifiable

data are needed in order to carry out longitudinal analyses that may be crucial in assessing a program's effectiveness.

**Management**—Schools, districts, and state education agencies use data about students to assist in the planning and scheduling of educational programs and the distribution of resources (e.g., fiscal, staffing, and materials). Management functions generally do not require personally identifiable information.

**Research and Evaluation**—Schools, as well as local, state, and federal education agencies, conduct analyses of program effectiveness, the success of subgroups of students, and changes in achievement over time to identify effective instructional strategies and to promote school improvement activities. These data may or may not be personally identifiable.

**Operations**—Schools and districts need data to ensure the efficiency of their day-to-day functioning. For example, schools must maintain attendance records, handle students' health problems, and operate transportation and food service programs. Personally identifiable data are needed for such operations.

Efficient maintenance of data about individual students allows data needed for one purpose to be used for other appropriate purposes. However, the uses must be justified under existing policies, and data providers should be informed of these uses. For example, information about a student's home language collected for required aggregate federal reporting could also be used in the evaluation of a school's language programs. In these instances, personally identifiable information that is used for the analyses cannot be publicly released without written approval from the parents.

## B. Justifying Data Collection

In general, schools and education agencies are not restricted in what they may request about students; this is determined by state laws and regulations, and the policies of the school, district, or state education agency. However, federal law (i.e., the Protection of Pupil Rights Amendment [PPRA]) does specify several types of questions that cannot be asked without prior consent of the parents. (See section 2C for a detailed discussion.) A good practice is to collect and maintain in the education

records only those data for which a clear and specific purpose has been identified.

In deciding what data can be requested from individuals, first consider several important and practical factors. Data collection can be a burden on the data providers if too many questions are asked or the completion of the form is too time-consuming. If the way in which questions are asked makes it unclear what information is requested, the accuracy of the data may be undermined. An important rule of thumb in data collection is that the data need should outweigh data burden and collection problems. Justification for data collection could include what methods will be used to guard against nonresponse, inaccuracy, privacy intrusion, and infringement of information security.

### C. Ensuring Data Integrity and Accuracy

Data collectors may promote data integrity and accuracy by:

- making sure data providers understand the importance of the data; and
- designing the data collection activity and training survey staff to respect the dignity of the respondents.

An important consideration in choosing data elements and the procedures to collect data is the quality of the data that will be received. *Data integrity* means that the information provided is complete and unchanging; *data accuracy* means that the information is correct.

Two issues are important in ensuring data integrity and accuracy. The first is the degree to which the data provider (usually the student or parent) supports the data collection. It is important for students and their parents to know if the data being requested are required by law or for the purposes of ensuring that certain services can be received by the child. It is important for parents to understand when failure to provide accurate and complete data may result in the denial of benefits (e.g., immunization records required to enroll a child in school). For most data elements or data collection forms, school officials should inform students and their parents why the data are important and how they will and will not be used. Written assurances of data confidentiality often alleviate concerns and elicit more cooperation, but not in all cases.

Data collectors should be prepared to openly and thoroughly respond to hard questions raised by parents and privacy advocates.

A second issue that can affect data integrity and accuracy is the design of the data collection activity and the training provided to data collectors. Training is important for all staff who might be involved in collecting student information, regardless of the purposes. Such staff may include teachers, school secretaries, school nurses, guidance counselors, principals, and evaluators. Areas that should be included in staff training are:

- the distinction between collecting data that are mandatory and those that are voluntary, and the options of the student or parent regarding provision of the data;
- the ethical and legal responsibilities of staff to prevent unauthorized use or disclosure of data; and
- the ways staff can obtain explanations or other help while collecting the data.

The training could focus on how the questions or requests for information may be stated by the staff person to ensure that the request is clear and the data can be collected consistently from all individuals. For instance, it is important for data collection procedures to ensure that parents and students have the opportunity to provide accurate answers regardless of their language, cultural, or educational backgrounds. Staff should be sensitive to and respectful of respondents' privacy and their possible reluctance to answer a question. *The information belongs to the individual; school personnel are just "borrowing" it.*

### D. Protecting Unique Identification Codes

Using unique identification codes would:

- allow the records to follow the correct students when they move within the state; and
- provide the flexibility of merging data from different files to promote efficiency without threatening privacy.

Some state education agencies assign a set of sequential identification numbers for schools or school districts to use so that the identification number of a student is

unique within the state. It is a good practice that school districts provide to each student a system-generated number that contains no imbedded information.

Many educators and social service providers inquire about the use of social security numbers. The social security number has the advantage of being unique to students and does not change when they move to another city or state. Using the social security number can make it easier for schools to locate the appropriate transcript or student information when they receive a request. The numbers can be used to share information or conduct studies across agencies only with prior written consent, as required by FERPA. Some states exchange information about families across agencies to determine eligibility for services. For example, with prior consent from parents several states use social security numbers and other family information to link across Temporary Assistance for Needy Families and other public assistance files to establish a student's eligibility for the additional support and services, to count the number of economically disadvantaged students that qualify a campus for Title I funding, and to establish a student's eligibility for vocational and job training programs.

In general, schools, school districts, and state education agencies cannot release the social security numbers of students because this is considered personal information and is part of the education records under FERPA. While federal law limits the use and release of social security numbers, it does not prohibit schools from asking for the number. Specifically, schools can ask for a child's social security number but cannot require it, and schools must inform parents that they do not have to provide the social security number. Schools also cannot deny any right, privilege, or benefit to students or their parents who refuse to disclose a social security number. Schools that use social security numbers should be prepared to issue an alternative code in case of such refusal. In addition, it is important for school officials to be aware that it is difficult and time consuming to check the accuracy of the social security numbers given. For example, some parents may not recall the social security number for their child or may give a wrong number. For these reasons, social security numbers would mostly be used as an attribute for checking against duplicate records, rather than as an identification code.

More thorough discussions of the use of social security numbers versus other identifiers can be found in papers prepared for several state education agencies (e.g., New

York, Massachusetts, and California) (Clements and Ligon 2001; Ligon 1997).<sup>4</sup> Since social security numbers are used to maintain confidential information by other agencies outside the education system, it is crucial to ensure that no one gets illegal access to the numbers. Security is far more important with social security numbers than locally assigned identifiers, because the identity of a person is easily revealed with his or her social security number. For example, the printing or display of social security numbers on education documents demands a higher degree of diligence from everyone handling those documents. In fact, some state laws prevent the display of social security numbers on student records. Many state and local education agencies establishing a unique student identifier system rely not on social security numbers, but on an alternate, system-generated number using, without exposing, such personal characteristics as name and date of birth. Social security numbers, if maintained, are thus kept as an additional item for accuracy checks, but not as an identifier. Their uses are restricted to very limited purposes. In states using social security numbers, an attorney general's opinion, legislative authority, or state board of education authority is typically secured first.

## **E.** Determining the Longevity of Records

Many states have legal requirements defining how long education records must or may be kept. There may also be federal requirements for how long some data should be maintained. School districts should have more specific policies noting exactly which data to store and how long data should be maintained. For instance, transcript information for high school completers is often kept active for a fixed length of time, such as 5 to 10 years. With information technology, storage space is no longer as significant a problem, and student transcripts may be kept active even longer. Two recommended components to include in a school or district data policy are a listing of what data elements are included in the school transcript or record (sent with students when they move) and a time period for how long these records will be maintained.

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<sup>4</sup>Clements, Barbara, and Glynn Ligon, *Designing and Implementing a System for Assigning Student Identifiers in New York*, Evaluation Software Publishing, Inc., Austin, Texas, April 2001. This paper and similar studies for Massachusetts and California can be found at the website: [[www.evalsoft.com](http://www.evalsoft.com)].

Other types of data (e.g., after-school care arrangements or extracurricular activities) may not be needed after a certain period of time (e.g., 1 year or after a student has left the school). It is a good idea to include in a written data policy an indication of which data elements will be expunged from education records and when they will be deleted. Finally, there are some data that a school or agency may want to expunge to protect the student. Disciplinary actions are an example; state law or local policy usually governs these cases.

### COMMONLY ASKED QUESTIONS

**Q.** How do I decide what information to collect about a student?

**A.** Check state and local laws and regulations as well as school board policies for the types of information required to collect. Other than these requirements, agency or school staff should carefully consider the needs for the information against the costs and burden of collecting it. See sections 3A and 3B.

**Q.** Must I have permission from the parents to give an achievement test to a student?

**A.** Permission from parents is not usually needed for achievement testing unless state or local policies related to obtaining parental permission already exist or if the test contains questions from one of the eight areas listed in PPRA. In general, schools should inform parents of the purposes and uses of testing and whether it is mandatory. See section 3B; also see discussion of the Protection of Pupil Rights Amendment (PPRA) in section 2C.

**Q.** How is information collected from students on the Internet protected?

**A.** In April 2000, the Children's Online Privacy Protection Act of 1998 was passed. This law governs the online collection of personal information from children under

age 13. The rule requires operators of web sites or online services directed to children or which children might use to post prominent links on their web sites to a notice of privacy. This notice: 1) explains how the web site collects, uses, and/or discloses personal information from children; 2) notifies parents that they wish to collect information from their children and obtain parental consent prior to collecting, using, and/or disclosing such information; 3) assures parents that no more personal information is collected than is needed for the children's participation in online activities; 4) allows parents the opportunity to review or have their children's information deleted from the operator's databases; and 5) establishes procedures to protect the confidentiality, security, and integrity of personal information they collect from the children.

**Q.** How responsible am I for the accuracy of the student data I receive?

**A.** In general, data collectors are more ethically than legally responsible. You can promote the accuracy and integrity of the data in several ways. See section 3D.

**Q.** When can I destroy student records? When not?

**A.** Agencies or schools may establish their own policies, based on federal and state legal requirements, to determine the length of time records or portions of records are kept. See section 3E. However, schools may not destroy a record if there is a pending request to review it. See section 5.

**Q.** Can I use social security numbers to identify education records?

**A.** Yes, you may use social security numbers if your state law does not prohibit it. However, you may not require students to provide them. It is important for you to inform students or parents if agencies or schools intend to use these numbers. See section 3F.

### REFERENCES

- Clements, B., and Ligon, G. (2001). *Designing and Implementing a System for Assigning Student Identifiers in New York*. Austin, TX: Evaluation Software Publishing, Inc.
- Ligon, G. (1997). *Designing and Implementing a System for Assigning Student Identifiers*. Austin, TX: Evaluation Software Publishing, Inc.
- National Forum on Education Statistics. (1994). *Education Data Confidentiality: Two Studies. Issues in Education Data Confidentiality and Access, and Compilation of Statutes, Laws, and Regulations Related to the Confidentiality of Education Data* (NCES 94-635). Washington, DC: U.S. Government Printing Office.





# SECTION 4

## Securing the Privacy of Data Maintained and Used Within an Agency

### OVERVIEW

Many school administrators are concerned with breakdowns in the security of their records systems. One administrator might agonize about the file cabinet key being stolen from the school secretary's desk when he or she is at lunch. Another might worry about students breaking into the automated management information system to change their grades. Still another might cringe at the thought of certain student information being released to the media. These situations could happen anywhere, in public or private schools, school districts, intermediate service units, or state agencies, regardless of the sophistication of the records systems.

The No Child Left Behind (NCLB) Act has heightened the involvement of state education agencies in providing data, thus increasing their responsibilities in maintaining individual student data and safeguarding their privacy. Maintaining the privacy of personally identifiable data about students requires clear policies to restrict who has access to data and how the data are used. This section describes some of the considerations in deciding who can review and use student data, what are legitimate uses of data, and what security will be needed to protect against inappropriate access.

### GOALS

- ✓ Discuss how to consider providing access and use
- ✓ Determine "legitimate educational interest"
- ✓ Discuss how to protect against inappropriate access

### KEY POINTS

- An official designated as the data steward should be responsible for keeping individual records safe and intact from accidents, unauthorized access, theft, changes, or unintentional release.
- A security risk assessment is important to identify the assets of an agency, potential threats to those assets, vulnerable points in an agency, probabilities of threats striking a vulnerable point, and cost estimates of losses should a potential threat be realized.
- It is more practical to establish criteria for determining broad categories of positions than to list exactly who or what individual positions are considered to be "school officials."
- While agencies or schools may establish a policy to determine what constitutes "legitimate educational interest," the decision also may be made on a case-by-case basis.
- It is important to train all staff in information security as soon as they are hired. They should know what is considered appropriate and inappropriate access to data and use of the information within the records.
- Existing professional standards are invaluable resources to support policymaking and training.
- It is important to determine each time whether the staff assigned to conduct the research are trained and authorized to access the data. An alternative approach is to sidestep the question of security by creating a research file deleting the students' identifying information.



- Equally important are detailed procedures for records retention and disposal, as determined by an agency's needs and legal requirements. Inappropriate disposal methods also threaten the privacy of the records.

## A. Management Responsibilities

### A1. Assign a data steward

As part of the overall effort to ensure the quality of data maintained at an agency, it is important to identify a *data steward* who will serve as the primary contact for such purpose. This person is abreast of the latest federal and state requirements in maintaining the privacy of student records, and is knowledgeable about the data collection activities within his or her agency. He or she is involved in policymaking and possesses good communication skills. The data steward monitors the activities of other staff who work with the data collection activities and plans periodic reviews of the data collection process to ensure that data quality requirements are being met. More importantly, this person ensures that data are made available to all persons who have a need to know, including agency staff and other personnel, and are protected from unauthorized access and unintentional release.

Regardless of the position, a person with responsibility for the confidentiality of education records (e.g., the data steward or the records manager who works closely with him or her) has serious responsibilities for ensuring that all who work with the data will help him or her in guarding the privacy of education records. In addition, the records manager should ensure that the equipment and procedures will protect the security of the records. The manager should develop and enforce a written policy that describes what data are maintained and what procedures are in place to ensure that access to personally identifiable data is restricted to those persons with a legitimate educational interest as defined by the system.

### A2. Conduct a security risk assessment

Security risks can be found in different components of the systems: hardware, operating systems, software, networks, databases, and people from both inside and outside the agency. A risk assessment identifies the assets of an agency, potential threats to those assets, vulnerable points in an agency, probabilities of threats striking a vulnerable point, and cost estimates of losses should a poten-

tial threat be realized. Security threats can come from both inside and outside an agency. Hacking, unauthorized copying, user error, programming errors, lost encryption keys, lost documentation, computer viruses, flood, and rain or water damage are just a few examples of security threats. The risk assessment will assist an agency in its effort to develop countermeasures against perceived threats. Chapter 2 of *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security* (National Forum on Education Statistics 1998) provides step-by-step procedures and a checklist for a security assessment. Another publication, *Weaving a Secure Web Around Education: A Guide to Technology Standards and Security* (National Forum on Education Statistics 2003), also discusses the security assessment in a web environment. These two documents provide further guidelines for maintaining a secure electronic and network environment that protects sensitive information.

Once risks are identified, the agency may select equipment that has the appropriate mechanical configuration, provides access to authorized users, and has software that restricts access to authorized persons only. Among the procedures used to ensure the privacy and security of computer records are password protection applications that restrict access to data elements and files, frequent password changes to guard against break-ins, and the use of encryption. Exhibit 4–1 contains basic information about securing automated records.

### A3. Develop written policies and procedures

To carry out these management responsibilities, the records manager has to know who is authorized to see and modify personally identifiable student data. A written policy can define the appropriate school officials and what constitutes a legitimate educational interest. This policy states who is allowed to change data and what procedures are needed to ensure that all records are updated when changes are made.

Management has a responsibility to inform staff members of their rights and responsibilities with regard to student data. One commonly used procedure is to have persons granted access to personally identifiable data sign an oath of nondisclosure. This agreement should list all types of information that must be kept confidential and forbid staff from discussing security aspects of the data system, such as a locked filing cabinet or a com-



puter, with unauthorized individuals. The acknowledgment of specific legal penalties required by law should be included in this oath. While this may seem extreme, it can help to ensure that staff members know exactly what the requirements and their responsibilities are.

Written policies also could cover the current legal restrictions for disclosure or nondisclosure. For example, the Patriot Act of 2001 allows disclosure under certain conditions, while the National Defense Authorization Act allows military recruiters to obtain directory information of secondary school students. Procedures should be updated periodically to reflect recent changes in federal and state laws. See section 2 for a discussion of these recent changes. The web site of the Family Policy Compliance Office also contains updated information about changes in federal requirements.

Sample policies can be found in *Weaving a Secure Web* (mentioned above). These include an acceptable-use policy, technology resource use agreement, electronic mail policy, dial-in access policy, password policy, and web contents accessibility. These samples can be adapted to state or district use, and are the integral parts of the overall policy.

## **B.** Defining “Legitimate Educational Interests”

The Family Educational Rights and Privacy Act (FERPA) makes it clear that “school officials with legitimate educational interests” may be given access to personally identifiable information about students. However the law does not say specifically who those persons are, nor does it stipulate how to determine the limits of a legitimate educational interest, although the U.S. Department of Education could rule, as a matter of law, that a school official did not have “legitimate educational interest” in accessing information contained in education records. Agencies or schools maintaining personally identifiable data about students should have written criteria for determining which school officials have a legitimate educational interest in specific education records because this must be included in the annual notification to parents, as specified in FERPA. Agencies or schools could make broad decisions based on legal requirements and good practices. The intent to follow this practice should be stated in the school’s or agency’s written policy and must be

included in the annual notification of rights under FERPA. The Family Policy Compliance Office has a model notification that contains sample language.

In determining the school officials who might need access to education records, it is more practical to establish broad position criteria than to list exactly who, or what individual positions, qualify. General criteria such as the following might be useful:

- a person employed by the agency or school in an administrative, counseling, supervisory, academic, student support services, or research position, or a support person to these positions; or
- a person employed by or under contract to the agency or school to perform a special task.

Identifying a person as a “school official” does not automatically grant him or her unlimited access to education records. The existence of a legitimate educational interest may need to be determined on a case-by-case basis. A sample policy statement of what constitutes legitimate educational interest might include substantiation such as the following:

- The information requested is necessary for that official to perform appropriate tasks that are specified in his or her position description or by a contract agreement.
- The information is to be used within the context of official agency or school business and not for purposes extraneous to the official’s areas of responsibility or to the agency or school.
- The information is relevant to the accomplishment of some task or to a determination about the student.
- The information is to be used consistently with the purposes for which the data are maintained.

Having access to education records or the information within the records does not constitute authority to share this information with anyone not given access through the written policy. This is particularly critical if the data are to be used away from the agency or school by contractors or consultants. See section 6 for more information on releasing information outside an agency.

After the policy defines school officials with a legitimate educational interest, a list of authorized positions or persons and records or specific data elements to which they *may* have access could be created. This is particularly important if the system is automated.

The records manager decides the legitimacy of each request for information. If there is any doubt or question regarding the request or the legitimate educational interest, the records manager should not disclose the information without the approval or concurrence of the appropriate agency or school officials or written permission from the student or parent.

## C. Training Agency Staff

Training all agency staff, even those who do not have access to individual education records, is important to ensure that education records are handled correctly. Training could include:

- What is the appropriate and inappropriate access and use of data or information contained in the education records. (For instance, a staff member may have a legitimate access right to a student's education record for making placement decisions. That same staff member may not have a right to view the records of other students for whom he or she does not have responsibilities. Persons who are not authorized to see personally identifiable data should be informed why they are denied access if they are in positions where they must work with students.)
- How to ask questions when access decisions need to be made.
- How to handle problems when there are misunderstandings.
- Exactly what is expected in each data collection document and any other important procedural details.
- How to protect information while it is being collected or used. (For instance, staff should not leave education record files opened on their desks or showing on their computers when they step away from their desks.)
- What are the key aspects of information security, such as physical network security, software security, and user access security.

It is important to extend the training to nonemployees, such as school volunteers and contractors who are hired by the agency. Also, training materials should be updated periodically to reflect recent changes in federal and state requirements. Any special requirements related to specific data collection documents or procedures should be included.

## D. Professional Ethical Standards

The use and misuse of student data are covered to some extent by professional ethical standards. Several documents should be reviewed and considered in this area. However, professional ethical standards may not conflict with the requirements under FERPA that state that parents must be provided access to their children's education records. See the references at the end of this section. Particularly relevant sets of ethical standards include:

- *Ethical Standards for School Counselors* (American School Counselor Association 1992)
- *Ethics and Law for School Psychologists* (Jacob-Timm and Hartshorne 1994)
- *Standards for Educational and Psychological Tests*, produced jointly by the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education. This document specifically addresses the use of test results. Also, a good resource is *The Program Evaluation Standards*, published by the Joint Committee on Standards for Educational Evaluation (1994). These standards describe ethics related to respecting and protecting the rights and welfare of human subjects.
- *Guidelines for Protecting Confidential Student Health Information*, published by the American School Health Association (2000), in collaboration with the National Association of School Nurses and the National Association of State School Nurse Consultants, provides a wealth of recommendations specifically concerned with navigating a course through conflict obligations.

## E. Research Use Within an Agency

Sometimes the records manager will receive requests for research using education records, such as comparisons of the test scores of students in different programs. District policy or procedures should specify the steps in making and acting on such requests. The records manager may elect to have staff complete the analysis or contract with consultants to do the analysis. If a staff member conducts the analysis, it is important to determine if he or she is authorized to have access to personally identifiable stu-

dent data. If not, the records manager may create a file containing the needed data without the students' identifying information. This is a good way to protect confidentiality while allowing data to be used by contractors or outside researchers as well. The release of student data outside of the agency is discussed in more detail in section 6.

## F. Data Disposal

Retaining data beyond its useful life exposes an agency to unnecessary privacy risks. The written policies of records maintenance should include detailed procedures for records retention and disposal, as determined by an agency's needs and legal requirements. Inappropriate disposal methods also threaten the privacy of the records. For example, records should not simply be erased or media reformatted. They should be overwritten with random binary codes. In addition, when an agency upgrades its networks and systems, data contained in the original systems could be exposed if the tapes, disks, and hard drives are not cleaned properly. Even if a vendor replaces a hard drive, the old one must be returned so it can be checked to ensure that it was properly cleaned.

### COMMONLY ASKED QUESTIONS

- Q.** If a student's record is corrected at the district level, must the district inform other holders of that record?
- A.** *Yes. This is a major part of the importance of a written policy regarding what data are maintained and where they are kept. Also see section 5 for changes made to education records as requested by parents.*
- Q.** What should I do when elected officials or others with authority over me want to see individual education records?
- A.** *Unless authorized by law, the same rules of access apply to elected officials as to anyone else outside an agency. When you establish policies and procedures on access, the records manager or designated official would have the authority to deny unauthorized access. You can instruct all other staff members to refer requests to the designated official or records manager. See sections 4A, B, and E.*
- Q.** Is it permissible to use information from the school lunch program in disaggregating student assessment scores; in determining student eligibility for supplemental educational services, such as tutoring; and in prioritizing opportunities for school choice to meet No Child Left Behind (NCLB) requirements?
- A.** *The National School Lunch Act (NSLA) permits the disclosure of children's free or reduced-price school lunch eligibility status to individuals directly connected with the administration or enforcement of federal and state education programs. Because Title I is a federal education program, individuals who are directly connected with, and who have a need to know, a child's eligibility status to administer and enforce Title I requirements under NCLB may have access to the information. However, as with all confidential information, access should be limited to as few individuals as possible. For example, teachers may be provided a list of students who need supplemental tutoring. The teachers do not need to know that students on the list are certified eligible for free and reduced-price school meals.*
- Q.** Does everyone in an agency have access rights to student records?
- A.** *No. See section 4B for specific guidance.*
- Q.** Do contractors or vendors for an agency have access rights to student records?
- A.** *Contractors or vendors acting on behalf of the agency or school to perform specified duties that the agency or school is authorized to perform may be allowed access to those records they need to perform such duties. You should consider this kind of access on a case-by-case basis. Staff from organizations who have access to individual data should be trained in their responsibilities to keep the data confidential. See sections 4B and E.*
- Q.** Who can do filing, typing, and data entry of education records?
- A.** *Agencies or schools may assign these duties to qualified staff members. However, it is important to provide training as soon as you hire both permanent and temporary staff. The training should include the access rights as well as the responsibilities for safeguarding the confidentiality of data to which they have access. See section 4C.*

**Q.** What policies should a school district, regional office, and state education agency have in effect?

**A.** *In addition to the policies required by federal or state laws, you should also establish policies that cover how and what data to collect; how, where, and how long*

*data are maintained; on what criteria individuals within and outside the agency may be given access to these data; and how students and parents may review and request amendments to the education records. See sections 3 to 6.*

## Exhibit 4-1

Some Ways to Promote Secure Maintenance of Automated Student Records<sup>5</sup>

- ✓ Document the date and reason for collecting information for each form and each data element, so that files may be kept current and not used for unintended or inappropriate purposes.
- ✓ System security is a complex enterprise that is best left to professionals rather than to school faculty or technology staff. However, when resources dictate the use of teachers/technology coordinators to implement security, the provision of adequate professional development and written policies is critical.
- ✓ Identify education record files and data elements within the files as restricted (confidential) or unrestricted (e.g., directory information).
- ✓ Develop a filing system for records, so that they can be retrieved easily and accurately when needed. The practice will minimize the possibility of misplacing confidential information and thereby allowing unauthorized access. This is true for either automated or paper-record systems.
- ✓ Maintain complete and well-documented records on all changes and additions to files. Keep a list of changes and additions, note who made them, and note when they were made.
- ✓ Application and operating system software can be protected by using passwords and by eliminating access to those who have no need to use particular software. Passwords also can be used to limit access to parts of student files or to specific data elements. Systems operators should monitor access closely through a recordkeeping system. In addition, they should require users to change their passwords frequently; at a minimum, every 3 months.
- ✓ Where possible, a warning statement should appear on the computer screen before access is permitted. This statement should stay on the screen for at least 10 seconds to ensure that it is readable. It should be worded to convey the following message: *"Unauthorized access to personally identifiable information is a violation of federal (and/or state) law and will result in (prosecution or a maximum fine of \$\_\_\_ and/or imprisonment of up to \_\_\_ years, where applicable)."* Users should be prompted to select whether to proceed. If it is not feasible for this statement to appear on the screen of the computer, it should be typed and attached to the monitor in a prominent location.
- ✓ The transmission of data from one agency to another creates additional security risks that can be minimized through the use of standardized protocols, various encryption technologies, and digital signatures. When encryption and decryption are used to ensure security of data, the algorithm required to encrypt and decrypt must receive the same protection as the data. When not in use, it must be secured at all times. Refer to *Weaving a Secure Web Around Education: A Guide to Technology Standards and Security* (National Forum on Education Statistics 2003) for guidelines in securing hardware, operating systems, applications, and the network.
- ✓ Extreme care should be exercised to ensure that the data are not inadvertently made available through use of networking technology. For example, password protection of access to the data file should be required in addition to access to the computer.
- ✓ Ensure that people involved in coding, entering, and processing the information have the necessary training and background to perform their tasks accurately and maintain strict confidentiality, and that they understand the criteria, context, penalties, and other considerations.
- ✓ Avoid making excessive copies of back-up records. If back-up copies are made, label documents as "original" or "copy."

<sup>5</sup>Included in this checklist are basic considerations for maintaining automated student records. Readers should refer to two documents that provide further guidelines in this area: *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security* (1998) and *Weaving a Secure Web Around Education: A Guide to Technology Standards and Security* (2003).

## REFERENCES

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- National Forum on Education Statistics. (2003). *Weaving a Secure Web Around Education: A Guide to Technology Standards and Security* (NCES 2003–381). U.S. Department of Education. Washington, DC: National Center for Education Statistics.
- National Forum on Education Statistics. (1998). *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security* (NCES 98–297). U.S. Department of Education. Washington, DC: National Center for Education Statistics.



# SECTION 5

## Providing Parents Access to Their Child's Records

### OVERVIEW

Sometimes parents worry about what information is kept about their children, and whether the information is correct. To protect the privacy of students and their families, the Family Educational Rights and Privacy Act (FERPA) grants parents the right to review, amend, and challenge the contents of their child's education record. Section 2 includes a discussion of FERPA's requirements; this section provides additional suggestions to implement and facilitate the process.

### GOALS

- ✓ To review parents' rights of access to their child's records
- ✓ To provide practical tips for implementing step-by-step procedures that allow parents access to their child's records

### KEY POINTS

- Parents should be informed of their rights under FERPA, although the actual means of notification is the decision of the agency or school.
- It is important for an agency or school to prepare written procedures for handling record requests.
- A designated official should manage the review process. This official can verify the identification of the parents, explain the laws, help parents understand the record, and refer parents to appropriate resources.
- The agency or school should verify the authenticity of requests and comply within 45 days.
- Agencies or schools may, but are not required to, provide copies of the records.
- If it is not feasible for the parents to review the records because of distance, the school should provide a copy of the record.
- While agencies or schools are not allowed to charge for the search and retrieval of records, they may charge for copying time and postage.
- Written procedures can guide parents through the process of challenging their child's record. The school or district may provide a form to streamline the process.
- Parents should be notified as soon as a hearing is scheduled. The hearing may be presided over by an agency or school official, if this person is considered a third party.
- Evidence presented in the hearing should be documented. The decision should be based solely on the evidence presented at the hearing.
- It is important to follow through the decision of the hearing.



## A. Notifying Parents of Their Rights

Schools or districts are required to make public notification of parents' rights under this law. See Exhibit 5–1 for a model notification. The 1994 amendments of FERPA require districts to “effectively inform” parents and eligible students. The notification therefore needs to be carried out in such a way that parents and students actually receive notice. However, the actual means of notification (e.g., a special letter, a newsletter article, a bulletin from the parent-teachers' association, or inclusion in a student handbook) is the decision of each school or district. In addition, it is advisable to attempt to notify parents who have a primary or home language other than English. For instance, the notification may be translated into different languages or interpreters may provide the information to parents when they are registering their child at the school.

## B. Providing Access to Individual Records

FERPA allows parents to inspect and review their own child's education record. Exhibit 2–1 includes a Fact Sheet of FERPA describing the federal requirements in this aspect. Either of the natural parents, regardless of the custody assignments, has the rights granted under FERPA. See exhibit 5–1 for clarifications of this aspect. Some states have established laws with provisions regarding access of education records. It is also advisable to check for possible state laws that define “parents.”

An agency or school may choose to promptly honor a parent's standing request for access. While prompt responses are best, agency or school staff should not omit the procedure of verifying the authenticity of the request. Hence, it is important that agencies or schools establish internal management procedures related to handling requests from parents to review their child's record. These procedures should describe clearly all steps and necessary forms, and designate the official who handles all requests. This will not only avoid confusion among staff at agency or school offices, but will also facilitate the response process.

FERPA specifies that the following are not part of an education record and thus are not subject to the parent access rule of FERPA:

- instructional, supervisory, and administrative information about personnel;
- records maintained by a law enforcement unit;
- records on a student who is 18 or older, or who is attending an institution of postsecondary education; and
- records that are maintained by a physician, psychiatrist, or other professional or paraprofessional, and the records that are made in connection with treatment.

## C. Handling a Parent's Request

It is advisable to establish in a district's student records policy procedures for responding to requests to review individual records. The following could be considered in the procedures:

- *Written request:* Parents should be asked to submit a written request to review their child's education record using a request form developed by the district. See exhibit 5–2 for a sample form. The form should explain the relevant federal and state laws, describe the access procedures, and identify the official designated by the agency or school to handle the request. This form should be made available at school offices, although requests should be directed to the district office.
- *Referral to central office:* Since teachers and other school-based professionals have the most frequent contact with parents, these professionals often receive informal requests for information about a student. If the scope of these requests is beyond the day-to-day communication about a student and the information can be found only in the education record, teachers should refer requesters to the appropriate school or district office. This would ensure that all requests are handled appropriately and uniformly.
- *Verification of request:* Upon receipt of a written request, the requester's identification should be verified as soon as possible. Staff should check the education record and determine if there is no apparent reason, such as a legally binding document, to believe the person may not have the rights of access to the student's record. Additional procedures may be added to verify the authenticity of the request. For instance, staff may call the parents using the telephone number listed in the school's records to verify if they have actually made the request.

Since, according to FERPA, an agency or school must comply with requests to review a record within 45 days or less from the date of receipt of the request, school officials should make arrangements for access as promptly as possible. FERPA specifies that a school or district may not destroy the record for a student if a request for access to that record is pending. It is also advisable to determine if state laws require a quicker response (i.e., less than 45 days).

FERPA also indicates that no funds will be made available under any program to any agency or institution that has a policy of denying or preventing parents of students from reviewing the education records of their children. If any material or document in the education record of a student includes information on more than one student, the student's parents have the right to review records pertaining only to their child.

## D. Managing the Review

After verifying the legitimacy of a request, the school or agency should notify the parent of the time and place to inspect the record. See the sample notice in exhibit 5–3. A school or district staff member may be designated for managing the review. The role of this staff member might include:

- explaining the laws and regulations that safeguard the confidentiality of the information;
- verifying the identification of the requester (through the use of an identification with the bearer's photograph);
- staying with the parent during the review to make sure the parent understands the contents of the record;
- making sure the complete record is returned after the review;
- answering questions about the policies and procedures regarding the review; and
- referring the parent to the appropriate resources if a parent has further questions about the contents of the record.

At the end of the review, the parents may be asked to sign a form, such as the one in exhibit 5–3, indicating that they have reviewed the record.

Parents may bring another person (e.g., an interpreter, a trusted friend, or an attorney) to review the record. The staff member managing the review should:

- explain the laws and regulations that safeguard the confidentiality of the education records, and the penalties to the agency or school of unauthorized disclosure;
- ask the parent to sign and date a consent form, such as the one in exhibit 5–4, to allow the accompanying person access to the record; and
- ask the accompanying person to sign an affidavit of nondisclosure, such as the one in exhibit 5–4.

## E. Providing Copies or Charging a Fee

FERPA does not require agencies or schools to provide copies of education records unless there are reasons (e.g., great distance, illness, disability, or a lack of building accessibility) that make it impossible for parents or eligible students to inspect the records in person. A school district may establish in its policy the circumstances under which copies of education records will be provided.

As established in FERPA, the agency or school may not charge for search and retrieval of the records. However, it may charge for copies, copying time, and postage. Fees for copies of records, including transcripts, should be established in the school or district policy and publicized as needed. However, the fee imposed should not serve to deter parents from reviewing their child's record. The agency or school also may allow the parent who is reviewing the records to make copies of parts of the records. If so, it is permissible to charge the parent for photocopying costs.

## F. Handling Challenges to Record Contents

FERPA also provides parents, custodial or noncustodial, and eligible students the right to request that a school correct or amend records believed to be inaccurate, misleading, or in violation of a student's rights. If the school decides not to amend the record, the parent or eligible student has the right to place a statement with the record commenting on the contested information.

A school district should develop a written description of the procedures to notify parents and eligible students of their rights to challenge record contents and guide them through the process. The parents must identify the part of the record they want to change, and specify why they believe it to be inaccurate, misleading, or in violation of the student's rights. The parents should make a written request to amend the record. The school or district may provide a form for this purpose, such as the one in exhibit 5–5.

The school or district may decide whether the request is valid. If the school or district can verify that the contents in question are in error, the record should be amended as soon as possible and the parent notified of the changes in writing. Exhibit 5–6 contains a sample form for this process.

## **G.** Managing the Hearing Procedures

A school or district may decide not to make the requested correction. If so, school officials should notify the parents of the decision and advise parents of their right to a hearing to challenge the information believed to be inaccurate, misleading, or in violation of the student's rights. Exhibit 5–7 contains a sample form for this process. The parents should be asked to inform the school or district if they would like to schedule a hearing to challenge the record.

The school or district should notify the parents, as soon as feasible but in advance of the date, location, and time of the hearing. The hearing must be presided over by someone who is considered a disinterested third party; this person may be a school or district employee. The parents must be allowed to present evidence relevant to the issues raised in the original request to amend the record. The parents may be assisted by other individuals such as an attorney.

When a decision is made about challenged content, the school or district needs to document the evidence presented in the hearing and reasons for the decision. The decision has to be based solely on the evidence presented in the hearing.

If the decision of the hearing is that the challenged information is not inaccurate, not misleading, or not in violation of the student's rights, the school or district must notify the parent. This notification informs the parents that they have a right to place in the record: 1) a statement commenting on the challenged information, or 2) a statement setting forth reasons for disagreeing with the decision that the record will not be changed. This statement will accompany the record when it is transferred to another entity in the future.

If the decision is that the challenged information is inaccurate, misleading, or in violation of the student's rights, the record must be appropriately amended. The school or district must notify the parent, in writing, that the record has been amended. If the information is maintained in portions of the record located in more than one place in the school or district, then information in all locations need to be corrected.

### **COMMONLY ASKED QUESTIONS**

- Q.** Can students review their own records?
- A.** *FERPA permits schools to afford minor students rights in addition to those given to parents. In addition, once a student is 18 years old, the rights under FERPA transfer from the parents to the student. If a person is granted the legal status of an emancipated minor, that individual has access to his or her own record, but under FERPA, this does not remove the parents' rights unless action is taken by a court to do so. Most states define an emancipated minor as a minor who has the power and capacity of an adult. When the student attends a postsecondary institution, even if he or she is under 18 years of age, the student may review the record in the postsecondary institution.*
- Q.** Besides the annual notification of FERPA rights, what else does a school or district need to do annually?
- A.** *Schools or districts need to tell parents at the beginning of the school year if policies change, and give parents a chance to opt out of having their student's directory information released. See section 6B for a discussion of releasing directory information. In addition, the Protection of Pupil Rights Amendment (PPRA) requires that school districts or schools annually*

*notify parents of their rights under PPRA and of the school's policies regarding obtaining consent or allowing parents to opt their child out of participating in certain school activities (such as a survey containing information about religion, mental problems, etc.). Activities requiring notification and provision to opt out of participation are those involving the collection, disclosure, or uses of personal information from students to market or sell that information and any non-emergency, invasive physical examination or screening that is required as a condition of attendance. See section 2C for a detailed discussion of this aspect.*

- Q.** How do I respond speedily to requests for reviewing student records?
- A.** *If you establish written procedures and provide appropriate forms, you can facilitate the reviewing process and forestall frustrating delays. See section 5B.*
- Q.** Should I authenticate requests for student information? How far do my responsibilities extend?
- A.** *The agencies or schools releasing information are responsible for verifying the authenticity of a request. However, you will need to make a judgment call as to what precautions are sufficient. You can reduce ambiguity by creating a written policy with verification procedures. See sections 5C and D for suggestions.*
- Q.** Can I discuss the education record of a student in front of someone the parent has brought along, such as a language interpreter or friend who sits in when I let the parent review the record?
- A.** *Yes, you may discuss the record if the parent signs a consent form. See section 5D.*
- Q.** Do I have to provide copies of an education record when the parents request to see it?
- A.** *The agency or school may choose to provide copies, although this is required only when it is not feasible for the parent to review the record because of distance, illness, disability, or a lack of building accessibility. See section 5E.*
- Q.** Must I allow a parent to make a copy of an education record?
- A.** *No, you do not have to allow a parent to make a copy unless a failure to do so would prevent the parent from inspecting and reviewing the records. The agency or school can charge for the copies. See section 5E.*
- Q.** Do noncustodial parents have access rights to student records?
- A.** *Parents, custodial and noncustodial, as well as legal guardians have access to student information unless the agency or school has evidence of a court order or state law revoking these rights. Parent rights extend to surrogate parents of children with disabilities. See exhibit 5–1 for the pamphlet, "Rights of Non-Custodial Parents," developed by the Family Policy Compliance Office of the U.S. Department of Education.*
- Q.** What do I do if a noncustodial parent requests to amend an education record?
- A.** *You would follow the same procedures as you would for amending records for custodial parents. See exhibit 5–1.*
- Q.** Must I give my notes on a student to his or her parent?
- A.** *Notes created by teachers or counselors as memory aids and not shared with anyone else except a temporary substitute are not considered education records by FERPA. Once notes are shared with other officials, they become education records. Teachers may choose not to give their notes to parents. See section 2 for the definition of an education record.*
- Q.** What are the access rights of emancipated minors?
- A.** *While FERPA does not specifically speak to emancipated minors, the Family Policy Compliance Office has ruled in specific cases that an emancipated minor under state law should be provided access and other rights under FERPA, but that unless a court rules so, the parents' FERPA rights are not revoked.*

## Rights of Noncustodial Parents in the Family Educational Rights and Privacy Act of 1974<sup>6</sup>

The Family Educational Rights and Privacy Act (FERPA) sets out requirements designed to protect the privacy of parents and students. In brief, the law requires a school district to: 1) provide a parent access to the records that are directly related to the student; 2) provide a parent an opportunity to seek correction of the record he or she believes to be inaccurate or misleading; and 3) with some exceptions, obtain the written permission of a parent before disclosing information contained in the student's education record.

The definition of parent is found in the FERPA implementing regulation under 34 CFR 99.3.

*“Parent” means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.*

Section 99.4 gives an example of the rights of parents.

*An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody, that specifically revokes these rights.*

This means that, in the case of divorce or separation, a school district must provide access to both natural parents, custodial and noncustodial, unless there is a legally binding document that specifically removes that parent's FERPA rights. In this context, a legally binding document is a court order or other legal paper that prohibits access to the education record, or removes the parent's rights to have knowledge about his or her child's education.

Custody or other residential arrangements for a child do not, by themselves, affect the FERPA rights of the child's parents. One can best understand the FERPA position on parents' rights by separating the concept of custody from the concept of rights that FERPA gives parents. Custody, as a legal concept, establishes where a child will live, and often, the duties of the person(s) with whom the child lives. FERPA, on the other hand, simply establishes the parents' right of access to and control of the education record related to the child.

Here are the answers to questions frequently asked about the rights of noncustodial parents.

**1. Does FERPA require a school to keep a parent informed of the child's progress even though the parent is divorced and living some distance from the child?**

No. FERPA does not require schools to inform parents of student progress whether the parents are divorced or not.

**2. Does FERPA require a school to provide a parent copies of the record?**

Generally, a school is not required to provide parents copies of the record. However, if the distance is great enough to make it impractical for a parent to visit the school to review the record, the school must make copies of the record and send them to the parent when that parent requests access to the record.

**3. May a school charge for copies of records?**

Yes. A school may charge a reasonable fee for copying.

**4. Does the noncustodial parent have the right to be informed of and to attend teacher conferences?**

FERPA does not address conferences for the purpose of discussing student performance. Thus, a school has no obligation under this law to arrange a conference to accommodate the noncustodial parent. However, if records of conferences are maintained, the noncustodial parent has the right to see those records.

<sup>6</sup>The pamphlet was developed by the Family Policy Compliance Office of the U.S. Department of Education.

**5. Must the school notify the noncustodial parent of his/her FERPA rights?**

No. The school would be considered in compliance with the law if it notifies only the parent who has custody of the child.

**6. Must the school provide the noncustodial parent the same general notices it provides the custodial parent?**

No. General notices, lunch menus, PTA information, announcement of teacher conferences, school pictures, and other similar information are not "education records" as defined by FERPA. Therefore, schools are not legally required to provide them.

**7. Is the school required to honor a parent's "standing request" for access or copies?**

No. FERPA does not require a school to honor a standing request, but the school may do so if it wishes. If parents wish to obtain information from their child's record on a regular basis, they should submit requests periodically. The school must respond to each request within 45 days.

**8. How can a noncustodial parent get access to records?**

Any parent may ask the school for the opportunity to review the record, either by going to where the records are kept or by requesting copies. The school may ask the parent for some identification.

**9. Can the parent with custody prevent the noncustodial parent from exercising his or her FERPA rights?**

No. FERPA rights are given to both parents. The school may assume that a parent has these rights unless it has evidence to the contrary. The school does not need the permission of the custodial parent to give access to the non-custodial parent.

### Sample Request to Review an Education Record

Date: \_\_\_\_\_

To: [Name of Designated Official]

From: [Name of Parent]

[Address and Phone Number]

Under the provisions of the Family Educational Rights and Privacy Act and [insert applicable state/local laws and regulations], I wish to inspect the following education record:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

of [Name of Student]: \_\_\_\_\_

School at Which Student Is Enrolled: \_\_\_\_\_

Requester(s)' Relationship to Student: \_\_\_\_\_

I do \_\_\_/do not \_\_\_ desire a copy of such records. I understand that a reasonable fee will be charged for the copies.

[Insert fee schedule if available]

Signature: \_\_\_\_\_

.....

***For Official Use Only***

Date Received: \_\_\_\_\_

Date Request Verified: \_\_\_\_\_ Verified by: \_\_\_\_\_

Approved: \_\_\_ Disapproved: \_\_\_ Reason(s) for disapproval: \_\_\_\_\_

Signature of Official Approving/Disapproving Request: \_\_\_\_\_

Date: \_\_\_\_\_ Date Notification Sent: \_\_\_\_\_



**Exhibit 5-3**

### Sample Notification to Review an Education Record

Date: \_\_\_\_\_

To: [Name of Parent(s)]

From: [Name of Designated Official]

Your request for review of your/your child's record was received on [insert date]. The request was approved.

\_\_\_\_\_ The record will be available at the following office for review on [insert date]:

[Name and address of office, including room number and contact person]

\_\_\_\_\_ As you requested, copies of the record will be mailed to you upon receipt of the copying fee: \_\_\_\_\_

Please forward your check, made payable to [appropriate agency], to [address of agency].

Please contact [insert name] of [insert office] at [insert telephone number] should you have questions regarding this notice.

Signature of Designated Official: \_\_\_\_\_

***For Use on Date of Review:***

\_\_\_\_\_ I have reviewed and/or have been informed of the contents of the requested education record on [insert date] and am satisfied with its accuracy and completeness.

\_\_\_\_\_ I have reviewed and/or have been informed of the contents of the requested education record on [insert date]. I am aware that I have the right to request an amendment of all or part of the record if I am not satisfied with its accuracy and completeness. I also have received a request form for this purpose.

Signature of Parent(s): \_\_\_\_\_

Signature of Staff Managing the Review: \_\_\_\_\_

***For Use in Copying/Mailing of Record:***

Date Fee Received: \_\_\_\_\_ Amount Received: \_\_\_\_\_

Check No: \_\_\_\_\_ Staff Initials: \_\_\_\_\_

Date Copies Mailed: \_\_\_\_\_ Staff Initials: \_\_\_\_\_

**Sample Consent Form  
to Allow Accompanying Person to Review Record  
(For Use by Parent or Eligible Student to Grant Consent)**

I hereby grant permission for [name of person] \_\_\_\_\_ to accompany me today during my review of my/my child's education records. I understand that in doing so, the information maintained in the education records, otherwise protected by the Family Educational Rights and Privacy Act (FERPA) [and state laws, if applicable], may be disclosed with my consent to the above individual.

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Date: \_\_\_\_\_

***For Use by Accompanying Person as Affidavit of Nondisclosure***

In accompanying the above-signed parent/guardian on this date during his/her review of the education records of: \_\_\_\_\_, I will be given access to confidential information maintained in the records of the named student. I understand that this information is protected under FERPA [and state laws, where applicable]. I hereby acknowledge that I fully understand that the intentional release by me of this information to any unauthorized person could subject me to [penalties, where applicable] imposed by FERPA [and state laws].

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Date: \_\_\_\_\_

***For Official Use Only***

Staff Initials: \_\_\_\_\_ Date: \_\_\_\_\_

**Exhibit 5-5**

**Sample Request  
to Amend an Education Record**

To: [Name of Designated Official]

From: [Name of Parent(s)]

I have reviewed my child's education record and believe it contains information that is inaccurate, misleading, or in violation of my child's rights. Please amend the record as follows:

Current Record:

To be Changed to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

***For Official Use Only***

Date of Hearing Scheduled: \_\_\_\_\_

Location: \_\_\_\_\_

Date of Notification Sent: \_\_\_\_\_

Signature of Official Approving/Denying Request: \_\_\_\_\_

### Sample Notification for Approval/Disapproval of Request for Amendment

Date: \_\_\_\_\_

From: [Name of Designated Official]

To: [Name of Parent(s)]

Your request for amendment of the education record of your child, \_\_\_\_\_, was received and reviewed.

\_\_\_\_\_ The request was approved and necessary changes were made to the specified record as requested.

\_\_\_\_\_ The request was denied because \_\_\_\_\_.

However, you are entitled to a hearing concerning your request. If you decide to request a hearing, please notify the following office within [number of days as specified by state or local policies].

[Name of Contact Person]

[Address and Telephone Number]

Signature: \_\_\_\_\_

**Exhibit 5-7**

**Sample Notification  
for a Hearing of Request for Amendment**

To: [Name of Parent(s)]  
From: [Name of Designated Official]  
Date: [Date]

We have received your request to schedule a hearing for the purpose of challenging the contents of the education records of your child, [name of student]. A hearing is hereby scheduled as follows:

\_\_\_\_\_ The hearing is scheduled at:

[Date]  
[Time]  
[Location/Office]  
[Address]

If you cannot be present on the above date, please contact my office as soon as possible to establish a mutually convenient date.

\_\_\_\_\_ The hearing is rescheduled at:

[Date]  
[Time]  
[Location/Office]  
[Address]

You shall have a full and fair opportunity to present evidence relevant to the issues you have raised regarding your child's education records. You also may be assisted or represented by individuals of your choice, including an attorney. The decision will be based exclusively on the evidence presented at the hearing.

Please do not hesitate to contact me if you have any questions.

\_\_\_\_\_  
[Signature]

[Name, Title]  
[Office]  
[Address]  
[Phone Number]





# SECTION 6

## Releasing Information Outside an Agency

### OVERVIEW

Managers of education records at the state, local, or school level receive numerous requests for information. Requests could come from the news media, businesses, relatives, agency staff, law enforcement units, attorneys, private investigators, the governor's or legislators' offices, or researchers.

This section supplements section 2 of this document, which discusses the federal laws that govern the release of education records. Many states have laws or statutes that further restrict the release of these records. School, district, or state education agency staff should contact their agencies' legal counsel or counsel assigned to their agency by the state attorney general's office for legal opinions about confidentiality requirements and recommended procedures. This section outlines some general guidelines for deciding whether to release information.

### GOALS

- ✓ Distinguish between different types of information and discuss the release procedures of each of them
- ✓ Recommend ways to safeguard information that is released outside of the agency
- ✓ Discuss the benefits and risks of sharing information with other agencies and suggest ways to ensure the privacy of individual records during the process
- ✓ Discuss electronic options of transferring data in a secure way

### KEY POINTS

- Personally identifiable data are those that contain information that would make the student's identity easily recognized. Release of this type of data is subject to established policy in the school district, as well as state and federal laws.
- State and local laws may specify what types of information are considered directory information, which may be released without prior consent. However, parents must be informed of what is considered directory information and given the opportunity to withhold its release.
- Nondirectory information can be released with written consent from the parent. The consent should specify the information that may be released, the purpose of the release, and the recipient.
- Examples of those to whom information from education records may be released without seeking consent from parents include authorized representatives from state and local education agencies, and health or safety personnel in case of an emergency.
- Requests from researchers should be handled on a case-by-case basis. Schools or districts should establish a set of criteria, application procedures, and written guidelines for making the decision.
- Many agencies are developing strategies that establish the kinds of privacy standards and procedures that would ensure the confidentiality of information while allowing restricted use of information for specific and pre-approved purposes.



- Interagency sharing of information from students' education records generally requires a signed consent by parents or eligible students, regardless of whether the records originate in schools, health centers, or employment or social service agencies.
- As a final security control, a designated official should review the compiled data and verify that local procedures have been followed before approving the release.
- Recipients should be required to sign an affidavit that they will not release any personally identifiable information received.
- It is important to document data release whether or not prior consent was required. This information should remain in the record as long as the record is maintained.
- Agencies should establish policies to cover instances in which information may be released through electronic means. A variety of methods can be used to safeguard the data, including encryption and passwords, and careful logging of a transfer.

## A. Types of Information Release

### A1. Releasing nonpersonally identifiable information

When a district or school staff member receives an information request, the first question he or she needs to consider is what type of information is being requested. Generally, an information request about one or more individuals can be categorized as *nonpersonally identifiable* information or *personally identifiable* information.

Nonpersonally identifiable data do not reveal specific information about a particular individual. They usually describe a group of persons (e.g., the aggregate number of students participating in extracurricular activities) without identifying any one student. Or they consist of individual records stripped of any information that would make it possible to identify the person described.

Release of nonpersonally identifiable data is generally allowed. A district or school may determine how this type of information is released. It is advisable to designate appropriate officials within the agency to review the compiled data, making sure that no single individual can be

identified by a combination of several pieces of nonpersonally identifiable information.

For example, the release of school-level enrollment counts does not constitute releasing of personally identifiable information. However, enrollments by race or other demographic categories against various performance measures are clearly subject to cell suppression, if the cell size is low. Small cell sizes allow an audience to discern personally identifiable information about an individual. It is good practice for state and local education agencies to develop cell suppression guidelines regarding the release of aggregate data, in order to avoid the inadvertent violation of the confidentiality rights of students.

In planning and producing analyses and tabulations, the general rule is that there should be no cell (or category) published in which there are fewer than three respondents, or in which personal information could be obtained by subtraction or other simple mathematical manipulations. However, this should be adjusted based on the factors unique to the district or school, such as the size of the school or community population. It is important not to allow information to be disclosed through subsequent cross-tabulation of the same data with other variables.

An associated issue is whether or not a statistic is based upon a sufficient number of observations to be reliable as a measure of what it is intended to measure. Even if individual identities are adequately masked, the value of a cell may need to be suppressed because the value fails to meet reasonable criteria for reliability. In a paper entitled "Why a Small  $n$  Is Surrounded by Confidentiality: Ensuring Confidentiality and Reliability in Microdatabases and Summary Tables," Ligon, Clements, and Paredes (2000) suggest useful solutions for protecting an individual's confidential information and describe the conditions under which statistics should be suppressed because the contents are based upon too few individuals to be reliable. The paper also includes a checklist to ensure the confidentiality of individuals when releasing statistics.

### A2. Releasing personally identifiable information

Personally identifiable data may or may not identify a person directly, but may contain information that would make a student's identity easily recognized. This information is more sensitive than grouped information or sum-

marized data and therefore requires more attention and care before release. Personally identifiable information, including the identifying data listed below, must be maintained in education records that are protected with appropriate security. It is important that state or local education agencies establish policies that define personally identifiable information and list specific examples. This will avoid confusion when actual information requests are handled.

Personally identifiable data often are unique to an individual, alone or in combination with other data, such as:

- a person's name;
- the names of the student's parents or other family members;
- the address of the student's parents or other family members;
- the telephone number of a person;
- a photograph of a person;
- an identifier, such as a person's social security number or an identification number assigned by the school;
- a list of characteristics (e.g., apparent disability, birthmark, race or ethnicity) that would make the person's identity easily traceable; and
- other information that would make the person's identity easily traceable.

Some types of identifying data may be defined as part of the directory information in a district's education records policy. Staff should check with the policy for the proper release of this type of information. Section 6B discusses directory information and its proper release.

## **B.** Release of Directory Information

If information requests are related to personally identifiable student information to be obtained from the education records, the first question a school official should ask is whether the request is for directory information as defined in the district's education records policies. The release of directory information is governed by specific disclosure rules under FERPA that are different from education records in general. Section 2 of this document contains definitions of *education records* and *directory*

*information*, as well as federal regulations that relate to the release of this information.

Agency or school staff should refer to federal, state, and local laws and regulations about the types of data that may be released without consent of the parents. Besides those specified in FERPA, the U.S. Congress recently passed a provision in the No Child Left Behind (NCLB) Act that allows the disclosure of directory-type information (students' names, addresses, and telephone listings) to military recruiters. State and local laws may specify data items considered directory information. Section 2B includes the types of items that are *typically* considered directory information by local policies.

As required by FERPA, annual notification should be given to allow parents to request that all or portions of directory information not be released. Exhibit 6–1 contains a sample notification form. Upon receipt of an information request, district or school staff need to verify that there is an appropriate prior consent to release that piece of information about the student(s).

## **C.** Release With Prior Consent

When individual information not authorized by FERPA or other federal laws such as the National School Lunch Act (NSLA) is requested by a third party (e.g., a relative, family lawyer, or news reporter), the requester should be required to present written consent from the parent. If information requested from the record is not considered directory information but is personally identifiable, it can be released if the parent provides a written, signed, and dated consent document. The document must:

- specify the information that may be released;
- state the purpose of the release; and
- identify the individuals or entities to whom the release may be made.

Staff members processing the request need to authenticate the request. The parent could be contacted for verification if there is any question or doubt about its authenticity.

Unless otherwise allowed by federal or state law, or local policies, agency or school staff should not assume that if parents openly discuss information included in their

child's education records, the parents are giving "implied" consent for staff to release that information. Written consent for agency or school release from the parent is required by FERPA.

## **D.** Release Without Prior Consent

In some circumstances, without prior written consent from the parent, personally identifiable information may be released to particular individuals or entities outside the agency or school. Such release must be allowed by an established policy. Agency or school staff should be familiar with federal and state laws as well as local policies established in this regard. They should also understand that they are not required to release information unless otherwise specified by these laws or policies, but are given the option to do so. Section 2 lists these outside individuals or entities to whom student records may be released. Examples of these individuals include designated, authorized representatives from state and local education agencies, and health or safety personnel in case of an emergency. Exhibit 6–2 includes a form that an agency or school could use to monitor this type of release.

Within the agency or school, education records may be released and used by personnel who are considered to have a legitimate educational interest or need-to-know without prior written consent of the parent. Section 4 contains guidelines regarding this type of release. Examples of personnel who may have authorized access to the student records include research and evaluation directors and service providers or coordinators of special programs in which the students participate.

The NSLA allows the release of free- and reduced-price school meal eligibility without the consent of the parent for certain purposes. (See section 2.) Agencies or schools should establish written guidelines to permit such release.

## **E.** Release to Researchers

In some cases, researchers who are not employed by the agency or school may be authorized to conduct data processing or research and evaluation studies through contractual arrangements. If these efforts are initiated by and performed on behalf of the agency or school, researchers may be considered school officials who have a legitimate

educational interest. These situations were discussed in section 4. However, researchers outside the agency or school often request individual information (which may or may not be personally identifiable) for their own research agendas. More often than not, the requested information includes more than one data item from the education records or student database. These requests should be handled on a case-by-case basis. The written agency or school policy should include criteria for considering such requests, such as:

- perceived benefits of the research;
- potential invasion of students' privacy;
- reputation of the requester; or
- availability of staff to monitor the process of the release and the research activities.

The *NCES Statistical Standards*, last updated by the National Center for Education Statistics (NCES) in September 2002, includes a section on maintaining confidentiality during data processing. This section includes the standards and procedures to which NCES staff and contractors must adhere in order to protect the confidentiality of personally identifiable information. State and district officials may consider these standards in developing their own procedures and requirements. Exhibit 6–3 includes these standards.

In general, the release of data to researchers outside the agency should be considered as a loan of data (i.e., recipients do not have ownership of the data). Agencies or schools could request that these data be returned or copies destroyed when the researchers complete their work.

Before considering these data requests, agencies should establish written guidelines and procedures to allow the on-site access or off-site loan of personally identifiable data by appropriate individuals or organizations. Last updated in 2000, NCES published a manual called *Restricted-Use Data Procedures Manual* to ensure the implementation of proper procedures before releasing any of its data sets. The following items, adapted from this manual, could be included in an agency's policies and procedures regarding the loan of data:

- description of all federal and state laws and regulations governing access to the data and penalties for violation;
- procedures to request access to or loan of data and name of the official designated to handle the request;

- criteria for accepting or denying requests;
- minimum expected security requirements;
- allowance for unannounced, unscheduled inspections of the data user's site;
- agency review of publications to verify that disclosure procedures have been followed; and
- other relevant requirements.

Organizations that intend to obtain access to personally identifiable data could be required to submit a formal written application on the organization's letterhead that would include:

- the type of data (with specific items listed) requested;
- reasons for requesting the data;
- a description of how the data will be used and analyzed;
- a description of how analyses will be presented and reported;
- names and titles of: 1) the official(s) with the authority to bind the requesting organization to the agreement, 2) the official(s) in charge of the day-to-day operations involving the use of the data, and 3) the professional and support staff who conduct the research and analysis, as well as those who may have access to the data;
- the estimated amount of time the data are needed; and
- the desired medium of release (e.g., paper or media format).

In addition, the organizations requesting access or loan of data should submit a security plan addressing all applicable security procedures. Those procedures may include:

- *Computer security*—use and update passwords; implement logon procedures with automatic security data access shut-down function; assign access security levels; integrate warning statements; prevent external access to any modems connected to the system while processing data on a computer; and use additional procedures to safeguard the data in networked environments. If a one-time complete backup copy of the data will be needed, the applicant should also explain the security procedures surrounding the backup copy of the data, including those backup copies that are created automatically while downloading. NCES goes so far as to generally exclude networked environments when licensing external users. Refer to *Weaving a*

*Secure Web Around Education: A Guide to Technology Standards and Security* (National Forum on Education Statistics 2003) for recommendations in this area.

- *Physical handling and storage of data*—catalogue and storage with lock and key; minimal allowance and secured storage of printed copies; and additional restrictions on copying of data.
- *Transportation of data*—ideally by a bonded courier and notice of confidentiality and restricted use, or in the case of electronic data transfer, proper built-in security safeguards.

Agencies must proceed with caution before releasing portions of databases containing individual education records since these can include personally identifiable information. Under most cases, the release of database information with personally identifiable information is limited by law. In these cases, if a request for individual records is approved, agency or school staff should extract only the data approved for release.

Before a data set is released across agencies or to researchers or research institutions, appropriate agreements must be signed to clearly state that, in the minimum:

- all records will remain private;
- conditions of release and re-release are well defined and limited; and
- penalties for inappropriate records use or release of records are in place.

Individuals employed by the agencies who are authorized and who will have access to the individually identifiable information also could be required to sign an affidavit of nondisclosure. Exhibit 6–4 contains a sample form.

In most cases, information indicating that an education record has been released must be documented in the record and retained there until the education record is destroyed.

## Release to Other Service Agencies

There are increasing needs for education and other service agencies to develop coordinated data systems that enable them to more effectively and efficiently serve children and their families. Many agencies, such as education, health, social service, and labor agencies, are

seeking means to facilitate the automatic accessibility of information from student records. Cross-agency partnerships have been developed for streamlining services. Although they are limited by some practical, political, technical, and regulatory barriers, service providers and policy analysts agree that benefits and efficiencies can be gained from sharing data for at least these three well-defined purposes:

- **Providing children with supportive services**—Counselors and health services providers may need information about an individual's social, educational, and health status to diagnose a problem, and develop and implement a treatment plan. Records kept in schools (e.g., attendance information, family background, and reports of academic and behavioral achievements or problems) can contribute critical information for case planning and management. Some information may help law enforcement officials locate youth involved in the juvenile justice system who may need assistance or who may be a danger to themselves or those around them.
- **Increasing access to social and educational services**—Sometimes agencies need to seek out or verify eligible program participants. Often there are children in schools whose families may not realize they are eligible for certain assistance (e.g., free or reduced-price lunch, health services, or welfare services) that is available through school or community agencies. Records of several service agencies may need to be cross-checked to increase the efficiency of deciding what services are available and to ensure those services reach the individuals who need them.
- **Conducting policy planning and evaluation studies**—Student records that are part of an education agency's administrative structure can inform statistical studies for improving management of services and evaluating outcomes. A start toward using integrated electronic records systems for management and outcomes evaluation is occurring in several states. In each instance, the state's legislature has encouraged the development of integrated data systems to strengthen, evaluate, or manage integrated public services or to improve access to evaluation and planning information to support workforce development programs. Such systems emerge typically following an investment in consensus-building procedures that include members of all contributing agencies in planning. No exchange of information occurs until appropriate memoranda of agreement are in place, along with procedures for

obtaining the consent of participating individuals or verifying that such consents are unnecessary, because no confidential or personally identifiable information is issued at the individual case level.

Education agencies are finding new ways to support services integration for students while they meet their legal and ethical obligations to restrict the release of information from student records. One way this occurs is for agencies to guide data sharing with well-defined policies for gaining consent to use records across agencies at the time that records are initially established. In general, information about students can be released only with the *signed consent* of parents or eligible students who have been told, in language they understand, what information is to be used across agencies, why, and how that sharing will occur. The following are strategies for protecting the confidentiality of information used across agencies:

- **Obtain legal advice to guide the process**—The legal offices of the agencies can assist with the study of applicable federal and state laws, as well as establish a memorandum of understanding or an interagency agreement to confirm what data will be exchanged and how it will be used. They can also help ensure that agencies maintain records of what information has been shared and the authorization for sharing it. A thorough knowledge of the rationale behind federal, state, and local privacy laws, and an understanding of what the laws allow and disallow, are the building blocks of widely sought interagency data coordination.
- **Obtain prior written consent from parents or eligible students**—Agencies that collaborate for in-take procedures, direct service, or research should explicitly spell out procedures for obtaining written consent and define in advance what data will be shared, how they are used, and the means of ensuring privacy if they are released from the originating agency.
- **Establish well-defined procedures**—These procedures ensure that all parties involved who work with student records understand confidentiality restrictions and procedures for handling private, personally identifiable information. These also include adequate training on legal requirements and ethical standards, the appropriate use of the information, and the strategy to safeguard the security of the data.
- **Implement privacy safeguards**—When research studies are to be conducted, information from several agencies can be analyzed within the education



agency, following adequate privacy safeguards, so that no identifiable information is available to individual researchers or analysts. Data are matched electronically so that personally identifiable information from several data sources is connected within the computer and not actually seen. In these cases, personal information is only used to produce aggregate results for groups and programs.

## **G.** Review Prior to Release

As a final control, an appropriate official could review the compiled information or data for accuracy and to ensure that they are within the scope approved for release. This official also may review the procedures to ensure compliance with all federal, state, and local statutes, rules, and regulations that apply to the release. Signatures of the appropriate and authorized persons should be required for every release.

## **H.** Avoid Misuse of Information by Nonintended or Secondary Users

Any organization creating, maintaining, using, or disseminating education records with personally identifiable data must assess the reliability of the information for its intended use and must take precautions to prevent misuse of data. When data are released to individuals or groups outside the agency, the recipients should be required to sign an affidavit stating that they will use the data in a way consistent with that described in their requests, and not to transfer or re-release the data to another individual or organization. Exhibit 6–5 contains a sample statement. Although school officials are not liable for a third party’s misuses of data, it is important to implement and follow proper procedures in good faith to protect the students and their families, as well as the agency or school.

## **I.** Document the Release

Agencies or schools should maintain records of access, retrieval, or release of records, including the names of persons retrieving records and the purposes for each release, and a list of personnel authorized to have access to the file. They should also maintain a record of user requests

for data that have been denied or only partially fulfilled. Such information can be used for periodic reviews of agency confidentiality and data release policies.

Information about releases with or without prior consent of the parent should remain with the education record as long as the record is maintained. It is a good practice to document all access and release. However, documentation is not required if the request was made by or release was made to the most common users:

- the parent or eligible student;
- a school official who has been determined to have a legitimate educational interest;
- a requester with written consent from the parent or student; or
- a requester seeking directory information only.

## **J.** Ensure the Security of Data in Electronic Transmission

Particular attention should be given to confidentiality when data are released through electronic means because of the increased potential for unauthorized access. For example, school staff cannot visually check the photo identification of a facsimile or electronic mail recipient. It is recommended that policies and procedures be established to address the issue of data forwarding via electronic means.

School officials should routinely embed various levels of encrypted codes into computerized databases. This will protect the confidentiality of the data, as well as ensure the integrity and authenticity of the information. Clear rules and procedures about who can send and who can receive and use data should be established, as should the penalties for abuse or misuse of systems. The transmission of data from one agency to another creates additional security risks that can be minimized through the use of standardized protocols, various encryption technologies, and digital signatures. Refer to *Weaving a Secure Web Around Education: A Guide to Technology Standards and Security* (National Forum on Education Statistics 2003) for a detailed discussion and technical specifications of these methods.

It is important for the electronic system to log the transfer of personally identifiable data in a security audit trail to account for releases of data by and to appropriate individuals. The use of electronic authentication programs

can reassure the sending agency or school that the information has reached the appropriate recipient and that no changes to the contents have been made.

### COMMONLY ASKED QUESTIONS

**Q.** Who (other than parents) must a school official allow to see an education record of a student?

**A.** *School officials are not required to allow anyone other than the parents to see the education records of a student; the exceptions allowing the release are circumstances stipulated by federal or state laws, such as government-required audits, evaluations, or court orders. See section 6D; also see a detailed discussion of the federal statutes in section 2B.*

**Q.** Which public officials have access to education records without consent of a parent?

**A.** *School officials with a “legitimate educational interest” in the information have access to education records without specific consent of parents or eligible students. Policies defining officials who may receive information without prior consent must be accessible to parents for review. FERPA also permits other disclosures of information from education records without consent, usually for educational purposes. For examples, schools may disclose information on students to state or local educational authorities for audit or evaluation of federal or state supported education programs, or for the enforcement of federal legal requirements relating to those programs (such as IDEA). This condition for disclosure without consent does not generally extend to other state agencies.*

**Q.** If a parent makes information about a student public, must school officials keep that piece of information confidential?

**A.** *Yes, school officials should not respond to information made public by a parent, such as to the media, without consent from the parent. See section 6C.*

**Q.** Must a school official release a student’s record to a family lawyer?

**A.** *A school official does not have to release a record of a student to his or her family lawyer, but may do so upon receipt of a prior written consent from the parent, unless the school is assured that the attorney is asking on behalf of the parent. See section 6D.*

**Q.** What penalties apply to the misuse or improper disclosure of confidential information?

**A.** *The penalty for noncompliance with the Family Educational Rights and Privacy Act (FERPA) and Protection of Pupil Rights Amendment (PPRA) can be withdrawal of U.S. Department of Education funds from the institution or agency that has violated the law. This applies to schools, school districts, and state education agencies. The Family Policy Compliance Office of the U.S. Department of Education, charged with reviewing and investigating complaints, seeks to promote voluntary compliance with the law. A third party who improperly discloses personally identifiable information from student records can be prohibited from receiving access to records at the education agency or institution for at least 5 years. State laws on privacy may also apply penalties.*

**Q.** What are the liabilities or penalties if an education agency or institution violates FERPA?

**A.** *An education agency or institution subject to FERPA may not have a policy or practice of disclosing education records, or nondirectory, personally identifiable information from education records, without the written consent of the parent or eligible student, except as allowed by law. If a complaint is received by the Department of Education alleging a violation of FERPA, the FPCO investigates the complaint to determine if a violation of FERPA occurred. If a school is found to be out of compliance with FERPA, the FPCO works to bring the school into voluntary compliance with the law. If voluntary compliance is not achieved, then a school would be in jeopardy of losing federal education dollars. There is no private cause of action (right to sue) under FERPA and, in 2002, the U.S. Supreme Court ruled in *Gonzaga University v. John Doe* that students and parents may not sue for damages under 42 USC § 1983 to enforce provisions of FERPA.*

**Q.** What are the consequences of a third party’s misuse of education records?

**A.** *School officials must inform third parties receiving information, as allowed under FERPA, of the requirements concerning redisclosure of information. If a third party is found to have improperly redisclosed personally identifiable information from education records, the school may not allow that third party access to information for at least 5 years.*



**Q.** Can student records be transmitted electronically, via the Internet or facsimile?

**A.** *The law requires agencies to prevent the unauthorized release of personally identifiable information from education records. Thus, when student records are transmitted electronically, confidentiality must be protected both by the sender and receiver of information. Agencies must establish procedures for releasing information, and they must continually train officials and clerical staff about their obligation to treat personally identifiable information confidentially.*

*Various experts in the application of FERPA and the uses of electronic data exchange consider facsimile machines to be less secure than the electronic transmission of records. If facsimile machines are to be used, the institutions involved with the exchange of student information must establish security procedures that meet the privacy obligations set out in FERPA. See section 6I.*

### Sample Request to Withhold Release of Directory Information<sup>7</sup>

To: All Parents

School Year: \_\_\_\_\_

The items listed below are designated as “directory information” of [name of agency or school] and may be released for any purpose at the discretion of [name of agency or school]. [Cite state laws and regulations or local policies, where applicable.] Under the provisions of the Family Educational Rights and Privacy Act of 1974, as amended, you have the right to withhold the release of any or all of the information listed below.

[Listed below are examples of directory information]

- Name of student
- Address of student
- Telephone number of student
- Electronic mail address
- Photograph
- Date and place of birth
- Dates of attendance
- Grade level
- Participation in officially recognized activities and sports
- Weight and height of members of athletic teams
- Awards received

Please consider very carefully your decision to withhold any item of “directory information.” Should you decide to inform [name of agency or school] not to release any or all of the items listed above, any future requests for such information from individuals or entities not affiliated with the [name of agency or school] will be refused. Please indicate here your request to withhold any or all of the above items:

\_\_\_\_\_

.....

If this form is not received in [name of office] prior to [date], it will be assumed that the above information may be released for the remainder of the current school year. A new form for nonrelease must be completed each [term/semester/year].

Parent’s Name: \_\_\_\_\_

Student’s Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

<sup>7</sup>Adopted and modified from Association of Collegiate Registrars and Admission Officers, *Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended*, Revised Edition, 1995.

**Exhibit 6-2**

## Sample Request of Nonparent for Access to Education Record

To: [Name of designated official]

From: \_\_\_\_\_  
[Name, title, organization]

I hereby request permission to examine the following part(s): \_\_\_\_\_

\_\_\_\_\_ of the official education records of: \_\_\_\_\_ [name of student(s)] at:

\_\_\_\_\_ [name of agency or school]. I certify that I am (check one as appropriate):

\_\_\_\_\_ An authorized official of another school system in which the student intends to enroll.

\_\_\_\_\_ An authorized representative of the Comptroller General of the United States.

\_\_\_\_\_ An authorized official of the financial institution to which the student applied to receive financial aid. The purpose of this request is to determine eligibility, amount of aid, conditions of aid award, and enforcement of award terms and conditions.

\_\_\_\_\_ An authorized official of an accrediting organization. I understand that release is allowed on the conditions that only appropriate members of my organization view the records and that resulting studies do not identify any particular student.

\_\_\_\_\_ An authorized representative of the Secretary of the U.S. Department of Education.

[Add other categories as allowed in state or local laws and regulations.]

I agree that no unauthorized person or organization will have access to any records or information obtained through this request without the written permission of the parents of the student or the student. I understand the maximum penalties for redisclosure of the record will be [as set forth by federal and state laws and regulations].

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

***For Official Use Only:***

Request approved/denied by: \_\_\_\_\_

## NCES Statistical Standards on Maintaining Confidentiality (National Center for Education Statistics 2002)

1. Staff and contractors must pledge not to release any individually identifiable data, for any purpose, to any person not sworn to the preservation of confidentiality.
2. All contractors whose activities might involve contact with individually identifiable information must provide NCES Project Officers with a list of all staff who might have contact with such data; all such staff must have a signed notarized affidavit of nondisclosure on file at NCES. These affidavits and the staff list must be kept current as staff members leave and as new staff members are assigned to NCES projects with individually identifiable information.
3. All contractor staff with access to individually identifiable information must only use that information for purposes associated with the data collection and analysis specified in the contract.
4. Respondents must be told in a cover letter or in instructions that “All responses that relate to or describe identifiable characteristics of individuals may be used only for statistical purposes and may not be disclosed, or used, in identifiable form for any other purposes, unless otherwise compelled by law.”
5. All materials having individually identifiable data must be kept secure at all times through the use of passwords, physical separation of individual identity from the rest of the data, and secure data handling and storage.
6. When confidentiality edits (that are performed using perturbation techniques) are used for a data file, they must be applied to all statistical files derived from that data file.
7. NCES distributes Data Analysis Systems (DAS) that produce tabular estimates from restricted-use files. In this case, the following conditions must be met:
  - a. NCES may not release the exact sample size for restricted-use data files that are distributed through a DAS.
  - b. Only restricted-use data files with Disclosure Review Board (DRB)-approved confidentiality edits may be used to produce a DAS.
  - c. A DAS may not publish unweighted edits.

The confidentiality protection required in a DAS is a function of the type of estimate(s) to be produced. For example, a DAS that produces cell counts may require the use of more extensive confidentiality edits.

If a public-use file is released or planned for a data file, any DAS created for that data file must be based on public-use data or restricted-use data that have undergone perturbation disclosure limitation techniques as part of confidentiality edits.

8. For public-use data files, NCES minimizes the possibility of a user matching outliers or unique cases on the file with external (or auxiliary) data sources. Because public-use files allow direct access to individual records, perturbation and coarsening disclosure limitation techniques may both be required. The perturbation disclosure limitation techniques by definition include the techniques applied in a confidentiality edit (if one is performed) and may include additional perturbation disclosure limitation techniques as well.

All public files (i.e., the edited restricted-use files) that contain any potentially individually identifiable information must undergo a disclosure risk analysis in preparation for release to the public. The steps are as follows:

- a. At an early state in designing and conducting this analysis, staff must consult the DRB for guidance on disclosure risk analysis and on the use of NCES disclosure risk software. Any modifications that are necessary as a result of the analysis must be made, and the entire process must be documented.
- b. The documentation of the disclosure risk analysis must be submitted to the DRB. The documentation must include descriptions of the risk of disclosure of individually identifiable information, age of the data, accessibility of external files, detail and specificity of the data, and reliability and completeness of any external files. The documentation should also include the results demonstrating the disclosure risk after adjustments to the data.

- c. The DRB will review the disclosure risk analysis report and make a recommendation to the Commissioner of NCES about the file release.
  - d. The Commissioner then rules on the release of the data file.
9. Inasmuch as confidentiality edits are intended to protect individually identifiable data, files that incorporate the results of the DRB-approved confidentiality edit plan may be used to produce tables without confidentiality concerns over minimum cell sizes. When this is done:
- a. All versions of a data file must reflect the same confidentiality edits. Staff must consult the DRB on the confidentiality plan, data file dissemination plan (restricted, public use, and/or DAS), and disclosure risk analysis plan, concurrently.
  - b. Documentation of the confidentiality edit must be included, along with the documentation of the disclosure risk analysis that is submitted to the DRB.
10. A survey program may decide not to apply confidentiality edits to a restricted-use file. In this situation, when tabulations are produced, any table with a cell with 1 or 2 unweighted cases must be recategorized to insure that each cell in the table has at least 3 unweighted cases. This restriction also applies to documentation for public-use files. This rule excludes table cells with zero cases because there are no data to protect in the cell.

Example: A principal salary table by race and years of experience may only have 2 Asian respondents with more than 20 years of experience. To implement this standard, one possibility would be to either combine the Asian category with another race group or combine the 20+ years of experience category with the next lower experience category. This process would continue until all cells have either at least 3 unweighted cases or no unweighted cases.

11. At the discretion of the Commissioner of NCES, data security staff may release individually identifiable data to persons for statistical uses compatible with the purposes for which the data were collected. Persons receiving individually identifiable data from NCES shall execute a restricted-use data license agreement, sign affidavits of nondisclosure, and meet such other requirements as deemed necessary in accordance with other confidentiality provisions of the law.
12. Before external data users may gain access to public-use data files, they must agree that they will not use the data to attempt to identify any individual whose data is in the file. This may be accompanied by using the following wording:

**“WARNING**

Under law, public-use data collected and distributed by the National Center for Education Statistics (NCES) may be used only for statistical purposes.

Any effort to determine the identity of any reported case by public-use data users is prohibited by law. Violations are subject to Class E felony charges or a fine up to \$250,000 and/or a prison term up to 5 years.

NCES does all it can to assure that the identity of data subjects cannot be disclosed. All direct identifiers, as well as any characteristics that might lead to identification, are omitted or modified in the dataset to protect the true characteristics of individuals. Any intentional identification or disclosure of a person violates the assurances of confidentiality given to the providers of the information. Therefore, users shall:

- Use the data in this dataset for statistical purposes only.
- Make no use of the identity of any person discovered inadvertently, and advise NCES of any such discovery.
- Not link this dataset with individually identifiable data from other NCES or non-NCES datasets.

To proceed you must signify your agreement to comply with the above-stated statutorily based requirements.”

### Sample Affidavit of Nondisclosure by Researchers

I, [name of individual], do solemnly [swear or affirm] that when given access to the [title of data to be provided] provided by [name of the agency or school], I shall not:

1. use or reveal any personally identifiable information furnished, acquired, retrieved, or assembled by me or others, under the provisions of [citation of applicable laws] for any purpose other than statistical purposes specified in the [name of agreement];
2. make any release or publication whereby an individual could be identified or the data furnished by or related to any particular person can be identified; or
3. permit anyone other than the individuals authorized by [name of the agency or school] to examine the individual reports.

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Date: \_\_\_\_\_

The penalty for unlawful release is [maximum penalties as specified by the applicable laws and provide citations].

Notary Public and Seal: \_\_\_\_\_

**Exhibit 6-5****Sample Statement  
of Nonrelease of Released Information**

I understand that upon receipt of the information provided by [name of agency or school] regarding [type of information] about [name of student(s)], the re-release of such information is prohibited by the Family Educational Rights and Privacy Act of 1974, as amended [and cite state and local laws, where applicable]. I acknowledge that I fully understand that the intentional release by me of this information to any unauthorized person could subject me to [criminal and civil penalties, where applicable] imposed by law.

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Date: \_\_\_\_\_

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# List of Acronyms

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<b>CFR</b>	Code of Federal Regulations
<b>CSIS</b>	California Student Information Services
<b>COPPA</b>	Children’s Online Privacy Protection Act
<b>FERPA</b>	Family Educational Rights and Privacy Act
<b>FOIA</b>	Freedom of Information Act
<b>FPCO</b>	Family Policy Compliance Office
<b>HIPAA</b>	Health Insurance Portability and Accountability Act
<b>IDEA</b>	Individuals with Disabilities Education Act
<b>IEP</b>	individualized education program
<b>NCES</b>	National Center for Education Statistics
<b>NII</b>	National Information Infrastructure
<b>NSLA</b>	National School Lunch Act
<b>NCLB</b>	No Child Left Behind Act
<b>OIRA</b>	Office of Information and Regulatory Affairs
<b>OMB</b>	Office of Management and Budget
<b>PPRA</b>	Protection of Pupil Rights Amendment
<b>USC</b>	United States Code





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