



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

July 28, 2014

Mr. Dale A.R. Erquiaga
Superintendent of Public Instruction
Nevada Department of Education
700 E. Fifth Street
Carson City, Nevada 89701

Dear Mr. Erquiaga:

This is in follow-up to recent telephone conversations that you, members of your staff, and representatives from the U.S. Department of Education have had concerning the applicability of the Family Educational Rights and Privacy Act (FERPA) to information maintained in the Nevada State Longitudinal Data System (SLDS).

It is our understanding that a parent requested to view his children's data in the System of Accountability Information in Nevada (SAIN) or the Nevada SLDS. From conversations with you and your staff, it is our understanding that each school district in Nevada uploads each student's current data record to the Nevada SLDS on a nightly basis. According to a May 14, 2014, memorandum addressed to you from Carrie Parker, former Deputy Attorney General for Nevada, the Nevada Department of Education (NDE) explained to the parent that no such records exist for his child, and that NDE has no tool or visual application that allows for individual student data maintained in Nevada's SLDS to be viewed in a readable format. NDE explained that the SLDS data in question is coded in such a way that NDE would have to develop a special computer program to allow the identification and extraction of data on a specific child, and to create an individual student record in a readable format.

Specifically, you asked:

- 1) whether the SLDS data are "education records" under FERPA;
- 2) whether NDE can fulfill the parental access requirements in FERPA by allowing the parent to view the data included in the SLDS data fields on his or her child, providing the parent a copy of the Nevada Department of Education Data Dictionary, and explaining to the parent the data included in the SLDS; and
- 3) whether the NDE has to write a computer program interpreting the data in the SLDS in order to respond to the parent's request to inspect and review his children's education records at the NDE.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering national educational excellence and ensuring equal access.

You have also raised a concern about not being able to identify whether the requestor is a legitimate parent or guardian or an eligible student who would have the right to inspect and review the education records under FERPA.

FERPA protects the privacy interests of parents and students in a student's "education records" by affording parents the right to access their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of personally identifiable information (PII) from the records. Educational agencies and institutions subject to FERPA may not have a policy or practice of disclosing PII from education records without the written consent of their parents, unless an exception applies. All FERPA rights transfer from parents to students when the student reaches 18 years of age or attends a postsecondary institution. *See* 34 CFR § 99.3 ("Eligible student"). This office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations (20 U.S.C. § 1232g; 34 CFR Part 99). We address your concerns below.

Applicability of FERPA to Disclosing Educational Agency or Institution

An educational agency or institution is prohibited from disclosing PII from students' education records, without consent, unless the disclosure meets an exception to FERPA's general consent requirement. *See* §§ 99.30 and 99.31. (By "educational agency or institution" in FERPA, we generally mean a school district, individual school, and college or university.) Educational agencies and institutions may non-consensually disclose PII from education records for audit, evaluation, or enforcement purposes under §§ 99.31(a)(3) and 99.35 only to authorized representatives of the officials or agencies listed in § 99.31(a)(3). Typically, local educational agencies (LEAs) and their constituent schools disclose PII from students' education records to State educational authorities, such as a State educational agency (SEA), under this exception to FERPA's general consent requirement. The term "education records" means those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. *See* § 99.3 "Education records."

Applicability of FERPA to NDE

An SEA, such as the NDE, may "re-disclose" PII from students' education records that it has received from constituent schools if the re-disclosure is:

- (1) on behalf of the educational agency or institution that provided the information;
- (2) meets the requirements of § 99.31 (exceptions to the FERPA's general consent requirement); and
- (3) the SEA (or the educational agency or institution) has complied with FERPA's recordation requirements in § 99.32(b).

Section 99.32(a) generally requires an educational agency or institution to maintain a record of each request for access and each disclosure of PII from the education records of each student. If a State educational authority, such as an SEA, is authorized to make further disclosures of PII from education records under § 99.33(b), the educational agency or institution either must record

the names of the additional parties to which the SEA may disclose the information on its behalf, and their legitimate interests under § 99.31 in requesting or obtaining the information, or the SEA must make this recordation under § 99.33(b)(2) if the educational agency or institution has not made the record. Each student's record of disclosures must be available for inspection by a parent or eligible student under § 99.32(c).

The FERPA statute (20 U.S.C. § 1232g(a)(1)(B)) and its implementing regulations in 34 CFR § 99.10(a)(2)(i) make clear that, for purposes of FERPA's inspect and review provisions, an SEA and its components constitute an educational agency or institution. They specifically state that whether or not a SEA is an educational agency or institution under FERPA, parents have the right to review education records maintained by an SEA on their children who are or have been in attendance at any educational agency or institution that is subject to FERPA. Accordingly, records that are directly related to students and maintained by the NDE (or SLDS) are "education records" for purposes of FERPA's inspect and review provisions.

While an SEA, such as the NDE, may receive funds from the Department, as a practical matter, *all* of the provisions of FERPA – such as notification requirements and the amendment of records requirements – generally do not apply to an SEA. This is because FERPA defines "education records" as information directly related to a "student," which itself is defined as excluding a person who has not been in attendance at the educational agency or institution. *See* § 99.3 "Student." Because students generally are not in attendance at an SEA, it follows that most FERPA provisions generally do not directly apply to SEAs.

However, in addition to FERPA's inspect and review provisions (discussed above), certain other FERPA provisions often do apply to SEAs, such as FERPA's re-disclosure and recordation provisions. As noted above, under FERPA's re-disclosure provisions, an SEA, such as the NDE, generally may not non-consensually re-disclose PII from students' education records that it has received from constituent educational agencies or institutions unless the re-disclosure meets certain conditions. FERPA's recordation provisions also will generally apply if an SEA non-consensually re-discloses PII from students' education records that the SEA received from constituent educational agencies and institutions. *See* the definition of "personally identifiable information" in § 99.3. For a discussion of how these recordation requirements apply to SEAs, please see the 2008 Federal Register, 73 FR 74806, 74823-74824 (December 9, 2008) – <http://www2.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf>.

Please also note that the Elementary and Secondary Education Act of 1965, as amended (ESEA), specifically protects the privacy of student academic assessment data at the State level. Section 1111(i) of the ESEA (20 U.S.C. § 6311(i)) states the following:

PRIVACY – Information collected under this section shall be collected and disseminated in a manner that protects the privacy of individuals.

Accordingly, section 1111(i) of the ESEA requires States to collect and disseminate information collected in connection with their yearly student academic assessments in a way that protects the privacy of individuals.

Parental and Student Access to Education Records at the SEA Level

As explained above, in addition to the general applicability of FERPA's re-disclosure and recordation provisions to PII from students' education records maintained by an SEA, SEA are also required to provide a parent or eligible student with access to those education records it maintains. Congress amended FERPA in 1994 as part of the Improving America's Schools Act so that parents would have the right to inspect and review education records maintained by an SEA. See 20 U.S.C. § 1232g(a)(1)(B) and 34 CFR § 99.10(a)(2). FERPA provides parents and eligible students with the right to inspect and review education records maintained by an SEA within a reasonable period of time, but not more than forty-five days after it has received a request. See § 99.10(a)(2). This includes, for example, State assessments maintained by the SEA. The SEA may make the education records available to the parent or eligible student either directly, by sending them to the LEA for inspection and review, or making other appropriate arrangements.

In response to your specific question about ways in which the NDE can fulfill the parental access requirements in FERPA, the SEA can fulfill these requirements by: (1) allowing a parent to view requested data included in the SLDS data fields on his or her child; (2) providing the parent with a copy of the Nevada Department of Education Data Dictionary; and (3) if requested to do so, by providing a reasonable explanation of the children's data included in the SLDS to the parent.

Specifically, § 99.10 of the FERPA regulations state the following concerning parental and student access to education records:

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component, shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall –

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component, shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

FERPA generally permits educational agencies and institutions, as well as SEAs, to charge a fee for a copy of an education record that is made for a parent or eligible student, if the parent or eligible student is provided a copy. *See* § 99.11(a). However, if a fee for copies effectively prevents a parent or eligible student from exercising the right to inspect and review education records, then educational agencies and institutions, as well as SEAs, would be required to provide copies without payment. *Id.* These cases are limited to the parent providing evidence of the inability to pay for the copies due to financial hardship. However, educational agencies and institutions, as well as SEAs, may not charge a fee for search and retrieval of education records. *See* § 99.11(b).

Interpreting Data in the SLDS

You inquired whether the NDE had to create software to interpret the data in the SLDS and generate a new record in order to respond to a parent's request to inspect and review his or her child's education records. NDE would not generally be required to create a new, interpretive record or document for a parent in response to a request to access his or her child's education records. However, as explained above, the SEA would be required to respond to reasonable requests for explanations and interpretations of records. The SEA would have to provide an explanation and interpretation of education records it maintains in response to reasonable requests, regardless whether the data is generated from a State assessment or if the data is generated from education records uploaded from constituent schools.

Verifying the Identity of Parents

We understand that the NDE believes that it does not have sufficient data in its system to verify a person's claimed status as a parent. You are correct to pay attention to verification, as educational agencies and institutions, as well as SEAs, must ensure that they use reasonable methods to identify and authenticate the identity of parents and eligible students before providing access to education records in order not to improperly disclose or re-disclose PII from education records. Specifically, § 99.31(c) states the following:

An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

Note that FERPA affords parents, custodial and noncustodial alike, the right to inspect and review their children's education records, unless an educational agency or institution or an SEA has evidence that there is a court order or State law which specifically provides to the contrary. *See* § 99.4. The NDE may ask for legal certification denoting parenthood, such as a birth certificate, as well as for other forms of identification if needed to identify and authenticate the identity of the individual requesting access as a parent. The NDE alternatively may work with the LEA or school in order to verify the requester's status as the child's parent and the requester's right to inspect and review education records (e.g., to determine if the school is aware of a court order that specifically provides to the contrary), but may not deny access to a parent without having undertaken reasonable efforts to obtain the data needed to verify a person's claimed status as a parent.

I trust this is responsive to your inquiry and adequately explains the applicability of FERPA to the Nevada Department of Education.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale King". The signature is fluid and cursive, with the first name "Dale" and last name "King" clearly distinguishable.

Dale King
Director
Family Policy Compliance Office