

# Maximizing the Power of Education Data while Ensuring Compliance with Federal Student Privacy Laws

## *A Guide for State Policymakers*

March 2007

### Collecting and Using Longitudinal Data and Safeguarding Privacy

Educators and policymakers are recognizing the value of *better information* as an essential tool for improving schools and raising student achievement. They understand that when states collect the most relevant data and are able to match individual student records over time, they can answer the questions that are at the core of educational effectiveness. Policymakers, educators and researchers need statewide longitudinal data systems capable of providing timely, valid and relevant data. Access to these data:

- ▶ gives teachers (as well as parents and students) the information they need to tailor instruction to help each student improve,
- ▶ gives administrators resources and information to effectively and efficiently manage, and
- ▶ enables policymakers to evaluate which policy initiatives show the best evidence of increasing student achievement.

State longitudinal data systems make it possible for these data to be collected and shared with parents, teachers, students, administrators, researchers and institutions across the education pipeline. While building and using these indispensable data systems are important for policy, management and instructional decisions that focus on individual student success, these needs must be balanced with appropriate protections for the

privacy of student records. In particular, the federal Family Educational Rights and Privacy Act (FERPA) imposes limits on the disclosure of student records by educational agencies and institutions that receive funds from the U.S. Department of Education (USED). (For more information on this law, see [www.ed.gov/policy/gen/guid/fpco/index.html](http://www.ed.gov/policy/gen/guid/fpco/index.html) and the department's new National Center for Education Statistics Forum

In response to state requests for information on FERPA, the managing partners of the Data Quality Campaign (DQC) have worked with the law firm of Holland & Knight to analyze FERPA and how the new roles of SEAs (and their longitudinal data systems) in data collection and sharing can be aligned with FERPA. This issue analysis may serve as a guide to assist states as they build and use state longitudinal data systems in ways that comply with FERPA and fully protect the privacy rights of students and their parents.

The DQC values student privacy and strongly supports the use of longitudinal data as an indispensable tool in the effort to improve school performance; this legal analysis concludes that instituting and using these state longitudinal data systems can be done in accordance with FERPA protection of student privacy.

Guide for state education agency [SEA] staff at [http://nces.ed.gov/forum/pub\\_2006805.asp](http://nces.ed.gov/forum/pub_2006805.asp).)

In the 30 years since FERPA was enacted, the technology and culture around data collection and use have changed and so has the state role in collecting and using data, resulting in some uncertainty around how FERPA relates to state agencies and state longitudinal data systems. This uncertainty has led to organizations and individuals being denied appropriate access to educational data under the sometimes mistaken assertion that providing the information would be “in violation of FERPA.”

Until now, virtually the only written guidance on FERPA has been provided through letters on specific cases issued by USED’s Family Policy Compliance Office (FPCO), which administers FERPA. USED is planning to issue proposed regulations that, among other things, clarify how FERPA relates to state longitudinal data systems. This will provide an important opportunity for states and all education stakeholders to submit comments on how

to implement the statute in a manner that aligns student privacy protections with the modern data systems that are needed to facilitate educational reform.

There is important information to convey to states now regarding how to build state data systems consistent with FERPA requirements. This DQC issue brief identifies areas that already are resolved and proposes approaches to issues for which there may not be clear answers at the current time, but for which our legal experts believe there are viable strategies for states to pursue. (A more detailed legal analysis of these issues is available on the Holland & Knight Web site at [www.hklaw.com](http://www.hklaw.com).) Additionally, this issue brief aims to provide states with suggested actions to think about in relation to both federal and state policies and regulations. The DQC looks forward to providing forums for these conversations within and across states to inform sound policy decisions that support using longitudinal data to improve student achievement while also protecting individual student privacy.

## FERPA: Background

In addition to giving parents rights to inspect and challenge the contents of their children’s education records, FERPA prohibits educational agencies and institutions from disclosing students’ education records without written parental consent. However, FERPA limits on disclosure apply only to personally identifiable information on students. State longitudinal data systems may collect and disclose anonymous data on students, provided the data are not easily traceable to individual students. Further, if the data are personally identifiable, they still can be collected and disclosed without written

parental consent if the uses and recipients of the disclosure come within statutorily authorized disclosures (principally in FERPA itself). Several of these authorized disclosures relate to core functions of state longitudinal data systems.

Federal law does not provide a right for parents or students to sue in court for a FERPA violation. The potential sanction for a FERPA violation is a cutoff of USED funds, but the law requires that USED seek voluntary compliance before seeking that remedy.

## Clearly Permissible Data Sharing/Disclosure under FERPA Precedents: What We Know

Consistent with FPCO precedents, many data collection and disclosure practices relevant to state longitudinal data systems are clearly permissible under FERPA (without obtaining written parental consent for each disclosure).

**Sharing student data that are not personally identifiable is permissible.** State longitudinal data systems can obtain and disclose anonymous student information provided there are safeguards against sharing data that are easily traceable to individual students.

**Even in instances in which personally identifiable information on students is shared, there are several types of disclosures that are permissible under FERPA:**

- ▶ **Evaluating/auditing state and local programs and implementing school and district accountability:** States can create a state data warehouse and use student data obtained from districts or schools, including postsecondary institutions, to evaluate schools, districts, postsecondary institutions, teachers and programs, including for the purpose of making accountability determinations under federal and state laws.
- ▶ **Monitoring and analyzing assessment, enrollment and graduation data:** Under the No Child Left Behind Act, states, districts and schools can use data on state assessments, enrollment and graduation not only to evaluate programs but also to track

individual students and diagnose and address their specific needs and achievements. This information can be shared with a school currently attended by each student. States may contract with other organizations to maintain and analyze these data, as long as these responsible parties do not re-disclose personally identifiable information.

- ▶ **Performing studies to improve instruction:** FERPA clearly authorizes schools or school districts to disclose students' personally identifiable information to organizations that will conduct research studies on their behalf to improve instruction. (See page 5 for more information on organizations initiating their own studies.)
- ▶ **Sharing student records among schools:** Students' personally identifiable information may be passed on by students' prior schools or districts to current or prospective schools or districts. This is subject to notice to parents and the right of parents to contest data.
- ▶ **Maintaining a teacher identification system that links teachers and students:** Neither FERPA nor any other federal law generally addresses the privacy of information about teachers. However, the link between which teacher is teaching which students generally may be disclosed only if disclosure is authorized under the other principles described in this guide, such as for evaluation or study purposes.

## Aligning New State Data Roles to FERPA: What States Should Consider

As discussed above, since FERPA was enacted, the role of the state relating to education data and the establishment of state longitudinal data systems have changed. This, in turn, has raised new issues about how states' use of longitudinal data relates to student privacy protections. In particular, states have raised issues as to (1) whether FERPA permits schools and local educational agencies (LEAs), without parental consent, to provide students' education records to a state longitudinal data system, and if so, whether the data system may in turn disclose those records (for example, to researchers or to schools in which the student intends to enroll); (2) whether data may be released for studies to improve instruction that may be initiated not by a school or district (or by the state longitudinal data system, on their behalf), but by another organization; (3) whether a school registering a new student may access limited information from the data system, such as date and place of birth, current and former addresses, and name of parent for all students with the same name, to ensure that the school obtains education records for the right student; and (4) whether the state longitudinal data system may match student records with records maintained by noneducation state agencies, such as the state employment agency or state Medicaid agency.

While there are not direct, definitive answers to all dimensions of these four issues, we believe there are legally reasonable and sound approaches to address each of them that can promote the benefits of longitudinal data systems while fully protecting student privacy. In this light, the following section outlines several approaches states may consider. We hope these issues and approaches will be clearly and directly addressed in the USED's forthcoming regulation amendments.

### Issues and Proposed Approaches for Consideration by States

***Issue 1:** Does FERPA permit schools and LEAs, without parental consent, to provide students' education records to a state longitudinal data system, and if so, may the data system in turn disclose those records (for example, to researchers or to schools in which the student intends to enroll)?*

As stated above, schools and districts may share even identifiable student data with state longitudinal data systems within several FERPA provisions, including the evaluation and study provisions related to allowable disclosures. The issue here is how broadly states can use those data and under what circumstances states can further disclose those data.

**(a) Under one line of reasoning, the state longitudinal data system generally could be understood to be acting for elementary and secondary schools and LEAs in maintaining and analyzing their student education records.**

- In this approach, providing student data to the state longitudinal data system would not be a disclosure outside of the school or LEA, with the results that (i) the data could be used for any purpose for which the school or LEA could use the data; and (ii) disclosures of the data by the longitudinal data system to schools and other organizations would be deemed initial disclosures beyond the school or LEA, not re-disclosures that arguably may be barred by FERPA. Under this approach, the longitudinal data system, acting for the student's school or LEA, would be able to disclose personally identifiable student data to the school or LEA in which the student intends to enroll; to a student's former school or LEA, or to a separate state

educational agency, for the purpose of evaluation or conducting a study to improve instruction; or to a research organization for a study to improve instruction for or on behalf of the student's school or LEA.

- ▶ This approach is consistent with FERPA's definition of education records as including records maintained by a person acting for a school or LEA and harmonizes FERPA with other federal laws that promote and provide financial support for state longitudinal data systems.

**(b) Alternatively, while re-disclosures of data generally are understood as not being permitted under FERPA, there is a legal argument that the longitudinal data system may re-disclose as long as that disclosure comes within any disclosure authorized by FERPA. The argument here is that FERPA was not intended to restrict re-disclosures that fully meet the requirements applicable to initial disclosure. However, this approach would require changes to USED regulations, which currently authorize re-disclosures only if approved and recorded as part of the initial disclosure by the school or LEA.**

*Issue 2: May data be released for studies to improve instruction that may be initiated not by a school or district (or by the state longitudinal data system, on their behalf), but by another organization?*

The authorized disclosure for studies could encompass studies initiated by third-party organizations if the state issues laws, regulations and/or guidance defining the scope and process for FERPA-authorized disclosures for research studies as permitting such third-party studies under state-established conditions.

- ▶ This approach permits states to define when a study is "authorized" by the state longitudinal data system

on behalf of the LEA or school, including studies that may be initiated by other organizations but that clearly benefit the school or LEA.

- ▶ This approach encourages establishing a process for approval of such studies by the longitudinal data system, including written agreements with the research organizations to safeguard and not re-disclose personally identifiable information, consistent with FERPA requirements.
- ▶ This approach thereby aligns privacy protections with the need to facilitate field-initiated studies that are not funded by schools, LEAs or the longitudinal data system but that may be of significant benefit to them in improving instruction.

*Issue 3: May a school registering a new student access limited information from the data system, such as date and place of birth, current and former addresses, and name of parent for all students with the same name, to ensure that the school obtains education records for the right student?*

A state may issue regulations that define date and place of birth, name of parent, and current and former addresses of students as "directory information" for the limited purpose of permitting schools registering a new student to check that information for all students with the same name to ensure they are obtaining education records for the right student.

- ▶ Under this approach, parents have the right to indicate that directory information not be disclosed without their prior consent, but that is likely to happen rarely, if at all, for the subject limited disclosures.
- ▶ Because these limited disclosures are designed to protect student privacy interests by avoiding disclosures of the wrong student records for students with the same name, it is arguable that they should be



permitted without using the directory information designations, but it is legally safer to use such designations, unless USED were to issue regulations generally permitting these limited disclosures.

***Issue 4:** May the state longitudinal data system match student records with records maintained by noneducation state agencies, such as the state employment agency or state Medicaid agency?*

**The noneducation agency may provide its records to the longitudinal data system for matching purposes without implicating FERPA. FERPA would not generally authorize the longitudinal data system to provide student data to the noneducation agency, but doing so may be authorized if the purpose is to audit or evaluate federal or state education programs or to ensure compliance with federal requirements applicable to such programs.**

- ▶ Some programs administered by noneducation agencies may be deemed education programs, such as vocational education, occupational training and school-based Medicaid services.
- ▶ If so, consistent with USED precedent, state officials who administer these programs may receive student records from the longitudinal data system for the

purpose of audit and compliance. USED has been more restrictive in limiting the provision of student records for the purpose of *evaluating* education programs only to “state education officials,” but there is a reasonable argument that state officials who administer these programs are state education officials with specific reference to these programs.

***Note on postsecondary matching of records with state longitudinal data systems:** Many postsecondary institutions, particularly independent colleges and universities, may not consider it appropriate to vest in the state longitudinal data system responsibility to maintain some of their education records. This does not bar these institutions from disclosing personally identifiable data on their students to the state longitudinal data system, consistent with authorized disclosures in FERPA. Specifically, a postsecondary institution may provide personally identifiable data on their students’ enrollment and performance to the state longitudinal data system to enable state elementary and secondary education authorities to evaluate the preparation of those students for postsecondary education, as well as evaluating high schools, programs, curricula and state assessments. Also, the state longitudinal data system may provide a student’s elementary and secondary education records to a college or university in which the student enrolls or seeks to enroll.*

## Conclusion

Federal law sanctions and supports state longitudinal data systems, which are intended to facilitate more effective use of data for improving education and meeting the academic needs of students, consistent with core state and federal policy and law. Through state longitudinal data systems, states, educators and

researchers can have access to and use student data to meet these purposes — subject to applicable safeguards and procedures — while safeguarding privacy protections for students and their parents that FERPA is designed to secure.

# Actions for State Policymakers To Ensure Privacy while Supporting the Use of Data

Subject to the caution that the USED is expected to issue proposed regulations in this area in the near future, state education leaders, working with their legal counsel in both the state agency and the state attorney general's office, should begin to consider the following actions, as needed and appropriate, as they build and use their state longitudinal data systems:

- ▶ Review and clarify state law, regulations and guidelines on the role of the longitudinal data system in maintaining and analyzing student records on behalf of schools and LEAs, and ensure that any disclosures from the state longitudinal data system are compliant with FERPA regulations.
- ▶ Clarify roles and responsibilities for protecting individual privacy. Through state regulations and guidelines or through appropriate agreements with schools and LEAs, allocate responsibilities between schools or LEAs and the state for implementing FERPA procedures (e.g., parental notices, records of disclosures, rights to contest content of records), and clarify these responsibilities for parents. (Note that the school or LEA will remain accountable to USED for FERPA compliance, although the state longitudinal data system may perform these functions on behalf of the school or LEA.)
- ▶ Develop agreements between postsecondary institutions and the agencies that manage the longitudinal data system to match records for purposes of evaluating or studying the performance of LEAs and elementary and secondary schools in preparing students for college.
- ▶ Issue state regulations designating students' date and place of birth, parents' names, and current and former addresses as directory information for the limited purpose of disclosing that information for all students with the same name to schools registering new students to ensure that such students and their records are properly identified.
- ▶ Take steps to ensure schools and LEAs inform parents (in their annual FERPA notice to parents) of the role of the state longitudinal data system in maintaining records on behalf of the school or the LEA, of the categories of state longitudinal data officials who will have access to the records, and of the allocation of responsibilities for implementing FERPA procedures and rights. The notice also should designate a student's date and place of birth, parents'

names, and current and former addresses as directory information for the limited purpose of providing this information to schools for the registration of new students with the same name to ensure proper identification of the student and his or her records.

- ▶ Ensure that education records maintained in the state longitudinal data system on behalf of an LEA or a school are properly linked to that LEA or school, so that access by any other agency, institution or person to those records is barred, except under FERPA-authorized disclosures.
- ▶ To the extent that FERPA responsibilities are centralized in the state longitudinal data system, ensure that the system has the infrastructure to perform these functions, including, for example, automated, electronic methods for recording disclosures of students' personally identifiable information to third parties.
- ▶ Review state privacy laws to ensure that all of the proposed actions around building and using a state longitudinal data system are in accordance with state law.
- ▶ Develop and issue guidelines or regulations that address the ability of the state longitudinal data system to enter into agreements for "authorized studies" on behalf of a school or LEA, including studies initiated by other organizations that clearly benefit the school or LEA, as a basis to disclose personally identifiable data to the research organization, subject to strong protections against re-disclosure of the data. The regulations or guidelines should make clear for all researchers, educators and policymakers the procedures and expectations to access and protect state longitudinal data for research purposes.

*State policymakers should begin to consider these steps and frame their own state-specific plan of action for addressing the alignment of privacy protection laws and their state longitudinal data system. In addition, state and district education and policy staff should share their reactions and ideas in response to the proposed regulatory changes to FERPA once these are issued by the USED.*

*This issue brief was written by the managing partners of the Data Quality Campaign and based on the legal analysis by Steve Winnick, Scott Palmer and Art Coleman of Holland & Knight LLP. A copy of the full legal analysis may be found at [www.hklaw.com](http://www.hklaw.com). This issue brief and the longer legal analysis are intended as information for educators and policymakers. They should not be construed as specific legal advice, and leaders should not rely upon the information contained within without counsel.*

## DATAQUALITY CAMPAIGN

Using Data To Improve Student Achievement

[www.DataQualityCampaign.org](http://www.DataQualityCampaign.org)

The Data Quality Campaign is a national, collaborative effort to encourage and support state policymakers to improve the collection, availability and use of high-quality education data and to implement state longitudinal data systems to improve student achievement. The campaign aims to provide tools and resources that will assist state development of quality longitudinal data systems, while providing a national forum for reducing duplication of effort and promoting greater coordination and consensus among the organizations focusing on improving data quality, access and use.

### Managing partners of the Data Quality Campaign include:

- ▶ Achieve, Inc.
- ▶ Alliance for Excellent Education
- ▶ Council of Chief State School Officers
- ▶ Education Commission of the States
- ▶ The Education Trust
- ▶ National Association of State Boards of Education
- ▶ National Association of System Heads
- ▶ National Center for Educational Accountability
- ▶ National Center for Higher Education Management Systems
- ▶ National Governors Association Center for Best Practices
- ▶ Schools Interoperability Framework Association
- ▶ Standard & Poor's School Evaluation Services
- ▶ State Educational Technology Directors Association
- ▶ State Higher Education Executive Officers

### Endorsing partners of the Data Quality Campaign include:

- ▶ ACT
- ▶ Alliance for Quality Teaching
- ▶ American Association of Colleges for Teacher Education
- ▶ American Association of State Colleges and Universities
- ▶ American Board for Certification of Teacher Excellence
- ▶ APQC
- ▶ Center for Teaching Quality
- ▶ College Summit, Inc.
- ▶ Consortium for School Networking
- ▶ Educational Policy Institute
- ▶ ETS
- ▶ GreatSchools
- ▶ The Institute for a Competitive Workforce
- ▶ Jobs for the Future
- ▶ League of Education Voters Foundation
- ▶ Learning Point Associates
- ▶ National Alliance for Public Charter Schools
- ▶ National Association of Secondary School Principals
- ▶ National Education Knowledge Industry Association
- ▶ Pathways to College Network
- ▶ Postsecondary Electronic Standards Council
- ▶ Roads to Success
- ▶ Southern Regional Education Board

## Holland+Knight

Holland & Knight LLP is a national and international law firm that provides legal services in a wide range of areas, including but not limited to government, business and litigation. Holland & Knight's Education Policy Practice is one of the premier education policy practices in the United States, with a focus on helping education leaders at all levels of the education pipeline develop and implement policies

that best serve their goals, while satisfying federal and state legal requirements. The Education Policy Practice offers a range of integrated preventive law and policy services, including strategic planning, policy counseling, program reviews, litigation support, training and working with agency staff teams, and federal advocacy support.

For more information about the Data Quality Campaign, please visit [www.DataQualityCampaign.org](http://www.DataQualityCampaign.org).

© Copyright 2007. Data Quality Campaign. All rights reserved.