

COULD FERPA HALT YOUR SLDS?



A Mini-Guide That Explores Potential FERPA
Roadblocks Disruptive to Your SLDS Project



ESP
Solutions
Group

Written by Glynn D. Ligon, Ph.D. and Barbara S. Clements, Ph.D.
gligon@espsg.com bclements@espsg.com

INTRODUCING ESP's FERPA SHERPA

My role is to guide you through FERPA's more interesting twists and turns. Here are some of my insights...



"We now seek to exchange an individual's education data from 'labor to labor.'" From birth to the workforce, from early childhood programs to postsecondary to employment offices, we wish to empower agencies to share what they know about their clients/students to leverage data for decision making."

"Policing FERPA should not limit its dual purpose to 'serve AND protect.'" FERPA serves the students by providing appropriate access to information but also protects the confidentiality of an individual's education records."

"Helpers should not help themselves to private information." Volunteer parents and student aides in school offices are not in the 'need to know' category of FERPA. Even the extreme need for their help doesn't justify these friends and neighbors seeing confidential records."

Introduction

Let's not overreact, but let's not get caught unprepared for a FERPA-based legal challenge that could disconnect the hard-won linkages among agencies and institutions as required by the American Recovery and Reinvestment Act. When the Obama administration fired Paul Gammell from his position as FERPA administrator, it raised the caution flag for everyone that sharing individually identifiable data across agencies must be done in a process that is circumspect.

We have been advising education agencies for a long time and have found attention to FERPA to be cyclical. Guess what? We're at the height of that cycle, so pay attention to details. During the crafting of state longitudinal data systems (SLDS) applications, we saw early childhood, higher education, departments of health and human services, and workforce agencies eagerly offering and asking for data exchanges. Our admonition to the education agencies was consistently—policy, policy, policy—get your policies (and related processes) in place early on to guide the sharing of the data, to protect the confidentiality of individual data, and to manage access to the data. If there were a hoarse font, we would have had to print this in it.

Yes, without adequate policies, governance, processes, and monitoring, your longitudinal data system could be halted by a FERPA challenge. That's what this paper is all about. A few pages will not provide enough guidance, so we'll follow up with one of our more substantive Optimal Reference Guides on the broader area of governance. For now, here are our initial thoughts on FERPA.

Can FERPA and an SLDS Coexist?

The FERPA regulations stipulate that certain individuals and organizations may be given access to student records without parental consent. Two relevant groups are:

- State and designated local education authorities with responsibilities for audit and evaluation of educational programs.
- Organizations authorized by education agencies or institutions to conduct studies that concern the improvement of instruction.

Longitudinal data systems developed by state education agencies with early childhood agencies, higher education authorities, and employment agencies should be considered systems designed to provide for the evaluation of educational programs and the improvement of instruction (and, we might add, services).

Here is one way that the system could be appropriately used. Feedback to districts and high schools about students' postsecondary work has traditionally been aggregate. For example, data may be provided on the number of Wilson High School graduates; the number (or percent) of Wilson High School graduates who enrolled at Big State University; the number of Wilson High School graduates enrolled at Big State University who were required to take a remedial mathematics course; the number of Wilson High School graduates enrolled at Big State University who completed their freshman year and returned for the sophomore year.

This information provides some general indication of the success of Wilson High School graduates who enrolled at Big State University; however, it does not give any specific information to Wilson High School about why certain graduates needed remedial courses or what might have had an impact on their decisions to return for the sophomore year.

In order to give more specific and useful information to high schools, individual postsecondary student records should be linked to individual elementary/secondary student records. This linkage would enable Wilson High School to find out if their students who did not take trigonometry and pre-calculus were more likely to need remedial mathematics courses than those who did. Similarly, Wilson High School could look at the success of students who were previously limited English proficient in college-level English classes.

Our position has always been that the high school should receive specific enough information about their graduates so that various analyses could be made to help evaluate educational programs and improve instruction. It is possible that the state longitudinal data systems could provide the analytic capability needed by high schools and districts. This would entail deciding what data elements from the elementary/secondary record and the postsecondary record should be included in the longitudinal data system. States should start with what questions need to be answered and then identify the data elements needed to answer those questions. Program participation indicators would be useful, particularly if a program was focused on decreasing dropout rates, giving students skills needed for the workplace or postsecondary success, or other long-term outcomes.

Systems that go from "labor to labor" (a.k.a. birth to the workforce) can be developed in such a way that users can have access to a data set for analytic purposes without having to know specific names.

More valuable information is available in the following Optimal Reference Guides:

Confidentiality and Reliability Rules for Reporting Education Data

FERPA: Catch 1 through 22

download them at www.espsg.com/espsweb/library

Our Dual Responsibility

FERPA mandates a dual responsibility for educators.

- Provide access to the contents of a student's education record to that student and to the parents if that student is under 18.
- Limit access to the contents of the student's education record only to persons with a legitimate educational interest or a "need to know."

A student's education record contains information about the family, grades, test scores, courses taken, programs participated in, services received and other confidential information. The link to that information is personally identifiable information such as name, identification code, or other characteristics that make it easy to identify a student. So as long as the data shared among agencies is not identifiable to specific individuals, then the agencies' policies would rule, and the individuals' FERPA rights would be moot. But the need to link records for students from different agencies means that a disinterested person must be trusted to make the linkages, refrain from sharing information that is seen, and provide a data set with individually identifiable information masked. This can be a big task, but it is not impossible, even within the constraints of FERPA.

Our Challenges

From schools to district offices to state departments, FERPA presents multiple challenges that an education agency's FERPA officer must negotiate across multiple offices and agencies. If we add agencies servicing young children, postsecondary institutions, and workforce agencies, we have made these challenges even greater. We have compiled our running list of challenges that an education agency faces in the pursuit of FERPA compliance. Here we begin to expand it to longitudinal data systems.

1. **Get permission from (parents) students to share their data (for research; with other agencies; with higher education). Can we obtain a global release? If agencies are going to share data and track individual students, the stakes rise!**
2. Keep track of the wishes of the (parent) student; track changes in wishes; track changes in contact information so notifications can be made.
3. Document, track, and share any denial of a challenge a student made to the contents of a record.
4. Document whenever a student's data are used or shared; inform the (parents) student of each time the data have been accessed by a researcher or another agency, or at least keep a record for when they ask.
5. Keep data confidential within an agency; keep people without a legitimate educational interest (or need to know) from handling or seeing the data/files (e.g., volunteers, student aides, other teachers, board members, technicians, etc.).
6. Develop procedures that will "guarantee" the security of the data/files from loss, theft, hackers, etc.
7. Manage "need to know" within the participating agencies so access can be limited to specific students' data, specific data elements, or only non-identifiable data.
8. Agree on what needs to be protected, either because the data are confidential or because they can be used to personally identify an individual's data.
9. Agree on masking rules; keep clever mathematicians from calculating data in masked cells; avoid masking too much and damaging decision making.
10. Apply those masking rules faithfully whenever reports are published and whenever someone uses a software application to access a database and execute queries.
11. Agree on which agencies need to share data, which agencies have a right/need to see data, and what data they can see.
12. Establish and follow data retention and destruction processes.
13. Adopt and maintain comprehensive and consistent laws, policies, regulations, procedures, and processes; align local policies with federal and state laws.
14. Train employees to be aware of, understand, and follow those laws, policies, regulations, procedures, and processes.
15. Build, procure, and maintain automated systems that follow those laws, policies, regulations, procedures, and processes.

FERPA is so removed at the federal level, so generalized in its guidance, so inapplicable in its case law, and so light in its sanctions, it is no surprise that these challenges are simply overwhelming to a local school system. This is even more understandable given that FERPA violations are scarcely pursued by parents or students.

ESP's support of our education agency clients has been to develop jointly a Data Access and Management Policy that specifies the answers to the challenges listed above. Different states have different laws and policies, but the areas that need be covered are the same. Having a Data Access and Management Policy helps all participants and stakeholders to know what they can and cannot do with student data, what they must do if they have questions or data needs, and what will ultimately happen to the individually identifiable student data.

Misguided Uses of FERPA

FERPA has been used honestly and surreptitiously as a basis to withhold data from those who have requested them. Two situations:

1. To restrict sharing of student data within an agency among programs.

Example: The cafeteria staff managing the National School Lunch Program refuses to identify the students who qualify for free or reduced-price lunches to other school programs. This used to be more common, but the now well-circulated Department of Agriculture memo authorizing this exchange can be pulled out when needed.

2. To deny requests for information for uses with which an agency disagrees.

Example: A well-known critic of the school district requests data to examine whether students in a new mathematics curriculum score higher on the state assessment, but the administration does not want the program evaluated in its first year of implementation. The request for data is denied citing FERPA.

In the first case, ESP has worked with several agencies to enable the sharing of data. In the second case, governing boards and even the courts have been called upon to rule. A clear Data Access and Management Policy will help work out these issues in advance.

THE FERPA SHERPA SAYS

"Now. That's when an education agency's Data Access and Management Policy needs to be up-to-date. A major grant, upgrade, or expansion to a longitudinal data system is a great motivator."

FERPA General Guidance for Students from the USED

General Information

FERPA is a Federal law that applies to educational agencies and institutions that receive funding under a program administered by the U. S. Department of Education. The statute is found at 20 U.S.C. § 1232g and the Department's regulations are found at 34 CFR Part 99.

Under FERPA, schools must generally afford students who are 18 years or over, or attending a postsecondary institution:

- Access to their education records;
- An opportunity to seek to have the records amended;
- Some control over the disclosure of information from the records.

Access to Education Records

Schools are required by FERPA to:

- Provide a student with an opportunity to inspect and review his or her education records within 45 days of the receipt of request;
- Provide a student with copies of education records or otherwise make the records available to the student if the student, for instance, lives outside of commuting distance of the school;
- Redact the names and other personally identifiable information about other students that may be included in the student's education records.

Schools are not required by FERPA to:

- Create or maintain education records;
- Provide students with calendars, notices, or other information which does not generally contain information directly related to the student;
- Respond to questions about the student.

Amendment of Education Records

Under FERPA, a school must:

- Consider a request from a student to amend inaccurate or misleading information in the student's education records;
- Offer the student a hearing on the matter if it decides not to amend the records in accordance with the request;
- Offer the student a right to place a statement to be kept and disclosed with the record if as a result of the hearing the school still decides not to amend the record.

A school is not required to consider requests for amendment under FERPA that:

- Seek to change a grade or disciplinary decision;
- Seek to change the opinions or reflections of a school official or other person reflected in an education record.

Disclosure of Education Records

A school must:

- Have a student's consent prior to the disclosure of education records;
- Ensure that the consent is signed and dated and states the purpose of the disclosure.

A school MAY disclose education records without consent when:

- The disclosure is to school officials who have been determined to have legitimate educational interests as set forth in the institution's annual notification of rights to students;
- The student is seeking or intending to enroll in another school;
- The disclosure is to state or local educational authorities auditing or enforcing Federal or State supported education programs or enforcing Federal laws which relate to those programs;
- The disclosure is to the parents of a student who is a dependent for income tax purposes;
- The disclosure is in connection with determining eligibility, amounts, and terms for financial aid or enforcing the terms and conditions of financial aid;
- The disclosure is pursuant to a lawfully issued court order or subpoena; or
- The information disclosed has been appropriately designated as directory information by the school.

Annual Notification

A school must annually notify students in attendance that they may:

- Inspect and review their education records;
- Seek amendment of inaccurate or misleading information in their education records;
- Consent to most disclosures of personally identifiable information from education records.

The annual notice must also include:

- Information for a student to file a complaint of an alleged violation with the FPCO;
- A description of who is considered to be a school official and what is considered to be a legitimate educational interest so that information may be shared with that individual; and
- Information about who to contact to seek access or amendment of education records.

Means of Notification

- Can include student newspaper; calendar; student programs guide; rules handbook, or other means reasonable likely to inform students;
- Notification does not have to be made individually to students.

ESP will develop a Data Access and Management Policy for your education agency, which relates to your state laws and regulations and includes guidelines for ensuring secure maintenance of student records within your agency and appropriate release of information by your agency. We've developed formal Data Access and Management Policies for state education agencies including these:

- Iowa
- Kansas
- Nebraska
- New Hampshire
- Oklahoma
- South Carolina

Call us at 512-879-5300 or visit our website at www.espsolutionsgroup.com for more information.



ESP Solutions Group

8627 N. Mopac, Suite 400, Austin, TX 78759
www.espsolutionsgroup.com
(512) 879-5300