

## 2013 DRAFTING REQUEST

### Bill

Received: 9/13/2013 Received By: pgrant  
Wanted: As time permits Same as LRB:  
For: Don Pridemore (608) 267-2367 By/Representing: Liz Pusch  
May Contact: Drafter: pgrant  
Subject: Education - state superintendent Addl. Drafters:  
Higher Education - tech. college  
Higher Education - UW System Extra Copies: TKK  
FFK

Submit via email: YES  
Requester's email: Rep.Pridemore@legis.wisconsin.gov  
Carbon copy (CC) to:

---

### Pre Topic:

No specific pre topic given

---

### Topic:

Disclosure of personally identifiable student data

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### Instructions:

See attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pgrant 9/18/2013	evinz 9/26/2013	jfrantze 9/26/2013	_____			
/P1	pgrant 11/1/2013	csicilia 11/5/2013		_____	mbarman 9/26/2013		
/P2	pgrant 11/14/2013	csicilia 11/18/2013	rschluet 11/18/2013	_____	sbasford 11/6/2013		

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/1	pgrant 11/26/2013	csicilia 12/4/2013		_____	lparisi 11/18/2013		
/2	pgrant 12/11/2013	csicilia 12/13/2013	rschluet 12/13/2013	_____	sbasford 12/4/2013		State S&L
/3	pgrant 12/18/2013	csicilia 12/18/2013	jmurphy 12/18/2013	_____	srose 12/13/2013		State S&L
/4				_____	mbarman 12/18/2013	mbarman 1/7/2014	State S&L

FE Sent For:

AT  
INTRO.

<END>

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/3				_____	srose 12/13/2013		State S&L

FE Sent For:

4  
 gjs 12/18  
 13  
 Jan 12/18  
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*9*  
*12/13* *JF*

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3 yrs  $\frac{12/13}{13}$  <END>



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2 gjs @ 12/2/13  
P. 12/4

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/1				<u>        </u> <u>        </u>	lparisi 11/18/2013		
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*/P2 gjs 11/5/13*

*[Signature] 11/6/13*

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**Pre Topic:**

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**Topic:**

Prohibit DPI from requiring schools to provide additional info for the SIS

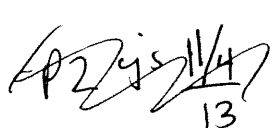
---

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See attached

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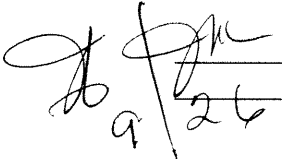
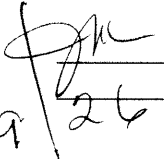
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/?	pgrant	1/p/eev 9/26/13					

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<END>

9/13/13

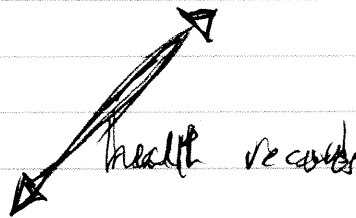
Liz Pridemore  
Tusch

SIS

1/8-125  
1/15-28

~~etc~~ lt. all sch. info given to DPH (all schools)  
ref'd to be given

i.e. not any data base



lt. to info req'd now

docs/p

freeze anyone  
at schools at what they're  
doing now

115.30(1) make such reports as to lpi as will  
enable lpi to...

(2) ... & any other info requested by it

120.18 (1) (5)

# BILL

Date (time)  
needed

SOON  
DN

LRB - 3165 / P1

PG: eev : \_\_\_\_\_

Use the appropriate components and routines developed for bills.

AN ACT . . . [generate catalog] **to repeal . . . ; to renumber . . . ; to consolidate and renumber . . . ; to renumber and amend . . . ; to consolidate, renumber and amend . . . ; to amend . . . ; to repeal and recreate . . . ; and to create . . .** of the

statutes; **relating to:** *information collected by the department of public instruction for the student information system from charter schools and <sup>certain</sup> private schools.*

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

### *Analysis by the Legislative Reference Bureau*

If titles are needed in the analysis, in the component bar:

For the main heading, execute: . . . . . **create → anal: → title: → head**

For the subheading, execute: . . . . . **create → anal: → title: → sub**

For the sub-subheading, execute: . . . . . **create → anal: → title: → sub-sub**

For the analysis text, in the component bar:

For the text paragraph, execute: . . . . . **create → anal: → text**

*(attached) - see INS ANL*

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

**SECTION #.**



## 2013 BILL

1     **AN ACT to amend** 115.28 (12) (a) 3. and 115.28 (12) (b) of the statutes; **relating**  
 2             **to:** use of the state's student information system by a private school  
 3             participating in a parental choice program.

*INS ANU*

### *Analysis by the Legislative Reference Bureau*

Current law directs the Department of Public Instruction (DPI) to develop a proposal for a multiple-vendor student information system (SIS). DPI must submit the proposal to the Joint Committee on Finance (JCF) for its approval. If JCF approves the proposal, DPI must implement it and must ensure that information about pupils enrolled in charter schools and about pupils enrolled in private schools participating in a parental choice program (PCP) is collected and maintained in the SIS. Current law also provides that if the SIS is established, DPI must ensure that within five years, every school district and every charter school is using the SIS, and that every private school participating in a PCP is either using the SIS or is using a system that is interoperable with the SIS.

~~This bill allows a private school participating in a PCP to use the SIS established by DPI, but does not require the private school to do so or to establish its own student information system.~~

*continues*

~~**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**~~



ANALYSIS, cont.

If this bill prohibits DPI from collecting for the SIS, from charter schools or from private schools participating in a PCP, any information that is not required to be submitted to DPI on the bill's effective date.

end INS ANL

Section #. 115.28 (12) (a) 3. of the statutes, as affected by 2013 Wisconsin Act 20, is amended to read:

115.28 (12) (a) 3. If the proposal is approved under subd. 2., the state superintendent shall ensure that information about pupils enrolled in charter schools and about pupils enrolled in private schools participating in a parental choice program under s. 118.60 or 119.23, including their academic performance and demographic information, aggregated by school district, school, and teacher, is collected and maintained in the student information system.

History: 1971 c. 40, 125; 1973 c. 89, 90; 1975 c. 39, 115, 199, 220, 224, 395, 422; 1977 c. 26, 29, 203, 418, 429; 1979 c. 28, 331; 1979 c. 346 ss. 10, 15; 1979 c. 355; 1981 c. 20, 241; 1983 a. 27, 412; 1985 a. 12; 1985 a. 29 ss. 1686m, 1689, 3202 (43); 1987 a. 27, 159; 1989 a. 31, 56, 297, 336, 359; 1991 a. 39, 93, 108, 164, 227, 250, 269, 315; 1993 a. 16, 27, 213, 223, 335, 339, 437, 455, 492; 1995 a. 27 ss. 3847g to 3858, 9126 (19), 9145 (1); 1995 a. 225; 1997 a. 27, 113, 114, 164, 240, 245, 252; 1999 a. 9, 19, 32, 124, 185, 186; 2001 a. 16; 2003 a. 33, 42; 2005 a. 25 ss. 1108, 1855, 1856m, 1856w; 2005 a. 218, 220, 466; 2007 a. 20 ss. 2683 to 2684m, 9121 (6) (a); 2007 a. 68, 222; 2009 a. 28, 64, 99, 220, 302, 329; 2011 a. 32, 157, 166, 173, 209; 2013 a. 20.

for the student information system

The state superintendent may not collect from charter schools or from private schools participating in a parental choice program under s. 118.60 or 119.23 that is not required to be submitted to the department under chs. 115 to 121 on the effective date of this subdivision [LRB inserts date].

(Encl)

Mon-Sep-16-2013 4:00 pm

pgrant(ppro-qsilver-02)

any information

PG: ppv:

DN  
date

Liz:

This bill does not limit the information that DPI may collect from public schools (other than charter schools) because current law requires school districts to report to DPI any information that DPI requests. See ss. 115.30<sup>v</sup> (1) and (2) and 120.18<sup>1</sup>(1)(s)<sup>s</sup>.

PG

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3165/P1dn  
PG:eev:jf

September 26, 2013

Liz:

This bill does not limit the information that DPI may collect from public schools (other than charter schools) because current law requires school districts to report to DPI any information that DPI requests. See ss. 115.30 (1) and (2) and 120.18 (1) (s).

Peter R. Grant  
Managing Attorney  
Phone: (608) 267-3362  
E-mail: [peter.grant@legis.wisconsin.gov](mailto:peter.grant@legis.wisconsin.gov)





State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-3165/P1  
PG:eev:jf

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1     **AN ACT to amend** 115.28 (12) (a) 3. of the statutes; **relating to:** information  
2             collected by the department of public instruction for the student information  
3             system from charter schools and certain private schools.

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***Analysis by the Legislative Reference Bureau***

Current law directs the Department of Public Instruction (DPI) to develop a proposal for a multiple-vendor student information system (SIS). DPI must submit the proposal to the Joint Committee on Finance (JCF) for its approval. If JCF approves the proposal, DPI must implement it and must ensure that information about pupils enrolled in charter schools and about pupils enrolled in private schools participating in a parental choice program (PCP) is collected and maintained in the SIS. Current law also provides that if the SIS is established, DPI must ensure that within five years, every school district and every charter school is using the SIS, and that every private school participating in a PCP is either using the SIS or is using a system that is interoperable with the SIS.

This bill prohibits DPI from collecting for the SIS, from charter schools or from private schools participating in a PCP, any information that is not required to be submitted to DPI on the bill's effective date.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***



10/24/13

TC from Liz (Pridemore)

RE -3165

1. FERPA

prohibit sharing

files <sup>of some</sup> def. of ed entities

~~hundreds of data fields~~

she'll send info

2. skybase

inhibit campus

DP: all way data field

~~# req'd of pub. schools~~

even some that <sup>are</sup> not necessary

NOTHING RELEVANT IN 2009 or 2011 sessions.

118125

2011 Wis. Act.	<del>260</del>	:	<del>(2)(h)</del>	s. 32 of Act <del>260</del>
	<del>32</del>	:	<del>(4)</del>	
	<del>105</del>	:	<del>(5)(b)</del>	

2009 Wis Act	<del>309</del>
	<del>+1</del>
	<del>302</del>
	<del>209</del>

~~#28~~

**The New York Times****Bits** The Business  
of Technology

OCTOBER 22, 2013, 12:01 PM

**Senator Raises Questions About Protecting Student Data**

By NATASHA SINGER

A lawmaker who is a staunch advocate of children's privacy is investigating whether the data collection and analysis practices of the growing education technology industry, a market estimated at \$8 billion, are outstripping federal rules governing the sharing of students' personal information.

On Tuesday, Senator Edward J. Markey, a Massachusetts Democrat, sent a letter to Arne Duncan, the Secretary of Education, about how K-12 schools are outsourcing management and assessment of student data, including intimate details like disabilities, to technology vendors. The letter cited an article in The New York Times this month about concerns over the proliferation of student data to companies.

"By collecting detailed personal information about students' test results and learning abilities, educators may find better ways to educate their students," Senator Markey wrote in the letter. "However, putting the sensitive information of students in private hands raises a number of important questions about the privacy rights of parents and their children."

School districts nationwide are increasingly using digital technologies that collect and analyze academic and other details about students in an effort to tailor lessons to the individual child. But privacy law experts say that many schools are employing student assessment software and other services without sufficiently restricting the use of children's personal data by vendors. Researchers at Fordham University School of Law in New York, for example, recently found that certain school districts have signed contracts without clauses to protect information like children's contact details, the locations where they wait for school buses every morning, or the food items they buy in school cafeterias.

In his letter, Senator Markey asked Mr. Duncan to explain whether the Department of Education had assessed the types of student information schools share with private companies; whether the department had issued federal standards or guidelines that outline the steps schools should take to protect student data stored and used by private companies; what kinds of security measures the department requires companies to put in place to safeguard student data; and whether federal administrators believe that parents, not schools, should have the right to control information about their children even if it is housed by private companies.

"Sensitive information such as students' behavior and participation patterns also may be included in files outsourced to third-party data firms and potentially distributed more widely to additional companies without parental consent," Senator Markey wrote. "Such loss of parental control over their child's educational records and performance information could have longstanding consequences for the future prospects of students."

Diane Ravitch's blog

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# Why Is the US Department of Education Weakening FERPA?

By dianerav

April 8, 2013 //

33

In the past few years, the privacy protections built into federal law have been weakened by the U.S. Department of Education to allow third-parties to access confidential information about students.

The Electronic Privacy Information Center summarizes the chronology. It has filed a lawsuit and is fight the Department's new policy, which will give the private sector access to confidential student data.

In December 2011, the U.S. Department of Education changed the regulations governing the release of student data to the private sector, without Congressional authorization to do so. At that time, "the ED issued final regulations implementing its proposed amendments, despite the agency's admission that "numerous commenters . . . stated that they believe the Department lacks the statutory authority to promulgate the proposed regulations contained in the NPRM." The final regulations' definitions for statutory terms "authorized representative," "education program," and "directory information" did not differ from the proposed regulations."

The new regulations "removed limitations prohibiting educational institutions and agencies from disclosing student personally identifiable information, without first obtaining student or parental consent. For example, the proposed FERPA regulations reinterpreted FERPA statutory terms "authorized representative," "education program," and "directory information." This reinterpretation gives non-governmental actors increased access to student personal data."

In January 2012, the Education Department and the federal Office of Science and Technology Policy created something called the Education Data Initiative. All these terms obscure what is going on: The Department of Education is colluding to release confidential student data to third-party vendors.

Here is what the Electronic Privacy Information Center says about this intrusion:

"The Education Data Initiative reflects a growing trend with student data: government agencies are taking personal information that students are required to provide, skirting federal regulations, and turning student data over to the private sector with few, if any, safeguards for privacy and security."

This is the background for inBloom, the massive database of confidential student information funded by the Gates Foundation with \$100 million, assembled by a subsidiary of Rupert Murdoch's News Corporation, stored on a "cloud" by amazon.com.

Tech entrepreneurs are excited by the prospects of using student data for marketing purposes, according to this article in Reuters.

But why isn't the U.S. Department of Education fighting to protect student privacy? Why did it weaken the FERPA law? Why is it acting on behalf of the private sector? They have their own lobbyists.

Categories Education Reform

## 33 comments

Matt

April 8, 2013 at 8:44 pm

What do I do with your blog? It's so much. I feel so overwhelmed.

Reply

dianerav

April 8, 2013 at 9:01 pm

Matt, this blog is for people who are passionate about education. If you are overwhelmed, I can understand. Unsubscribe

Reply

thenextlevel2000

April 9, 2013 at 8:23 am

I think Matt's question is a good one. What do we do with this information? We are in the midst of a battle – and the reports

# Amassing Student Data and Dissipating Privacy Rights

**F**rom test-performance scores to student financial data to statewide longitudinal data systems, there has been a dramatic increase in the collection of students' sensitive information over the last decade. Both the U.S. Congress and the presidential administrations have touted the amassing of student data as beneficial and necessary to a successful education system. However, the increase in the collection of student data has led to a marked decrease in student data protection. Changes to student privacy regulations and government programs such as the Education Data Initiative underscore the need for meaningful oversight for the protection of student data.

## The Education Department and Privacy Safeguards

In 2008 and 2011, the U.S. Education Department amended the regulations for the Family Educational Rights and Privacy Act (FERPA). These amendments increased private company and third-party access to student data. The 2008 changes expanded the definition of "school officials" to include "contractors, consultants, volunteers, and other parties to whom an educational agency or institution has outsourced institutional services or functions it would otherwise use employees to perform."<sup>1</sup> This amendment gives companies like Google and Parchment access to education records and other private student information.

Google Apps for Education offers "free Web-based email, calendar, and documents" to "millions of students and educators worldwide."<sup>2</sup> Arizona State University, the University of Michigan, Brown University, and other higher education institutions use Google Apps for Education to provide many of the services that colleges and universities had typically provided directly to students and faculty—resources for research, e-mail, and document production.<sup>3</sup> Because higher education can spend hundreds of thousands of dollars to provide e-mail servers to students and faculty, the allure of "free" e-mail service is obvious.<sup>4</sup> Less obvious, however, is that students are paying the cost to use Google's "free" servers by providing access to their sensitive data and communications.

Google states: "To the extent that Customer Data includes FERPA Records, Google will be considered a 'School Official' ... and will comply with FERPA."<sup>5</sup> Presumably, "FERPA

Records" mean "education records," including test scores, transcripts, and disciplinary infractions. Other Google representations raise real concerns about how the student information, now in control of private companies, will be used. For instance, Google will disclose student information from its Apps for Education if it has a "good-faith belief" that such disclosure is "reasonably necessary" to comply with law enforcement requests and to protect "the rights, property or safety of Google, [Google] users or the public as required or permitted by law."<sup>6</sup> This means that Google, and not the educational institution, will be making decisions about when to disclose sensitive student (and faculty) information to law enforcement agencies.

Parchment is another popular third-party entity to which colleges and universities routinely outsource students' most prized commodity: transcripts. Parchment is a web-based service that permits colleges to "receive, request, and analyze

electronic transcripts."<sup>7</sup> Despite Parchment's claim that its services are "fully secure and FERPA compliant," the company's terms of use reveal that to the extent permissible by law, Parchment disclaims any representation or warranty that its site is secure and disclaims any liability for lost data.<sup>8</sup> In an era of rampant security breaches, a company's failure to carry the responsibility for safeguarding students' transcripts is hardly reassuring.

Surprisingly, in 2011, the Education Department again loosened the safeguards for student records by modifying the key terms "education programs" and "authorized representatives" to permit greater disclosure of student data. Under FERPA, "authorized representatives" of the U.S. comptroller general, the secretary of education, and state educational authorities may access student records to audit or evaluate federally supported "education programs."<sup>9</sup> The new regulations broadly define "education programs" to encompass programs not only focused on "improving academic outcomes" but also related to "bullying prevention, cyber-security education, and substance abuse and violence prevention" regardless of whether the program is administered by an educational agency or institution.<sup>10</sup> And previously, "authorized representatives" were exclusively entities over which educational authorities had "direct control, such as an employee or a contractor of the authority."<sup>11</sup> Now, autho-

The increase in the collection of student data has led to a marked decrease in student data protection.



BY MARC ROTENBERG and KHALIAH BARNES

rized representatives can be any individual or entity that educational authorities select as an authorized representative.<sup>12</sup>

By amplifying “education programs” and “authorized representatives,” the Education Department has taken very narrow circumstances that permit the disclosure of education records and has expanded those circumstances to the point that the disclosure of student data is no longer the exception but is increasingly becoming the rule.

### Wider Disclosure, Fewer Safeguards

In January 2012 the Education Department, working with the Office of Science and Technology Policy (OSTP), announced the Education Data Initiative, a public-private partnership that collects and disseminates student data.<sup>13</sup> The Education Data Initiative involves several public-sector entities that gather student data and then disclose it to the private sector. For instance, under the Education Data Initiative, federal student aid websites feature “a ‘MyData’ download button to allow students to download their own data [and] . . . share . . . with third parties that develop helpful consumer tools.”<sup>14</sup>

Although the Education Department and OSTP are pushing for an increase in aggregating data, these agencies do not explicitly describe how the Education Data Initiative will protect students’ privacy or safeguard against security breaches. The absence of a breach policy is ironic in light of security breaches that affected an Education Department website in October 2011. The Education Department’s Federal Student Loan Servicing website (<http://www.myedaccount.com>) exposed “the personal financial details of as many as 5,000 college students” to borrowers who had logged into the website. Although the department shut down the website while it resolved the problem and “notified and offered credit monitoring services” to those affected,<sup>15</sup> this is an unfortunate example of the Education Department’s failure to establish appropriate technical safeguards that ensure confidentiality of personal records as required by the Privacy Act, which, like FERPA, is another landmark federal privacy law.<sup>16</sup>

The Education Data Initiative reflects a growing trend with student data: government agencies are taking personal information that students are required to provide, skirting federal regulations, and turning student data over to the private sector with few, if any, safeguards for privacy and security.

### Conclusion

In February 2012, the Electronic Privacy Information Center (EPIC) filed suit against the Education Department regarding the changes to the federal student privacy regulations under FERPA. At EPIC, we believe the agency exceeded its authority when it revised the federal privacy law to make student data more available. And we disagree with the agency’s decision to loosen the key definitions that help safeguard student records. Our case, *EPIC v. Department of Education*, is pending in federal district court in Washington, D.C.

When FERPA was enacted almost forty years ago, Congress made it clear that students’ personal information should not be made widely available. Congress was particularly concerned that if student records fell into the hands of private parties, these records could hurt students later in life when, for example, students were seeking jobs. Although the pressures have increased over the years to access student data, Congress and the Education Department should work to strengthen student privacy rights and provide oversight on student data disclosure. ■

### Notes

1. Family Educational Rights and Privacy Regulations Notice of Proposed Rulemaking, 73 Fed. Reg. 15,574, 15,578 (March 24, 2008); see also Family Educational Rights and Privacy Regulations, 73 Fed. Reg. 74,806, 74,852 (December 9, 2008).
2. Google Apps for Education, accessed December 12, 2012, <http://www.google.com/enterprise/apps/education/>.
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4. “Arizona State University Success Story,” Google Apps for Education Case Study, October 10, 2006, [http://static.googleusercontent.com/external\\_content/untrusted\\_dlcp/www.google.com/en/us/a/help/intl/en/edu/customers/pdfs/asu\\_success\\_story.pdf](http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/a/help/intl/en/edu/customers/pdfs/asu_success_story.pdf).
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6. “Privacy Policy,” Google, July 27, 2012, <http://www.google.com/policies/privacy/#infosharing>. See also “Security and Privacy,” Google Apps for Education, accessed December 12, 2012, <http://www.google.com/apps/intl/en/edu/privacy.html>.
7. “Docufide Receiver,” Docufide by Parchment, accessed December 12, 2012, <http://www.docufide.com/products/docufide-receiver>.
8. “Terms of Use,” Docufide by Parchment, accessed December 12, 2012, <http://www.docufide.com/terms-of-use>.
9. 20 U.S.C. § 1232g(b)(3) (2012).
10. Family Educational Rights and Privacy Regulations, 76 Fed. Reg. 75,604, 75,614 (December 2, 2011).
11. Family Educational Rights and Privacy Regulations Notice of Proposed Rulemaking, 76 Fed. Reg. 19,726, 19,734 (April 8, 2011).
12. 34 C.F.R. § 99.3 (2012).
13. Anesh Chopra and Zakiya Smith, “Unlocking the Power of Education Data for All Americans,” *Office of Science and Technology Policy Blog*, January 19, 2012, <http://www.whitehouse.gov/blog/2012/01/19/unlocking-power-education-data-all-americans>.
14. Office of Science and Technology Policy, Executive Office of the President, “Fact Sheet: Unlocking the Power of Education Data for All Americans,” January 19, 2012, p. 1, [http://www.whitehouse.gov/sites/default/files/microsites/ostp/ed\\_data\\_commitments\\_1-19-12.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ostp/ed_data_commitments_1-19-12.pdf).
15. “Government Site Exposes Financial Info of Thousands of College Students,” *CBS Local Media*, October 26, 2011, <http://washington.cbslocal.com/2011/10/26/government-site-exposes-financial-info-of-thousands-of-college-students/>. See also Alice Lipowicz, “Education Dept.’s New Website Suffers Data Leak, Malfunctions,” *Federal Computer Week*, October 31, 2011, <http://fcw.com/articles/2011/10/31/education-dept-experiencing-data-leak-glitches-on-new-student-loan-website.aspx>.
16. 5 U.S.C. § 552a(e)(10) (2012).

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## EPIC v. The U.S. Department of Education

### Challenging the Department of Education's Family Educational Rights and Privacy Act (FERPA) 2011 Regulations

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#### Top News

- **Judge Rules that EPIC Lacks Standing to Challenge Education Department's Unlawful Regulations:** A federal court dismissed EPIC's lawsuit against the Education Department. EPIC has challenged the agency's 2011 changes to the Family Educational Rights and Privacy Act (FERPA) which allow the release of student records for non-academic purposes and undercut parental and student consent provisions. The court held that neither EPIC nor any of its Board of Director co-plaintiffs "have standing to bring the claims asserted in the complaint." The judge did not reach EPIC's substantive claims asserted in the complaint. EPIC argued that the Education Department exceeded its authority with the changes and that the revised regulations violate the federal student privacy law. Before initiating the lawsuit, EPIC submitted extensive comments to the Education Department, opposing the unlawful regulations. EPIC intends to take further steps to safeguard student privacy. For more information, see [EPIC: EPIC v. The U.S. Department of Education](#) and [EPIC: Student Privacy](#). (Oct. 1, 2013)
- **EPIC to Defend Student Privacy Rights in Federal Court:** On July 24, EPIC President Marc Rotenberg and EPIC Administrative Law Counsel Khaliah Barnes will present arguments in federal district court in Washington, DC in support of student privacy. In [EPIC v. Dept. of Education, No. 12-327](#), EPIC is challenging recent changes to the Family Educational Rights and Privacy Act (FERPA) that allow the release of student records for non-academic purposes and undercut parental consent provisions. In 2011, EPIC submitted extensive comments to the agency opposing the changes. After the Education Department failed to modify the proposed regulation, EPIC filed a lawsuit and argued that the agency exceeded its authority with the changes, and also that the revised regulations are not in accordance with the 1974 privacy law. EPIC is joined in the lawsuit by members of the EPIC Board of Directors Grayson Barber, Pablo Garcia Molina, Peter Neumann, and Deborah Peel. For more information, see [EPIC: EPIC v. The U.S. Department of Education](#) and [EPIC: Student Privacy](#). (Jul. 23, 2013)
- **EPIC Testifies Before Colorado Board on Student Privacy:** EPIC Administrative Law Counsel Khaliah Barnes testified before the Colorado State Board of Education on privacy issues concerning inBloom and other companies that acquire student information. In response to public outcry over a pilot program which grants these companies access to sensitive student data, the Colorado Board of Education hosted a public session. Representatives from inBloom, the Colorado Attorney General's Office, a local school district, and EPIC participated. EPIC recommended that Colorado ensure that students and parents have access to education records maintained by third party providers, and that students and their parents should be able to limit disclosure to third parties. In 2012, EPIC sued the Education Department for issuing regulations that failed to safeguard student privacy. For more information, see [EPIC: EPIC v. The U.S. Department of Education](#) and [EPIC: Student Privacy](#). (May. 21, 2013)
- **In Federal Court EPIC Defends Student Privacy:** In documents filed with a federal court in Washington, DC, EPIC is challenging changes to the Family Educational Rights and Privacy Act (FERPA). The revised regulations, issued by the Education Department, allow the release of student records for non-academic purposes and undercut



parental consent provisions. The rule change also promotes the public use of student IDs that enable access to private educational records. In 2011, EPIC submitted extensive comments to the agency, opposing the changes and arguing for the need to safeguard privacy. After the Education Department failed to make necessary changes, EPIC filed a lawsuit and argued that the agency exceeded its authority with the changes, and also that the revised regulations are not in accordance with the 1974 privacy law. EPIC is joined in the lawsuit by members of the EPIC Board of Directors and Advisory Board Grayson Barber, Pablo Garcia Molina, Peter Neumann, and Deborah Peel. For more information, see EPIC: EPIC v. The U.S. Department of Education and EPIC: Student Privacy. (Jan. 22, 2013)

- **EPIC Urges Education Department to Protect Student Privacy:** EPIC has submitted comments to the Education Department, recommending the agency collect only "relevant and necessary" student information when it undertakes educational studies. The agency's Institute of Education Sciences has proposed a "Study of Promising Features of Teacher Preparation Programs" to help assess teacher effectiveness. The new database will contain records on "approximately 5,000 students and 360 teachers." EPIC urged the agency to only collect student data germane to teacher effectiveness, such as test scores, and opposed the agency's collection of detailed student information such as actual name and "disciplinary incidences." Earlier this year, EPIC sued the Education Department for issuing regulations that failed to safeguard student privacy. For more information, see EPIC: EPIC v. The U.S. Department of Education and EPIC: Student Privacy. (Jul. 31, 2012)
- **EPIC Sues to Block Changes to Education Privacy Rules:** EPIC has filed a lawsuit under the Administrative Procedure Act against the Department of Education. EPIC's lawsuit argues that the agency's December 2011 regulations amending the Family Educational Rights and Privacy Act exceed the agency's statutory authority, and are contrary to law. In 2011, the Education Department requested public comments regarding the proposed changes. In response, EPIC submitted extensive comments, addressing the student privacy risks and the agency's lack of legal authority to make changes to the privacy law without explicit Congressional intent. The agency issued the revised regulations despite the fact that "numerous commenters . . . believe the Department lacks the statutory authority to promulgate the proposed regulations." EPIC is joined in the lawsuit by co-plaintiffs Grayson Barber, Pablo Molina, Peter G. Neumann, and Dr. Deborah Peel. The case is EPIC v. US Department of Education, No. 12-00327. For more information, see EPIC: Student Privacy. (Feb. 29, 2012)
- **Department of Education Issues Unlawful Regulations that Harm Student Privacy:** The Department of Education has released final regulations concerning the Family Educational Rights and Privacy Act (FERPA). These regulations exceed the agency's legal authority and expose students to new privacy risks. The new rules permit educational institutions to release student records to non-governmental agencies without first obtaining parents' written consent. The new rules also broaden the permissible purposes for which third parties can access students records without first notifying parents. The agency rules also fail to appropriately safeguard students from the risk of re-identification. In response to the Department of Education's request for public comments, EPIC submitted extensive comments to the agency in May 2011, addressing the student privacy risks and the agency's lack of legal authority to make changes to FERPA without explicit Congressional intent. For more information, see EPIC: Student Privacy. (Dec. 5, 2011)

## Background

In April 2011, the U.S. Department of Education (ED) issued a notice of proposed rulemaking (NPRM), inviting public comments on its proposed regulations amending the Family and Educational Rights and Privacy Act of 1974 (FERPA). The proposed regulations removed limitations prohibiting educational institutions and agencies from disclosing student personally identifiable information, without first obtaining student or parental consent. For example, the proposed FERPA regulations reinterpreted FERPA statutory terms "authorized representative," "education program," and "directory information." This reinterpretation gives non-governmental actors increased access to student personal data.

On May 23, 2011, EPIC filed comments with the ED, noting the illegality of the agency's amendments, including the illegality of the agency's reinterpretation of the statutory terms "authorized representative," "education program," and "directory information." EPIC's comments stated that "the ED's proposals expand a number of FERPA's exemptions, reinterpreting the statutory terms 'authorized representative,' 'education program,' and 'directory information.' These proposals remove affirmative legal duties for state and local educational facilities to protect private student data." EPIC also noted that the proposed regulations ignored the FERPA's purpose and relied on a "fundamental misreading of appropriations legislation." EPIC's comments stated that by designating non-governmental actors as "authorized representatives" of state educational institutions, the ED would perform an "unauthorized, unlawful sub-delegation of its own authority." EPIC's comments further stated that by expanding the definition of "educational programs," the ED would expose "troves of sensitive, non-academic data." EPIC's comments stated that the proposed regulations permitting schools to "disclose publicly student ID numbers that are displayed on individuals cards or badges . . . insufficiently safeguard[]

students from the risks of re-identification." EPIC recommended to the ED that the proposed regulations should be withdrawn because they were contrary to law and exceeded the scope of the agency's rulemaking authority.

On December 2, 2011, the ED issued final regulations implementing its proposed amendments, despite the agency's admission that "numerous commenters . . . stated that they believe the Department lacks the statutory authority to promulgate the proposed regulations contained in the NPRM." The final regulations' definitions for statutory terms "authorized representative," "education program," and "directory information" did not differ from the proposed regulations.

On February 29, 2012, EPIC filed a lawsuit under the Administrative Procedure Act against the ED. EPIC's lawsuit argues that the agency's December 2011 regulations amending the Family Educational Rights and Privacy Act exceed the agency's statutory authority, and are contrary to law. EPIC is joined in the lawsuit by co-plaintiffs Grayson Barber, Pablo Garcia Molina, Peter G. Neumann, and Dr. Deborah Peel. The Education Department filed its answer to EPIC's complaint on May 4, 2012, requesting that the Court dismiss EPIC's complaint.

On July 23, 2012, EPIC filed a Motion to Supplement the Administrative Record and Consider Extra-record evidence with the Court. In its motion, EPIC requested the Court to order the Education Department to supplement the administrative record to include four document sets that were before the Education Department at the time of its decision, and were considered by the agency when it issued its NPRM and subsequent final regulations. Additionally, EPIC requested that the Court consider extra-record evidence that is highly relevant to the final regulations and necessary for effective judicial review. For example, at the time that the agency issued the final regulations, it had not offered guidelines on student data and cloud computing. After the Education Department issued its regulations, the agency created a document which provided cloud computing guidance. Importantly, this document explains that even though "outsourcing information technology (IT) functions" would not "traditionally be considered and audit or evaluation," the Education Department will consider outsourcing IT functions as "auditing" or "evaluating" under FERPA regulations. FERPA permits nonconsensual disclosure of education records to "authorized representatives" for audits and evaluation of federal and state education programs.

In response to EPIC's motion, the Education Department filed a Consent Motion for Extension of Time Regarding the Dispositive Motion Briefing Schedule that was previously issued by the Court. On July 24, 2012, the Court vacated the briefing schedule and announced that a new briefing schedule would be re-established upon the Court's resolution of EPIC's motion.

On October 26, 2012, the Court issued a Memorandum Opinion and Order granting in part and denying in part EPIC's Motion to Supplement the Administrative Record and Consider Extra-record evidence. The Court granted EPIC's motion to supplement the record with two documents concerning "directory information" that were before the agency at the time of the final regulations. The Court denied EPIC's motion to supplement the record with documents that support the agency's definition of "education program," because the agency admitted that it did not rely on concrete, factual knowledge to support the new definition, and therefore the requested documents do not exist. Finally, the Court denied EPIC's motion requesting that the Court consider extra-record evidence.

Following the resolution of EPIC's Motion to Supplement the Administrative Record and Consider Extra-record evidence, the Court established the following briefing schedule: the Education Department's Dispositive Motion is due by November 30, 2012; EPIC's Opposition and Cross Motion is due by January 18, 2013; the Education Department's Reply and Cross Opposition is due by February 1, 2013; and EPIC's Reply to the Cross Motion is due by February 15, 2013.

On November 30, 2012, the Education Department filed a Motion to Dismiss or, in the alternative, a Motion for Summary Judgment, arguing that: (1) EPIC and its individual co-plaintiffs lack standing to challenge the final regulations; (2) the final rule is entitled to Chevron Deference; (3) none of the challenged definitions ("directory information", "authorized representatives", and "education programs") exceed statutory authority; and (4) the challenged definitions are in accordance with law because they are the product of reasoned decision-making.

On December 19, 2012, EPIC filed a consent motion seeking additional time to coordinate each plaintiff's declaration to support standing.

On January 18, 2013, EPIC filed its Cross-Motion for Summary Judgment and Memorandum Opposing Defendant's Motion to Dismiss and Motion for Summary Judgment. EPIC's motion argued that the individual plaintiffs have standing because there is an imminent risk that their private education records will be disclosed. EPIC also argued that EPIC has standing on its own because EPIC has suffered a concrete and demonstrable injury to its activities, and that EPIC has standing to bring suit on behalf of the members of the Advisory Board and Board of Directors. Concerning the merits,

EPIC argued that that: (1) each of the challenged definitions exceeds statutory authority and is therefore not entitled to Chevron deference; and (2) the disputed definitions are not in accordance with law because they are contrary to the FERPA's plain meaning and are not a permissible construction of the statute. EPIC also argued that the definitions are arbitrary and capricious because they are not the product of reasoned decisionmaking. Finally, EPIC requested that the Court hear oral argument on the motion.

On February 1, 2013, the Education Department filed its Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply in Support of its Motion to Dismiss or, in the Alternative, for Summary Judgment, reiterating its initial arguments and responding to EPIC's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss.

The Court held oral arguments on July 24, 2013.

On September 26, 2013, the Court dismissed EPIC's lawsuit, holding that neither EPIC nor any of its Board of Director co-plaintiffs "have standing to bring the claims asserted in the complaint." The Court did not reach EPIC's substantive claims asserted in the complaint. The Court further held that its order was a "final appealable order."

## Resources

- [The U.S. Department of Education](#)
- [The U.S. Department of Education, FERPA Notice of Proposed Rulemaking, April 8, 2011](#)
- [EPIC, Comments on the FERPA Notice of Proposed Rulemaking, May 23, 2011](#)
- [The U.S. Department of Education, FERPA Final Regulations, Dec. 2, 2011](#)
- [EPIC, The Administrative Procedure Act](#)

## Legal Documents

### *EPIC v. U.S. Department of Education, Civ. Action No. 12-00327(ABJ) (D.D.C.)*

- [Docket](#)
- [EPIC's Complaint against the Department of Education, Feb. 29, 2012](#)
- [Education Department's Answer to EPIC's Complaint, May 4, 2012](#)
- [Scheduling Order, May 21, 2012](#)
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  - [Nat'l Academic Press Workshop](#)
  - [OMB Directive](#)
  - [NCES Small Rural Districts](#)
- [EPIC's Motion to Supplement the Administrative Record and Consider Extra-Record Evidence, July 23, 2012](#)

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If you are a teacher and want to sign the petition but don't want your name to appear for various reasons, please just sign as "Anonymous Teacher" and use a non-school email address. We collect anonymous comments from teachers who are afraid to speak out and publish them on our site. Please feel free to do so here: [Click to Take Survey](#)

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## Dangerous Federal FERPA Changes

Published June 15, 2012 | By [Renee Braddy, Oak Norton](#)

Districts around the state (including Davis & Wasatch County) are revising their local FERPA policies to allow more of student's personal information to be given **without parental consent**. This allows for children to be tracked and national databases to be created.

2	109
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FERPA stands for "Family Educational Rights and Privacy Act" (**20 U.S.C. 1232g (US Code)**)

It was originally put into law in 1974 at the federal level to limit the amount of children's personally identifiable information that could be given without parental consent.

There are federal and state FERPA laws, as well as district FERPA policies. In 2011, the **US Dept. of Education** created a new FERPA **regulation** that went into effect Jan. 3, 2012. Regulations are usually created by non-elected departments and therefore **DO NOT** pass through congress, but in essence they are observed the same as law.

The US Dept. of Education created this new regulation ([34 CFR Part 99](#)) which significantly broadens the definition of "personally identifiable information" as well as the term "authorized representatives".

According to the regulation, "personally identifiable information" includes:

*The term includes, but is not limited to—*

*... (d) A personal identifier, such as the student's social security number, student number, or **biometric record**;*

...

*(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or*

**Wondering what in the world “biometric record” means and what is includes?**

***Biometric record,**” as used in the definition of “personally identifiable information,” means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include **fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.***

This allows for a collection of personal health records!

As a parent, I had to ask myself, to whom is this information being given? The answer is found in the regulation with the definition of “**Authorized representative**”

*“**Authorized representative**” means **any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct – with respect to Federal- or State-supported education programs – any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.***

So, our children’s personal information can be given to: **Pretty much anyone without parental consent.**

Specifically, we have modified the definition of and requirements related to “**directory information**” to clarify (1) that the right to opt out of the disclosure of directory information under FERPA **does not include the right to refuse to wear**, or otherwise disclose, a student identification (ID) card or badge;

<http://www2.ed.gov/policy/gen/guid/fpco/pdf/2012-final-regs.pdf>

(6)(i) The disclosure is to **organizations conducting studies** for, or on behalf of, educational agencies or institutions to:

- (A) **Develop, validate, or administer predictive tests;**
- (B) Administer student aid programs; or
- (C) Improve instruction.

What is predictive testing? Here’s one definition from Wikipedia.

**Predictive testing is a form of genetic testing.** It is also known as **presymptomatic testing.** These types of testing are used to detect gene mutations associated with disorders that appear after birth, often later in life. These tests can be helpful to people who have a family member with a genetic disorder, but who have no features of the disorder themselves at the time of testing. Predictive testing can identify mutations that increase a person’s risk of developing disorders with a genetic basis, such as certain types of cancer. For example, an individual with a mutation in BRCA1 has a 65% cumulative risk of breast cancer. Presymptomatic testing can determine whether a person will develop a genetic disorder, such as hemochromatosis (an iron overload disorder), before any signs or symptoms appear. The results of predictive and presymptomatic testing can provide information about a person’s risk of developing a specific disorder and help with making decisions about medical care.

Of course, predictive testing can also relate to determining where children are best suited in a centrally planned education-to-work system. Things are in the works to identify which children are suited for college vs. a trade school earlier than graduation, so that deficiencies and college-level remediation can be redirected.

### **Questions:**

Why would the federal government want to track genetic and medical information coupled with educational information in a cradle to grave longitudinal database (which Utah has implemented)? Why is the Gates Foundation funding biometric tracking? Why is the Gates Foundation co-hosting the London International Eugenics Conference with Planned Parenthood and the United Nations Population Fund (UNFPA) next month? Why would the Department of Health and

Human Services under Kathleen Sebelius (responsible for the FERPA changes listed above) be offering \$75 million in grants for schools to open health clinics inside their schools away from parental oversight? Why did the Gates Foundation sign a 2004 agreement with UNESCO (U.N. Education arm) to create a global education system and then pay nearly \$20 million to the National Governor's Association and Council of Chief State Superintendents Organization to prompt them to create Common Core?

You don't have to be a rocket scientist to see that the federal government is in the business of control and not education. Why aren't Utah leaders moving to protect Utah's from these overreaches of the federal government? Schools will become the ultimate laboratories in fulfillment of Marc Tucker's dream for creating central planning for the American workforce.

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Posted in [Concerns](#) | Tagged [Database](#), [FERPA](#)

**3 Responses to *Dangerous Federal FERPA Changes***



*Dale* says:  
June 20, 2012 at 10:06 pm

This is just scary.

[Reply](#)



*Dennis McDougale* says:  
May 30, 2013 at 12:12 pm

Hello: Could you or have you put together a letter that we can send to our local, state, and federal representative explaining our demands on eliminating common core?

Thanks  
Dennis

[Reply](#)

Pingback: [Michelle Malkin | Rotten to the Core: Jeb Bush's Crony Republicans Against Higher Standards](#) «

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# The Family Educational Rights and Privacy Act (FERPA): A Legal Overview

Jody Feder  
Legislative Attorney

May 1, 2013

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

RS22341

## Summary

The Family Educational Rights and Privacy Act (FERPA) of 1974 guarantees parental access to student education records, while limiting the disclosure of those records to third parties. The act, sometimes referred to as the Buckley Amendment, was designed to address parents' growing concerns over privacy and the belief that parents should have the right to learn about the information schools were using to make decisions concerning their children. No substantial legislative changes have been made to FERPA since 2001, but in 2011, the Department of Education (ED) issued controversial new regulations that, among other things, permit educational agencies and institutions to disclose personally identifiable information to third parties for purposes of conducting audits or evaluations of federal- or state-supported education programs or enforcing compliance with federal requirements related to such programs.



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This report provides an overview of the Family Educational Rights and Privacy Act (FERPA),<sup>1</sup> as well as a discussion of several court cases that have clarified the statute's requirements.

## Access to Education Records

Under FERPA, educational agencies and institutions that receive federal funds must provide parents with access to the educational records of their children. Access must be provided within a reasonable time, but no later than forty-five days after a request to access education records has been made. In addition, the statute provides parents with an opportunity to challenge the content of their children's education records in order to ensure that the records are not inaccurate, misleading, or otherwise in violation of a student's privacy rights.<sup>2</sup>

Under the statute, education records are defined to include those records, files, documents, and other materials that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution.<sup>3</sup> Education records may also include videotape and products of other media.<sup>4</sup> However, education records do not include any of the following: (1) records of educational personnel that are in the sole possession of the maker and not accessible to anyone other than a substitute; (2) records maintained by a law enforcement unit of an educational agency or institution for purposes of law enforcement; (3) employment records; or (4) medical records for students who are age eighteen or older.<sup>5</sup>

The parents of a student may exercise rights granted by FERPA until the student reaches the age of eighteen or attends an institution of postsecondary education. At that point, the rights defined by FERPA are transferred from the parents to the student.<sup>6</sup> However, FERPA provides that certain types of information shall not be available to students in institutions of postsecondary education. Such students shall not have access to their parents' financial records. Letters and statements of recommendation submitted prior to the enactment of FERPA must also remain confidential if the letters are not used for other purposes. Finally, recommendations regarding admission to any educational agency or institution, employment application, and the receipt of an honor must remain confidential if the student has signed a waiver of his right of access.<sup>7</sup>

## Release of Education Records

In addition to requirements regarding access to educational records, FERPA prohibits educational agencies or institutions that receive federal funds from having a policy or practice of releasing the

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<sup>1</sup> 20 U.S.C. §1232g.

<sup>2</sup> *Id.* at §1232g(a)(2). See also 34 C.F.R. §99.21(a)-(b).

<sup>3</sup> 20 U.S.C. §1232g(a)(4)(A).

<sup>4</sup> 34 C.F.R. §99.3.

<sup>5</sup> 20 U.S.C. §1232g(a)(4)(B); 34 C.F.R. §99.3.

<sup>6</sup> 20 U.S.C. §1232g(d).

<sup>7</sup> *Id.* at §1232g(a)(1)(C).

education records of a student without the written consent of his parents.<sup>8</sup> In addition, each educational agency or institution must maintain a record that identifies those individuals, agencies, or organizations that have requested or obtained access to a student's education records.<sup>9</sup>

It is important to note that consent is not required for the release of education records to certain individuals and organizations. These exceptions to FERPA's general prohibition against nonconsensual disclosure of educational records are described in detail below, as are controversial 2011 regulations that, among other things, permit educational agencies and institutions to disclose personally identifiable information to third parties under limited circumstances.

## General Exceptions

Under FERPA, education records may be released without consent to certain school or government officials, including the following: school officials with a legitimate educational interest in the records; school officials at a school to which a student intends to transfer, as long as the parents are notified of the transfer; authorized representatives of the Comptroller General of the United States, the Secretary of Education, or state educational authorities in connection with an audit and evaluation of federally supported education programs or in connection with the enforcement of federal requirements that relate to such programs; authorized representatives of the Attorney General for law enforcement purposes; in connection with a student's application for, or receipt of, financial aid; state and local officials pursuant to a state statute that requires disclosure concerning the juvenile justice system and the system's ability to effectively serve the student whose records are released; and persons designated in a federal grand jury subpoena or any other subpoena issued for a law enforcement purpose.<sup>10</sup> In addition, a new exception was added in 2013 to allow nonconsensual disclosure to a caseworker or other state, local, or tribal child welfare agency official with legal responsibility for the care or protection of the student.<sup>11</sup>

Education records may also be released without consent to certain third parties other than school or government officials. For example, education records may also be released to accrediting organizations to carry out their accrediting functions, and to the parents of a dependent student. Organizations conducting studies for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction may also access education records. However, such studies must be conducted in a manner that does not reveal the personal identification of students and their parents, and the education records must be destroyed when they are no longer needed.<sup>12</sup>

In 2001, the definition of "education records" and the requirements related to the release of such records was the subject of review in a Supreme Court case, *Owasso Independent School District v. Falvo*, that considered whether peer grading and the practice of calling out grades in class

<sup>8</sup> *Id.* at §1232(b)(1).

<sup>9</sup> *Id.* at §1232(b)(4)(A).

<sup>10</sup> *Id.* at §1232(b)(1).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

resulted in an impermissible release of education records.<sup>13</sup> The plaintiff argued that the grades on student-graded assignments were education records maintained by students acting for an educational institution and that students should not be allowed to call out the grades they recorded in class because education records may not be released without consent. The school district, on the other hand, maintained that FERPA's definition of "education records" covered only institutional records or materials maintained in a permanent file, such as final course grades, standardized test scores, attendance records, and similar information, but not student homework or classroom work.<sup>14</sup>

Ultimately, the Court concluded that the grades on peer-graded student assignments were not education records, identifying two statutory explanations for its decision. First, the Court determined that student assignments are not "maintained" within the meaning of FERPA's definition of "education records" because neither the teacher nor the students maintain the grades of a recently corrected assignment in a manner that reflected a common understanding of when something is "maintained." As the Court observed, the word "maintain" suggests records that "will be kept in a filing cabinet in a records room at the school or on a permanent secure database...."<sup>15</sup> Second, the Court concluded that student graders are not "person[s] acting for" an educational institution for purposes of FERPA's definition of "education records." The Court found that the phrase "acting for" does not suggest students, but rather connotes agents of the school, such as teachers, administrators, and other school employees. Moreover, the Court maintained that correcting a classmate's work could be viewed as being part of an assignment: "It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils."<sup>16</sup> The Court did not interpret FERPA to prohibit such educational techniques, and noted that the logical consequences of finding peer-graded assignments to be education records would seem unbounded.

## Directory Information

Absent prior notice from a parent, an educational agency or institution may release directory information without consent. FERPA defines directory information to include the following: "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student."<sup>17</sup>

An agency or institution compiling directory information must give public notice of the categories of information it has designated as "directory information," and must allow a reasonable period of time after the issuance of such notice to permit a parent to inform the agency or institution that parental consent must be given before the release of any or all of the directory information.<sup>18</sup>

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<sup>13</sup> 534 U.S. 426 (2002).

<sup>14</sup> *Id.* at 431-32.

<sup>15</sup> *Id.* at 432-433.

<sup>16</sup> *Id.* at 433.

<sup>17</sup> 20 U.S.C. §1232g(a)(5).

<sup>18</sup> *Id.*

In 2011, the Department of Education (ED) issued new regulations that expanded the definition of directory information to include a student identification number displayed on a student identification card or badge. Under the new regulations, parents may not opt out or otherwise prevent an educational agency or institution from requiring students to wear badges or cards that are designated as directory information.<sup>19</sup>

## **Health and Safety Exception**

Under another important exception to the general prohibition against nonconsensual release of educational records, such records may be released in connection with an emergency if the records are necessary to protect the health or safety of the student or other persons.<sup>20</sup> In the wake of the shootings at Virginia Tech, there have been several attempts to clarify FERPA's health or safety exception. For example, under amendments to the Higher Education Act made in 2008, ED is required to provide guidance clarifying rules regarding disclosure when a "student poses a significant risk of harm to himself or herself or to others, including a significant risk of suicide, homicide, or assault." Such guidance must clarify that institutions that disclose such information in good faith are not liable for the disclosure.<sup>21</sup> In addition, ED issued regulations that contain similar clarifications regarding disclosure requirements in the event of a threat to health or safety.<sup>22</sup>

## **Disclosure of Misconduct and Drug and Alcohol Violations**

FERPA does not restrict postsecondary institutions from disclosing certain information about student misconduct and from identifying student drug and alcohol violations. For example, a postsecondary institution may disclose to an alleged victim of any crime of violence or nonforcible sex offense the final results of any disciplinary proceeding conducted by the institution against the alleged perpetrator. Likewise, an institution may disclose to anyone the final results of any disciplinary proceeding conducted against a student who is an alleged perpetrator of any crime of violence or nonforcible sex offense if the institution determines as a result of the proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.<sup>23</sup>

It is important to note that amendments made to the Higher Education Act in 2008 essentially override FERPA's optional disclosure rule by requiring institutions of higher education to disclose to the alleged victim of any crime of violence or a nonforcible sex offense the results of any disciplinary proceeding conducted by the institution against a student who is the alleged perpetrator of such a crime or offense. If the alleged victim is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim for purposes of disclosure.<sup>24</sup>

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<sup>19</sup> Department of Education, Family Educational Rights and Privacy, 76 FR 75604 (December 2, 2011).

<sup>20</sup> *Id.* at §1232(b)(1).

<sup>21</sup> P.L. 110-315, §801.

<sup>22</sup> Department of Education, Family Educational Rights and Privacy, 73 FR 74806 (December 9, 2008).

<sup>23</sup> 20 U.S.C. §1232g(b)(6).

<sup>24</sup> P.L. 110-315, §493.

In addition, FERPA permits a postsecondary institution to disclose to a parent or legal guardian of a student information regarding any violation of any federal, state, or local law, or any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance. However, disclosure is permitted only when the student is under the age of twenty-one and the institution determines that the student committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance.<sup>25</sup>

## Disclosures Related to the Investigation and Prosecution of Terrorism

In 2001, FERPA was amended to allow the Attorney General (AG) or certain employees designated by the AG to seek access to education records that are relevant to an authorized investigation or prosecution of a terrorism-related offense or an act of domestic or international terrorism. These records may be disseminated and used as evidence in an administrative or judicial proceeding.<sup>26</sup>

To obtain access to the records, the AG or his designee must submit a written application to a court for an order requiring an educational agency or institution to release the records. The application must certify that there are specific facts that give reason to believe that the education records are likely to contain relevant information, and the court shall issue the order if it finds that the application includes this certification.<sup>27</sup> Education records disclosed pursuant to a court order are not subject to FERPA's requirement that educational agencies and institutions maintain records identifying entities that have requested or obtained access to a student's education records.<sup>28</sup>

## The 2011 Regulations

In 2011, ED issued a final rule amending the FERPA regulations.<sup>29</sup> Designed to allow increased data sharing, the rule was intended, in part, to facilitate the development of statewide longitudinal data systems (SLDS). According to ED, "Improved access to data will facilitate States' ability to evaluate education programs, to ensure limited resources are invested effectively, to build upon what works and discard what does not, to increase accountability and transparency, and to contribute to a culture of innovation and continuous improvement in education."<sup>30</sup>

The new regulations make a number of changes, including, but not limited to

- permitting educational agencies and institutions to disclose personally identifiable information to authorized third parties for purposes of conducting audits or evaluations of federal- or state-supported education programs or enforcing compliance with federal requirements related to such programs;

not w/ 118.125 allows disclosure re audits/evals. only to DPI

<sup>25</sup> 20 U.S.C. §1232g(i).

<sup>26</sup> *Id.* at §1232g(j)(1).

<sup>27</sup> *Id.* at §1232g(j)(2).

<sup>28</sup> *Id.* at §1232g(b)(4).

<sup>29</sup> Department of Education, Family Educational Rights and Privacy, 76 FR 75604 (December 2, 2011).

<sup>30</sup> *Id.*

- allowing student identification numbers to be designated as directory information for purposes of display on a student identification card or badge; and
- adding new enforcement mechanisms for violations of the act.

} mt w1

The changes regarding release of personally identifiable information and directory information have proved to be somewhat controversial. Indeed, privacy advocates have raised concerns, noting that the changes may pose increased risks to student privacy, and one organization—the Electronic Privacy Information Center (EPIC)—has filed a lawsuit alleging that the regulations exceed the agency’s statutory authority and are contrary to existing law.<sup>31</sup>

## Enforcement of FERPA Violations

Under FERPA, educational agencies and institutions found to have a policy of denying parental access to a student’s education records or releasing a student’s education records without written consent may be denied federal funds. The Secretary of Education is authorized to deal with violations of the act and to establish or designate a review board for investigating and adjudicating FERPA violations.<sup>32</sup> The Family Policy Compliance Office (FPCO), which acts as a review board, permits students and parents who suspect a violation to file individual written complaints.<sup>33</sup> If a violation is found after investigation, the FPCO will notify the complainant and the educational agency or institution of its findings and identify the specific steps that the agency or institution must take to comply with FERPA.<sup>34</sup> If the agency or institution fails to comply within a reasonable period of time, the Secretary may either withhold further payments under any applicable program, issue a complaint to compel compliance through a cease-and-desist order, or terminate eligibility to receive funding.<sup>35</sup>

In *Gonzaga University v. Doe*,<sup>36</sup> the Court considered whether a student could enforce the provisions of FERPA by suing an institution for damages under 42 U.S.C. Section 1983, which provides a remedy for violations of federally conferred rights. The respondent, a former student at Gonzaga, planned to teach in the Washington state public school system after graduation. Washington required new teachers to obtain an affidavit of good moral character from a dean of their graduating college or university, but the respondent was denied such an affidavit after Gonzaga’s teacher certification specialist informed the state agency responsible for teacher certification of allegations involving sexual misconduct by the respondent. The respondent sued Gonzaga, alleging a violation of section 1983 for the impermissible release of personal information to an unauthorized person under FERPA.<sup>37</sup>

The Court found that FERPA creates no personal rights that may be enforced under section 1983. The Court noted that unless Congress expresses an unambiguous intent to confer individual

<sup>31</sup> Electronic Privacy Information Center v. U.S. Department of Education, No: 1:12-cv-00327 (D.D.C. filed February 29, 2012).

<sup>32</sup> 20 U.S.C. §1232g(f), (g).

<sup>33</sup> 34 C.F.R. §99.63.

<sup>34</sup> *Id.* at §99.66.

<sup>35</sup> *Id.* at §99.67(a).

<sup>36</sup> 536 U.S. 273 (2002).

<sup>37</sup> *Id.* at 277.

rights, federal funding provisions, like those included in FERPA, provide no basis for private enforcement under section 1983. The respondent had argued that as long as Congress intended for a statute to “benefit” putative plaintiffs, the statute could be found to confer rights enforceable under section 1983.<sup>38</sup> The Court disagreed: “it is the rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section.”<sup>39</sup> The Court also observed that FERPA’s nondisclosure provisions had an aggregate focus and were not concerned with the needs of any particular person.<sup>40</sup> By having such a focus, the provisions could not be understood to give rise to individual rights.

## **Author Contact Information**

Jody Feder  
Legislative Attorney  
jfeder@crs.loc.gov, 7-8088

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<sup>38</sup> *Id.* at 282.

<sup>39</sup> *Id.* at 283.

<sup>40</sup> *Id.* at 288.



## Grant, Peter

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**To:** Pusch, Liz  
**Subject:** RE: FERPA information relating to data collection (per your request)

Hi Liz,

Wisconsin's pupil records law, s. 118.125, stats., has three provisions that may be relevant:

1. Under s. 118.125 (2) (d), pupil records *must* be made available to persons employed by the school district that the pupil attends who are required to hold a teacher's license, to law enforcement officers who are individually designated by the school board and assigned to the school district, *and to other school district officials who have been determined by the school board to have legitimate educational interests, including safety interests, in the pupil records.* There is no definition of "school district officials" in state law. Note, however, that FERPA, in a similar provision (in which the term "school officials" is used), states that a contractor, consultant, volunteer, or other party to whom an institution has outsourced institutional services or functions may be considered a school official under certain circumstances. I feel fairly certain that this is the provision that you are concerned about.
2. Section 118.125 (2) (g) 1. *authorizes* a school board to provide any public officer with any information required to be maintained under chs. 115 to 121 (the school code). There's no definition of "public officer." (I'm not sure that this is relevant; I could not find a substantially similar provision in FERPA.)
3. Section 118.125 (2) (g) 2. *requires* a school board, upon the request of DPI, to provide DPI with any information contained in a pupil record that relates to an audit or evaluation of a federal or state-supported program or that is required to determine compliance with requirements under chs. 115 to 121. (Note that this provision applies only to information provided to DPI, so it might not be a concern.)

FERPA also has a provision allowing disclosure, under certain conditions, to organizations conducting studies for, or on behalf of, educational agencies or institutions to develop, validate, or administer predictive tests; to administer student aid programs; or to improve instruction. Wisconsin law does not contain this exemption, so unless one of the above allows this, you do not need to modify the law.

Please let me know how you'd like me to proceed or if you have questions about any of this.

Peter

---

**From:** Pusch, Liz  
**Sent:** Monday, October 28, 2013 11:05 AM  
**To:** Grant, Peter  
**Subject:** FERPA information relating to data collection (per your request)

Good Morning Peter,

I'm attaching a copy of the 2011 changes to FERPA that was put out by the Congressional Research Service. Please note the discussion under "General Exceptions (pg 2)" and "The 2011 Regulations (pg 5-6)."

Thanks!

*Liz Pusch*  
Office of Rep. Don Pridemore  
608-267-2367  
[Liz.Pusch@legis.wi.gov](mailto:Liz.Pusch@legis.wi.gov)

## Grant, Peter

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**From:** Pusch, Liz  
**Sent:** Thursday, October 31, 2013 1:41 PM  
**To:** Grant, Peter  
**Subject:** RE: DPI's publication on pupil records

Great timing! I was just looking at 115.297 and was putting together an email to send to you:) Yes, this seems to be the section related to what I had been reading.

Based on Rep. Pridemore's request to protect the release of personally identifiable information about students, would it now be necessary to do more than expand the definition of "school official" as we had discussed yesterday?

My initial thoughts (prior to our phone conversation) were to:

- 1; Prohibit the release of personally identifiable information about individual students to third parties unless there is parental consent, or a student who is 18 or older consents, unless certain exceptions apply (exceptions could possibly be pursuant to 118.125)
- 2: Require detailed records of all non-consensual disclosures (those made under one of the exemptions) and includes notice requirements
3. allow for audits and the State Attorney General to enforce compliance

Thanks Peter!  
Liz

-----Original Message-----

**From:** Grant, Peter  
**Sent:** Thursday, October 31, 2013 1:22 PM  
**To:** Pusch, Liz  
**Subject:** RE: DPI's publication on pupil records

Hi Liz,

I just discovered a mistake in my email of Monday afternoon. The last paragraph describes a provision in FERPA that allows disclosure to organizations conducting studies for or on behalf of educational agencies. I wrote that Wisconsin does not contain this exemption. That was wrong; I had forgotten completely about s. 115.297, which requires DPI, the UW, the WTCS, and the WAICU to establish a longitudinal information system of student data. Under 115.297 (4), any of the agencies may submit student data to the system, to one of the other agencies, or to a public or private research organization to support an evaluation or study. The information may include personally identifiable student data under certain conditions. This might be what you're looking for, although the language is different from FERPA in that it does not explicitly mention the development, validation, or administration of predictive tests.

Sorry about the misinformation!

Peter

-----Original Message-----

**From:** Pusch, Liz  
**Sent:** Wednesday, October 30, 2013 3:48 PM  
**To:** Grant, Peter  
**Subject:** RE: DPI's publication on pupil records

Thanks Peter!  
Have a great night-  
Liz

-----Original Message-----

From: Grant, Peter  
Sent: Wednesday, October 30, 2013 3:35 PM  
To: Pusch, Liz  
Subject: DPI's publication on pupil records

<http://sspw.dpi.wi.gov/files/sspw/pdf/srconfid.pdf>

Liz,

I haven't been able to contact Anne Sappenfield yet to get her take on this, but I found this document on DPI's web site. Note page 4, under item 6, and page 7, under item 14. While the latter-referenced page seems to imply that the listed individuals (occupational therapists, physical therapists, speech/language clinicians, nurses, and police-school liaison officers) are the only ones who might be included in the category of "school official," the paragraph on page 4 states that "a school official may include...a person or company with whom the school district has contracted to perform a special task..." That sounds very broad, although the examples given (attorney, auditor, health consultant, and therapist) seem to indicate a very narrow interpretation.

I don't see anything else in the publication that raises any red flags.

I'll give you a call when I hear from Anne.

Peter

**BILL**

Date (time) needed

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AN ACT . . . [generate catalog] *to repeal . . . ; to renumber . . . ; to consolidate and renumber . . . ; to renumber and amend . . . ; to consolidate, renumber and amend . . . ; to amend . . . ; to repeal and recreate . . . ; and to create . . .* of the statutes; **relating to:** *the disclosure of personally identifiable student data*

SN ✓

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

*Analysis by the Legislative Reference Bureau*

If titles are needed in the analysis, in the component bar:

For the main heading, execute: . . . . . **create** → **anal:** → **title:** → **head**

For the subheading, execute: . . . . . **create** → **anal:** → **title:** → **sub**

For the sub-subheading, execute: . . . . . **create** → **anal:** → **title:** → **sub-sub**

For the analysis text, in the component bar:

For the text paragraph, execute: . . . . . **create** → **anal:** → **text**

→ (Prelim) ←

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

X SECTION #. SEC. # RP, 115.297 (3)(e) ↘

Section #. 115.297 (4) (b) (intro.) of the statutes is renumbered 115.297(4)(b) and amended to read:

115.297 (4) (b) (intro.) Any of the agencies may disclose personally identifiable student data to the longitudinal data system under sub. (3) (a), to another agency, or to a public or private research organization, ~~to support an evaluation or study under this section if the disclosure is in connection with a data sharing agreement that does all of the following:~~

History: 2009 a. 59; 2013 a. 20.

1. if the student, if an adult, or the student's parent or guardian, if the student is a minor, consents in writing, or the disclosure is allowed without consent under s. 118.125 (2) or 34 CFR 99.31 other than 34 CFR 99.31 (a) (6).

X

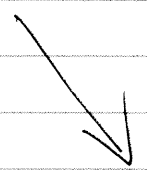
SEC. # RP, 115.297 (4) (b) 1. to 5.

9

SEC. CR. 115.297 (4)(c) ✓

9

115.297 (4)(c) An agency shall maintain a written record of all disclosures of personally identifiable student data made under this section without the consent described under par. (b).



Section #. 115.297 (5) (a) of the statutes is amended to read:

115.297 (5) (a) Nothing in this section, and nothing in the written agreement under sub. (3) ~~or in a data-sharing agreement entered into under sub. (4)~~ may be construed to infringe upon or diminish the legal authority of any of the agencies.

History: 2009 a. 59; 2013 a. 20.

④ SEC. # CR. 115.297 (7)

④ 115.297 (7) <sup>ⓑ</sup> ENFORCEMENT. <sup>Ⓒ</sup> The attorney

general or any district attorney may  
bring an action in circuit court for the  
enforcement of this section, including an  
action to restrain by temporary or  
permanent injunction any violation of this  
section.

(End)