

## **Federal and State Laws Governing Access to Student Records**

Education records are the records, files, documents, and other materials that contain information directly related to a student and are maintained by a school or a person acting on the school’s behalf. The information in a student’s education record is largely private and can’t be disseminated unless the law or a rule authorizes or directs school officials to share the information. A request for access to a student’s education record means that someone—a student, the student’s parent, someone with the parent’s consent, someone for whom a federal exception applies—asks school officials to provide information in the record. This information brief discusses the federal and state laws that regulate access to student records.

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## Introduction

Public schools collect a lot of information about their students. School records often contain detailed information about a student's health and physical condition, aptitude scores, achievement and psychological tests, comments by school counselors and teachers, notes on interviews with parents and students, reports by social workers, delinquency reports, samples of students' work, and autobiographies. Some records may indicate a student's race, religion, and national origin.

In addition, a student may be asked to complete questionnaires for federally and locally funded research projects. The rationale for collecting all of this information is to gain a more "individualized" understanding of the student, to promote education of the "whole" student, and to benefit school administration.<sup>1</sup>

The federal Family Educational Rights and Privacy Act (FERPA) generally provides that information contained in students' education records are private and that parents largely control the access to that information. The exceptions in FERPA permit schools to disclose education data without a parent's consent under certain circumstances. FERPA sets minimum data practices standards that states may make more stringent as long as no conflict with federal law arises.

The Minnesota Government Data Practices Act, Minnesota Statutes, chapter 13, regulates government practices involving data in Minnesota. The Minnesota law adopts the provisions in FERPA and includes some additional restrictions and requirements on the sharing of education data.

This information brief discusses the federal and state laws that regulate access to student records.<sup>2</sup>

**Federal Law.** The section on federal law covers:

- the requirement that a school obtain the consent of the parent or student before disclosing records;

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<sup>1</sup> Some experts such as D. Goslin and N. Bordier, "Record Keeping in Elementary and Secondary Schools," in *On Record: Files and Dossiers in American Life* (S. Wheeler ed. 1969) suggest that much more information is collected and maintained in permanent school records than is ever used by teachers and counselors.

<sup>2</sup> Under the Family Educational Rights and Privacy Act (FERPA), education records do not include: (1) records of instructional, supervisory, administrative, and education personnel that are in the sole possession of the person who created them and are not accessible or revealed to any other person except substitute personnel; (2) records maintained by a law enforcement unit of the school that are created by the law enforcement unit for the purpose of law enforcement; (3) records of school employees who are not students at the school that relate solely to the person's employment (data on a student who is a school employee but not because of the student's status as a student are classified as personnel data under [Minnesota Statute, section 13.43](#)); and (4) medical or mental health records of students 18 or older when the records are created and maintained solely for the student's treatment. [20 U.S.C. 1232g\(a\)\(4\)\(B\)](#).

- rights of parents and students to inspect and review records rights of parents and students to request that a school correct inaccurate or misleading records;
- circumstances under which schools may disclose records without consent;
- schools' ability to disclose directory information and summary data to anyone;
- third-party access to student data; and
- how Individuals with Disabilities Education Act (IDEA) and Family Educational Rights and Privacy Act (FERPA) together govern access to the education records of students with disabilities.

**State Law.** The section on state law covers:

- differences between federal and state law;
- state mandated reporting of education data; and
- law enforcement information on violent students.

**Federal and State Sanctions.** This section covers statutory penalties and private remedies for violating data practices law.

## Federal Law

**Congress enacted FERPA as part of the Federal Education Amendments of 1974 in an effort to ensure student and parent access to education records and protect the privacy of a student's education records.<sup>3</sup>**

FERPA applies to all public and private schools that receive funds through applicable U.S. Department of Education programs. Schools that fail to comply with FERPA can lose federal funding.<sup>4</sup> FERPA does not provide a basis for an individual to sue.

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<sup>3</sup> "Education records" means the records, files, documents, and other materials that contain information directly related to a student and are maintained by an educational agency or by a person acting for such agency or institution.

<sup>4</sup> The secretary of education may terminate federal financial assistance to a school only if the school has failed to comply with FERPA and the school will not comply voluntarily with the law. [20 U.S.C. §§ 1232g\(a\)\(3\) and 1232g\(f\)](#).

FERPA gives parents certain rights regarding their children's education records.<sup>5</sup> These rights transfer to the student or former student who reaches age 18 or attends any school beyond high school unless the student remains a dependent for tax purposes. Students and former students to whom rights have transferred are called eligible students.<sup>6</sup>

FERPA requires schools to effectively inform parents and eligible students of their rights under the law.<sup>7</sup> Each school is entitled to determine the means of notice. It can be in the form of a special letter, a PTA bulletin, a student handbook, or a newspaper article. Each school is required to adopt a written policy about complying with FERPA. Upon request, a school must give a copy of its policy to a parent or eligible student.<sup>8</sup>

The definition of "education records" under FERPA does not include: records in the sole possession of instructional, supervisory, or administrative personnel; law enforcement records maintained solely for law enforcement purposes, provided that law enforcement personnel do not have access to education records; records of school employees who are not also students; physician, psychiatrist, and psychologist treatment records for eligible students.<sup>9</sup> Schools may include in a student's records information about disciplinary actions taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community.

FERPA does not generally regulate the creation or destruction of education records.<sup>10</sup> Schools may not destroy records while a request to access the records is pending. Under IDEA, schools must give the parents of students with disabilities the opportunity to request that the school destroy records that are no longer needed.<sup>11</sup>

The three most important FERPA provisions are:

- a limit on a school's ability to disclose data in education records to third parties without parents' consent;
- access by parents and eligible students to all education records directly related to them; and
- the right to a hearing to challenge "inaccurate, misleading, or otherwise inappropriate" data in the education records.

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<sup>5</sup> 20 U.S.C. § 1232g.

<sup>6</sup> 34 C.F.R. §§ 99.3 to 99.5.

<sup>7</sup> 20 U.S.C. § 1232g(e) and 34 C.F.R. §99.7

<sup>8</sup> 34 C.F.R. § 99.6.

<sup>9</sup> 34 C.F.R. § 99.3.

<sup>10</sup> 34 C.F.R. § 99.10(3).

<sup>11</sup> 34 C.F.R. § 300.624.

**Schools must obtain written permission from the parent or eligible student before disclosing information in education records.<sup>12</sup>**

FERPA generally prohibits schools from disclosing education records or other personally identifiable information<sup>13</sup> without the written consent of the parent or eligible student.

An effective written consent requires the parent or eligible student to state that the student's education record may be disclosed, the purpose of disclosing the record and the person(s) to whom the disclosure may be made.<sup>14</sup> Under Minnesota rules, the person giving consent must demonstrate sufficient mental capacity to appreciate the consequences of allowing access to the data.<sup>15</sup> A parent or student may consent to release records to anyone the parent or student indicates.

**Parents and eligible students have the right to inspect and review education records.<sup>16</sup>**

The records must be inspected and reviewed within a reasonable period of time.<sup>17</sup> FERPA does not require schools to provide copies of materials in education records unless parents or eligible students can't inspect the records personally. Schools may charge a fee for copies of education records.

**Parents and eligible students have the right to request that a school correct education records they believe to be inaccurate or misleading or otherwise in violation of the student's privacy or other rights.<sup>18</sup>**

If the school refuses to change the records, parents and eligible students have the right to a formal hearing.<sup>19</sup> If the school still refuses to correct the records after the hearing, the parent or eligible student may place written comments about the contested information in the records.<sup>20</sup>

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<sup>12</sup> 20 U.S.C. § 1232g(b)(1) and (2).

<sup>13</sup> FERPA limits school officials' ability to disclose personally identifiable information in students' education records. Under FERPA "personally identifiable information" includes a list of personal characteristics or other information that would make a student's identity easily traceable. 34 C.F.R. § 99.3. FERPA generally requires officials to obtain a parent's consent before disclosing personally identifiable information in a minor student's education record. 34 C.F.R. § 99.30. Some exceptions apply. See also *Minn. Stat. § 13.02*, subd. 19.

<sup>14</sup> 34 C.F.R. § 99.30(b).

<sup>15</sup> *Minn. Rules, part 1205.1400*, subp. 3.

<sup>16</sup> 34 C.F.R. § 99.3.

<sup>17</sup> A school must comply with a request for access to records within 45 days.

<sup>18</sup> 20 U.S.C. § 1232g(a)(2).

<sup>19</sup> 20 U.S.C. § 1232g(a)(2) and 34 C.F.R. § 99.22.

<sup>20</sup> 20 U.S.C. § 1232g(a)(2) and 34 C.F.R. § 99.21.

## **Schools may disclose records without consent if a federal exception applies.**

Schools may choose to disclose education records without consent<sup>21</sup> to:

- **school officials in the student’s school district who have a legitimate educational interest in the information.** Schools must establish criteria for defining “school official” and “legitimate educational interest” and notify parents annually of the definitions. Schools must use the published definitions to determine whether it is appropriate for a school official to have access to a student’s education records without the parent’s written consent. A school official may include licensed, permanent, or substitute administrators, supervisors, and instructors, and school employees or contractors including secretaries, clerks, school board attorneys, and auditors. Factors for determining whether an official has a legitimate educational interest may include whether the official needs the information, consistent with the purposes for which the data are maintained, to (1) perform appropriate tasks specified in the official’s job description or contractual agreement; (2) accomplish official agency or school business; or (3) accomplish a task or make a determination affecting the student.<sup>22</sup>
- **another school to which a student is transferring.** Three conditions must be met before school officials in a school to which a student transfers may have access to the student’s education record without a parent’s consent. The school providing the record must: (1) make a reasonable effort to notify the student’s parent of the record transfer unless the parent requests the student’s transfer or the school indicates in its annual notice to parents that it will transfer a student’s record when the student transfers; (2) give parents a copy of their student’s education record upon request; and (3) allow parents to participate in a hearing to challenge any contested information in the student’s record.<sup>23</sup> In Minnesota, a transfer of a student’s education record must include information about any disciplinary actions taken against the student for possessing or using a dangerous weapon.<sup>24</sup> The school to which the student transfers must request the student’s record or confirm with the sending school that it received the record and must notify law enforcement officials if a missing child flag appears on the sending school’s record.<sup>25</sup>
- **parents when a student over 18 is still dependent.** A parent may have access without consent to the education record of a dependent student who is 18 or older and listed as a dependent on the parent’s income tax return.

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<sup>21</sup> 34 C.F.R. § 99.31(b).

<sup>22</sup> School officials’ access to learning readiness program records is also on a “need to know” basis. Program records contain information about a child’s school-readiness, behavior, family circumstances, and need for educational support. The information is private data and is part of a student’s permanent record. [Minn. Stat. § 124D.15](#).

<sup>23</sup> See 34 C.F.R. § 99.31(a)(3) and § 99.34(a).

<sup>24</sup> [Minn. Stat. §§ 120A.22](#), subd. 7(b) and [121A.44](#)(b).

<sup>25</sup> [Minn. Stat. § 123B.08](#), subd. 3.

- **certain government officials in order to carry out lawful functions.** Authorized representatives,<sup>26</sup> including representatives of the U.S. Comptroller General and the Secretary of Education, and state education authorities may have access without consent to students' education records to audit and evaluate federally funded education programs. The U.S. Attorney General, and agency officials working on the attorney general's behalf, may have access for law enforcement purposes. Federal and state authorities must prevent unauthorized disclosure of the data they receive.<sup>27</sup>
- **appropriate parties in connection with financial aid to a student.** Individuals responsible for determining a student's eligibility for financial aid and the amount of and conditions for the aid or for enforcing the terms and conditions of that aid may have access without consent to education records.<sup>28</sup>
- **organizations doing certain studies for the school.** Organizations such as the College Entrance Examination Board or the Educational Testing Service that conduct studies for educational agencies or institutions to help develop, validate, and administer predictive tests, administer student aid programs, or improve instruction may have access without consent to education records. Organizations must protect the identity of students and their parents participating in a study and must destroy information when they no longer need it for the study.<sup>29</sup> An organization that fails to destroy the information is denied access to the school for at least five years. State agencies collecting students' personally identifiable information may redisclose personally identifiable information to third parties provided they follow the above requirements.<sup>30</sup>
- **accrediting organizations.** Accrediting organizations without consent may receive education data for accreditation-related purposes.<sup>31</sup>
- **individuals who have obtained court orders or subpoenas.** Schools must make a reasonable effort to notify a parent or eligible student before responding to a subpoena or court order unless the subpoena is from a federal grand jury or is issued for a law enforcement purpose and the court or issuing agency directs the school not to disclose the subpoena to the parent or eligible student or the request concerns an investigation or

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<sup>26</sup> Authorized representative is defined as "any entity or individual designated by a state or local educational authority or an agency headed by an official listed in [section 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." [34 C.F.R. § 99.3](#)

<sup>27</sup> [20 U.S.C. § 1232g\(b\)\(1\)\(C\)](#); [34 C.F.R. § 99.31\(a\)\(3\)](#); [Minn. Stat. § 13.32](#), subd. 3(e).

<sup>28</sup> [20 U.S.C. § 1232g\(b\)\(1\)\(D\)](#); [34 C.F.R. § 99.31\(a\)\(4\)](#); [Minn. Stat. § 13.32](#), subd. 3(e). Postsecondary students do not have access to their parents' financial records.

<sup>29</sup> [20 U.S.C. § 1232g\(b\)\(1\)\(F\)](#); [34 C.F.R. § 99.31\(a\)\(6\)](#); [Minn. Stat. § 13.32](#), subd. 3(e).

<sup>30</sup> [34 C.F.R. § 99.31\(a\)\(6\)\(ii\)](#). This provision was added in 2011, and is intended to allow states to better develop their state-level education databases.

<sup>31</sup> [20 U.S.C. § 1232g\(b\)\(1\)\(G\)](#); [34 C.F.R. § 99.31\(a\)\(7\)](#); [Minn. Stat. § 13.32](#), subd. 3(e).

prosecution of an act of terrorism.<sup>32</sup> Schools may insist on receiving a court order instead of a subpoena; requiring a court order obligates a court to consider laws that restrict disclosing private or confidential information.<sup>33</sup>

- **persons who need to know in cases of health and safety emergencies.** Officials without consent may have access to data they need to protect the health or safety of a student or other person in an emergency situation.<sup>34</sup> The authority to disseminate data in an emergency situation must be strictly construed.
- **juvenile justice system.** Schools without consent may share education data<sup>35</sup> with state or local juvenile justice system officials if: (1) a state statute authorizes the disclosure; (2) the data assists the officials in effectively serving the juvenile before adjudication; and (3) the officials certify in writing that they will not disclose the data to a third party except as permitted by state law.<sup>36</sup> Minnesota law requires schools that release data to juvenile justice system officials to record the release in the student's education record.<sup>37</sup>
- **local officials and authorities to whom disclosure was authorized by a state statute** adopted before November 19, 1974.<sup>38</sup>

Other federal exceptions to the prior consent requirement allow schools to disclose records to:

- **the U.S. Attorney General to investigate crimes or acts of terrorism.** A school must produce records under a court order allowing the U.S. Attorney General to collect and use education records to investigate and prosecute specific crimes or acts of terrorism, whether domestic or international.<sup>39</sup>
- **child welfare agencies.**<sup>40</sup> A school may release a child's education records to child welfare agencies without a parent's prior written consent. This exception includes all children placed in foster care by a state or local agency that is entitled to access a child's case plan and is legally responsible for the child's care and protection. These child welfare agencies must ensure children are enrolled in school, their school placements are

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<sup>32</sup> 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9).

<sup>33</sup> Minn. Stat. § 13.03, subd. 6; Minn. Rules, part 1205.0100, subp. 5.

<sup>34</sup> 34 C.F.R. § 99.36(c).

<sup>35</sup> Education data that can be shared includes the student's name, home address, telephone number, date of birth, school schedule, attendance records and photo, and the parent's name, address, and telephone number. 20 U.S.C. 1232g(b)(1)(E)(ii) and Minn. Stat. § 13.32, subds. 3(I) and 8.

<sup>36</sup> 20 U.S.C. § 1232g(b)(1)(E) and 34 C.F.R. §§ 99.31(a)(5) and 99.38.

<sup>37</sup> Minn. Stat. § 13.32, subd. 3.

<sup>38</sup> 20 U.S.C. § 1232g(a)(5)(A), (b)(1), and (b)(2)(B), and 34 C.F.R. § 99.31.

<sup>39</sup> The U.S. Patriot Act of 2001.

<sup>40</sup> Public Law 112-278, amending Section 444 of 20 U.S.C. 12329 (FERPA).



stable, and children who change schools are promptly enrolled elsewhere with all their school records.

- **inform the public about sex offenders.** A school is required to disclose any information regarding registered sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, [42 U.S.C. 14071](#).<sup>41</sup>
- **provide access to de-identified records and information.** A school may release records without consent after the removal of all personally identifiable information if the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable. Schools may attach a unique—but not personally identifiable—record code to each student for purposes of education research.<sup>42</sup>

The federal **Campus Security Act** provides an exception to the prior consent requirement pertaining to discipline at a postsecondary institution. A postsecondary institution may disclose the final results<sup>43</sup> of a violent crime or nonforcible sex offense only when it determines the student is the alleged perpetrator and the student has violated the institution's rules or policies.<sup>44</sup> If the institution determines a student has used or possessed alcohol, if under 21, or a controlled substance, it may also disclose that information to a student's parent.<sup>45</sup>

**Schools must keep records** of all requests for access to and disclosure of information where a student is personally identifiable.<sup>46</sup> The school must keep records of the requests as long as the school maintains the student's education record. The school's records must identify the requester and describe the requester's legitimate interests in the information. This record-keeping requirement does not apply if the requester is a parent<sup>47</sup> or eligible student, a school official with a

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<sup>41</sup> [20 U.S.C. § 1232g\(b\)\(7\)\(A\)](#); [34 C.F.R. § 99.31\(a\)\(16\)](#).

<sup>42</sup> [34 C.F.R. § 99.31\(b\)\(1\)](#).

<sup>43</sup> The "final results" of any proceeding are defined as the name of the student, the findings of the proceeding board/official, any sanctions imposed by the institution, and the rationale for the findings and sanctions (if any). The presence of the names of any other student, such as a victim or witnesses, may be included only with the consent of that student. [20 U.S.C. § 1232g\(b\)\(6\)\(C\)](#).

<sup>44</sup> [20 U.S.C. § 1232g\(b\)\(6\)](#); [34 C.F.R. § 99.31\(a\)\(14\)](#). See also NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 2014) (discussing best practices for postsecondary institutions on campus adjudicative programs complying with FERPA), available at [http://www.whitehouse.gov/sites/default/files/docs/report\\_0.pdf](http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf); INTERSECTION OF TITLE IX AND THE CLERY ACT, U.S. DEPARTMENT OF EDUCATION (Apr. 2014) (discussing the intersection of FERPA obligations under Title IX and the Clery Act), available at <https://www.notalone.gov/assets/ferpa-clerychart.pdf>.

<sup>45</sup> [34 C.F.R. § 99.31\(a\)\(15\)](#). Notably, this does not supersede state law that prohibits disclosing this information. For more information on recent changes in Minnesota law related to campus sexual violence, see the House Research publication *Campus Sexual Violence Policies*, August 2015.

<sup>46</sup> [34 C.F.R. § 99.32](#).

<sup>47</sup> A parent includes a child's natural parent, an adoptive parent, a stepparent, and a legal guardian.

legitimate educational interest within the district the student attends, a person with consent from a parent or eligible student, a person requesting directory information, or a person with a subpoena prohibiting the subpoena or information from the subpoena from being disclosed.<sup>48</sup>

### **Schools may disclose directory information and summary data to anyone.**

Schools may disclose **directory information** to anyone without the consent of the parent or eligible student. Directory information describes information about students that generally would not be considered harmful or an invasion of privacy if disclosed. Schools decide what information they will designate as directory information. Directory information may include a student's name, email address, address, telephone number, date and place of birth, major field of study, participation in official school activities and sports, weight and height of athletic team members, dates of attendance, degrees and awards received, and the most recent previous school attended.<sup>49</sup> A school may not release a student's Social Security number and can release a student identification number only if it cannot be used to gain access to education records.<sup>50</sup> A school may not charge for access to directory information but may charge for a copy of the information.

A school that is designating directory information must tell parents and eligible students what information it is designating as directory information. The school must give the parent or eligible student a reasonable amount of time to request that any or all of the directory information relating to the student not be disclosed.<sup>51</sup> Schools may disclose directory information about former students without meeting the conditions in this paragraph.<sup>52</sup>

The U.S. Secretary of Defense may seek access to directory information about students who are 17 or older or enrolled in the 11th or 12th grade.<sup>53</sup> Directory information for this purpose includes a student's name, address, telephone number, date and place of birth, level of education, degree received, and the most recent previous school attended. Under FERPA, the secretary cannot require elementary or secondary schools to provide directory information.<sup>54</sup> In Minnesota, information that is designated directory information is public and accessible to anyone.

**Summary data**, which are public data under Minnesota law,<sup>55</sup> are the statistical records and reports derived from data on individuals in which individuals are not identified and from which individuals' identities cannot be determined. No consent is needed to disclose summary data

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<sup>48</sup> [34 C.F.R. 99.32\(d\)](#).

<sup>49</sup> [20 U.S.C. § 1232g\(a\)\(5\)\(A\)](#).

<sup>50</sup> An example of using a student identification number to gain access to records would be using it to sign into a school's online grades program.

<sup>51</sup> [20 U.S.C. § 1232g\(a\)\(5\)\(B\)](#).

<sup>52</sup> [20 U.S.C. § 1232g\(a\)\(5\)\(A\)](#) and (B); [34 C.F.R. § 99.37\(a\)](#).

<sup>53</sup> The No Child Left Behind Act of 2001, P.L. 107-110 (January 8, 2002), provides for the disclosure of directory information to military recruiters.

<sup>54</sup> [10 U.S.C. § 503\(b\)\(6\)](#).

<sup>55</sup> [Minn. Stat. § 13.02](#), subd. 19.

because personally identifiable information is not available in summary data. However, a given set of information maintained by an educational agency or institution, even if it does not contain a name or other unique personal identifier, may link a particular student to the data. Schools violate FERPA if they fail to obtain consent before disclosing data that constitute personally identifiable information.

### **Third-party access to student data.**

An ongoing tension exists between protecting students' personally identifiable information (PII)<sup>56</sup> from unauthorized disclosure and giving public and private sector third parties access to and use of longitudinal student data. Such data may be collected to improve education policies and best practices, deliver on-demand personalized instruction and other education-related services to help students learn, and evaluate programs. For example, school districts might want to integrate students' education records with other government data on children's mental health or child-welfare placements, or with data from the juvenile justice system to combat truancy. The private sector software and apps that educators use to help provide classroom instruction and to assess student performance generate massive amounts of contextual or transactional data about students' behavioral and learning patterns, called metadata.<sup>57</sup>

To collect and share data on students, states use statewide longitudinal data systems that contain anonymous data on students in preschool through college. These statewide systems may link educational data to workforce information or they may link education records with records from one or more other public agencies.<sup>58</sup> Although records are stripped of identifying information about individual students, some systems may want, with parent consent, to use identifiable information to provide individual students with targeted instruction or other education-related services.

School districts and schools may contract with third parties to provide online educational services or perform online functions that districts and schools cannot efficiently provide themselves, including student information systems, instructional improvement systems, online education programs or apps, or assessment systems. Third-party contractors sometimes need PII from students' education records to implement the contract. A FERPA exception to the prior consent requirement allows districts and schools that contract with a third-party contractor, consultant, volunteer, or other third party to disclose PII from education records if the third party:

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<sup>56</sup> Personally identifiable information (PII) includes direct identifiers such as name and address and may include indirect identifiers such as date or place of birth, metadata about students' interactions with an app or service, or other, publicly available information that a reasonable person in the school community may use to identify an individual student. See [20 U.S.C. 1232g](#); [34 C.F.R. Part 99.3](#).

<sup>57</sup> Metadata gives meaning and context to other collected data. For example, information about how long a student needed to complete a task online can be enhanced by information about when the student completed the task or how many times the student tried to complete the task.

<sup>58</sup> Minnesota's statewide longitudinal data system, called SLEDS, contains student-level de-identified data from prekindergarten through postsecondary education and workforce data.

- performs an institutional service or function that a district or school employee would otherwise perform;
- meets FERPA criteria for being a school official with a legitimate educational interest in education records;
- is under the direct control of the district or school regarding use and maintenance of the education records; and
- uses the education records for authorized purposes only and does not disclose the PII from the education records to other parties unless specifically authorized by the district or school and allowed under FERPA.

Unlike directory information where parents and eligible students may opt out of having their information shared, parents and students have no right to opt out when districts and schools agree to share PII information under this “school official” exception.<sup>59</sup>

Under FERPA, districts and schools that disclose PII from students’ education records to third parties under the “school official” exception remain responsible for protecting the data. Third parties may use the PII for authorized purposes only. FERPA gives parents and eligible students the right to request access to the education data maintained by third parties on behalf of the district or school, which must be provided within 45 days.

FERPA protects PII contained in the student records maintained by a district or school but does not protect de-identified student information or directory information. The federal Protection of Pupil Rights Amendment (PPRA)<sup>60</sup> protects PII collected from students and limits what third parties can do with that information. Under PPRA, districts and schools must notify parents when their students participate in activities where students’ personal information is collected, disclosed, or used for marketing purposes and allow parents to opt out of these activities. Notice and the opportunity to opt out do not apply if districts collect and use the students’ personal information to develop, evaluate, or provide students or schools with educational products or services. Neither FERPA nor PPRA prohibits districts and schools from allowing third parties to provide students with generalized, nontargeted advertising.

### **IDEA and FERPA together govern access to the education records of students with disabilities.**

Federal law governing access to the education records of students with disabilities is similar to FERPA. Parents have access to and may review all records related to their student’s disability and the education services provided to their student under the student’s individual education plan.<sup>61</sup>

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<sup>59</sup> FERPA’s “school official” exception allows districts and schools to disclose educational records to third-party contractors performing a service or function that the district or school can’t perform itself. [34 C.F.R. §§ 99.31\(a\)\(a\); 99.7\(a\)\(3\)\(iii\)](#).

<sup>60</sup> The Protection of Pupil Rights Amendment (PPRA) [20 U.S.C. § 1232h](#); [34 C.F.R., part 98](#).

<sup>61</sup> [34 C.F.R. § 300.562\(a\)](#).

Schools may disclose information in a disabled student's education record only with a parent's consent unless an exception applies.<sup>62</sup> Schools may disclose the fact that a student has an individual education plan if the student is accused of committing a crime. IDEA regulations require school officials to comply with FERPA when releasing student records to law enforcement officials after notifying them about the criminal behavior of a student with disabilities.<sup>63</sup> Four exceptions to FERPA's prohibition against allowing school officials to disclose students' education records without consent appear to permit FERPA and the IDEA<sup>64</sup> crime reporting provision—section 1415(k)(9)(B)<sup>65</sup>—to operate together effectively.

- (1) FERPA allows school officials, consistent with state statute, to disclose education records to specified individuals when the disclosure “concerns the juvenile justice system” and relates to the system’s ability to “effectively serve the student whose records are released.”<sup>66</sup>
- (2) FERPA allows school officials to disclose education records in an emergency if it is “necessary to protect the health or safety of the student or other persons.”<sup>67</sup> A U.S. Department of Justice handbook includes “on-campus disruptions that constitute criminal acts” within this exception.<sup>68</sup>
- (3) FERPA excludes from its definition of education records those records that a school district’s law enforcement unit makes, maintains, and uses solely for law enforcement purposes. An officer assigned to patrol school grounds might make such records. Law enforcement unit records are only part of the “special education and disciplinary records” that school officials might turn over under the IDEA crime reporting provision. There is no requirement under IDEA that school officials disclose law enforcement unit records and no requirement that school officials obtain consent before disclosing such records.

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<sup>62</sup> 34 C.F.R. § 300.571(b).

<sup>63</sup> Under Minnesota’s Pupil Fair Dismissal Act, a school district may exclude or expel a pupil with an individual education plan for misbehaving if the misbehavior is not a manifestation of the pupil’s disability. Under IDEA, a school district may unilaterally place a pupil with a disability in an alternative setting for up to 45 days if the pupil carries a weapon to school or a school function or uses, possesses, sells, or solicits illegal drugs at school or a school function. Also, a court may order a change of placement.

<sup>64</sup> Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. 1400-1487 (1994 & Supplement. IV 1998)).

<sup>65</sup> 34 C.F.R. 300.529(b)(2) (providing that “an agency reporting a crime under this section may transmit copies of the child’s special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act”).

<sup>66</sup> Officials in the juvenile justice system who receive such records must certify in writing that they will not disclose the student’s education records to a third party without consent unless a statutory exception applies. 20 U.S.C. 1232g(b)(1)(E)(ii)(I) (1994); 34 C.F.R. 99.38(a) and (b).

<sup>67</sup> 20 U.S.C. 1232g(b)(1)(I) (1994); 34 C.F.R. 99.31(a)(10).

<sup>68</sup> Michael L. Medaris, et. al, U.S. Department of Justice, *Sharing Information: A Guide to the Family Rights and Privacy Act and Participation in Juvenile Justice Programs* (1997).

- (4) FERPA authorizes school officials to disclose education records demanded in a subpoena or court order.<sup>69</sup> A court may require the person requesting a court order to demonstrate the need for disclosing the student's education records before the court orders the records disclosed.

## State Law

### **Minnesota's data practices law was amended in 1979 to include a section on educational data.**

The Congressional Record indicates that Congress intended FERPA to set only minimum standards. FERPA permits Minnesota and other states to enact laws setting more stringent data practices standards if there is no direct conflict with federal law. Minnesota Statutes largely parallel FERPA provisions; a number of subdivisions specifically incorporate FERPA provisions by referring to federal statutory citations in the state law.<sup>70</sup>

Under Minnesota's data practices law, "educational data" is "private data on individuals." The classification "private data" means essentially that the data is available only to its subject. In the case of educational data, the subject is the student. Schools cannot disclose education records or other personally identifiable information unless the student<sup>71</sup> or the student's parent gives written consent or a federal or state exception applies.<sup>72</sup>

### **There are several differences between federal and state law governing access to student records.**

**A school must give notice when asking students for information about themselves.** Minnesota law,<sup>73</sup> unlike federal law, contains a notice requirement that is often called the Tennessen warning after the author of the legislation. A school must give students a Tennessen warning any time it collects from the students private or confidential data about the students. When a school asks students for such data, it must tell them how and for what purpose it intends to use the data, whether the students may refuse to supply the data and the consequences of providing or not providing the data, and identify those who are allowed to receive the data under federal or state law. A school that fails to administer a Tennessen

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<sup>69</sup> In order to allow an affected individual to challenge a subpoena or court order, school officials must make a reasonable effort to notify the individual of the subpoena or court order before the officials comply with its demands. [20 U.S.C. 1232g\(b\)\(1\)\(J\)](#).

<sup>70</sup> [Minn. Stat. § 13.32](#), subd. 5.

<sup>71</sup> In Minnesota, a minor student who is sufficiently mature can give informed consent. [Minn. Stat. §13.02](#), subd. 8.

<sup>72</sup> [Minn. Stat. § 13.32](#), subd. 3.

<sup>73</sup> [Minn. Stat. § 13.04](#), subd. 2.

warning may not store, use, or disseminate the data it collects.<sup>74</sup> A school that provides a Tennessean warning must limit access to students' private data to those "whose work assignments reasonably require access."<sup>75</sup> It is the school's obligation to ensure the privacy and confidentiality of the data.

**A minor student can give informed consent to disclose educational data.** Under FERPA, effective consent requires the consent of a parent or eligible student. State law defines "individual" to be a natural person, which includes minors.<sup>76</sup> Consequently, either the parent or the minor student can give consent unless a law enables a minor to prevent or restrict a parent's action. Only sufficiently mature minor students can give effective consent, however, and determining whether a minor student is mature enough to give effective consent must be done on a case-by-case basis.

**There is a lack of clarity between federal and state law about whether a school can disclose education records to the parents of a minor student without the student's consent.** State law permits a minor student to request that a school deny the student's parents access to education data about the student;<sup>77</sup> education data include the health services of a school nurse working in a public school setting. Under federal law, a school may disclose personally identifiable information about the student to the parents without the student's consent if the student is a minor or a dependent.<sup>78</sup> State law permits a school official to withhold data if the minor requests it and if the official reasonably concludes that withholding the private data from a parent or guardian would be in the minor's best interest. However, under [Minnesota Rules, part 1205.0500](#), subpart 4, which parallels federal law, school officials must not deny parents access to a student's education record unless the student is a full-time student in a postsecondary institution or is 18 years old. State law permits a school official, without consent, to release data that concern certain medical, dental, mental, or other health services provided under [Minnesota Statutes, sections 144.341 to 144.347](#), if failing to inform the parents would seriously jeopardize the minor's health.

**Only a court order can compel school personnel to release education records.** Federal law requires school personnel to release education records subject to a court order, an ex parte court order, or a subpoena.<sup>79</sup> Before releasing the records, school personnel must make a reasonable effort to notify the parent or eligible student of the order or subpoena. Minnesota law obligates school personnel to release data only under a court order, and does

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<sup>74</sup> Under [Minnesota Statutes, section 13.05](#), subdivision 4, a school that fails to provide the requisite Tennessean warning is prohibited from collecting, storing, using, or disseminating private or confidential data on students for any purpose except those stated to the student at the time the school collects the data.

<sup>75</sup> [Minn. Rules, part 1205.0400](#), subp. 2.

<sup>76</sup> [Minn. Stat. § 13.02](#), subd. 8.

<sup>77</sup> [Minn. Stat. § 13.02](#), subd.

8. <sup>78</sup> [34 C.F.R. § 99.31\(a\)\(8\)](#).

<sup>79</sup> [34 C.F.R. § 99.31\(a\)](#).

not require disclosure under a subpoena.<sup>80</sup> Consequently, school personnel who receive a subpoena may insist upon a court order under Minnesota Statutes, section 13.03, subdivision 6, to compel discovery of the data.

**Parents cannot inspect the desk notes of teachers but can inspect the desk notes of other school personnel.** Under FERPA, the desk notes of teachers, supervisors, administrators, and other education personnel are not classified as government data and are not accessible by a subject of that data. Under Minnesota law,<sup>81</sup> which is significantly more restrictive than federal law, only teachers' desk notes<sup>82</sup> are not government data, not accessible by the subject of the data, and not available for parents to inspect. The result is that more data are accessible to parents because only teachers' desk notes are not classified as education data and not available to parents. Teachers must destroy their desk notes at the end of each school year if they do not want the notes to become educational data.

### **State law requires school officials to report education data without consent in specific circumstances.**

Minnesota law contains several specific exceptions to the requirement that schools must have the consent of the parent or eligible student before releasing information from a student's records. Consistent with the federal law exceptions, school officials may be mandated to disclose information as a result of a health or safety emergency or when the disclosure is made to a school official with a legitimate educational interest.<sup>83</sup> These exceptions require school officials to report student data on chemical abuse, students' health including immunizations, severe burns and injuries from firearms, missing and maltreated children, tuberculosis screening, and possession of unlawful firearms and dangerous weapons.

- **chemical abuse** – a teacher must immediately notify the school's chemical abuse preassessment team if the teacher knows or has reason to believe that a student is using, possessing, or transferring alcohol or a controlled substance while on school premises or involved in a school-related activity<sup>84</sup>
- **child maltreatment** – a teacher, school administrator, coach, education paraprofessional, or school counselor immediately must report the maltreatment of a child to the local welfare agency, the local police department, or the county sheriff if that person knows or has reason to believe that the child is being neglected or physically or sexually abused<sup>85</sup>

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<sup>80</sup> [Minn. Stat. § 13.32](#), subd. 3.

<sup>81</sup> [Minn. Stat. § 13.32](#), subd. 1, para. (a).

<sup>82</sup> Teachers may reveal desk notes only to a substitute teacher if the desk notes are to remain inaccessible and not education data.

<sup>83</sup> See Minn. Op. Atty. Gen. 169-f (March 28, 1989).

<sup>84</sup> [Minn. Stat. §§ 121A.26, 121A.28](#).

<sup>85</sup> [Minn. Stat. § 626.556](#), subd. 3.



- **firearm injuries and burns** – a school medical official immediately must report<sup>86</sup> to local law enforcement officials or the county sheriff a student's injuries from a firearm or a crime perpetrator's wounds from a dangerous weapon,<sup>87</sup> and must report to the state fire marshal a student's second- or third-degree burns<sup>88</sup>
- **juveniles' health records** – schools, at a juvenile court's request, must provide the court with the health records of a student who appears before the juvenile court<sup>89</sup>
- **law violation** – a teacher or other school employee may report to a law enforcement agency any violation of law occurring on school premises or at a school-sponsored event<sup>90</sup>
- **immunization records** – schools must maintain immunization records, including the student's name, address, date of birth, gender, parent's name, all immunizations the student received, and any adverse reactions the student suffered, and forward those records to the school to which a student transfers<sup>91</sup>
- **tuberculosis screening** – schools must give the state health commissioner access to education data to evaluate tuberculosis screening programs<sup>92</sup>
- **unlawful firearms** – school officials, without including personally identifying information, must report to criminal or juvenile justice officials and the commissioner of education those students with an unlawful firearm<sup>93</sup>

**Receiving information about violent students from law enforcement officials.** In 1994, Minnesota authorized courts and law enforcement officials to provide schools with the following information about violent students enrolled in the school:

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<sup>86</sup> Law enforcement officials are prohibited from disclosing the name of the person making the report, which ultimately must be in writing. The person making the report cannot be subpoenaed or forced to testify. [Minn. Stat. § 626.53](#).

<sup>87</sup> [Minn. Stat. § 626.52](#), subd. 2.

<sup>88</sup> School medical officials must report student burns that cover over 5 percent or more of a student's body. [Minn. Stat. § 626.52](#), subd. 3.

<sup>89</sup> [Minn. Stat. § 144.30](#).

<sup>90</sup> [Minn. Stat. § 126.037](#), subd. 2.

<sup>91</sup> [Minn. Stat. §§ 13.32](#), subd. 3(f), [121A.15](#), and [144.3351](#).

<sup>92</sup> [Minn. Stat. § 144.441](#), subd. 8.

<sup>93</sup> [Minn. Stat. §§ 121A.05](#) and [121A.06](#). The report is available to the public because it does not contain personally identifying information and is not education data.

- juvenile adjudication information after a juvenile court issues a dispositional order if the juvenile's action involves conduct on school property or is an offense listed under [Minnesota Statutes, section 260B.171](#), subdivision 3<sup>94</sup>
- information that is reasonably necessary to protect a victim where there is probable cause to believe a juvenile committed an offense that would be a crime if committed by an adult and the victim is a student or staff member at the school, or, regardless of a victim's status, there is probable cause to believe a juvenile committed a serious crime<sup>95</sup>
- information about an agency investigation of child maltreatment<sup>96</sup>

Information provided by courts and law enforcement officials become part of a student's education record. Under Minnesota law, school officials may disclose data within the school district to assure people's safety, protect property, or address the educational or other needs of students.<sup>97</sup>

## Federal and State Sanctions

**There are federal and state sanctions for violating data practices law.**

Under federal law, a school that fails to comply with FERPA can lose all federal education funding.<sup>98</sup> A harmed individual may file a civil lawsuit alleging tortious wrongdoing, including invasion of privacy, defamation, or libel, or may file a section 1983 (civil rights) action.<sup>99</sup>

Under state law, a person who suffers damage as a result of a school district violating data practices law can bring a civil action against the school district for damages. If a violation is willful, the plaintiff can recover exemplary damages of up to \$15,000 per violation plus costs and

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<sup>94</sup> The list of offenses includes murder, manslaughter, vehicular homicide and injury, assault, robbery, kidnapping, false imprisonment, criminal sexual conduct, tampering with a witness, arson, burglary, terroristic threats, harassment and stalking, controlled substance crime, and possessing or using a dangerous weapon.

<sup>95</sup> [Minn. Stat. § 260B.171](#), subd. 3(a). See the preceding footnote for a list of serious crimes.

<sup>96</sup> [Minn. Stat. § 626.556](#), subd. 10, paras. (f) and (g). Schools must maintain data related to assessing child abuse or neglect until the investigating agency destroys its own data and directs the school to destroy the data as well. An investigating agency must retain child abuse or neglect data for at least ten years after its final entry in the case record in those instances where there is a determination of maltreatment or the need for child protective services. [Minn. Stat. § 626.556](#), subd. 11c, para. (c).

<sup>97</sup> [Minn. Stat. § 13.32](#), subd. 7.

<sup>98</sup> *Norris by Norris v. Board of Ed. of Greenwood Community School Corp.*, 797 F.Supp. 1452 (S.D. Ind. 1992).

<sup>99</sup> *Fay v. South Colonie Cent. School Dist.*, 802 F.2d 21 (2nd Cir. 1986); *Norwood v. Slammons*, 788 F.Supp. 1020 (W.D. Ark. 1991).

reasonable attorney fees.<sup>100</sup> Other remedies include bringing a court or administrative action to enjoin a district from violating data practices law<sup>101</sup> or to compel a district to comply with the law.<sup>102</sup> In addition to civil remedies, school personnel who willfully violate the state data practices law may be guilty of a misdemeanor and may be suspended without pay or dismissed.<sup>103</sup>

*For more information about data privacy and education, visit our website, [www.house.mn/hrd/](http://www.house.mn/hrd/).*

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<sup>100</sup> [Minn. Stat. § 13.08](#), subd. 1.

<sup>101</sup> [Minn. Stat. § 13.08](#), subd. 2.

<sup>102</sup> [Minn. Stat. §§ 13.08](#), subd. 4; [13.085](#).

<sup>103</sup> [Minn. Stat. § 13.09](#).