

Legal Subcommittee Meeting Summary

May 20, 2020

This document provides a summary of key points that emerged over the course of a day-long meeting. More information about the meeting, including the referenced legislation, the PowerPoint, and a meeting recording are available at <https://cadatasystem.wested.org/meeting-information/legal-subcommittee>.

The Legal Subcommittee will create contracts to support data sharing and protect privacy. The May 2020 meeting had the following goals:

- Ground the work of this committee by providing an update on the recommended scope for phase one of the California data system
- Share best practices for data agreements with third parties, using examples from California and other states
- Identify core components for legal agreements for data requests from non-partner entities
- Create legislative frameworks for partner entity data sharing and public record requests

The following representatives attended the meeting:

Veronica Villalobos-Cruz, Association of Independent California Colleges and Universities; Douglas Smith, Bureau for Private Postsecondary Education; Kathy Lynch, California Community College Chancellor's Office; Katie Elliott, California Commission on Teacher Credentialing; Bruce Yonehiro, California Department of Education; Jennifer Marquez, California Department of Technology; Jennifer Schwartz, California Health and Human Services Agency; Amy Fong & Rima Mendez, California School Information Services; Ed Hudson & Arun Casuba, California State University; Julia Blair, California Student Aid Commission; Jeanne Wolfe, Department of Labor; Carolyn Kubish, Department of Social Services; Brian Davis, Employment Development Department; Stella Ngai, University of California Office of the President

Workgroup Update

The meeting opened with the facilitator providing an update on decisions made by the California Cradle-to-Career Workgroup on their April 29 meeting and answering clarifying questions from subcommittee members.

The subcommittee also determined that, going forward, when the Workgroup directs questions to the subcommittee, the facilitation team will draft a summary of responses for review by subcommittee members.

European Union General Data Protection Regulation (GDPR)

At the February 2020 Legal Subcommittee meeting, the group raised questions about the implications of GDPR for the state data system. Baron Rodriguez, a member of the facilitation team who holds a GDPR law certification, provided a summary of the regulation that provides data privacy rights for European students. Citing guidance from the American Association of Collegiate Registrars and Admissions Officers (see <https://www.aacrao.org/advocacy/compliance/gdpr>), Baron Rodriguez recommended tagging European Union students in the data set and ensuring that their information is not included in the state

data system. By taking the most conservative possible position, the state data system would not need to devote resources to excluding individual students who exercise their “right to be forgotten.”

Ed Hudson from CSU held a differing opinion about whether GDPR standards would apply to European students attending college in the United States. Two subcommittee members suggested that individual partner entities should be given the authority to determine whether an individual’s records should be removed from the state data system, while another wondered what type of appeals process would be needed in this case.

Baron Rodriguez shared the following resources to inform the discussion:

- <https://www.mondaq.com/unitedstates/privacy-protection/714722/gdpr-complicates-admissions-applications-for-us-universities>
- <https://omniupdate.com/blog/posts/2019/gdpr-higher-education.html#applies>

The group agreed that each partner entity would develop its own recommendation about whether European Union students should be excluded from the state data set for discussion at the June meeting.

Facilitator’s note: It may be helpful to consider that the purpose of the state data system is to examine outcomes of Californians across agencies and over time, so information such as receipt of financial aid or post-college employment may not be relevant or available for EU citizens.

FERPA Best Practices: Sean Cottrell, Privacy Technical Assistance Center

Sean Cottrell provided information on applying the Family Educational Rights and Privacy Act (FERPA) in the context of state data systems and answered questions posed by the group. Several key concepts discussed included:

- FERPA’s definition of education program is broad, and includes any program principally engaged in the provision of education, including some childcare programs funded by the California Health and Human Services (CHHS) Agency.
- Per FERPA, personally identifiable information (PII) can only be shared without consent pursuant to a FERPA exception, such as audit and evaluation by entities that are designated as authorized representatives, and can only be used for approved purposes that conform, such as auditing or evaluating state- and federally-funded education programs.
- The data destruction provision only applies to PII. Legal agreements between the partners, related to sharing PII for the purpose of matching individual records, could allow the data to be stored for as long as the partner entity remains a party to the state data system or allow the timeframe to be extended after a periodic review. See <https://studentprivacy.ed.gov/resources/best-practices-data-destruction>
- The governance structure should standardize policies across partner entities, which means that rules should be designed in alignment with those held by the most restrictive partner. The rules that apply to partner entities will also need to apply to third parties who are delegated authority to conduct audits and evaluations. These policies should be made transparent.

Questions for Sean Cottrell, and subsequent discussion, included the following points:

- Bruce Yonehiro from CDE noted his understanding that federal law requires that PII from education records may only be disclosed under (i) the “studies” exception to organizations conducting studies “for, or on behalf of, an educational agency” and (ii) under the “audit and

evaluation” to the “authorized representative of the education authority.” He explained that to meet these requirements, the partner Education Agencies must be cosignatories to any legal agreements that involve PII from their data sets. So, for example, any agreement with a third party that involves PII could not be made by the managing entity alone. Sean Cottrell generally agreed, but noted that that partner entities could allow the managing entity to disclose data to conduct audits and evaluations in a manner consistent with *Scenario 2* at the following link:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/IDS-Final_0.pdf#page=19

- In a subsequent email correspondence, Bruce noted that *Scenario 2* expressly states that “*each agency that “owns” the PII being requested enters into a formal, written agreement with the entity requesting data.*”
- In email correspondence regarding the meeting notes, Veronica Villalobos-Cruz from AICCU asked the group to: 1) clearly define the owner of the data as it moves through each entity and 2) recommend actions for assigning responsibility in the case of a breach, either through legislation or clear provisions in the data exchange agreement.
- Jennifer Schwartz from CHHS inquired how FERPA defines deidentification: removing PII or requiring statistical deidentification. Sean Cottrell explained that deidentification required more than removing obvious data elements like name and address and shared a resource that explains the federal definitions: <https://studentprivacy.ed.gov/resources/data-de-identification-overview-basic-terms>, as well as an example of how to reduce access to PII while still allowing data to be shared: <https://studentprivacy.ed.gov/resources/case-study-5-minimizing-pii-access>. The facilitation team noted that a future meeting of the Legal subcommittee will address deidentification procedures.
- Kathy Booth from WestEd asked about a use case identified by the Cradle-to-Career Workgroup, which would allow partner entities to access linked data without having to sign agreements every time they wanted to use this information. Sean Cottrell note that this scenario would be problematic unless PII were removed from that data set and the records were deidentified, thus avoiding the need to comply with FERPA. However, this scenario presents risks that partner entities could identify PII by re-matching the data set to their own records. Some states have a disclosure review board that determines which rules to apply on a case-by-case basis.
- The group also discussed the concept of signing an agreement that authorizes data matching without specifying how those data will be used. For example, would it be possible for the partner entities to sign the Interagency Data Exchange Agreement and indicate that they will share PII for the purpose of linking records without signing a Business Use Case Proposal that specifies what will be done with that information once linked? Sean Cottrell indicated that this would be problematic under FERPA, but noted that sharing data for matching purposes is allowable—particularly if the intention is to release deidentified data—and shared the following resource: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/IDS-Final_0.pdf#page=19.

Legal Agreements with Third Parties

Sean Cottrell reviewed common components of legal agreements with third parties and shared the following resource with the group: <https://studentprivacy.ed.gov/resources/written-agreement-checklist>.

Brian Davis from EDD noted that federal law requires his agency to be reimbursed for data matches. Bruce Yonehiro from CDE echoed this concern, noting that California Education Code requires researchers to cover the costs of responding to requests for CALPADS data. Sean Cottrell noted that the state could pay the partner entities to participate in the Cradle-to-Career Data System and recommended that information about payments from third parties should be included in the MOU template.

Brian Davis also indicated that EDD information can only be provided to state agencies for a specific purpose--such as to evaluate a federal program. Sean Cottrell noted that the federal disclosure rule is specific to social security numbers—not employment data. California could comply with this rule by ensuring that data sets do not include social security numbers and use a different form of unique identifier instead.

The subcommittee agreed that several members would create a draft MOU for third parties, for review by the full group at the June meeting. This group will address how agreements might vary related to when PII is shared versus when deidentified data are shared. The following individuals volunteered to be part of this homework team: Carolyn Kubish, CDSS; Jennifer Schwartz, CHHS; Rima Mendez, CSIS; Jeanne Wolfe, DOL; and Stella Ngai, UCOP (Bruce Yonehiro of CDE will also review the draft MOU).

Legislative Frameworks for State Data Systems

Sean Cottrell provided several examples of legislation passed in other states to create state data systems. In addition to reviewing examples provided in advance of the meeting, he described the process used in Wisconsin (see <https://docs.legis.wisconsin.gov/statutes/statutes/115/II/297>).

Sean Cottrell also described how other state data systems respond to requests for public records—many specifically note that intersegmental data are not considered public records. These laws help to ensure FERPA can be enforced, so that requestors cannot construct a set of variables that would allow them to reidentify records about specific individuals. The US Department of Education can provide support to California in aligning federal and state-specific requirements through its policy determinations process.

Subcommittee members broke into small groups to begin crafting legislative language related to creating the data system and clarifying how Public Records Act (PRA) requests should be handled in order to protect PII.

The small group addressing legislation for creating the state data system felt most comfortable with the Wisconsin approach, which applies many FERPA requirements, such as clarifying the purpose, scope, and duration for exchanging information. However, this means that until the Cradle-to-Career research agenda has been approved, it will be difficult to finalize legislative language.

The PRA small group recommended that both Education Code and the Public Records Act be amended to clarify that the state data system cannot release PII in response to a PRA request. Bruce Yonehiro noted that the release of PII is already prohibited by the PRA. He stated that the subcommittee should work on legislation to prevent an obligation to respond to requests for de-identified custom and redacted data sets. Other members concurred that such requests are problematic and would need to be addressed.

Subcommittee members agreed to convene an additional homework team to work on legislative language in advance of the June meeting, with the following members: Bruce Yonehiro, CDE; Douglas Smith, BPPE; Jennifer Schwartz, CHHS; Brian Davis, EDD; and Stella Ngai, UCOP.