

Legal Subcommittee Meeting Summary

February 19, 2020

This document provides a summary of the key points that emerged from substantive discussion over the course of the day. More information about the meeting, including the background paper and the PowerPoint, are available at <https://cadatasystem.wested.org/meeting-information/legal-sub-committee>. The website also provides information on the overall [process](#) for how the data system will be designed.

The Legal Subcommittee will develop technology specification requirements to address data structures and privacy considerations. The February 2020 meeting had the following goals:

- Ground the work of this committee by outlining the recommended scope for phase one of the California data system and key considerations related to creating legal agreements that support data sharing and protect privacy
- Identify privacy concerns for the first phase of development
- Evaluate whether the Interagency Data Exchange Agreement could be modified to meet the needs of the state data system
- Identify the process by which a data sharing agreement should be created

The following representatives attended the meeting:

Veronica Villalobos Cruz, Association of Independent California Colleges and Universities; Freshta Rasoli, Bureau for Private Postsecondary Education; Marc LeForestier & Kathy Lynch, California Community College Chancellor's Office; Bruce Yonehiro, California Department of Education; Carolyn Kubish, California Department of Social Services; Jennifer Marquez, California Department of Technology; Jennifer Schwartz, California Health and Human Services Agency; Angela Ratty, California School Information Services; Arun Casuba, California State University Chancellor's Office; Patrick Perry, California Student Aid Commission; Brian Davis, Employment Development Department; Stella Ngai, University of California Office of the President; and Jeanne Wolfe, Labor and Workforce Development Agency.

Introductions and Level Setting

The meeting opened with the facilitator providing a description of the benefits of a longitudinal data system, an overview of the California Cradle-to-Career Data System Act, and a description of the process that will be used to craft recommendations for the Governor's Office. Subcommittee participants were encouraged to work closely with their peers on other subcommittees to ensure that workgroup members are able to provide recommendations on behalf of their agencies at monthly meetings on these types of issues.

The facilitator summarized the initial recommendations of the Cradle-to-Career Workgroup regarding the focus of the first phase of data system development, including creating a P20W data set that includes early care, K-12, postsecondary, financial aid, and employment data; making information available via dashboards and query tools; and creating a request process that would allow additional data to be linked for specific purposes. The Workgroup will be identifying additional phase one tools for practitioners, students, and families at the February meeting.

Participants introduced themselves and described the types of data their agencies or organizations collect and how they display or link that information.

Evaluating the Scalability of the IDEA and BUCP Framework

Mike Wilkening from the Governor's Office and Jennifer Schwartz from the California Health and Human Services Agency (CHHS) provided a summary of the history of the Interagency Data Exchange Agreement (IDEA). The agreement and companion Business Use Case Proposal (BUCP) was originally developed for CHHS. IDEA is now being scaled by the Governor's Office, and in the process, is being revised. The subcommittee reviewed a draft of the evolving IDEA and BUCP form.

IDEA states that data should be shared for the benefit of Californians in a secure manner for appropriate purposes. It covers responsibilities for data providers and data recipients and presumes that money will not be exchanged when data are shared. It includes an addendum for the Health Insurance Portability and Accountability Act (HIPAA), but specifies that this addendum only applies to those entities that are accountable for HIPAA regulations. IDEA was drafted so that any entity at the state level could sign on to the agreement, such as education agencies, the legislature, and judicial councils, which makes it a candidate for the data exchanges between partner entities to create a state data system. It could potentially be modified for county/region entities that are government based, but would not be appropriate for data sharing with research organizations or individuals.

The BUCP addresses content such as the purpose of the data exchange, which elements are needed, who has access to data, for how long, and under which conditions. For signatories to IDEA, the underlying terms don't need to be negotiated for a data exchange—instead the BUCP form focuses on other agreements necessary for the data exchange. The BUCP could be amended to address needs specific to the state data system. For example, the form includes prompts on legal authority and specialized security. The state data system could adopt common language on these topics that could be integrated into the form, as well as identify additional requirements that are specific to some data exchange contexts.

In essence, IDEA and BUCP shifts the paradigm so that agencies adopt a cooperative framework to get to yes, so that data can be appropriately utilized to improve services provided to Californians. While it allows requests for items that are not allowable or inappropriate to be denied, it ensures that a requestor seeking information for a legitimate purpose would have an easier avenue for data sharing. One way that IDEA establishes oversight for inter-agency data sharing requests is an embedded conflict resolution process. For those entities under the authority of the governor, if there is a difference of opinion about whether data should be provided to a requestor, the discussion follows a chain of review that ultimately ends with the governor. In cases where the data provider is not under the authority of the governor, the chief data officer will convene the parties to mediate a resolution. If no agreement can be reached, the request will be denied.

The group asked clarifying questions, such as what would happen if there is a breach of data. Jennifer Schwartz clarified that IDEA addresses consumer notifications, security breach protocols, and issues of improper use and disclosure. The agreement puts responsibility for notification on the entity whose data was breached and does not address issues such as financial remuneration for a breach. However, financial requirements could be written into the BUCP.

One participant asked what would happen if legal representatives for agencies that disagree about sharing data disagree on how to interpret a law such as the Family Educational Rights and Privacy Act (FERPA). Mike Wilkening responded that the chief data officer will rely on counsel to review relevant laws. BUCP also helps to ensure that data requests are implemented under an appropriate framework. For example, the form includes prompts where requestors list the statute that allows them to access information. If legal constraints prevent the data provider from sharing the data as requested, the intention is that the entities would work together to identify other ways that appropriate data can be legally shared.

Another participant asked whether IDEA and BUCP could be paired with an end user license agreement that addresses issues such as whether data will be released to the general public or researchers. Jennifer Schwartz noted that BUCP can define role-based access that varies based on allowable purposes and the entity that is getting the information.

In response to another question, Jennifer Schwartz clarified that the forms include security standards, as well as providing places in the BUCP where higher thresholds can be required. The minimum bar for security aligns to the state chief information officer requirements. She also noted that the agreement includes a research review process that aligns with the Committee for Protections for Human Subjects and includes language that prevents disclosure of data by subcontractors.

A participant asked whether IDEA would void existing agreements, and Mike Wilkening assured the group that it would not. The group briefly discussed whether members of the partner entities could continue to meet to discuss data sharing agreements given Bagley-Keene requirements associated with the California Cradle-to-Career Data System Act. The facilitator clarified that a memo is forthcoming from the Governor's Office that describes the terms by which partner entities can continue to meet.

Finally, two participants inquired about whether IDEA addresses international privacy requirements like the European Union General Data Protection Regulation (GDPR). Colleges that serve international students are increasingly being asked about the right to be forgotten, which is included in the GDPR. IDEA does not include any such provisions. Baron Rodriguez, a national expert on state data systems and legal requirements who is part of the facilitation team, noted that GDPR generally does not apply to the types of information included in state data systems and their associated uses, however he will revisit the use cases for the system. Additional information on international regulations will be included in the background paper for the March Legal Subcommittee meeting.

The subcommittee discussed whether it was better to just focus on data sharing needs specific to the partner entities that have been prioritized to share data for phase one of the state data system (currently that list includes the Association of Independent California Colleges and Universities, Bureau for Private Postsecondary Education, California Department of Education, California Community College Chancellor's Office, California Department of Education, California State University, California Student Aid Commission, Employment Development Department, and the University of California Office of the President). However, given that the Research Agenda Subcommittee identified information on early care, health, and social services that would be important for answering the policy questions laid out in the California Cradle-to-Career Data System Act, it is likely that additional data sources will be swiftly integrated into the system. The tools for practitioner and individuals, which the Cradle-to-Career Workgroup will be examining later in the month, may also require other data sets. One participant wondered why the Department of Justice wasn't involved in the workgroup or subcommittees, given the

likelihood that information on justice involvement may be important to address state priorities. Another participant recommended that the Department of Motor Vehicles be included if the state intends to use its information to facilitate data matching.

Subcommittee participants noted that it is difficult to fully assess IDEA and BUCP without more clarity about the specific information that will be included and accessed from the state data system, but several indicated that it is good to start for a model agreement. Another participant urged that the state data system integrate content from other legal agreements that have been brokered for bilateral data-sharing purposes. This led to an agreement that the subcommittee would use existing agreements to craft a draft FERPA addendum to IDEA (the draft of IDEA that was distributed for the meeting includes a FERPA addendum that had already been deemed insufficient in early feedback).

Public Comment

In the public comment portion of the meeting, an online participant submitted the question of whether informed consent should be addressed in the data sharing agreement and wondered how the concept of informed consent is addressed by relevant laws. The issue was flagged for discussion once the specific products for phase one of the data system are determined in April, as this would impact how consent would need to be addressed.

Identifying Critical Legal Considerations

Each subcommittee participant raised critical legal considerations that their agency had identified for the state data system. Themes included:

- There is greater concern about complying with federal laws than state laws, particularly if the legislature would be willing to create a legal framework that requires partner entities to provide information for the state data system.
- Different legal frameworks will be needed for the three use cases being prioritized for phase one of the state data system (the P20W data set, the research request process, and tools for individuals and practitioners)
- There needs to be clear rules about who can request each data point within the P20W data set or when pulling additional data points for research requests, with these rules taking into account specific regulations associated with each data point. This is particularly important for health and social service data, which is subject to numerous laws that are tailored to various populations.

Several subcommittee participants stressed the value of passing legislation that creates a clear case for agencies contributing data to a state data system. This is important so that data access is not a function of who is holding specific staff roles or elected offices, or the expiration dates of existing bilateral data sharing agreements. It would also help create a stronger framework for addressing statutory requirements—particularly in noting that data belong to individuals and data sharing should be driven by the common good, rather than the current paradigm where agencies can develop a sense of ownership over the data they hold.

A number of subcommittee participants shared concerns raised in the workgroup and other subcommittees about how California Public Records Act (PRA) requests should be handled. Some

participants thought that it would be helpful to establish protocols for how partner entities should respond to PRA requests, particularly regarding data they had received from another entity. Other participants suggested that PRA requests should always be referred to the originating agency, although this will also require changes to statute. Baron Rodriguez noted that clarifying legislation to state PRA request process such as limiting PRA requests to the original source data agency is generally how other states handle similar dilemmas. Some suggested that the legislature should pass a law that exempts the state data system from PRA requests, on the grounds that the volume of data that would be available for individuals would make it more difficult to keep identities private. This led to a discussion about the value of establishing common standards about how to statistically de-identify information, both in responding to data requests and related to data that is shared through public dashboards and query tools.

Other comments that the group will need to address in future meetings include:

- How to address dates by which data must be destroyed
- How to structure legal agreements when individuals request access to data
- The need to amend the Unemployment Insurance code so that data can be shared with the entity that hosts the information.
- How the data system host will ensure information is secured once it is shared
- Whether social service and health data, when combined with education data, is considered education data and subject to FERPA
- How many years of historical data will be included in the state data system
- Setting consistent standards for interpreting regulations, such as rules regarding financial aid data
- Managing consent processes

Answers to Questions

The subcommittee was able to answer some of the questions posted by the workgroup and other committees:

- *Do any of the partner entities have legal restrictions that prevent them from putting data into a centralized system?* EDD can provide batch files that are response to specific queries, such as providing back employment and earnings data for a set of individuals. However, it must charge the state data system to provide this information, per federal law. CHHS and DSS have many requirements about disclosing information that mean some data elements can only be shared to specific types of people under specific conditions.
- *What needs to be taken into account when looking at the intersection of federal and state rules?* Federal regulations take precedence, but there may be cases where the federal regulations do not apply to how data are being compiled or used.
- *How could key considerations such as institutional review board requirements, reviewing draft reports, destroying data, consequences for violating the terms of the agreement, and indemnification a be integrated into legal agreements with others?* These could be included in boilerplate language that would be used in the BUCP.

- *How can third-party use of data be aligned with FERPA requirements?* This is addressed in the IDEA and BUCP, and language could be further tailored specific to California data system use cases.
- *Could someone access the full data set using a public records act request? And What are the legal rules around data disclosure? For example, if data are shared with an outside entity through the request process, could someone use a Public Records Act request to require that outside entity to provide unitary data?* Current California laws could lead to agencies to believe that they need to release the data set. However, there are several possible strategies for mitigating this risk.

Next Steps

Subcommittee participants outlined the following questions for the Technology & Security Subcommittee:

- Can data be tagged so it is possible to track source agency?
- How will data be securely transferred to protect from breaches?
- How will data be stored and transferred so it won't be re-identified, particularly for vulnerable populations?

And these request for the California Cradle to Career Data System Workgroup:

- Please attend to how information will be communicated to students about who has their information, why it is being shared, and how it will be used.

A small group including Arun Casuba, Carolyn Kubish, Freshta Rasoli, Jennifer Schwartz, and Bruce Yonehiro agreed to develop draft FERPA language. Brian Davis offered to provide language from existing agreements on sharing employment information and will examine terms under which employment and income data from tax records could be shared.

Jennifer Schwartz agreed to share procedures used for statistical de-identification at CHHS. Other subcommittee participants were encouraged to share their standards on this topic as well.