

Legal Subcommittee Meeting Summary

April 20, 2021

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

The April 2021 meeting had the following goals:

- Provide an update on key decisions
- Review the proposed:
 - Incident response plan
 - Master data exchange agreement
- Discuss next steps for the participation agreement

The following representatives attended the meeting:

Veronica Villalobos Cruz, Association for Independent California Colleges and Universities; Freshta Rasoli, Bureau for Private Postsecondary Education; Kathy Lynch, California Community College Chancellor's Office; Bruce Yonehiro, California Department of Education; Marina Feehan, California Department of General Services; Kary Marshall, California Department of Technology; Cynthia (Cyndi) Bosco, California Department of Health Care Services; Carolyn Kubish, California Department of Social Services; Rima Mendez, California School Information Services; Monique Shay, Ed Sullivan, and John Walsh, California State University; Gabriel Ravel, GovOps; Jeanne Wolfe, Labor and Workforce Development Agency; and Stella Ngai, University of California, Office of the President

Update on Key Decisions by the Cradle-to-Career Workgroup

The meeting opened with Kathy Booth of WestEd providing an update on decisions made by the workgroup at its March meeting, including adopting:

- a revised list of P20W data points, with the condition that data sharing be based on a contractual agreement between the data providers and the managing entity
- an opt out policy
- a security framework, with the condition that it will be updated annually to reflect evolving requirements

A progress report was delivered to the legislature on April 1, and the workgroup has created a homework team to further review the proposed deidentification policy.

Incident Response Plan

In the March, the Technology & Security Subcommittee approved an incident response plan that is based on the Department of General Services (DGS) incident response plan. DGS is responsible for managing security for the Government Operations Agency (GovOps). However, the Technology & Security Subcommittee asked that the Legal Subcommittee review the policy to ensure that the plan adequately addresses requirements for the Health Insurance Portability and Accountability Act (HIPAA) and Information Practices Act (IPA). Because the Family Educational Rights and Privacy Act (FERPA) does not include breach requirements for individuals, the subcommittee recommended reviewing best

practices outlined by the U.S. Department of Education's Privacy Technical Assistance Center (PTAC). The Legal Subcommittee tasked Marion McWilliams of WestEd to conduct this review.

Overall, Marion McWilliams of WestEd noted that the DGS policy meets or exceeds requirements. However, she flagged two issues for discussion with the Legal Subcommittee:

- The incident response plan defines personal information more narrowly than the personally identifiable information (PII) definition developed by the Legal Subcommittee and adopted by workgroup. Should the plan be amended to adopt the Cradle-to-Career PII definition for personal information, such that breach protocols should be followed if any of these data points are inadvertently released?
- The plan focuses on notifications to individuals in the case of a breach. Should data providers also be notified and if so, in what contexts?

She also noted that she had made minor adjustment to plan to align with FERPA best practices, such as keeping records of all disclosures of education information on specific individuals, so that individuals could be informed about how their data had been used if they requested this information.

Marina Freehan of DGS asked whether the amendment of the plan would mean that DGS would follow a different protocol for the Cradle-to-Career Data System than for other work. Marion McWilliams of WestEd confirmed this would be true. However, the specific people who would be responsible for implementing the incident response plan has yet to be determined, as GovOps has not yet staffed the new Office of Cradle-to-Career Data. Marina Freehan of DGS indicated that she would need to discuss this with her agency's information technology officer before she could approve this approach.

Stella Ngai of UC indicated that she would like to have her organization's Technology & Security Subcommittee representative review the edited plan before providing approval. She also asked whether the incident response plan had been cross-referenced against requirements in the California Consumer Privacy Act (CCPA) and the California Privacy Rights Act (CPRA). Marion McWilliams of WestEd noted that CCPA does not apply to public agencies. However, she had not checked against CPRA requirements.

Marion McWilliams of WestEd volunteered to cross-reference the Cradle-to-Career Data System incident response plan against CCPA and CPRA, but flagged that the policies will not line up because of the unique definition of PII for the Cradle-to-Career Data System. Therefore, she will also create a crosswalk of definitions for personal information, so that the differences are clear, as well as which definitions are applicable to each breach policy.

Next Marion McWilliams of WestEd clarified that because the DGS incident response plan focuses on IPA requirements, it only discusses notifications to individuals. For the Cradle-to-Career Data System version, language could be added regarding alerting data providers, which should specify the point at which a data provider would be notified. For example, should data providers be alerted any time there is an investigation into a security incident or at the point that a breach has been confirmed?

Stella Ngai of UC indicated that data providers should be alerted as they hold the school official role. However, she would need to confer with her colleagues to determine the appropriate point at which her organization would want to be notified.

Cyndi Bosco of DHCS asked whether her agency would be notified if there was a breach with Medi-Cal data. Marion McWilliams of WestEd noted that per DGS's current policy, they would not.

Marion McWilliams of WestEd asked the education partner entities if they thought GovOps should notify individuals if their data is breached, even though it is not a FERPA requirement. Subcommittee members did not have an opinion on this matter.

Finally, Marion McWilliams of WestEd flagged that in an earlier draft of the participation agreement, language on breach protocols was included. She recommended that instead the participation agreement should reference the incident response plan. This would allow for the policy to be kept in alignment with rapidly-evolving security protocols without having to ask data providers to sign new versions of legal agreements. This issue will be taken up by the homework team that is drafting the participation agreement. The homework team will also draft language on notifying data providers regarding breaches and the circumstances in which they will be notified.

ACTION ITEM: Members of the subcommittee agreed that they would come to the May meeting with recommendations on whether to move forward with proposed incident response plan including whether students should be notified if education data are breached, even though this is not a FERPA requirement.

Legal Agreements

Marion McWilliams of WestEd reminded the group of their earlier decision to not use the Interagency Data Exchange Agreement (IDEA) for data exchanges due to concerns by the education partners that it violates FERPA. Instead, core legal agreements will be divided among three documents:

- Master Data Exchange Agreement (MDEA), which sets the conditions for sharing data among signatories
- Business Use Case Proposals (BUCP), which sets the conditions for specific data exchanges
- Participation Agreement, which establishes requirements and roles between data providers and GovOps for the Cradle-to-Career Data System

She clarified that MDEA is very similar to IDEA, but varies on the following points:

- Includes additional FERPA provisions
- Clarifies that BUCPs only apply to those entities that sign the BUCP
- Notes that data sharing is voluntary and eliminates the dispute resolution process
- Removes language regarding points of contact and authority levels of officials
- Allows for independent colleges to be cosignatories, rather than just state agencies
- Embeds additional terms and conditions in the BUCP, rather than in the master agreement

Finally, she noted that MDEA was written in such a way that it could be used in contexts beyond the Cradle-to-Career Data System, to expedite the sharing of data housed in the Cradle-to-Career Data System among partner entities for other purposes.

Stella Ngai of UC recommended that MDEA define the managing entity role and include an addendum that makes GovOps a business associate.

Cyndi Bosco of DHCS agreed that MDEA should define the managing entity role, but clarified that GovOps would only be designated as a business associate if DHCS data were included per a BUCP. However, GovOps must be a business associate of DHCS in order to receive personal health information.

Marion McWilliams of WestEd clarified that FERPA or HIPAA conditions would only be applied if education or personal health information were included, respectively, which would be incorporated in the BUCP. However, as written, this designation would only be granted to GovOps. If MDEA were being used to transfer sensitive information to another signatory, another approach may be needed.

Bruce Yonehiro of CDE suggested editing the language to indicate that no entity is a business associate unless it says so in the BUCP and that entity agrees to incorporate the terms of the HIPAA addendum. Cyndi Bosco of DHCS and Stella Ngai of UC agreed with that change.

ACTION ITEM: Bruce Yonehiro of CDE and Stella Ngai of UC volunteered to craft specific language for inclusion.

Jeanne Wolf of CLWDA inquired whether MDEA would become the sole means for exchanging educational data and how MDEA relates to IDEA.

Bruce Yonehiro of CDE responded that non-education agencies would only need to sign MDEA if they wanted access to education data. They could use IDEA to exchange other types of information and use the participation agreement to establish terms with GovOps.

Jeanne Wolfe of CLWDA expressed concern that if MDEA can be used more broadly that it might undercut IDEA, particularly because it eliminates the dispute resolution process. Limiting MDEA so that it can only be used for the Cradle-to-Career Data System would prevent this problem.

Bruce Yonehiro of CDE noted that MDEA is primarily meant for the Cradle-to-Career Data System. However, it is flexible enough to use for other purposes. For example, if CDE and UC wanted to link data to examine an issue about college-going rates, they could use MDEA to do so. Or, agencies could choose to use different types of agreements. For example, CDE currently shares adult education records with CLWDA for the CAALskills data system. IDEA could not be used for this exchange because it is not FERPA compliant. In future years, CDE and CLWDA could elect to either use MDEA or they could extend their existing data sharing agreement for CAALskills. The benefit of MDEA is that the agencies could use GovOps to facilitate the data exchange.

Cyndi Bosco of DHCS asked whether MDEA would take the place for the IDEA and wondered whether CHHS would be expected to sign MDEA in addition to IDEA. She was concerned that CHHS might not want to sign MDEA, particularly if the participation agreement was sufficient to address requirements between CHHS and GovOps.

Bruce Yonehiro of CDE responded that MDEA would not replace IDEA, but it would create a mechanism for sharing education data. If CHHS wants to receive education data using the GovOps infrastructure, it would only need to sign a BUCP that incorporates MDEA's terms, and does not need to sign MDEA.

Jeanne Wolf of CLWDA pointed out that IDEA indicates that shall be the mechanism for any exchange of information. Introducing MDEA undermines this aspect of IDEA. Cyndi Bosco of DHCS concurred.

Bruce Yonehiro of CDE replied that the intent was not to undermine IDEA – the problem is that IDEA cannot be used for education data because FERPA states that state education agencies cannot be forced to disclose information.

Carolyn Kubish of CDSS suggested that it would be preferable to make IDEA FERPA-compliant rather than create a two-tiered system for legal agreements. Bruce Yonehiro of CDE indicated that he had provided edits to IDEA a year ago for this purpose.

Jeanne Wolfe of CLWDA replied that IDEA includes the dispute resolution clause because of concerns that entities might hamper data sharing. The proposed edits would undercut the intent of the agreement.

Kathy Booth of WestEd inquired whether MDEA should apply to data points included in the Cradle-to-Career Data System only, or to education data only, as a way to ensure that it could not be used to undercut IDEA.

Bruce Yonehiro of CDE agreed with this approach.

Ed Sullivan of CSU asked whether IDEA trumps MDEA, such that it would be possible to link education data without the BUCP that includes MDEA conditions. For example, if CSU wanted to link its data with EDD, would they need to sign IDEA in order to get employment records?

Bruce Yonehiro of CDE indicated that if an education agency requested another entity's information, it should agree to the terms stipulated by the agency providing the information.

Jeanne Wolfe of CLDWA and Stella Ngai of UC underscored their desire to develop a solution that would allow the Cradle-to-Career Data System to go forward. Jeanne Wolfe of CLWDA suggested that the subcommittee members take time to review the MDEA and IDEA to better understand the differences between the two and to provide guidance to their leadership about the value of MDEA to address FERPA requirements.

ACTION ITEM: Subcommittee members agreed to provide written comment to WestEd on MDEA by May 4, so that the agreement can be finalized at the May 11 meeting.

Participation Agreement

Marion McWilliams of WestEd noted that the current draft lacks many specifics. WestEd has produced an initial cleaned up draft and a homework team has been convened to edit the document. Those who are interested in being on the homework team who have not already volunteered should contact LeAnn Fong-Batkin. If there are high level policy issues that need to be resolved, these will be brought to the May 11 meeting.

Next Steps

Kathy Booth of WestEd noted that several additional meetings may be needed in order to get through the remaining action items for the subcommittee. These will include:

- May 11: Finalize MDEA and BUCP template
- May 25: Finalize the participation agreement
- June 9: Finalize third party data sharing agreements