



JACOB S. FELDMAN
FLORENCE T. FRAZER
JAMES H. PYUN*
LAURA A. FERRUGIARI

CHRISTIE R. JACOBSON
JOSEPH P. LILLY
JOSEPH W. CARBONARO**
EBONÉ L. WOODS◇
JONATHAN HEIDELBERGER
ANNE M. MCGINNIS

*ALSO ADMITTED IN NJ

**ALSO ADMITTED IN MA

◇ALSO ADMITTED IN CT

INFO@FFEDLAW.COM

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION
MEMORANDUM

To: Board Members
Superintendents of Schools; Business Officials;
Pupil Personnel Administrators

From: Frazer & Feldman, LLP

Re: Parent Bill of Rights

Date: August 8, 2014

A handwritten word 'UPDATE' in black ink, written in a bold, slanted, sans-serif font. The word is underlined with three horizontal lines. It is positioned on the right side of the page, overlapping the 'Re:' field of the memorandum header.

As you may be aware, as part of the Common Core Implementation Reform Act, Education Law Section 2-d was adopted to insure the protection of student data. On July 29, 2014, the New York State Education Department (“SED”) issued guidance regarding certain provisions of Education Law Section 2-d that school districts should be aware of.

Specifically, school districts are now required to develop a Parents’ Bill of Rights for Data Privacy and Security (“Bill of Rights”). The Bill of Rights must contain certain specified advisements, be published on the district’s website, and be included in every contract entered into between a school district and third party contractors where the third party contractor will receive student data, or teacher or principal data. The statute also specifies obligations that must be observed by third party contractors who enter into such contracts. Finally, the statute states that, following the issuance of regulations by the Commissioner of Education, school districts will be required to adopt a policy on data security and privacy. However, as of this moment, the regulations triggering that obligation have not been issued.

Please note that a sample Bill of Rights, and a list of the third party contractor obligations created under the statute have been attached to this memorandum for your use.

Bill of Rights Required Elements

According to the SED guidance, the purpose of the Bill of Rights is to “inform parents (which also include legal guardians or persons in parental relation to a student, but generally not the parents of a student who is eighteen or over) of the legal requirements regarding privacy, security and the use of student data.” Each district’s Bill of Rights must, at minimum, include the following advisements:

1. That a student’s personally identifiable information¹ cannot be sold or released by an educational agency for any commercial or marketing purposes;
2. That parents have the right to inspect and review the complete contents of their child’s education record;
3. That state and federal laws protect the confidentiality of personally identifiable information, and safeguards must be in place when data is stored or transferred;
4. How parents may access the NYSED Student Data Elements List; and
5. How parents can file complaints about possible breaches of student data.

In addition, the Bill of Rights must include an advisement regarding certain provisions that must be included in each contract entered into between an educational agency and a third party contractor where the third party contractor receives student data, or teacher or principal data.² These required provisions include:

1. The exclusive purposes for which the students data, or teacher or principal data, will be used;
2. How the third party contractor will ensure that any persons or entities that the third party contractor will share the data with, if any, will abide by data protection and security requirements;
3. What happens to the data once the contract expires;
4. How a parent, student, eligible student³, teacher or principal may challenge the accuracy of the data collected; and

¹The statute uses the same definition for personally identifiable information as the federal Family Educational Rights and Privacy Act (“FERPA”).

²Teacher or principal data is defined by the statute as personally identifiable information from the records of an educational agency relating to the Annual Professional Performance Reviews (“APPR”) of classroom teachers or principals that is confidential and not subject to review under Education Law Section 3012-c.

³An eligible student is defined by the statute as a student who is 18 years old or older.

5. Where the data will be stored, and the security measures taken to protect the data.

Notably, the statute includes a provision which states that SED's Chief Privacy Officer "shall develop additional elements" to be included in the Bill of Rights. Consequently, school districts should anticipate that it will be necessary to modify their Bill of Rights in the future as these additional elements are developed and announced.

Third Party Contractors

The statute also includes specific obligations for a third party contractor who enters into contracts with an educational agency, where the third-party contractor will receive student data, or teacher or principal data. These obligations include:

1. Limit access to education records to those individuals that are determined to have legitimate educational interests;
2. Refrain from using education records for any purpose other than those explicitly authorized by the contract;
3. Refrain from disclosing personally identifiable information to any other party without prior consent of the parent or eligible student, *or* unless required to disclose the information by statute or court order and the third party contractor provides notice to SED, the district board of education, or institution that provided the information no later than the time that the information is disclosed, unless specifically prohibited from doing so by statute or court order;
4. Maintain reasonable safeguards to protect the security, confidentiality, and integrity of the personally identifiable student information in its custody; and
5. use encryption technology to protect data while in motion or in its custody from unauthorized disclosure.

In the event of a breach of personally identifiable information, a third-party contractor must notify the educational agency "in the most expedient way possible and without unreasonable delay." Upon receipt of such notice, the educational agency is required to report the breach of security or unauthorized release to the SED's Chief Privacy Officer. In addition, the educational agency will be required to report the breach of security or unauthorized release to the affected parent, eligible student, teacher or principal.

We hope that this was helpful to you, and we will continue to keep you updated as further guidance and/or implementing regulations are released. Please feel free to contact our office with any questions or concerns you may have.

ATTACHMENT

PARENTS BILL OF RIGHTS FOR DATA PRIVACY AND SECURITY

Pursuant to Education Law Section 2-d, the _____ School District (“District”) hereby sets forth the following Parents’ Bill of Rights for Data Privacy and Security,

1. A student's personally identifiable information cannot be sold or released for any commercial purposes;
2. Parents have the right to inspect and review the complete contents of their child's education record;
3. State and federal laws protect the confidentiality of personally identifiable information (as defined under Education Law Section 2-d(d), and safeguards associated with industry standards and best practices, including but not limited to, encryption, firewalls, and password protection, must be in place when data is stored or transferred;
4. A complete list of all student data elements collected by the State is available for public review at <http://www.p12.nysed.gov/irs/sirs/documentation/NYSEDstudentData.xlsx> or by writing to the Office of Information and Reporting Services, New York State Education Department, Room 863 EBA, 89 Washington Avenue, Albany, New York 12234; and
5. Parents have the right to have complaints about possible breaches of student data addressed. Complaints should be directed to (insert phone number, email and mailing address of District official here) or Chief Privacy Officer, New York State Education Department, 89 Washington Avenue, Albany, New York, email to CPO@mail.nysed.gov.
6. Each contract the District enters into with a third party contractor where the third party contractor receives student data, or teacher or principal data, shall include the following supplemental information:
 - a. The exclusive purpose for which the student data, or teacher or principal data, will be used;
 - b. How the third party contractor will ensure that the subcontractors, persons or entities that the third party contractor will share the student data or teacher or principal data with, if any, will abide by the data protection and security requirements;

- c. When the agreement expires and what happens to the student data or teacher or principal data upon expiration of the agreement;
 - d. If and how a parent, student eligible student, teacher or principal may challenge the accuracy of the student data or teacher or principal data that is collected; and
 - e. Where the student data or teacher or principal data will be stored (described in a such a manner as to protect data security), and the security protections taken to ensure such data will be protected, including whether such data will be encrypted.
7. The Parents' Bill of Rights shall be subject to change pursuant to the direction from the New York State Education Department Chief Privacy Officer, and the Regulations of the Commissioner of Education.

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OBLIGATIONS OF THIRD PARTY CONTRACTORS

1. Officers and or employees of the third party contractor and its assignees who have access to student data or teacher or principal data must receive training on the federal and state law governing confidentiality of such data.
2. Limit internal access to education records to those individuals that are determined to have legitimate educational interests.
3. Not use the education records for any other purposes than those explicitly authorized in its contract.
4. Except for authorized parties of the third party contractor, to the extent they are carrying out the contract, not disclose any personally identifiable information to any other party (a) without the prior written consent of the parent or eligible student; or (b) unless required by statute or court order and the party provides a notice of the disclosure to the department, district board of education, or institution that provided the information no later than the time the information is disclosed, unless providing notice of the disclosure is expressly prohibited by the statute or court order.
5. Maintain reasonable administrative, technical and physical safeguards to protect the security, confidentiality and integrity of personally identifiable student information in its custody.
6. Uses encryption technology to protect data while in motion or in its custody from unauthorized disclosure using a technology or methodology specified by the Secretary of the United States Department of Health and Human Services in guidance issued under Section 13402(H)(2) of Public Law 111-5.