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C O N F I D E N T I A L M E M O R A N D U M

PRIVILEGED ATTORNEY-CLIENT MEMORANDUM

TO: Jill Hawley
Associate Commissioner, Achievement and Strategy Division

FROM: Antony B. Dyl
Senior Assistant Attorney General

RE: Sharing of Student Data under the Data Pipeline Project

You have requested an informal legal opinion regarding whether it is permissible under state and federal law for the Colorado Department of Education to share individual data on students who transfer to a new school district with the district enrolling the students. For the reasons set forth below, I conclude that such sharing of student data is permissible.

The opinions expressed in this memorandum are the author's alone and do not reflect the opinion of the Attorney General.

Background

This opinion involves a change to how the Colorado Department of Education ("CDE") collects and disperses information from and to school districts as CDE moves away from its current Automated Data Exchange system and implements a new system called the Data Pipeline. The Data Pipeline is a component of the first phase of the Relevant Information to Strengthen Education (RISE) initiative, which will be a secure network that provides immediate information to support students from preschool through career.

The Data Pipeline is intended to reduce many of the redundancies found in the current system. Once finalized, the Pipeline will take CDE from 19 separate data collections to 6 interchanges and 2 periodic collections. These interchanges will focus on a student profile, staff profile, organization profile, special education, and discipline. The same data can be used for many purposes, thus eliminating collecting the same data in different collections. The Pipeline will be very secure, and data-sharing rules will be based on applicable federal law and regulations that govern each data element or category.

In discussions with school districts over implementation of the Data Pipeline, CDE has discovered that school districts face difficulties getting student data from the previous district in a timely manner in the event a student transfers districts. Under the current system, it may take weeks or even months before any student data is provided by the previous district, thus imperiling the receiving district's ability to effectively assess a transferring student's instructional needs in a timely manner. However, the Data Pipeline presents CDE with the opportunity to eliminate this difficulty by automating the process of such data transfers. When a Student Profile Record is sent to CDE via the Data Pipeline, CDE can assemble the relevant data such as demographics, assessment scores, growth scores, IEP status, and discipline data, and send it to the receiving district.

The legal question, however, is whether such information sharing between CDE and the districts is permitted under relevant federal and state law. I believe that it is.

Analysis

Federal privacy law regarding student records is governed by the Family Educational Rights and Privacy Act ("FERPA"). Under the regulations implementing FERPA:

Any educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

34 CFR Part 99, § 99.31(a)(2). This FERPA regulation appears tailor-made for disclosure of information through the Data Pipeline. However, it should be noted that by its terms, disclosure to other school systems under § 99.31(a)(2) is subject to the requirements of an additional regulation, § 99.34. Relevant to our inquiry here, this section requires CDE to make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible

student, unless the participating school districts have already given those parents or students an annual notification under § 99.7 that:

Includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer...

34 CFR Part 99, § 99.34(a)(1)(ii). Thus, to make this exception to FERPA work for the Data Pipeline, each participating school district or LEA in the Pipeline would have to be required, as a condition of participation, to agree to include in their annual notification language in compliance with § 99.34(a)(1)(ii), if they do not do so already. Each school district or LEA is already required by FERPA to annually notify parents of students currently in attendance, as well as eligible students of their rights under FERPA, so this would merely require at the most an amendment to the current notification requirements that all districts perform anyway. 34 CFR Part 99, § 99.7(a)(1).

It does not appear that state law would pose a problem for such transfer of information either. Thus, the Colorado Open Records Act states that:

Nothing in this subsection (3) shall prohibit the custodian of the records of a school, including any institution of higher education, or a school district from transmitting data concerning standardized tests, scholastic achievement, disciplinary information involving a student, or medical, psychological, or sociological information of any student to the custodian of such records in any other school or school district to which such student moves, transfers, or makes application for transfer, and the written permission of such student or his or her parent or guardian shall not be required therefor.

Section 24-72-204(3)(c), C.R.S. Furthermore, § 22-2-111(3)(a), C.R.S., allows for disclosure of pupil test scores filed and maintained by CDE, stating that such "information may be divulged or made known in the normal and proper course of administration of programs related thereto without such written consent". I believe that the transfer of student data to a district in which the student intends to, or already has, enrolled would be a transfer if information in the normal and proper course of the administration of educational programming for that student.

Conclusion

For the foregoing reasons, I conclude that it is permissible under state and federal law for the Colorado Department of Education to share individual data on students who transfer to a new school district with the district enrolling the students. The only proviso is that each school district and LEA participating in the Data Pipeline confirm that its annual notification of FERPA rights under § 99.7 contain information that conforms with the requirements of § 99.34(a)(1)(ii).