



BCJ
Bureau of Children's Justice



Dear Colleague:

In 2014, the California Department of Education (“CDE”) and the California Department of Social Services (“CDSS”) issued a [letter](#)¹ explaining that, “[e]ducational stability of foster youth necessitates more efficient sharing of information by county offices of education, local school districts, and child welfare agencies.” The letter “strongly encourage[d] counties, tribes, and educational agencies to develop protocols to exchange education records with expediency for the benefit of our foster youth and other children.” Since then, the Legislature has emphasized that “[s]haring necessary information with the caregiver is a critical component of effective service delivery for children and youth in foster care,”² and called for “a renewed sense of commitment to engaging foster parents in order to provide quality care to children and youth in foster care.”³ And recently, the Federal Departments of Education and Health and Human Services issued joint [guidance](#)⁴ reiterating the importance of collaboration between local educational agencies (“LEAs”) and child welfare agencies (“CWAs”), and specifically, “the critical role” that data-sharing between LEAs and CWAs plays as “a driving force in improving the education outcomes for children in foster care.”⁵

Some county and local agencies have not yet developed comprehensive protocols that would enable the types of information-sharing and collaboration that are critical to meeting the educational needs of foster youth. Indeed, under the Local Control Funding Formula (“LCFF”), LEAs receive additional funding to serve foster youth students, are accountable for their educational outcomes, and are required to take affirmative steps to ensure foster youth “receive appropriate educational supports and services.”⁶ Just as county and local educational agencies must redouble their efforts to support foster youth, LCFF requires CDSS to share certain foster youth information with CDE in order that CDE may reliably identify students who are foster youth and provide information sufficient to ensure that these students receive the appropriate supports and services that they need. This information, known as the “LCFF Foster Match Information,” in turn, is furnished in a secure and restricted manner by the CDE to LEAs to cultivate interagency information-sharing and collaboration.

We understand that the absence of information-sharing protocols may be the result of uncertainty regarding federal and state privacy laws. Therefore, CDE and CDSS, in partnership with the

¹ California Department of Education., *Educational Records of Youth in Foster Care*, (February 11, 2014) <<http://www.cde.ca.gov/nr/el/le/yr/14ltr0211.asp>> (as of August 12, 2016).

² Welfare and Institutions Code section 827.11, subdivision (a)(5).

³ Welfare and Institutions Code section 827.11, subdivision (c).

⁴ U.S. Departments of Education & Health and Human Services, *Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care* at 23 (June 23, 2016)

<<http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf>> (hereafter, “Dep’ts of Educ. & HHS Joint Guidance”) (as of August 12, 2016).

⁵ Id.

⁶ See, e.g., Education Code section 49085; Education Code section 52066, subdivision (d)(10).

Bureau of Children’s Justice at the California Department of Justice (“DOJ”), now write to emphasize that federal and state law encourages—and in many instances state law *requires*—the sharing of data and records to ensure that foster youth receive appropriate supports and services to address their needs. In order to promote the productive exchange of information, we have summarized federal and state law concerning four issues:

- School officials’ access to the LCFE Foster Match Information;
- Information that LEAs may and must share with CWAs;
- Information that CWAs may and must share with LEAs; and
- Information that may and must be shared with caregivers, even if the caregiver is not the foster child’s educational rights holder.

We have also provided some examples of circumstances where foster youth records were appropriately shared. At the end of this letter, we have included links to additional resources which may further help LEAs and CWAs better understand their information-sharing obligations and the limitations associated with disclosure.

This letter is intended to clarify expectations for education and child welfare agencies to share information pertaining to foster youth in a way that is lawful and appropriate. This letter does not create or confer any rights for or on any person or entity, nor does it impose any requirements beyond those required under applicable law and regulations.⁷ We hope this letter underscores the critical importance of interagency information-sharing, and enables counties, tribes, and educational agencies to develop policies and protocols that promote healthy collaboration and information-sharing.

I. KEY TERMS AND GUIDANCE FROM FERPA AND THE EDUCATION CODE

There are many exceptions to the general rule under the Family Educational Rights and Privacy Act (“FERPA”) and the Education Code that an LEA cannot disclose “non-directory” personally identifiable information (“PII”) from a student’s education record unless a parent or eligible student (i.e., a student who has reached 18 years of age or attends an institution of higher learning) provides written consent. As a threshold issue, LEAs may share without parental consent “directory information,” which is information that “would not generally be considered harmful or an invasion of privacy if disclosed.”⁸ LEAs should follow FERPA (including its regulations and guidance), the Education Code, and the LEAs’ own policies and regulations to identify what information is considered “directory” for purposes of providing notice about the

⁷ Furthermore, this letter does not endeavor to discuss any additional obligations that may arise under the Individuals with Disabilities Education Act (IDEA), Title 20 United States Code section 1400 *et seq.* Of relevance to this letter, LEAs should recognize that under the IDEA, PII of students may be disclosed if one of the exceptions under FERPA allowing for disclosure without parental consent applies. 34 Code of Federal Regulations part 300.622(a). Nonetheless, LEAs should consider their obligations with respect to the IDEA prior to making any disclosure discussed herein. For additional guidance, please review the U. S. Department of Education’s Presentation, *IDEA and FERPA Confidentiality Provisions* as of June 2014 available at <https://www2.ed.gov/policy/gen/guid/ptac/pdf/idea-ferpa.pdf>.

⁸ 34 Code of Federal Regulations part 99.3.

type of information considered to be directory in nature.⁹ LEAs should also allow parents an opportunity to “opt out” of the sharing of “directory information.”¹⁰ The rest of this letter will assume that the information at issue is “non-directory” PII from “education” or “pupil” records that can be shared only with parental consent, a lawful court order, or if one of the exceptions to the consent requirement applies.

“Personally Identifiable Information” from “Education” or “Pupil” Records

FERPA and the Education Code protect PII from being improperly disclosed from “education” or “pupil” records.

PII may include, but is not limited to:

- “The student’s name;
- The name of the student’s parent or other family members;
- The address of the student or student’s family;
- A personal identifier, such as the student’s social security number, student number, or biometric record;
- Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify student with reasonable certainty; or
- Information requested by a person who the educational agency or institution reasonably believes knows the identity of student to whom the education record relates.”¹¹

⁹ See, e.g., Title 20 United States Code section 1232g(a)(5); 34 Code of Federal Regulations parts 99.3 and 99.37; U.S. Department of Education, *FERPA Frequently Asked Questions - FERPA for School Officials* at 5 <http://familypolicy.ed.gov/sites/fpco.ed.gov/files/FPCO_School%20Officials%20FAQ.pdf> (hereafter, “FERPA FAQs”) (as of August 12, 2016); Education Code section 49061, subdivision (c); Education Code section 49073, subdivision (b).

¹⁰ See, e.g., Title 20 United States Code section 1232g(a)(5); 34 Code of Federal Regulations part 99.37; FERPA FAQs at 5; Education Code section 49073, subdivision (b).

¹¹ 34 Code of Federal Regulations part 99.3.

“Education” or “Pupil Records”

Disclosure of such information when contained in “education” or “pupil records” generally requires prior consent. The definitions of “education records” under FERPA and “pupil records” under the Education Code are substantially the same:

	FERPA	Education Code
<i>Definitions of “Education” or “Pupil Record”:</i>	“Education records” are (a) “[d]irectly related to a student” and (b) “[m]aintained by an educational agency or institution or by a party acting for the agency or institution.” ¹²	“Pupil records” are (a) “item[s] of information directly related to an identifiable pupil” and (b) “maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means.” ¹³
<i>The Definitions Exclude:</i>	Among other things, “[t]hose records which are kept in the sole possession of the maker of the records and are not accessible or revealed to any other person except a temporary substitute for the maker of the records.” ¹⁴	Among other things, “informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute.” ¹⁵
<i>Examples of “Education” Records</i>	“[G]rades, transcripts, class lists, student course schedules, health records (at the K-12 level), student financial information (at the postsecondary level), and student discipline files.” ¹⁶	

Exceptions

Notwithstanding the general rule requiring parental consent, both FERPA and state law provide numerous exceptions, permitting—and, under state law, sometimes requiring—the disclosure of PII from “education” or “pupil records” to certain parties without the need for prior consent or a court order.

¹² Id.

¹³ Education Code section 49061, subdivision (b).

¹⁴ FERPA FAQs at 2; see also 34 Code of Federal Regulations part 99.3.

¹⁵ Education Code section 49061, subdivision (b).

¹⁶ FERPA FAQs at 11.

The following sections will assume that the information at issue is PII from “education” or “pupil records” for which the agency has not secured prior consent to disclose.

II. THE SCHOOL OFFICIALS WHO MAY AND MUST BE PERMITTED ACCESS TO THE LCFF FOSTER MATCH INFORMATION

Because information-sharing and collaboration are critical to ensuring foster youth receive the supports and services they need, the Legislature created a framework in Section 49085 of the Education Code that requires CDSS to share the following pertinent information on foster youth with CDE on at least a weekly basis: (a) “[d]isaggregated information on children and youth in foster care sufficient for the department to identify pupils in foster care;” and (b) “[d]isaggregated data on children and youth in foster care that is helpful to county offices of education and other local educational agencies responsible for ensuring that pupils in foster care receive appropriate educational supports and services.”¹⁷

Once CDE receives the information from CDSS, CDE is then required “[t]o the extent allowable under federal law, ... [to] regularly identify pupils in foster care and designate those pupils in the California Longitudinal Pupil Achievement Data System [CALPADS] ... to collect disaggregated pupil outcome data.”¹⁸ CDE is also required, to the extent allowable under federal law, on at least a weekly basis to inform (a) school districts and charter schools and (b) county offices of education about the identity of any pupils enrolled in foster care, and provide “data helpful to ensuring pupils in foster care receive appropriate educational supports and services.”¹⁹ This enables LEAs to both identify foster youth and ensure their unique needs and interests are being accounted for. CDE recognized in its “LCFF Frequently Asked Questions” that the data that CDSS maintains on foster youth is “useful for educational staff working with foster children and youth to understand where in the process a child or youth is and what services he or she is receiving from the child county social services or probation departments.”²⁰ In addition to the statewide foster match, “LEAs may conduct local matches with their county welfare departments, in which student enrollment data from their student information systems is matched with data in CWS/CMS.”²¹

LCFF Foster Match Information

To comply with the legislative mandate, CDE and CDSS determined that certain pieces of information were essential for CDSS to share with CDE, to be subsequently shared with appropriate personnel within an LEA, in order to ensure that pupils in foster care are accurately identified and receive “appropriate educational supports and services.”²²

The information determined by CDE and CDSS to meet this legislative mandate, referred to as the LCFF Foster Match Information, includes:

¹⁷ Education Code section 49085, subdivisions (a)(1) and (2).

¹⁸ Education Code section 49085, subdivision (b).

¹⁹ Education Code section 49085, subdivision (d).

²⁰ Cal. Dep’t of Educ., *LCFF Frequently Asked Questions – Foster Youth Under the LCFF*, <<http://www.cde.ca.gov/fg/aa/lc/lcfffaq.asp#FOSTER>> (hereafter, “LCFF FAQs”) (as of August 12, 2016).

²¹ LCFF FAQs.

²² See Education Code section 49085, subdivision (d)(3).

- “Foster ID;
- Case Start Date;
- Case End Date;
- Case ID;
- Episode Start Date (the start of an out-of-home placement);
- Episode End Date (the end of an out-of-home placement);
- Social Worker Name and Phone Number;
- Court Appointed Educational representative [aka “Educational Rights Holder”] and Phone Number
- An indication of whether the student is receiving family maintenance services;
- County of jurisdiction;
- Whether parental rights are limited (Y/N); [and]
- Responsible Agency (Child Welfare or Probation).”²³

This LCFF Foster Match Information is provided to “LEA staff with appropriate security roles.”²⁴ However, Education Code Section 49085 does not specify which school-level personnel should have access to the information.

The rest of this section describes the legal considerations that LEAs should consider in determining which “school officials” should have access to LCFF Foster Match Information.

Disclosure Without Prior Consent to “School Officials” with “Legitimate Educational Interests”

FERPA permits the disclosure of PII from education records, without prior consent, to “school officials . . . who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required.”²⁵ Therefore, two criteria must be met for a disclosure to be allowed under this exception - (a) it must be made to a “school official,” and (b) it must be for a “legitimate educational interest.”

First, under FERPA, a “*school official*” may include a “teacher, school principal, president, chancellor, board member, trustee, registrar, counselor, admissions officer, attorney, accountant, human resources professional, information systems specialist, and support or clerical personnel.”²⁶ In addition, a “school official” may under FERPA be “[a] contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or

²³ LCFF FAQs.

²⁴ Id.

²⁵ Title 20 United States Code section 1232g(b)(1)(A).

²⁶ FERPA FAQs at 8.

functions.”²⁷ Second, under FERPA guidance, a school official, “[g]enerally,” is considered to have a “*legitimate educational interest* if the official needs to review an education record in order to fulfill his or her professional responsibility.”²⁸

Under the Education Code, California law *requires* that such information “shall be permitted” without parental consent or a court order to “[s]chool officials . . . provided that the person has a legitimate educational interest to inspect a record.”²⁹ The terms “school official” and “legitimate educational interest” are not defined under the Education Code; as set forth below, school districts must notify parents each year as to the criteria to be used to determine who is a “school official” and what is a “legitimate educational interest.” But, the Education Code does indicate that disclosure is required to “[s]chool officials and employees of the school district, members of a school attendance review board appointed pursuant to Section 48321 who are authorized representatives of the school district, and any volunteer aide, 18 years of age or older, who has been investigated, selected, and trained by a school attendance review board....”³⁰ Unlike “school officials,” the Education Code *permits* (not requires) that “[s]chool districts may release” records to contractors and consultants.³¹ The Education Code expressly limits disclosure to those “contractor[s] or consultant[s] with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant.”³²

Unless otherwise permitted to do so under the FERPA consent exceptions and state law, authorized “school officials” who are permitted to receive PII from educational records shall “not disclose the information to any other party without the prior consent of the parent or eligible student.”³³ Moreover, “school officials” may only “use the information . . . for the purposes for which the disclosure was made.”³⁴

“School Officials” Who May Access LCFE Foster Match Information

Based on examples provided by county and local education professionals, and the text of FERPA, the Education Code, and relevant regulations and guidance, the following personnel are “school officials” who, at least in some circumstances depending on job responsibilities, would be appropriate personnel to have access to LCFE Foster Match Information:

²⁷ 34 Code of Regulations part 99.31(a)(1)(i)(B). To consider a contractor or other external party as a “school official,” the external party must (a) “[p]erform an institutional service or function for which the agency or institution would otherwise use employees;” (b) “[be] under the direct control of the agency or institution with respect to the use and maintenance of education records;” and (c) “[be] subject to the requirements [under FERPA regulations part] 99.33(a) governing the use and redisclosure of [PII] from education records.” Id.

²⁸ FERPA FAQs at 8 (emphasis added).

²⁹ Education Code section 49076, subdivision (a)(1)(A).

³⁰ Id.

³¹ Education Code section 49076, subdivision (a)(2)(G).

³² Id.

³³ 34 Code of Federal Regulations part 99.33(a)(1); Education Code section 49076, subdivision (a)(3).

³⁴ 34 Code of Federal Regulations part 99.33(a)(2).

- Foster Youth Education Liaisons and Coordinators, as well as any other District and County-level administrators and staff involved in coordinating or overseeing services for foster youth;³⁵
- School administrators such as principals and assistant-principals;
- Front office staff and records clerks responsible for enrollment, disenrollment, and records;
- School counselors;
- School social workers;
- Attendance coordinators;
- Special education directors, coordinators, and program specialists;
- School-based mental health staff; and
- Teachers.

“Legitimate Educational Interests” for Using LCFF Foster Match Information

It would be appropriate for those school officials to access LCFF Foster Match Information if they have a “legitimate educational interest” in knowing that student’s information. A “legitimate educational interest” would be satisfied when a school official uses the LCFF Foster Match Information for the purpose of providing, coordinating, facilitating, or ensuring services or benefits for foster youth. The following criteria should be considered when determining whether “legitimate educational interests” exist for LEAs to share LCFF Foster Match Information:

- Compiling and analyzing a foster youth’s attendance history;
- Verifying the completeness of a foster youth’s academic record;
- Determining the graduation requirements for a foster youth;
- Ensuring a foster youth receives appropriate supports and services to address a disability;
- Connecting a foster youth to educational programs that he or she is eligible for;

³⁵ The Federal Departments of Education and Health and Human Services’ Guidance (at 21) says that pursuant to the recent reauthorization of the Elementary and Secondary Education Act (20 U.S.C. §6312(c)(5)(A)), LEAs are required to “designate a local POC [Point of Contact] for child welfare agencies if the corresponding child welfare agency notifies the LEA, in writing, that the agency has designated a POC.” Among the responsibilities of the LEA’s POC is “[f]acilitating data sharing with the child welfare agencies, consistent with FERPA and other privacy protocols.” *Id.* at 22. In California, the local POC for LEAs is the Foster Youth Education Liaison required by Section 48853.5, subdivision (c) of the Education Code.

- Communicating with a foster youth’s Educational Rights Holder regarding a foster youth’s progress at school; and
- Identifying conditions that are impacting a foster youth’s progress at school that may be the result of a foster care placement.

Examples from the Field

Each LEA must determine which “school officials” have “legitimate educational interests” in the LCFF Foster Match Information, and must ensure that the criteria for defining those terms (a) comport with the general definitions discussed above; and (b) are included in the annual notification discussed below. The following specific examples of “legitimate educational interests” for the use of the LCFF Foster Match Information have been provided by county and local service providers:

Examples Offered by County and Local Service Providers of “School Officials” with “Legitimate Educational Interests” in LCFF Foster Match Data
<ul style="list-style-type: none"> • Academic counselor wants to determine whether the graduation eligibility requirements of AB 216 apply; • School principal wants the contact information for the court-appointed educational representative or social worker because she is considering a disciplinary measure (e.g., expulsion); • Attendance coordinator wants to determine whether a student was absent due to a verified court appearance or related activity, so that the student suffers no negative effect to grades; • IEP coordinator wants to ensure full access and eligibility for programs offered to foster youth; • Foster Youth liaison wants to determine whether a foster youth is eligible for certain services and programs; • Reading intervention specialist wants to determine whether a student has an adult at home who can engage in read-alouds, partner reading, etc.; • Counselor wants to determine whether certain mental health symptoms are the result of placements, mobility, etc.; and • Records clerk wants to locate lost or missing academic records.

Annual Notifications

FERPA mandates that LEAs include in their annual notifications “specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.”³⁶ Similarly, under state law, LEAs are required to provide annual notification to parents that includes, among other things, (a) “[t]he types of pupil records and information contained therein which are directly related to students and maintained by the institution” (i.e.,

³⁶ 34 Code of Federal Regulations part 99.7(a)(3)(iii).

what records are considered “pupil records”); and (b) “[t]he criteria to be used by the district in defining ‘school officials and employees’ and in determining ‘legitimate educational interest’ as used in Section 49064 and paragraph (1) of subdivision (a) of Section 49076.”³⁷ Especially because the terms “school officials” and “legitimate educational interests” are not defined under state law, it is important for LEAs to articulate their own criteria for defining those terms in their annual notifications.

Data Security

There is no requirement under FERPA for LEAs to have a record of each disclosure made to a school official.³⁸ However, school officials permitted access to the LCFF Foster Match Information shall not disclose the information to any other persons or entities unless the disclosure is otherwise allowable under FERPA and its consent exceptions.³⁹ LEA staff should be reminded periodically about the penalties that may be imposed upon an LEA for unlawful disclosures of PII from education records. In addition, LEAs should implement safeguards and security measures to ensure that no one other than those who need the LCFF Foster Match Information for legitimate educational interests are able to access such information.⁴⁰

III. INFORMATION THAT LEAS MAY AND MUST SHARE WITH CWAS

Education Records

Recognizing that LEAs may need to share education records with CWAs to coordinate services for youth who are in foster care, federal law permits—and state law requires—LEAs to make disclosures to CWAs under enumerated circumstances. Federal guidance explains that sharing data with CWAs is a “critical component to ensuring school stability” for foster youth because, among other reasons, such sharing enables caseworkers to “monitor and support the educational success of the child, assist with transitions, and make sure the child is receiving appropriate services and interventions.”⁴¹ Under FERPA, LEAs are permitted to disclose PII from education records without prior consent to (a) “an agency caseworker or other representative of a State or local child welfare agency, or tribal organization⁴² ... who has the right to access a student’s case plan” when (b) the CWA or tribal organization is “legally responsible, in accordance with State or tribal law, for the care and protection of the student.” LEAs are not permitted to disclose PII from education records for children who state or local CWAs are not “legally responsible for,” which Federal Department of Education guidance defines as children who “are not in foster care placement.”⁴³ This includes children who receive other services through the CWAs like

³⁷ Education Code section 49063.

³⁸ 34 Code of Federal Regulations part 99.32(d)(2).

³⁹ 34 Code of Federal Regulations part 99.33; Education Code section 49076, subdivision (a)(3).

⁴⁰ See LCFF FAQs.

⁴¹ Dep’t of Educ. & HHS Joint Guidance at 4, 23.

⁴² Title 20 United States Code section 1232g(b)(1)(L). Tribal organizations are also treated the same as CWAs under the Welfare and Institutions Code that says “persons” described in Section 827, subdivision (a)(H) involving CWAs, “include persons serving in a similar capacity for an Indian tribe, reservation, or tribal court when the case file involves a child who is a member of, or who is eligible for membership in, that tribe.” Welfare and Institutions Code section 827, subdivision (f).

⁴³ U.S. Department of Education, *Guidance on the Amendments to the Family Educational Rights and Privacy Act by the Uninterrupted Scholars Act* at 6 (May 27, 2014)

“vocational and skill assessments, training, tutoring, educational services, family services, and community enrichment activities.”⁴⁴

While FERPA *permits* disclosure to CWAs, state law *requires* that LEAs comply with requests from CWAs when the “agency caseworker[s] or other representative of a state or local child welfare agency, or tribal organization, ... has legal responsibility ... for the care and protection of the pupil,” and the records are “relevant to the legitimate educational interests of the requestor.”⁴⁵ Both federal and state law further permit CWAs to disclose the records, or PII contained in those records, “to an individual or entity engaged in addressing the pupil’s educational needs, if the individual or entity is authorized by the agency or organization to receive the disclosure and the information requested is directly related to the assistance provided by that individual or entity.”⁴⁶ Such disclosures must, of course, comply with “State or tribal laws applicable to protecting the confidentiality of a student’s education records.”⁴⁷

Several provisions in California law would be much more difficult to implement if LEAs were not permitted to share information about students in foster care, without parental care or court order, with the CWA responsible for the child’s care.

- First, federal and state law require CWAs to create a “case plan” for foster children.⁴⁸ Under federal and state law, the case plan includes the “health and educational records of the child,” consisting of, in part, (a) “the names and addresses of the child’s health and educational providers” (b) “the child’s grade level performance;” (c) “the child’s school record;” and (d) “any other relevant health and education information concerning the child determined to be appropriate by the State agency.”⁴⁹ Under state law, the case plan must include a summary of educational information that consists of, in part, (a) “the number of school transfers the child has already experienced;” (b) “the child’s educational progress, as demonstrated by factors, including, but not limited to, academic proficiency scores;” and (c) “credits earned toward graduation.”⁵⁰ In addition, under federal and state law, the case plan must have a plan for “ensuring the educational stability of the child” which includes (a) an “assurance[] that each placement of the child in foster care takes into account the appropriateness of the current educational security and the proximity to the school in which the child is enrolled at the time of placement;” and (b) “an assurance that the State agency has coordinated with appropriate local educational agencies ... to ensure that the child remains in the school in which the child is enrolled at the time of each placement or, if remaining in such school is not in the best interests of the child, assurances...to provide immediate and appropriate enrollment in a

<<https://www2.ed.gov/policy/gen/guid/fpco/ferpa/uninterrupted-scholars-act-guidance.pdf>> (hereafter, “USA Guidance”) (as of August 12, 2016).

⁴⁴ Id.

⁴⁵ Education Code section 49076, subdivision (a)(1)(N)(i).

⁴⁶ Education Code section 49076, subdivision (a)(1)(N)(ii); see also Title 20 United States Code section 1232g(b)(1)(L).

⁴⁷ Title 20 United States Code section 1232g(b)(1)(L).

⁴⁸ Title 42 United States Code section 671(a)(16); Welfare and Institutions Code section 16501.1.

⁴⁹ Title 42 United States Code section 675(1)(C); Welfare and Institutions Code section 16010, subdivision (a).

⁵⁰ Welfare and Institutions Code section 16010, subdivision (a).

new school....”⁵¹ As part of this “assurance,” if a child has to be moved to a new school, federal and state law requires that the placement agency coordinate with the appropriate LEAs “to provide all of the child’s educational records to the new school.”⁵²

- Second, California law requires that county placing agencies and educators “shall work together to maintain stable school placements and to ensure that each pupil is placed in the least restrictive educational programs, and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all pupils. ... In all instances, educational and social placement decisions shall be based on the best interests of the child and shall consider, among other factors, educational stability and the opportunity to be educated in the least restrictive educational setting necessary to achieve academic progress.”⁵³ In order to make decisions about a child’s placement that are in the best interest of the child, CWAs need the school’s education records to account for the child’s interests of “educational stability” and being “educated in the least restrictive educational setting necessary to achieve academic progress.”
- Third, in California, “[f]oster family agencies with jurisdiction over currently enrolled or former pupils may access records of grades and transcripts, and any individualized education plans that may have been developed pursuant to [state law] maintained by school districts or private schools of those pupils.”⁵⁴
- Fourth, under LCFF, it is a state priority for county offices of education to “coordinate services for foster children, including ... [p]roviding education-related information to the county child welfare agency to assist the county child welfare agency in the delivery of services to foster children, including, but not limited to, educational status and progress information that is required to be included in court reports.”⁵⁵

To the extent permitted by FERPA and its consent exceptions, LEAs are required pursuant to the above-referenced state laws to provide to CWAs the child’s “school record,” when requested, which includes, but is not limited to, the following information:

- The names of child’s educational providers;
- The number of school transfers the child has experienced;
- The child’s academic progress, including, but not limited to, the child’s academic proficiency scores (with the exception of statewide summative assessments, as noted below);
- Credits earned toward graduation;
- Grades and transcripts; and
- Individualized educational plans, if applicable.

⁵¹ Title 42 United States Code section 675(1)(G); Welfare and Institutions Code section 16501.1, subdivision (g)(8).

⁵² Welfare and Institutions Code section 16501.1, subdivision (g)(8)(B); Welfare and Institutions Code section 706.6, subdivision (e)(2). See also Title 42 United States Code section 675(1)(G).

⁵³ Education Code section 48850, subdivision (a).

⁵⁴ Education Code section 49069.3.

⁵⁵ Education Code section 52066, subdivision (d)(10)(B).

Education Records Relevant to the “Legitimate Educational Interests of the Requestor”

Beyond those specific enumerated records set forth above, LEAs also are required to provide CWAs with records if requested, and if “relevant to the legitimate educational interests of the requestor.”⁵⁶ In determining what records are relevant to the “legitimate educational interests” of CWAs, LEAs should consider their obligations under federal and state law to provide to CWAs the (a) educational information to ensure “the educational stability of the child;”⁵⁷ (b) educational information to “ensure that each pupil is placed in the least restrictive educational programs, and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all pupils;”⁵⁸ and (c) “educational status and progress information that is required to be included in court reports.”⁵⁹

LEAs may consider the following examples of when “legitimate educational interests” were found to exist to justify the disclosure of PII from educational records to CWAs and their representatives:

Examples Offered by CWAs and their Representatives of Instances where CWAs have “Legitimate Educational Interests” in Accessing Educational Records
<ul style="list-style-type: none"> • A caseworker wants to access the student’s transcripts to review the credits earned toward graduation and assess the student’s ability to graduate on time; • A caseworker wants to access information on services, resources, accommodations, and modifications that have been attempted, in order to ensure that the student’s educational needs and rights are properly addressed; and • A caseworker wants to access the student’s behavioral record to determine the effects of placement instability.

However, LEAs cannot disclose test results from the California Assessment of Student Performance and Progress (“CAASPP”) to CWAs. Such “results or a record of accomplishment shall be private, and may not be released to any person, other than the pupil’s parent or guardian and a teacher, counselor, or administrator directly involved with the pupil, without the express written consent of either the parent or guardian of the pupil,” or the pupil if the pupil is of majority age.⁶⁰ Since CWAs are not an enumerated party who may receive such records, LEAs should not disclose students’ CAASPP results to CWAs unless they receive consent from a parent or guardian.⁶¹

⁵⁶ See Education Code section 49076, subdivision (a)(1)(N).

⁵⁷ See Title 42 United States Code section 675(1)(G); Welfare and Institutions Code section 16501.1, subdivision (g)(8).

⁵⁸ See Education Code section 48850, subdivision (a)(1). See also Welfare & Institutions Code section 361, subdivision (a)(5); Welfare and Institutions Code section 726, subdivision (c)(2).

⁵⁹ See Education Code section 52066, subdivision (d)(10)(B).

⁶⁰ Education Code section 60607, subdivision (c)(1); see also Education Code section 60641, subdivision (a)(3)(A).

⁶¹ Id.

Recordkeeping

Under both FERPA and state law, LEAs must keep a record of disclosures of PII without prior consent when such disclosure is made to a CWA or tribal organization.⁶² The record must include (a) “[t]he parties who have requested or received personally identifiable information from the education records;” and (b) “[t]he legitimate interests the parties had in requesting or obtaining that information.”⁶³ If the LEA discloses the information “with the understanding that further disclosures will be made,” then the LEA must include the names and legitimate interests associated with those anticipated subsequent disclosures.⁶⁴

Interagency Agreements

Although there is no federal requirement for LEAs and CWAs to have a written agreement prior to a disclosure of PII of youth in foster care, the Federal Department of Education recommends that LEAs and CWAs enter into a memorandum of understanding (“MOU”) to clarify each other’s obligations with respect to the sharing of records.⁶⁵ As part of such an agreement, the Federal Department of Education also recommends that LEAs and CWAs “work together to determine how long the CWA ... should maintain the education records disclosed under this exception.”⁶⁶ For example, a CWA and LEA could agree that the CWA uses its standard record-keeping and destruction guidelines, or returns the records to the disclosing school or LEA when the child is no longer within the custody of the CWA.⁶⁷

California law specifically permits school districts, county offices of education, and county placing agencies to “develop cooperative agreements to facilitate confidential access to an exchange of the pupil information by email, facsimile, electric format, or other secure means, if the agreement complies with [FERPA].”⁶⁸ In addition, California law permits a school district, a county office of education, or county superintendent of schools to “participate in an interagency data information system within and between governmental agencies or school districts as to information or records that are nonprivileged, and where release is authorized as to the requesting agency under state or federal law or regulation.”⁶⁹ State law contemplates in Education Code Section 49076, subdivision (a)(4) that LEAs participating in such data-sharing arrangements will, among other things, “develop procedures or devices to secure privileged or confidential data from unauthorized disclosure.”⁷⁰ If LEAs and CWAs enter into such a data system, they must satisfy all of the security criteria identified in the statute.⁷¹

It is a best practice for LEAs and CWAs to create these joint data systems that are permitted by law, and to follow the Federal Department of Education’s recommendation to enter into MOUs regarding the exchange of data within such a system. Such data exchanges provide benefits for

⁶² USA Guidance at 7 (citing 34 C.F.R. § 99.32); see also Education Code section 49064.

⁶³ 34 Code of Federal Regulations part 99.32(a)(3).

⁶⁴ USA Guidance at 7.

⁶⁵ Id at 9.

⁶⁶ Id. at 8.

⁶⁷ Id.

⁶⁸ Education Code section 49076, subdivision (a)(1)(K).

⁶⁹ Education Code section 49076, subdivision (a)(4).

⁷⁰ Id.

⁷¹ Id.

foster youth by (a) ensuring appropriate security protocols are in place for the sharing of data; (b) making clear the responsibilities that apply to each entity; and (c) creating an efficient mechanism to exchange data that will better ensure that foster children receive the supports and services they need.

IV. INFORMATION THAT CWAS MAY AND MUST SHARE WITH LEAS

CWAs also have records and information related to students' educational needs that can help LEAs implement the educational rights of and coordinate services for foster youth. The Federal Guidance that emphasizes the importance of LEAs sharing data with CWAs also stresses the importance of CWAs identifying to LEAs which children are in foster care so that "school professionals have a better understanding of the [foster youth's] unique needs and can better assist the child in reaching his or her full academic potential."⁷² In addition to the state-level LCFF Foster Care Match Information authorized by statute, CDE has issued guidance stating that "LEAs may conduct local matches with their county welfare departments, in which student enrollment data from their student information systems is matched with data in [the state-wide] CWS/CMS."⁷³ This guidance is consistent with California law that permits LEAs to setup data exchanges with other agencies, and specifically allows school districts, county offices of education, and county placing agencies to "develop cooperative agreements to facilitate confidential access to and exchange of...pupil information."⁷⁴

Other than data that is part of the local and state matches, state law provides requirements and considerations for the disclosure of other types of records within the possession of CWAs, that CWAs should consider when determining whether to make a disclosure to an LEA.

- **Placement in Licensed Children's Institution**– When CWAs place a child in a "licensed children's institution," CWAs are *required* "to notify the local educational agency at the time a pupil is placed in such an institution. As part of that notification, the placing agency shall provide any available information on immediate past educational placements to facilitate prompt transfer of records and appropriate educational placement."⁷⁵
- **Placement Changes Which Result in School Transfers** - CWAs are *required* to inform the "appropriate person" at an LEA "[a]s soon as the county placing agency or county office of education becomes aware of the need to transfer a pupil in foster care out of his or her current school."⁷⁶ The recent Federal Departments of Education and Health and Human Services' Guidance advises that "LEAs should coordinate with [CWAs] to establish formal mechanisms to ensure that [LEAs] are

⁷² Dep'ts of Educ. & HHS Joint Guidance at 23.

⁷³ LCFF FAQs.

⁷⁴ Education Code sections 49076, subdivisions (a)(1)(K) and (a)(4).

⁷⁵ Education Code section 48852. "[L]icensed children's institution" is not defined within Section 48852 of the Education Code. Informative, though, is the definition of "licensed children's institution" in Section 56155.5 of the Education Code to mean "a residential facility that is licensed by the state, or other public agency having delegated authority by contract with the state to license, to provide nonmedical care to children, including, but not limited to, individuals with exceptional needs."

⁷⁶ Education Code section 49069.5, subdivision (c).

promptly notified when a child enters foster care or changes foster care placements.”⁷⁷

- **Juvenile Court Records** – The “juvenile case file,” as defined by statute, includes “a petition filed in any juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer.”⁷⁸ “The superintendent or designee of the school district where the minor is enrolled or attending school” *may* “inspect” juvenile records, but are not permitted to “copy” juvenile records.⁷⁹

Since CWAs, under the Welfare and Institutions Code, may only disseminate such records “to any persons or agencies ... authorized to receive documents pursuant to [Welf. & Inst. Code § 827],” CWAs may permit certain LEA officials to *inspect* juvenile court records.⁸⁰ An LEA may obtain authorization to copy a juvenile court record through a court order by the presiding judge of the juvenile court.⁸¹ In addition, some counties have standing orders that specify processes and procedures for LEAs and other individuals entitled to inspect records to follow in order to obtain copies of juvenile court records.⁸² LEAs should consult the standing orders in their respective counties for these protocols or processes if they need to obtain juvenile court records.

CWAs and LEAs that are privy to information contained in juvenile court records must be cautious about maintaining the confidentiality of these records. As entities with access to juvenile court records (or in the case of LEAs, entities with access to inspect juvenile court records), CWAs and LEAs shall not disseminate such records “to any persons or agencies, other than those persons or agencies authorized to receive documents pursuant to [Welf. & Inst. Code § 827].”⁸³ Therefore, CWAs and LEAs must not disclose juvenile court records to any individuals not named as authorized parties in Section 827 of the Welfare and Institution Code, subparagraphs (A) to (O).

- **Receipt of Public Social Services** – While generally, CWAs are prohibited from disclosing “any list of persons receiving public social services,” CWAs are permitted to disclose information regarding a foster youth’s receipt of public social services to county superintendents of schools or superintendents of school districts “only as necessary for the administration of federally assisted programs providing assistance

⁷⁷ Dep’ts of Educ. & HHS Joint Guidance at 24.

⁷⁸ Welfare and Institutions Code section 827, subdivision (e).

⁷⁹ Welfare and Institutions Code section 827, subdivisions (a)(1)(G) and (a)(5).

⁸⁰ See Welfare and Institutions Code section 827, subdivision (a)(4).

⁸¹ See, e.g., Welfare and Institutions Code section 827, subdivisions (a)(3) and (4).

⁸² See, e.g., Super. Ct. Sacramento County, Standing Order of the Juvenile Court, Eight Amended Order: Disclosure of Juvenile Case Files (Welf. & Inst. Code § 827; Calif. Rules of Court, rule 5.552) available at <<https://www.saccourt.ca.gov/juvenile/delinquency/orders/docs/ssc-jv-99-021.pdf>> (as of August 12, 2016).

⁸³ Welfare and Institutions Code section 827, subdivision (a)(4).

in cash or in-kind or services directly to individuals on the basis of need.”⁸⁴ For instance, CWAs are permitted to disclose information to LEAs that would enable schools to verify foster children’s categorical eligibility for the free lunch program.

- **Health, Mental Health, and Medical- Related Information** – Although health, mental health, and medical records are confidential, a health care provider may disclose such information to “a county social worker ... or any other person who is legally authorized to have custody or care of a minor for the purpose of coordinating health care services and medical treatment provided to the minor,” including for a “mental health condition.”⁸⁵ For purposes of this letter, it should be assumed that the health care provider complied with all requirements under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and state law prior to disclosing the health-related information to the CWA. The only focus here is whether a CWA may disclose to an LEA such information that was provided to it by a health care provider.

This health, mental health, and medical-related information obtained by a “county social worker” may be re-disclosed for the narrowly tailored purpose of “coordinating health care services and medical treatment of the minor [including “mental health services and treatment”] and the disclosure is authorized by law.”⁸⁶ It may, therefore, be appropriate for CWAs to disclose information from a health care provider to personnel within an LEA when the disclosure is for the purpose of “coordinating health care services and medical treatment,” or “mental health services and treatment”⁸⁷ Such disclosures must be limited to those individuals within the LEA who are in a position of coordinating health, mental health, and developmental disability services for their students, such as a school nurse, school psychologist, or a special education coordinator.

These limited disclosures to LEAs for the purpose of “coordinating” services and treatment are particularly important when it relates to an LEA’s responsibility to conduct special education assessments and provide necessary disability development services.⁸⁸ In those circumstances, the student’s educational attainment may be closely intertwined with health issues impacting the student’s hearing, vision, brain, or other needs that require care coordination to be properly addressed.⁸⁹

⁸⁴ Welfare and Institutions Code section 10850, subdivisions (b) and (d).

⁸⁵ Civil Code section 56.103, subdivisions (a) and (e)(1).

⁸⁶ Civil Code section 56.103, subdivisions (d) and (e)(1); Civil Code section 56.13.

⁸⁷ If an LEA is seeking to obtain medical information other than for the limited purpose of “coordinating health care services and medical treatment” or “mental health services or treatment,” the LEA has to obtain an authorization from the minor or the minor’s representative that complies with the requirements of California Civil Code Section 56.11.

⁸⁸ See, e.g., Education Code section 56320.

⁸⁹ See, e.g., Education Code sections 56333 and 56337; Government Code section 7575.

V. EDUCATIONAL INFORMATION THAT LEAS AND CWAS MAY AND MUST SHARE WITH CAREGIVERS WHO ARE NOT EDUCATIONAL RIGHTS HOLDERS

Disclosures to ERH Caregivers

Parents retain their right to make educational decisions for their child even when the child is placed into foster care. Courts can limit those rights, however, and instead appoint an educational rights holder (“ERH”) to make educational decisions for the child. The ERH can be the child’s caregiver or another person appointed by the court. An ERH is entitled “[t]o access records and to authorize the disclosure of information to the same extent as a parent or guardian under [FERPA].”⁹⁰ In other words, ERHs are entitled to the same records, as defined by FERPA and the Education Code, as a parent is entitled to under FERPA.⁹¹ ERHs need these records to carry out their responsibilities to make educational decisions that are in the child’s best interests, including, but not limited to, those affecting school and class enrollment, special education, and discipline.⁹²

Disclosures to Non-ERH Caregivers

Foster youth frequently live with caregivers who have not been designated as the youth’s ERH, either because the parents still retain the educational rights or because the court ordered that another person be named as the ERH. These non-ERH caregivers are entitled to certain educational information regarding the youth under their care. In 2015, the Legislature reinforced the importance of sharing information with caregivers by requiring that “information *shall* be provided to a caregiver regarding the child’s or youth’s educational, medical, dental, and mental health history and current needs” when “consistent with state and federal law.”⁹³ In doing so, the Legislature emphasized that “[s]haring necessary information with the caregiver is a critical component of effective service delivery for children and youth in foster care.”⁹⁴ The Legislature also stressed that its declaration that information be shared with caregivers is a “restatement of existing law” intended to “engender a renewed sense of commitment to engaging foster parents in order to provide quality care to children and youth in foster care.”⁹⁵

CWAs *must* disclose to caregivers current educational-related information contained in the health and education summary, which often takes the form of a Health and Education Passport (“HEP”). Under federal and state law, CWAs are responsible for compiling and providing a child’s health and education summary to caregivers.⁹⁶ State law requires the CWA to provide the summary or HEP to a caregiver “[a]s soon as possible, but not later than 30 days after initial placement of a child into foster care.”⁹⁷ The education-related information provided in the

⁹⁰ California Rules of Court, rule 5.650(f)(1)(A).

⁹¹ See 34 Code of Federal Regulations part 99.10.

⁹² See, e.g., Education Code section 48853, subdivision (a)(3); Education Code section 48853.5, subdivisions (f)(6) and (8); Education Code section 51225.1; Education Code section 51225.2, subdivision (d); California Rules of Court, rule 5.651.

⁹³ Welfare and Institutions Code section 827.11, subdivision (b) (emphasis added).

⁹⁴ Welfare and Institutions Code section 827.11, subdivision (a).

⁹⁵ Welfare and Institutions Code section 827.11, subdivision (c).

⁹⁶ Title 42 United States Code section 675(5)(D); Welfare and Institutions Code section 16010, subdivision (a).

⁹⁷ Welfare and Institutions Code section 16010, subdivision (c).

summary or HEP is the same information contained in the “case plan” discussed *supra*, and must include, but is not limited to:

- “[T]he names and addresses of the child’s ... education providers;”
- “[T]he child’s grade level performance;”
- “[A]ssurances that the child’s placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement;”
- “[T]he number of school transfers the child has already experienced;”
- “[T]he child’s educational progress, as demonstrated by factors, including, but not limited to, academic proficiency scores;” and
- “[C]redits earned toward graduation.”⁹⁸

In addition, it is necessary that the caregiver receive relevant and up-to-date information concerning the child in their care so (a) the caregiver is able to ensure that the foster child is receiving the services necessary for a successful educational outcome, and (b) because the caregiver is statutorily “responsible for *obtaining and maintaining* accurate and thorough information *from* physicians and *educators* for the child’s summary ... during the time that the child is in the care of the caregiver.”⁹⁹

Furthermore, although non-ERH caregivers are not included in the definition of “parent” in the Education Code, as they are in FERPA, and are not among the enumerated parties in the Education Code to whom LEAs may disclose education records,¹⁰⁰ CWAs *may* disclose the educational records they receive from LEAs to non-ERH caregivers who satisfy the statutory requirements for re-disclosure. Under both FERPA and the Education Code, CWAs may re-disclose education records they receive from an LEA to an individual or entity (a) “engaged in addressing the pupil’s educational needs,” (b) who is “authorized by the agency or organization to receive the disclosure;” and (c) when “the information requested is directly related to the assistance provided by that individual or entity.”¹⁰¹ Accordingly, CWAs are permitted to disclose pupil records to non-ERH caregivers who are “authorized” by the CWA and “engaged in addressing the pupil’s educational needs,” and when the information is “directly related” to the care of the foster youth.¹⁰²

⁹⁸ Welfare and Institutions Code section 16010, subdivision (a).

⁹⁹ Welfare and Institutions Code section 16010, subdivision (e) (emphasis added).

¹⁰⁰ See Education Code section 49061, subdivision (a); Education Code section 49076, subdivision (a). In order to access records from an LEA, non-ERH caregivers need authorization from the child’s ERH or through a court order. Title 20 United States Code section 1232g(b)(2); Education Code section 49076, subdivision (a).

¹⁰¹ Education Code section 49076, subdivision (a)(1)(N)(ii); see also Title 20 United States Code section 1232g(b)(1)(L).

¹⁰² Outside of the foster care context, LEAs are also *required* to disclose pupil records “relevant to the legitimate educational interests of the requestor” to “qualified relatives” who complete a “Caregiver’s Authorization Affidavit ... and signs the affidavit for the purpose of enrolling a minor in school.” See Education Code section 49076, subdivision (a)(1)(M); Family Code section 6550 et seq. A “qualified relative” can include “a spouse, parent,

VI. CONCLUSION

The DOJ, CDE, and CDSS reaffirm that foster youth are best served when all partners—including county offices of education, school districts, CWAs, and caregivers—collaborate and work as a team. Such collaboration is made possible by the productive and secure exchange of information, which federal and state law permit and, in many cases, require. We hope that this letter will assist county and local agencies to develop their own guidelines and protocols, where necessary, and promote the productive exchange of information.

For additional general CDE guidance regarding the privacy of student educational records, please see the link below:

<http://www.cde.ca.gov/ds/dp/>

For additional general guidance regarding foster youth, please see the California Foster Youth Education Task Forces “Education Law Fact Sheets” at the link below:

http://www.cfyetf.org/publications_11_3259084835.pdf

In addition, you may submit any questions regarding the guidance contained in this letter to BCJ@doj.ca.gov.

Sincerely,



Kamala D. Harris
Attorney General of
California



Tom Torlakson
State Superintendent of
Public Instruction



Will Lightbourne
Director, California Department
of Social Services

stepparent, brother, sister, stepbrother, stepsister, half brother, half sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix ‘grand’ or ‘great,’ or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.” Family Code section 6550, subdivision (h)(2).