



## Transcript: Data Sharing Under FERPA

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### Slide 1:

Baron Rodriguez: Welcome to the U.S. Department of Education & PTAC webinar entitled “Data Sharing Under FERPA”. This webinar is geared toward State educational agencies and is designed to provide an overview of the FERPA regulatory changes and how agencies can remain in compliance with FERPA while sharing data to further the utility and usefulness of State Longitudinal Data Systems.

My name is Baron Rodriguez and I am the PTAC Director. With us today is Kathleen Styles, Chief Privacy Officer at the U.S. Department of Education. Among other areas, Kathleen oversees the Family Policy Compliance Office and the Statistical Privacy Advisor. From the Family Policy Compliance Office, Ellen Campbell, Acting Director will be presenting and Michael Hawes Statistical Privacy Advisor for the Chief Privacy Officer at ED will also be speaking today.

### Slide 2:

Baron: Today’s presentation will last approximately an hour. Yesterday, we ran this presentation by your peers from the State Support Team to generate feedback and any questions that came as a result of the training. If any of your questions remain after today’s presentation, we encourage you to send those in to [PrivacyTA@ed.gov](mailto:PrivacyTA@ed.gov). The questions you send in may be used as basis for future trainings or guidance documents. Participants should also note that within a couple of weeks, we will post the archived webinar on both the PTAC and the FPCO websites along with the PowerPoint.

### Slide 3:

Baron: So now you know who we are, we’d like to understand a little better who YOU are. We’ve got several “polls” interspersed throughout this webinar to let us interact a little more. So this is the first question: Which answer best describes your connection with the educational community:

- Are you in early childhood education?
- Do you work primarily with K-12 education?
- Do you work with postsecondary education?
- Or do you not work in the education field?

### Slide 4:

Baron: The second question is really about which best characterizes your prior experience with FERPA:

- Are you a pro?
- Do you work with FERPA, but find it confusing?
- Are you at the point where you know what FERPA is, but don’t work with it often?
- Or there’s those who are “FERPA? What’s FERPA?”



We'll get to those a little later in the presentation.

#### Slide 5:

Baron: Today's agenda includes the following key topics: Ellen will cover: Disclosure of personally identifiable information from education records under FERPA and some of the key FERPA regulatory changes, Michael will discuss Mandatory provisions, I will discuss best practices for data sharing, and Kathleen will provide some tangible examples through "case studies" written to provide guidance to agencies seeking to remain compliant under FERPA. We will conclude the session with an overview of currently available resources from PTAC and FPCO.

#### Slide 6:

Baron: Okay, so let's start with the obvious. Why is Education hosting this webinar? We recognize that FERPA can be complex and we really do want to help entities with compliance. Mostly we included this because we loved the question. PTAC and ED officials meet weekly and talk through questions and responses and we all enjoyed this comment. And with that to set the stage...

#### Slide 7:

Baron: "Under FERPA, What is Required for Disclosure of Personally Identifiable Information of Education Records?"

So the first thing you need to understand is that FERPA doesn't have any "data sharing" provisions. FERPA is a privacy and confidentiality statute, it's about access to student information. When we talk about "data sharing under FERPA" the term used under the statute in and the regulations is "disclosure of PII (personally identifiable information) from education records."

So I'm going to turn it over to Ellen Campbell now to talk now, to explain some basics of FERPA. Ellen is a long time FPCO employee and has been the acting director of FPCO for two years. She has extensive experience with FERPA.

#### Slide 8:

Ellen Campbell: Thank you, Baron.

When we talk about "Disclosure of PII from Education Records under FERPA," at the SEA level, we really mean re-disclosure of that information, even though we use both terms.

This is because the original disclosure happens at the school or school district level when it discloses personally identifiable information (or "PII") from their students' education records to the SEA under one of the exceptions to FERPA's general consent rule. Typically, the exception in that scenario is the disclosure to authorized representatives of state educational authorities in connection with an audit or evaluation of federal or state supported education programs, or for the enforcement of or compliance with federal legal requirements that relate to those programs.



Under this exception, the SEA must protect the information and not disclose it in personally identifiable form to anyone other than pertinent SEA officials and their authorized representatives, except that the SEA may re-disclose PII from education records on behalf of the schools that provided the information under certain conditions, and it must destroy the PII when no longer needed.

It's very important that you understand the definition of PII, which works together with the equally important definition of "education records" in determining what information must be protected from disclosure.

PII includes not only direct identifiers – obvious items such as name, address, SSN – but also indirect identifiers that would have the effect of identifying a student. The standard is: "Can a 'reasonable person in the school community' – someone without personal knowledge of the circumstances – identify the student?"

"Education records" are those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the education agency or institution.

At the elementary/secondary level, a parent has the right under FERPA to provide written consent before PII from education records is disclosed. When the student turns 18 years old, or enters college at any age, he or she is considered an "eligible student" and all the rights under FERPA transfer from the parent to the student.

There are several exceptions that permit schools to disclose PII without consent, such as to organizations conducting studies and disclosures in connection with health or safety emergencies.

An SEA may re-disclose PII it has received from schools "on behalf of" its constituent schools, if the disclosure falls under one of the permitted exceptions to disclosure.

#### Slide 9:

Ellen: In the most recent amendments to FERPA, we stated that an SEA may enter into agreements and re-disclose PII "for, or on behalf of" its constituent schools under the "studies" exception in FERPA. Studies under this permitted disclosure must be for the specific purpose listed here and there must be an agreement in place.

While FERPA does not confer legal authority on an SEA to enter into agreements and act as representatives of schools, nothing in FERPA prevents them from doing so. These disclosures can be made notwithstanding the objection of the schools, so long as the SEA has independent authority to have the study conducted, whether expressly stated or implied, and makes the disclosure on behalf of the schools.

There is no "bright line" between what is considered a study and what is considered an "evaluation" under the audit or evaluation exception.

#### Slide 10:

Ellen: The key to understanding the audit/evaluation exception is to understand two important new definitions that we'll talk about in a moment: "authorized representatives" and "education programs."



In the 2011 regulations, we referred to “FERPA-permitted entities” to mean those authorities and officials listed here. I have been referring to SEA’s because of our audience today, but these principles apply to each of these entities listed on the slide.

#### Slide 11:

Ellen: While the studies exception only permits disclosures for certain types of studies, such as “improving instruction,” the audit or evaluation exception does not restrict the type of evaluations that can be done, except that it has to be in connection with an audit or evaluation of a Federal or State supported education program – or to enforce or comply with Federal legal requirements that relate to those programs, such as a State’s responsibilities under the IDEA requirements.

As I mentioned, it’s important to understand the new definition of “education program” and its parameters, which Michael will talk about shortly.

#### Slide 12:

Baron: So with that we wanted to give you the first set of poll results:

Which best describes what area you work in? It looks like the majority of folks on the call are from the K-12 sector. We have approximately 40 some-odd folks from the postsecondary community. So it looks like the majority are K-12 and postsecondary, but we do have some early childhood folks on here.

The second one, on where you are with FERPA, looks like the majority of people are with the “I work with FERPA but find it confusing,” which would be consistent with the calls we receive at the Privacy Technical Assistance Center. And there’s a couple of funny people who said “FERPA, what’s FERPA?” but maybe you were being serious. I’ve had some people come to me and ask what that is.

With that said, we’re going to move on to the next item. Thank you for your participation.

#### Slide 13

Baron: Our next poll is around your experience with data sharing. As you know this webinar is really focused on the data sharing components around FERPA. So where would you say that you are?

- Do you have extensive experience with data sharing?
- Some experience with data sharing?
- Or have you never tried to engage in data sharing, maybe because of fear of the FERPA regulations, or it is a very difficult process dealing agency by agency.

And we will get back to these results in a bit.

#### Slide 14:

Baron: So that was some of the basics of FERPA, to frame our discussion today. We’re going to turn now to Michael Hawes who is going to tell us a little bit about the FERPA amendments and how they



can affect data sharing. Michael oversees the PTAC contract at ED. He's a statistician and works on data release issues as well as the overseeing the PTAC contract.

#### Slide 15:

Michael Hawes: The Department of Education published the final FERPA regulatory changes on December 2, 2011, and they went into effect on January 3rd of this year.

These regulatory changes addressed numerous issues, including strengthening enforcement and helping to ensure the safety of students. With regard to data sharing, the new regulations expand the requirements for written agreements and enforcement mechanisms to facilitate evaluations that can enhance program effectiveness, facilitate research into what works and doesn't, and increase the accountability of those receiving or accessing the data.

While this presentation is about data sharing under FERPA as a whole, not just on the recent regulatory changes, I do want to take a moment to touch on some of the new regulations that are especially relevant to data sharing.

#### Slide 16:

Michael: In order to increase the accountability of those using PII from education records under FERPA's audit/evaluation exception, the new regulations now require written agreements between the educational authority disclosing the PII and their authorized representative that is receiving the data.

The new regulations also introduce the requirement that the educational authority disclosing the PII must use "reasonable methods" to ensure to the greatest extent practicable that its authorized representative is compliant with FERPA.

The regulations also provide definitions for two key terms that you will hear throughout this presentation: "authorized representative" and "education program."

Before I go into some of the specific details of these changes and definitions, however, I want to point out that privacy and data access both exist on a continuum, and these regulatory changes take a definite middle ground between being excessively permissive, and being overly limiting.

#### Slide 17:

Michael: So getting at the specifics of the changes, we should start with defining the terms.

What is an "Authorized Representative"?

Put simply, an authorized representative is the individual or entity that the educational authority has designated as being authorized to conduct an audit or an evaluation of a federally or state supported education program.

#### Slide 18:



This then leads directly to the definition of the term “education program” which the regulations define as any program which is principally engaged in the provision of education. This is a broad term, and can include:

- Early childhood education
- Elementary and secondary education
- Postsecondary education
- Special education
- Job training
- Career or technical education
- Or adult education

It also includes any other program that is administered by an educational agency or institution.

It is important to note however, that under FERPA’s audit and evaluation exception, PII can only be disclosed to audit or evaluate education programs that are federally or state supported.

#### Slide 19:

Michael: With the new regulations, written agreements are now mandatory when sharing PII without consent under both the studies exception and the audit/evaluation exception.

These written agreements are often called by different names:

- Interagency agreement
- Contract
- Memorandum of understanding
- Data exchange agreement
- Etc.

...but regardless of what you call it, some form of written agreement is required to share data under these exceptions.

When drafting these agreements, we recommend that you consult the document *Guidance for Reasonable Methods and Written Agreements*, available on both the PTAC and FPCO websites, for details on what is required to be included in these agreements, as well as a variety of best practices for you to consider when drafting them.

#### Slide 20:

Baron: Many states want to know what the requirements are for the written agreements under FERPA. The following slides will discuss the MINIMUM requirements under the studies and the audit/evaluation exceptions. Remember that your state privacy or procurement law may require MORE stringent components around data sharing written agreements and you should always consult with your procurement staff and/or attorneys to ensure compliance with state and local laws.

#### Slide 21:



Michael: As I mentioned a moment ago, written agreements are now required for sharing data without consent under both the Studies exception and the Audit/Evaluation exception. While the basic requirements for written agreements under both options are similar, the wording of the specific requirements differs for the two exceptions, so we will look at what is required under each.

Regardless of which exception you are using, however, it is important to know that these written agreements are critical to ensuring that all parties engaged in a data sharing arrangement understand their responsibilities and obligations for ensuring that the information is protected and used appropriately.

So, what is required for a written agreements under the studies exception?

The written agreement must clearly describe the specifics of the arrangement, including:

- The purpose of the study (and remember, it must conform to one of the allowable purposes that Ellen mentioned in her discussion earlier)
- The study's scope and duration
- And a description of the data to be disclosed.

The agreement must also require the entity receiving the data to:

- Only use the data for the purpose (or purposes) explicitly specified in the agreement
- Restrict access to the PII to only those individuals with a legitimate reason for access
- And to destroy the data upon completion of the study (and specifying a time period for that destruction).

#### Slide 22:

Michael: Under the Audit and Evaluation exception, on the other hand, written agreements must:

- Designate the entity receiving the data as the educational agency's "authorized representative"
- Specify what PII will be disclosed, and for what specific purpose
  - Remember from the definitions I mentioned earlier, that the purpose of a data sharing agreement making use of the audit/evaluation exception must be to audit or evaluate a federal or state supported education program, or to enforce or comply with federal legal requirements that relate to those programs.
  - Because of this restriction, the written agreement must describe the activity in a way that makes it clear that it falls within the audit/evaluation exception.

#### Slide 23:

Michael: Written agreements under the audit/evaluation must also require the authorized representative to destroy the PII upon completion of the audit or evaluation, and must specify the time period for this destruction.

The agreement must also establish the policies and procedures that will be used to protect the PII from any further disclosure and from unauthorized use.



#### Slide 24:

Baron: Many agencies ask whether a particular approach is “compliant with FERPA.” The fact is, even if an approach is “FERPA compliant” it may not be sufficient to adequately protect your data. It is very important that people understand things can’t be LESS secure than FERPA requires, but they can be MORE protective than FERPA requires. These are the basic aspects that agencies should minimally consider as part of their written agreements. You can see those stated on this slide.

#### Slide 25:

Baron: Some best practices around written agreements include the following:

- Maintain right to audit: Make sure that you regularly review policies, standards, and use of personally identifiable information to ensure compliance with terms set forth in the written agreements.
- Legal requirements: As stated earlier, FERPA is the bar, your state and local laws and agency policy may require more stringent/specific requirements for protection of PII data.
- Plans for handling a data breach: Many states have laws requiring this. Regardless, this is a best practice as inadvertent data loss is common.
- Review/approve reported results: Ensure that the data being released is accurate and does not inadvertently release PII through inadequate data disclosure avoidance techniques.
- Inform the public: Be transparent. Redact any security/protection mechanisms, but let folks know that you do have agreements in place. And, most importantly that you have security procedures and policies in place to ensure the data is protected.

#### Slides 26:

Baron: What to do if your representation violates a written agreement? Look to the terms of the agreement in addition to U.S. Department of Education enforcement. Contract remedies can be more flexible, so consider that as part of your path to take.

Contact the Family Policy Compliance Office for any questions.

#### Slide 27:

Baron: So what are reasonable methods? This is the ten-thousand-dollar question. Many agencies commented on the “reasonable methods” FERPA section during the Spring of 2011 Notice of Proposed Rule Making. Some agencies wanted a clearly articulated path for how to appropriately protect data. Other agencies thought it could be cost prohibitive and/or technically unfeasible should the Department define in stone on agencies’ behalf “reasonable methods.” Others thought that if defined, reasonable methods would be obsolete due to constantly changing security and technical advances.

#### Slide 28:



Michael: We want to stress that nothing in FERPA compels you to share data. BUT IF you choose share data, you are required to use reasonable methods to ensure, to the greatest extent practicable, that the data is properly used and protected by the entity receiving it.

This includes making sure that they are only using the PII for the authorized purposes detailed in the agreement, that they are properly protecting the data from further disclosure and unauthorized use, and that they destroy the data when the approved use has concluded.

#### Slide 29:

Baron: Obviously, this is a complicated subject. The Department has been working hard to provide states with real world scenarios, they'll be called case studies in this case, to help navigate the changes to FERPA and the complex world of data sharing and longitudinal data systems. Kathleen will now walk us through some example case studies, starting with High School Feedback Reports.

#### Slide 30:

Kathleen Styles: Yes! We agree that FERPA can be confusing and I'd love to talk through some examples.

We have developed case studies at ED because we realize this can get a little confusing. We've tried to use real world cases in our examples. We'll be posting our first two case studies on the web – hopefully this week – and others in the middle of production. Today we'll be talking through 3 examples. We do anticipate producing additional case studies in the future.

Let me stress that these case studies use fictional agencies and they do not address individual circumstances. Again a caveat as we walk through these case studies is that that this is a FERPA webinar. It's not a webinar on laws that apply to data sharing. When you think about these case studies – and data sharing in general – you need to be sure to consider other Federal, state, and local laws.

So for the first case study, the high school feedback report, assume with me that we've got a SEA in our fictional State X. The SEA has participated in the State Fiscal Stabilization Fund (SFSF) program. By accepting funds under the SFSF program, the SEA agreed to collect and publish various data, including data on students' success in college (such as whether they were required to enroll in remedial courses).

Assume also that the SEA in this case has a functioning K-12 State Longitudinal Data System (SLDS). The SEA therefore has data on State X high school graduates. What the SEA needs to do is match those high school graduates to post-secondary performance data.

Assume also with me that in State X, all of the post-secondary information for students at public institutions of higher education is located in a Higher Ed Governing Board. We realize that not all states are set up this way. The situation for each of you in each state will be different. But for purposes of this example, the SEA has the benefit of having to go to only one source to get data on students at state colleges and universities.

This will be an ongoing program. The SEA wishes to obtain these data yearly, to house the data in its SLDS, and to conduct an ongoing program to evaluate and produce individual high school feedback reports.



### Slide 31:

Kathleen: We've included here a handy dandy diagram here to show how the data might flow. And I want to include a note here: I attended the SLDS conference in November and one of the most helpful things for me was when presenters included slides with diagrams that showed data flows. We meet weekly with PTAC and FPCO and go over questions that come in, and we frequently have questions about what data is going where. It is very helpful to us when you have questions for us if you would, even in a simple way, diagram for us where the data is going.

1. In this example, starting at the top, you see the SEA and the higher ed governing board entering into a written agreement.
2. The next circle to the right, the agreement will designate the higher ed governing board as the SEA's authorized rep. The agreement, of course, will do much more than that, it will specify the data being shared, how it will be used, how it will be destroyed, and other things.
3. The SEA will send the list of graduates to the IHE System maintained by the higher ed governing board.
4. The higher ed governing board then conducts a record match to see which of the graduates are in the higher ed governing board system.
5. The higher ed governing board then sends the SEA performance information about these students. It could be enrollment, credits earned, and remedial class performance, whatever is specified in the written agreement.

### Slide 32:

Kathleen: So next question is how to accomplish this. In this instance the SEA uses FERPA's audit/evaluation exception, which allows the SEA to disclose PII, the graduates' names, to authorized representatives without consent to evaluate a federal- or state-supported education program.

This exception applies because the SEA is evaluating public high school instruction, which is an "education program" under FERPA.

This is a two-way data flow. The SEA has to send identifying information on its graduates to the higher ed governing board, and the higher ed governing board has to send back information about those students.

The SEA enters into a written agreement with the higher ed governing board designating the governing board as its authorized representative. This allows the SEA to send the governing board PII on its high school graduates. The governing board matches the SEA's list with its data and identifies students who have enrolled in State X's institutions of higher education. The higher ed governing board then sends information about these students back to the SEA.

Prior to designating the higher ed governing board as its authorized rep, the SEA ensures to the greatest extent practicable, that the HEGB will comply with FERPA and use the SEA's information only for the purposes set forth in the written agreement.



The SEA consults the document we call *Guidance for Reasonable Methods and Written Agreements*, and selects applicable best practices to safeguard the data. I really do want to highlight this document for you, which we've indicated is available on the PTAC and FPCO websites, as I think it will answer a lot of your questions on how to engage in data sharing. To be clear, again, you don't need to pick every single method or activity specified in this document. You should select those that make sense for your situation.

The SEA then uses the matched data and prepare high school feedback reports. It sends a high school feedback report to each of its LEAs for all of the high schools in the state.

One question is why would the higher ed governing board agree to do this? Hopefully the governing board is interested in supporting the SEA because it recognizes the value of this evaluation for improving student preparation for college. But the higher ed governing board has a legitimate interest in making sure that the SEA handles the confidential data appropriately.

So the higher ed governing board requires that the SEA destroy the postsecondary data when it is no longer needed to evaluate the SEA's programs. Because the SEA will be including this data in the state longitudinal data system for use in preparing future feedback reports, the governing board does not require the immediate destruction of the data. Upon expiration of the agreed-upon data retention period, however, the governing board requires the SEA to certify that the data has been destroyed.

Remember I mentioned this is a two-way data exchange? Well, FERPA actually only requires a written agreement for half of that transaction. As an educational agency, the SEA is entitled to receive information about its students without a written agreement, the same way it's entitled to receive information about its students from LEAs in the state.

It would not make sense for the higher ed governing board and the SEA to enter into a written agreement to cover only half of the data transfers occurring between them. And the higher ed governing board is legitimately interested in making sure the SEA handles its data properly. So the governing board and the SEA use best practices and enter into an agreement with two-way obligations. This agreement:

- Designates the governing board as the SEA's authorized representative;
- Specifies the data that will be sent – in both directions;
- Specifies how the data will be used – by both parties;
- Requires the destruction of the data when longer needed for the purpose specified, and provides a time period for that destruction;
- Establishes policies to protect the data from further disclosure or unauthorized use.

### Slide 33:

Kathleen: Our next case study deals with a head start program, and it deals with data leaving the SEA.

Let's go over the assumptions. In this instance in State A, a local community action organization, operates a large Head Start program for the city that's called XYZ Head Start. (You know this is fictional, because when we first wrote the case study we called it "ABC Head Start" and we were told there is an "ABC Head Start" so we shouldn't use that as an example.)

The majority of XYZ Head Start's funding comes from the U.S. Department of Health and Human Services (HHS); the Head Start program does not receive funding from the U.S. Department of Education.



The Head Start program wants to evaluate how well it is preparing children for school by obtaining information about its former students' performance in grades K-3.

Specifically, the Head Start program would like to receive data about its students from the SLDS, and it asks the SEA to share K-3 data to conduct this evaluation.

Again, for this case study assume that State A has a functional state longitudinal data system that has these data.

#### Slide 34:

Kathleen: The first thing that's important to this analysis is that the Head Start program is an "education program" under FERPA. It is primarily engaged in the provision of education, and early childhood programs can be educational programs under FERPA.

FERPA's audit and evaluation exception allows the SEA to disclose PII to authorized representatives without consent to evaluate state- or federally-supported education programs. Remember from the prior slide that this program is funded by HHS. Note that it does not have to be funded by ED itself, it just has to receive federal or state funding.

The SEA enters into a written agreement with XYZ Head Start that designates XYZ Head Start as its authorized representative to evaluate the Head Start program. This agreement:

- Designates the Head Start Program;
- Specifies the PII to be disclosed;
- Specifies that it is being disclosed to allow the Head Start program to evaluate itself;
- Requires that the data be destroyed when it is no longer needed for the purpose specified, and it provides a time period for that destruction; and
- Establishes policies to protect the PII from further disclosure or unauthorized use.

And one more time, I'm going to plug the *Guidance* document. The SEA, being aware of its responsibility to use reasonable methods to make sure, to the greatest extent practicable, that XYZ Head Start uses the information appropriately, consults the *Guidance for Reasonable Methods and Written Agreements* and selects best practices to include in the agreement.

In this instance, the SEA requires quarterly updates from XYZ Head Start on its progress on its study plan, reviews the organization's final report and conclusions, and requires written confirmation from the Director of XYZ Head Start, after the evaluation is concluded, certifying that the data received from the SEA have been destroyed.

The SEA records the disclosure of education records to XYZ Head Start, and identifies the students whose records were disclosed and the reason for the disclosure.

XYZ Head Start, aware that it is receiving electronic information that is FERPA-protected, consults the PTAC website and uses some additional resources that are available there. In this instance, the Head Start program adopts some of the best practices identified in *Data Security: Top Threats to Data Protection*.

As a further best practice, the organization establishes mandatory data security training, as recommended in *Data Security and Management Training: Best Practice Considerations*.



Slide 35:

Kathleen: Our next case study is intended to illustrate enforcement under the new regulations. We received a lot of comments in response to the notice of proposed rule making about the 5-year ban and we wanted to include an example that showed how it might work in practice.

This case study deals with an SEA that has decided to share data with outside researchers. The SEA is able to share data with outside researchers under the audit and evaluation exception. The agreement allows the research organization to use the SEA's data to compare the effectiveness of several different state-supported college prep programs used in different LEAs. For the sake of illustration, let's assume that the research organization is comparing the effectiveness of Advanced Placement (AP) curriculum to the International Baccalaureate (IB) curriculum to determine which program better prepares students for college.

The SEA does what it's supposed to do, it takes steps to ensure that the research organization uses the data appropriately. It selects appropriate methods from *Guidance* document to include in the written agreement.

The research organization uses the data and produces a report that makes important conclusions about State X's AP and IB programs. The SEA, pursuant to its agreement with the research organization, reviews and approves the tables in the report prior to publication to verify that the cell sizes are sufficiently large so that the tables do not reveal information about individual students.

Everything is golden and everyone is happy.

But then, some months after the publication of the final report, the SEA discovers that the research organization did not destroy the data in question, but rather that it breached the terms of the written agreement and shared the confidential data with another researcher. The SEA discovers this because another researcher contacts the SEA to ask questions about the data. This scenario has happened.

There is no requirement in FERPA, in the law or in the regulations, that the SEA notify FPCO in an instance like this. But we do consider it a best practice to be transparent. In this case study, the SEA notifies FPCO.

Slide 36:

Kathleen: We're glad the SEA notified FPCO, but that's actually not the first thing the SEA should do. This SEA, being a good data steward, moved immediately to require the second researcher to destroy the data file that he improperly received from the research organization. The SEA follows up to make sure that the researcher destroys the data file. The SEA now knows it has a problem with the research organization it shared information with, so it uses its right to audit. This right to audit was granted under its written agreement with the research organization, and it audits the research organization's data handling practices. The point of the audit is to make sure that no other violations have taken place, and that the data has, in fact, now been destroyed.

This SEA also elects to pursue contract remedies against the research organization. And I'd like to talk about that a little. FERPA can be a blunt instrument. You as data stewards should not be relying 100% on FERPA to ensure compliance with the entities you share data with. Your contractual remedies may be much more tailored, more effective, and more timely than FERPA remedies. You are not limited in



your data sharing agreements to the terms of FERPA. You could include in your agreements liquidated damages provisions. That means if the other party misuses your data they can owe you money. You can include shorter terms for a data ban. You could, for example, have a 1- or 2-year ban for smaller infringements. You could require the other party to pay for notification and remediation in the event of a data breach. In this instance, the SEA has contractual remedies, and it elects to pursue them. But again, they notify FPCO of the FERPA violation, and describe the actions they've taken.

FPCO has been notified, so FPCO investigates the FERPA violation to determine whether the SEA took “reasonable methods” to ensure to the greatest extent practicable that the research organization was compliant. FPCO’s investigation will focus on the SEA’s actions: did the SEA take reasonable methods to protect the data? In this instance, FPCO notes some mitigating factors. FPCO notes that the SEA did not try to hide the violation, and in fact notifies FPCO. FPCO notes the steps taken immediately after discovery by the SEA to recover the data. FPCO’s investigation concludes that the SEA did take reasonable methods to ensure the proper protection of data by the research organization. FPCO further determines though, that the research organization breach the terms of the written agreement. Accordingly, FPCO imposes a 5-year ban on the research organization. This ban provides that the SEA is not permitted for five years to act on behalf of the affected LEAs to share education records with the offending research organization. This ban is appropriate because the SEA was acting on behalf of its LEAs when it supplied the data from the SLDS that was shared with the research organization.

#### Slide 37:

Kathleen: I wanted to conclude with talking about transparency a little bit. As many of you know, the Fordham Center on Law and Information Policy and released a study in 2009 on children’s education records and privacy. This study was highly critical of SLDs system and privacy. And one of the criticisms was that states were not transparent with what they were doing with student data. We agree that transparency is key. Yes, FERPA allows SEAs to share data without consent. This does not mean that data sharing should be hidden. To the contrary, we think parents ought to be able to find out what is happening with their children’s data. The Department encourages states to post data sharing agreements on their websites. We encourage you to generally post information about how data is being used. The exceptions to FERPA allow data sharing for audits, for evaluations, for studies, etc. So, if you’re sharing data for these purposes, you should publish results! If you’re doing good work that is sharing important information and results, you should not hide it. We encourage you to publish it!

#### Slide 38:

Baron: So, what additional resources are available?

We’ve talked about the legal requirements and best practices for data sharing, and we’ve talked through some examples. But this will probably not answer all your questions. Your most important take-away today may be references to additional resources.

#### Slide 39:

Baron: First of all, the Family Policy Compliance Office administers FERPA, the Protection of Pupil Rights Amendment Act (PPRA), and the military recruiter provisions in the Elementary and Secondary Education Act (ESEA). Remember that the FPCO is a resource for states to use, so if you have questions, please do send the questions to them.



Slide 40:

Baron: In addition, the Privacy Technical Assistance Center is really designed to be a one-stop resource for educational data systems stewards, for information about privacy, confidentiality, and security issues. Our audience is really focused on local educational agencies, postsecondary institutions, and those of you here on the phone from state educational agencies. Our resources include regional meetings. We have several regional meetings that will be conducting over this year. We have lessons learned forums – we'll be at the MIS conference talking about different topics, one of which will be statistical suppression techniques as well as the FERPA changes. We have webinars such as this, we'll be talking about more in upcoming slides. And we offer technical assistance site visits, as well as our help desk.

Slide 41:

Baron: We also have resources available on the web right now. We have technical briefs, issue briefs on a variety of security and privacy topics. We will be publishing more of those over the next 5-6 months. We will be posting the case studies that Kathleen talked about today. We have security checklists, which you can use as a guide to create some of these agreements. We have frequently asked questions, webinars, presentations, and training materials. All will be posted on the PTAC web site, so please check there. We usually have documents going up at least monthly; as the spring comes on we'll probably have them going up more frequently.

Slide 42:

Baron: I said earlier we're going to talk about upcoming webinars. You can see in February we're we will be having a webinar specifically focused on FERPA for colleges and universities to provide the FERPA basics. It's really geared toward the postsecondary community, but you're welcome to attend as well. We encourage you to notify folks in the postsecondary community that this is coming up. To get to this, you can go to our website, and you can register for it. Make sure you register early – for audio reasons we are limiting it to 500 attendees.

And in March – there's been quite a few requests come in to the Privacy Technical Assistance Center helpdesk specifically around special education data and FERPA, and the intersection between IDEA. We'll be talking more about that – the date still has not been set – but we'll be getting back to you – check frequently on our website to see when that gets posted.

Slide 43:

Baron: As we explained at the outset, we're really not in the position take questions on the fly in this forum. Aside from the issues of the number of participants, we found that for but data sharing questions tend to be quite complex and quite fact-dependent. What we did is a dry run of today's presentation before some of your peers state support team members and we solicited questions from them on your behalf. We have selected three to answer today.

The first question is: I'd like more guidance on the written agreement requirement. Do you have a template agreement I can use? Or will you review a draft agreement for us?



Kathleen: This is a really good question, and it's a comment we've gotten to PTAC and FPCO and two myself personally as well. We are preparing a template agreement, but I want to highlight that I anticipate it will be more in the format of a checklist than a true template. A couple of reasons for that, and some people have asked us to review individual agreements, and we're not in the position to do that. We're not in a position to do that because of staffing issues, and because our lawyers represent ED, not you all in the audience. Additionally, neither our lawyers or us are up on state laws that will affect individual agreements. But we do want to be helpful in this regard and we're going to prepare an individual template and until we get that template prepared, I want to flog even harder the document *Guidance for Reasonable Methods and Written Agreements*. There are suggested contract terms in this document that may be helpful. Again – you're not going to need every suggested provision in every agreement. You really need to look to what's going to fit the situation.

Baron: Second question: Does FPERA permit data to be shared across state lines? I want to get wage data for former students from another state.

Kathleen: This is another question we get frequently. FERPA does not make distinctions based on state lines. An SEA could designate an entity in a different state as an authorized representative for the purpose of conducting an audit or evaluation of a federal- or state-supported education program.

Baron: Third question: Your high school feedback reports show an SEA getting data about students attending public colleges. But what about students at private colleges and universities?

Kathleen: The questioner in this case is quite right! SEAs will want to obtain the most complete information possible about their graduates. In some states the majority of HS graduates will attend an in-state public college. In other states, this may be a fairly small percent of graduates. The process is the same, however. The SEA would enter into a written agreement with the private college. The fact that FERPA permits this data sharing, however, doesn't always mean that the private college will want to share data with you. Private institutions sometimes don't have the same incentives for data sharing as public institutions do. My experience has been that data sharing works best when the benefits flow to both sides of the equation. Regrettably, if private colleges don't want to share data with you, that's not a problem that our statute or regulations are going to be able to help you with.

#### Slide 44:

Baron: Thank you Kathleen. And now we're going to share our earlier poll results around experience with data sharing. As you can see, most folks have some experience with data sharing, and then we have a few that have never tried to engage in data sharing. But for the most part there's a fair amount of experience with data sharing.

#### Slide 45:

Baron: We're going to ask another poll, and this is going to help us with our future trainings as well. ED plans to produce additional case studies. Please review the following list and select the one that you anticipate will be most helpful to you.

- A case study illustrating what is and is not an education program.
- A case study illustrating schools receiving PII about former students.
- A case study illustrating the intersection of FERPA and IDEA.
- A case study illustrating how a SLDS can receive workforce data.

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- Nice try, but I have another case study in mind. If you could send your suggestion to [privacyTA@ed.gov](mailto:privacyTA@ed.gov), we'll take those into consideration as well.

Slide 46:

Baron: Finally, we want to know how helpful you've found today's webinar to be. Was it

- Very helpful
- Somewhat helpful
- Not at all helpful.

We're very much open to your feedback and we look forward to hearing how we've done on this webinar.

Slide 47:

Baron: Thank you for attending today's webinar. As stated earlier, please send your questions in for consideration for future trainings and issue briefs. If we don't get to it in a training, it may be something we address through a case study or issue brief. But we do look forward to continually hearing from you, and we thank you again, and thanks our panelists today for their presentations.