



Sharing Education Information for Children in Foster Care

JUDICIAL COUNCIL BRIEFING ON
INFORMATION SHARING

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Judicial Council Briefing

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I. INTRODUCTION

Individuals responsible for children in foster care, including placing agencies, caregivers, and the courts, often need access to information in the children's education records in order to support their educational needs and achievement. These education records contain essential information about academic performance, educational history, progress and special needs. They also may contain sensitive information and are protected by confidentiality laws. Although confidentiality laws limit disclosure of information from education records, the framework to allow disclosure of critical information in the child welfare context exists. Yet, because of confusion regarding confidentiality, some stakeholders, including child welfare and probation agencies and caregivers, may face problems obtaining important information about the educational needs of children in their care. Children in foster care risk having their education interrupted or delayed, and education decisions made for them based on incomplete information, because the right people did not have the right information at the right time.

A priority for the Judicial Council is to identify and remove legal barriers that prevent foster children from getting the education they deserve and child welfare services and the juvenile courts from obtaining the information they need to make informed education decisions for foster children. One such barrier is confusion regarding applicable law. In response, the Judicial Council has prepared this overview of confidentiality laws related to sharing education information. The overview is **not an exhaustive legal analysis** of all issues related to sharing education information concerning foster children. Rather, it is intended to provide a basis and catalyst for further discussion among agencies and their legal counsel to identify ways to ensure key stakeholders obtain the information they need, and youth receive the educational services they deserve. The information in this brief applies to both dependent and juvenile justice involved children who are placed in foster or group care settings.

II. FEDERAL AND STATE LAWS

A. LAWS THAT REQUIRE CHILD WELFARE AGENCIES TO MAINTAIN EDUCATION INFORMATION IN EACH CHILD'S CASE PLAN AND PROVIDE THAT INFORMATION TO SPECIFIED INDIVIDUALS AND ENTITIES

- Title IV-E of the Social Security Act (42 U.S.C. § 670 et seq.) requires states to develop case plans for children in foster care and that the case plans include, among other things, the names of the child's education providers, the child's grade level performance, the child's school records, and any other relevant education information concerning the child as determined by the child welfare agency. (42 U.S.C. §§ 671(a)(16), 675(1)(C).) The case plan also must include a plan for ensuring the educational stability of the child while in foster care. This includes a plan for the exchange of school records when immediate enrollment of the youth is needed. (42 U.S.C. § 675(1)(G).)

- State law requires each case plan to include a summary of the education information of the child. It must include the names of the education providers, grade level performance, school records, assurances 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, the number of school transfers the child has experienced, and the child's educational progress. (Welf. & Inst. Code, § 16010(a)(1); *see also* Welf. & Inst. Code, § 16501.16.)
- State law requires the child welfare agency to attach the education summary to each court report and include in the court report the name and contact information of the person or persons currently holding the right to make educational decisions for the child. This must be filed with the court at the initial hearing and all review hearings. (Welf. & Inst. Code, §§ 16010(b), 16501.1(g)(14).) For non-minor dependents, this summary is only included with written consent from the dependent. (Welf. & Inst. Code, § 16010(b).)
- Rule 5.651 of the California Rules of Court requires review of the child's education plan, including education information, at every judicial hearing that might affect the child's receipt of education services. For youth in the juvenile justice system for whom foster care is being considered, the case plan and social study must include this education information. Section 706.6 of the Welfare and Institutions Code requires attachment of education records to the social study. (Welf. & Inst. Code, §§ 706.5, 706.6.)
- State law requires the child welfare placing agency to provide a caretaker with a copy of the child's current health and education summary (Welf. & Inst. Code, § 16010(c)), as well as medication and treatment information about foster youth in their care. (See Welf. & Inst. Code, § 16010.5(a); *see also* Welf. & Inst. Code, § 16501.1(k).)

B. LAWS THAT PROTECT THE PRIVACY AND CONTROL RELEASE OF INFORMATION IN AN EDUCATION FILE

THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

- FERPA applies to “educational agencies and institutions” that receive federal funds under programs administered by the U.S. Department of Education. “Educational agencies and institutions” include institutions that provide direct instruction to students, such as schools, as well as educational agencies that direct or control schools, such as school districts and state education departments. (20 U.S.C. § 1232g(a)(3); 34 C.F.R. § 99.1(a).) Almost all public schools and districts receive some form of federal education funding and must comply with FERPA.
- FERPA generally prohibits the disclosure of personally identifiable information from a student’s “educational record” without written consent from either the “parent,” if the student is 17 or younger, or the student if the student is 18 or older or attending a post-secondary program. (20 U.S.C. § 1232g(b)(1), (d); 34 C.F.R. § 99.30.)

- FERPA defines parent for this purpose as “a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian.” (34 C.F.R. § 99.3.)
- A written consent must be signed and dated and specify the records to be disclosed, the purpose for the disclosure, and identify the party or class of parties to whom the disclosure may be made. This consent may be signed electronically. (34 C.F.R. § 99.30.) See **Section V** for a link to a model FERPA compliant release form.
- FERPA defines “education record” as records, files, documents, or information recorded in any other way that contain information directly related to a student and are maintained by an educational agency or institution, or a person acting for such agency or institution. (20 U.S.C. § 1232g (a)(4)(A); 34 C.F.R. § 99.3.) Some recorded information is not considered part of the education record, such as “sole possession” records and the records of a school “law enforcement unit.” These terms are further defined in FERPA. (20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R §§ 99.3, 99.8.)
- FERPA allows for disclosure without written consent in limited circumstances. For example, FERPA allows release of information:
 - pursuant to a court order.
 - to officials of another school where the student seeks to enroll, including post-enrollment;
 - to state and local juvenile justice systems or their authorities if allowed or required under state law;
 - to appropriate parties in a health or safety emergency where necessary to protect the health and safety of the student or other individuals;
 - in connection with a financial aid application; and
 - to school officials in the same educational agency who have a “legitimate educational interest” in the information, among other exceptions.

(20 U.S.C. § 1232g(b)(1), (2); 34 C.F.R. § 99.31.) Additional exceptions are described later in this document.

- FERPA also permits the release of “directory information” relating to a student without written consent. “Directory information” can include a student’s identifying information, such as name, address and telephone number, date and place of birth, information about fields of study and student activities and the name of the most recent school that the student attended. (20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.) Before releasing directory information, the education agency must provide public notice to parents of the information it defines as “directory information” and give parents a reasonable period of time to object to the release of the information concerning their child. (20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37.)

- In many cases, FERPA limits recipients of personally identifiable information from an education record from re-disclosing that information to third parties unless the re-disclosure complies with FERPA. (20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33.)

THE CALIFORNIA EDUCATION CODE

- State law generally prohibits school districts from allowing access to “pupil records” without written “parent” consent or a court order. A written consent must specify the records to be released and identify the party or class of parties to whom the records may be released. (Ed. Code, §§ 49075, 49076). When information is released pursuant to a parent consent, state law explicitly requires an education agency to notify the recipient that transmission to others without written consent of a parent is prohibited. (Ed. Code, § 49075(a).)
- “Parent” in state law is defined as “a natural parent, adopted parent, or legal guardian.” (Ed. Code, § 49061(a).) “Pupil record” means “any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether records by handwriting, print, tapes, film, microfilm, or other means.” (Ed. Code, § 49061(b).)
- State law allows for disclosure without need of consent in limited circumstances. For example, state law allows release:
 - pursuant to a court order;
 - to officials of another school where the student seeks to enroll;
 - to state and local juvenile justice systems or their authorities if allowed or required under state law;
 - to appropriate parties in a health or safety emergency where necessary to protect the health and safety of the student or other individuals; and
 - to school officials in the same educational agency who have a “legitimate educational interest” in the information among other exceptions.(Ed. Code, §§ 49076, 49077.) State law also permits the release of “directory information,” as defined in section 49061. (Ed. Code, § 49073.)
- As a general matter, a person or agency that is permitted access to a pupil record shall not permit anyone else to access that information, except where the disclosure would be allowed by FERPA and state law. (Ed. Code, § 49076(a)(3).)
- If an educational agency determines that it cannot comply with FERPA due to a conflict with state law, the agency must notify the US Department of Education within 45 days, citing the conflict. The California legislature has stated its intent to resolve potential conflicts in a way that ensures continuation of federal education funding. (20 U.S.C. § 1232g(f); 34 C.F.R. § 99.61; Ed. Code, § 49060.)

III. WHEN EDUCATIONAL AGENCIES MAY RELEASE INFORMATION FROM A PUPIL RECORD

A. MAY RELEASE INFORMATION TO PARENTS, GUARDIANS, AND EDUCATIONAL REPRESENTATIVES AS FOLLOWS

- **Parents**, as defined by federal and state law, typically have the right to obtain educational records concerning their minor children and to consent to the release of educational information. (20 U.S.C. § 1232g(a)(1); Ed. Code, § 49069.) Parents have a right to re-disclose these records to third parties once received. (34 C.F.R. § 99.33(c).) They also have the right to attend education meetings concerning their child and to request and approve of services. Parents and guardians maintain these rights when a child comes before the juvenile court unless there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. (34 C.F.R. § 99.4; see Ed. Code, § 49061.)
- When children are in foster care, the juvenile court may limit a parent or guardian's educational rights and appoint a responsible adult to serve as an **educational representative** (sometimes referred to by practitioners as an "education rights holder" or "ERH"). If the Juvenile Court limits the educational rights of a parent, the court at the same time must appoint a responsible adult to make educational decisions. Parents' educational rights transfer to the appointed educational representative. (Welf. & Inst. Code, § 361(a)(1).)
- Regardless of the person or persons currently holding the right to make educational decisions for the child, **certain caregivers** retain rights and obligations regarding accessing and maintaining health and education information pursuant to sections 49069.3 and 49076 of the Education Code and section 16010 of the Welfare and Institutions Code. (Welf. & Inst. Code, § 361(a)(3).)
- Regardless of the person currently holding educational rights, the child's caregiver is responsible for reviewing and receiving the child's education records for purposes of gathering information for the case plan and for section 49069.3 of the Education Code. (Welf. & Inst. Code, § 16010(e).) Section 49069.3 allows a **foster family agency with jurisdiction over a currently enrolled or former pupil, a short term residential treatment program staff responsible for the education or case management of a pupil, and a caregiver who has direct responsibility for the care of the pupil**, including a licensed foster parent, an approved relative or nonrelated extended family member or a resource family to access the current or most recent records of grades, transcripts, attendance, discipline, and online communication on platforms established by schools for pupils and parents, and any 504 or individualized education programs (IEP) maintained by schools for students under their care for purposes of monitoring the student's educational progress, updating and maintaining education records and ensuring the student has access to educational services, supports, and activities. (Ed. Code, § 49069.3.)

- If the child is a “child with a disability” as defined in special education law (20 U.S.C. § 1401(3)), the court may directly appoint a responsible adult, known as a **surrogate parent**, or refer the child to the local education agency for appointment of a surrogate parent. Parents’ educational rights transfer to the appointed surrogate parent. If the child before the court has not yet been identified as a child with a disability, but is suspected of needing special education services, the court may, with input of interested persons, make educational decisions for the child. (20 U.S.C. § 1401(23); 34 C.F.R. § 300.30; Ed. Code, § 56028; Welf. & Inst. Code, §§ 361, 726; Gov. Code, § 7579.5; Cal. Rules of Court, rule 5.650.)

B. MAY RELEASE INFORMATION TO CHILD WELFARE AND PROBATION AGENCIES THROUGH DIFFERENT MECHANISMS

FERPA and state law allow educational agencies and schools to disclose education records to child welfare agencies through several different mechanisms. Depending on the mechanism used, there may be limits on the purposes for which the agency may use the information, as well as limits on the agency’s ability to re-disclose the information to third parties.

- Educational agencies may release information to placing agencies pursuant to a **written consent** that complies with FERPA and state law. The consent must include a description of the information to be disclosed, the purpose for the disclosure and the party or class of parties to whom the information may be disclosed. The consent may grant the receiving agency permission to re-disclose information if it describes the information, the purpose for re-disclosure, and party or class of parties to whom re-disclosure is allowed. (34 C.F.R. § 99.30; Ed. Code, § 49077).
- FERPA and state law allow educational agencies and institutions to share records with agencies and tribal organizations if a **court order** to share such records is issued in a court proceeding involving child abuse and neglect, and a parent is a party to that proceeding. (20 U.S.C. § 1232g(b)(2)(B).) Under California law, schools must make a reasonable effort to inform parents and the pupil that education information will be disclosed pursuant to a court order. (Ed. Code, § 49077.) State law requires the party that receives records pursuant to a court order not to disclose or disseminate the information received for any other purpose except as authorized by the court order or subpoena. (Ed. Code, § 49077.)
- FERPA and California law allow educational agencies and institutions to share educational records with “**an agency caseworker or other representative of a State or local child welfare agency or tribal organization**,” when the child welfare agencies or tribal organizations have a right to access a student’s case plan and are legally responsible, in accordance with state or Tribal law, for the care and protection of the student. Such agencies and organizations can re-disclose these records to any individual or entity engaged in addressing the student’s education needs if the individual or entity is authorized by the agency or organization to receive such disclosure, the information requested is directly related to the assistance provided by that individual or entity, and it is consistent with state confidentiality laws. (20 U.S.C. § 1232g(b)(1)(L); Ed. Code, § 49076(a)(1)(N).) This exception is known as

the Uninterrupted Scholars Act (USA) exception. The California Department of Education has urged districts to establish practices, protocols, and policies to support sharing foster youth educational information with social workers and probation officers. (Cal. Dept. of Education, *Educational Records of Youth in Foster Care* (Feb. 11, 2014).)

- State law also allows school districts to share pupil records with a “**county placing agency**” when the agency is acting as an “authorized representative of a state or local educational agency.” (Ed. Code, § 49076(a)(1)(K).) Authorized representative is specifically defined in FERPA and state law, and the records may only be used related to a specific purpose and not further re-disclosed. (20 U.S.C. § 1232g(3); 34 C.F.R. § 99.35.)

C. MAY RELEASE INFORMATION FOR RESEARCH AND AUDIT PURPOSES

- FERPA and California law allow personally identifiable information in an education record to be released to “[o]rganizations conducting studies for, or on behalf of, educational agencies or institutions for purposes of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if the studies are conducted in a manner that will not permit the personal identification of pupils or their parents by persons other than representatives of the organizations, the information will be destroyed when no longer needed for the purpose for which it is obtained, and the organization enters into a written agreement with the educational agency or institution.” (20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6); Ed. Code, § 49076(a)(2)(E).)
- The written agreement between the research organization and the educational agency or institution must specify the purpose, scope, and duration of the study or studies and the information to be disclosed; require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; require the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and require the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed. (34 C.F.R. § 99.31(a)(6); Ed. Code, § 49076(a)(2)(E).)
- The research organization is restricted from re-disclosing personally identifiable information received unless the disclosure is allowed by FERPA and state confidentiality law. (Ed. Code, § 49076(a)(3).)
- FERPA and California law also allow personally identifiable information in an education record to be released to authorized representatives of state educational authorities if the information is necessary in connection with the audit and evaluation of federally supported education programs, or in connection with the enforcement of the federal legal requirements which relate to such program. There are restrictions on use and requirements

regarding destruction of such data. (20 U.S.C. § 1232g(b)(3); 34 C.F.R. §§ 99.31(a)(3), 99.35; Ed. Code, § 49076(a)(1)(C).)

D. MUST DELIVER INFORMATION AND RECORDS TO A NEW EDUCATIONAL PLACEMENT WITHIN SPECIFIED TIME TO ENSURE TIMELY SCHOOL TRANSFER

- “Upon receiving a transfer request from a county placing agency or notification of enrollment from the new local educational agency, the local educational agency receiving the transfer request or notification shall, within two business days, transfer the pupil out of school and deliver the educational information and records of the pupil to the next educational placement.” As part of this process, the local educational agency shall compile the complete educational record of the pupil, including a determination of seat time, credits, and other information. (Ed. Code, § 49069.5(d), (e).)
- FERPA and state law authorize school districts to share pupil records without need of a parent consent or court order to officials and employees of other schools where the pupil intends to or is directed to enroll. (20 U.S.C. § 1232g(b)(1)(B); Ed. Code, § 49076(a)(1)(B), (2)(F).)

E. STUDENT’S RIGHT TO THEIR OWN INFORMATION

- When a student is 18 or older or a student is attending a post-secondary institution, the student may access their records and sign consents to release information to others. (20 U.S.C. § 1232g(d); 34 C.F.R. § 99.5(a).)
- FERPA does not prevent agencies from giving students younger than 18 additional rights. (34 C.F.R. § 99.5(b).).
- State law allows a student 16 or older to access their own records. (Ed. Code, § 49076(a)(1)(F).)
- State law allows a student 14 or older to access their own records if the student is a homeless and unaccompanied youth as defined by the McKinney-Vento Homeless Assistance Act. (Ed. Code, § 49076(a)(1)(L).)

III. USING ELECTRONIC RECORDS SYSTEMS TO EXCHANGE INFORMATION IN SOME CIRCUMSTANCES

- Federal regulations require state child welfare agencies to maintain certain data electronically and have electronic data systems that support exchange of information in a way that complies with confidentiality laws. The system must support bidirectional data exchange with certain partners, which may include school districts. (45 C.F.R. §§ 1355.40, 1355.43, 1355.52, 1355.53.)

- State law authorizes school districts, county offices of education, and county placing agencies to develop cooperative agreements to facilitate confidential access to and exchange of the pupil information by email, facsimile, electronic format, or other secure means, within the requirements of 34 C.F.R. § 99.35, if the educational agency is sharing information with a county placing agency acting as an “authorized representative” of a state or local educational agency. (Ed. Code, § 49076(a)(1)(K).)
- A school district may participate in an interagency data information system that permits access to a computerized database system within and between governmental agencies or school districts as to information or records that are non-privileged and where release is authorized as to the requesting agency under state or federal law or regulations if the parties meet certain requirements. (Ed. Code, § 49076(a)(4).)
- State law required the state Department of Education to enter a memorandum of understanding with the state Department of Social Services on or before February 1, 2014, that allows Social Services, at least once a week, to share disaggregated information sufficient to allow Education to identify pupils in foster care, as well as other information that is helpful to LEAs responsible for ensuring pupils in foster care receive appropriate educational supports. (Ed. Code, § 49085.)

IV. CONCLUSION

Children in foster care have a right to education and to have their educational needs met. Meeting educational needs requires access to certain information. Further, Title IV-E requires case plans in all foster care cases. These case plans must include education records. California must comply with the federal state plan requirements in order to receive federal funding for child welfare services and the foster care program.

While stakeholders are right to treat education information with sensitivity and need a clear understanding of the confidentiality protections accorded education records as required by law, certain education information for foster children can be shared among courts, the schools, probation, caregivers, and the child welfare agency in order to satisfy their case plan obligations and meet the educational needs of the child.

V. ADDITIONAL RESOURCES

From the Judicial Council:

- Consent to Release Education Information (*Dependency*) (form JV-227),
www.courts.ca.gov/documents/jv227.pdf.

From the California Department of Social Services:

- California Foster Youth Education Resource Hub, www.cdss.ca.gov/inforesources/California-Foster-Youth-Education-Resource-Hub.

- All County Letter No. 16-75, *Foster Youth Data Shared With California Department of Education* (Sept. 27, 2016), www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2016/16-75.pdf.
- All County Information Notice No. I-77-16, *Foster Youth Data Shared Between Local Education Agencies (LEA) and Child Welfare Agencies (CWA)* (Nov. 8, 2016),
www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acin/2016/I-77_16.pdf.

From the California Department of Education:

- Letter to District Superintendents, *Educational Records of Youth in Foster Care* (Feb. 11, 2014), www.cde.ca.gov/nr/el/le/yr14ltr0211.asp.
- State Superintendent of Public Instruction, CDSS Director, and California Attorney General, Dear Colleague Letter: *Joint Guidance Foster Youth Information-Sharing* (2016),
<https://oag.ca.gov/sites/all/files/agweb/pdfs/bcj/fy-info.pdf>.

From the American Bar Association (ABA):

- ABA Legal Center for Foster Care & Education, *Data & Information Sharing* (undated), www.fostercareandeducation.org/AreasofFocus/DataInformationSharing.aspx.

From the U.S. Department of Education:

- Non-Regulatory Guidance: *Ensuring Educational Stability for Children in Foster Care* (June 23, 2016), www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf.
- *Guidance on Amendments to the Family Educational Rights and Privacy Act by the Uninterrupted Scholars Act* (May 2014), www2.ed.gov/policy/gen/guid/fpco/ferpa/uninterruptedscholars-act-guidance.pdf.
- Privacy Technical Assistance Center, *FERPA Exceptions—Summary* (Apr. 2014),
https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20Exceptions_HANDOUT_horizontal_0.pdf.