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## **New York State Education Department's student data privacy law, Education Law § 2-d, and the Parent's Bill of Rights for Data Privacy and Security**

### **Comments by Sheila Kaplan, Founder, Education New York**

As founder of Education New York and as a data privacy researcher and advocate, I have been closely involved with statewide and national efforts over more than a decade to protect student privacy. Since 2007, I have worked closely with members of the State Senate and Assembly on bills to strengthen protections beyond what is provided under FERPA. In that time, and with my advocacy, New York has taken significant steps, in particular with enactment of the New York State Education Law §2-d, the promulgation of the Parent's Bill of Rights for Data Privacy and Security, and the appointment of a Chief Privacy Officer at the State Education Department. But more needs to be done to keep New York's students safe and secure. As lawmakers run in place, databrokers and third-party vendors are sprinting ahead in the ways they collect and use students' personally identifiable information, which includes student directory information. The 2014 World Privacy Forum report "[The Scoring of America](#)," by Pam Dixon and Robert Gellman, documented a pattern of data, largely students' directory information, originating from educational institutions and moving into third-party hands. A forthcoming national, multi-year study from Pam Dixon of the World Privacy Forum will provide additional overwhelming evidence that protections under FERPA are inadequate to protect the directory information of K-12 students and at the college and university level.

Even with privacy controls in place at the state and federal levels, it is still far too easy for individuals to get a hold of student information and use it for illegal purposes, including identity theft, child abduction in custody battles, and domestic violence. Few parents are aware, for example, that anyone can request—and receive—a student directory from a school. Data and information breaches occur every day in Pre-K-20 schools across the country, so that protecting student privacy has become a matter of plugging holes in a dyke rather than advancing comprehensive policy and regulations that make student privacy protection the priority.

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New York has an opportunity to be ahead of the curve to strengthen protection of students going forward. This would be best accomplished through comprehensive legislation and State Education rules and regulations that address specific areas of concern raised by privacy experts and parents. A model bill, "[The Student Privacy Protect Act](#)," developed in collaboration with longtime privacy and information policy expert Robert Gellman, could serve best as a guide to drafting an exemplary bill. The proposed model bill recommends that a school may disclose directory information about a student as provided in 34 Code of Federal Regulations Section 99.37 only in the following cases:

- (1) after giving the parent of the student or the eligible student at the school notice and opportunity to opt-out of the disclosure in accordance with Section 4;
- (2) if the disclosure does not include any personally identifiable student information other than disclosable directory information; and
- (3) if the disclosure is to a school newspaper; local newspaper; school club or organization; school yearbook; honor roll or other recognition list; graduation program; sports related publication which provides specific information about particular students for the purposes of a specific sports activity or function; or parent and teacher organization.

Under this model bill, "personally identifiable student information" means personally identifiable information and directory information. "Disclosable directory information" means the student's name; photograph; age; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full time or part time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.

It is important to note that disclosable directory information does *not* include a student's place and/or date of birth and contact information. In addition, and further following the recommendations of this model student privacy bill, the State could close the opt-out loophole in Education Law §2-d that endangers children by amending Section A to specify that student personally identifiable information cannot be sold or released by the educational agency for any commercial or marketing purposes, even when parents have not submitted a FERPA or student directory information opt out.

There is an urgent need to strengthen student privacy protections. The recent study "[Transparency and the Marketplace for Student Data](#)," by the Center on Law and Information Policy at Fordham Law School, noted the large gap in the law and regulation of the commercial marketplace for student data and made the following recommendations, which also should guide the amendment of Education Law §2-d and the development of additional legislation to protect student information:

- Parents, students, and the general public should be able to reasonably know the identities of student data brokers, what lists and selects they are selling, and where the data for student lists and selects derives. The researchers suggest applying a model like the Fair Credit Reporting Act to the compilation, sale, and use of student data once outside of schools and FERPA protections.

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- Brokers of student data should be required to follow reasonable procedures to Assure maximum possible accuracy of student data. Parents and emancipated students should be able to gain access to their student data and correct inaccuracies.
- Parents and emancipated students should be able to opt out of uses of student data for commercial purposes unrelated to education or military recruitment.
- When surveys are administered to students through schools, data practices should be transparent, students and families should be informed as to any commercial purposes of surveys before they are administered, and there should be compliance with other obligations under the Protection of Pupil Rights Amendment (PPRA).

The divide between how we protect the privacy of “children” vs. “students” under the law is still too wide, leaving the privacy, safety, and security of children at risk. Few parents are aware of the state and federal laws that protect their children’s school directory information and their right to “opt out,” and what that choice means. Schools have been found to have varying degrees of conformance with the basic FERPA notice requirements to parents and guardians under FERPA. The opt-out system under which parents must file a form with the school to keep their children's personally identifiable information from being shared remains haphazardly implemented and communicated to families, and it remains an administrative burden for schools. Opt-out is a regular practice of marketers and advertisers who know that few consumers will take affirmative action to remove their name and information from a list. Students and their families deserve the highest level of protection possible under New York State law, a more proactive system of consent, and much more information about the options available to them under the law to protect their children’s personally identifiable information, and the consequences of the choices they make.

Thank you for the opportunity to submit comments. Please contact Sheila Kaplan, Education New York with any follow-up questions.



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