



TO: Matthew L. Blomstedt, Ph.D.
Commissioner of Education

FROM: Dean Folkers

SUBJECT: Approve the proposed Rule 6

Proposed Board Action:

Approve the proposed Rule 6 (92 NAC 6), Regulations and standards for uniform sharing of student data, records and information.

Background Information:

Legislative Bill 262 was signed into Law in 2013, later codified as Rev. State Statute 79-2,104. The law requires the Department of Education to promulgate a rule around data sharing between school districts, Educational service units, learning communities and the department of education. An internal group drafted a rule, then engaged an external advisory group with representatives from districts, learning community, ESU's, and the department for review and revisions. The final draft is the result of that work and adjustments made as a result of the Public Hearing on May 14, 2014 at the Nebraska Department of Education.

Estimated Cost:

500

Supporting Documentation Included:

Final Draft and Hearing Minutes

For Additional Information on this item:

Dean Folkers or Scott Summers



Matthew L. Blomstedt, Ph.D., Commissioner
Scott Swisher, Ed.D., Deputy Commissioner

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TO: State Board of Education

FROM: Scott Summers, Legal Counsel III – Commissioner’s Appointed Staff Person to Conduct a Rule Hearing on Title 92, Nebraska Administrative Code, Chapter 6, *Regulations and Standards for Uniform Sharing of Student Data, Records and Information*

A handwritten signature in black ink, appearing to be "S.S.", is written over the end of the "FROM:" line.

DATE: May 15, 2014

RE: Summary of rulemaking hearing on proposed 92 NAC 6

On April 2, 2014, the Commissioner approved a hearing draft and set a hearing date and location to conduct a hearing on the adoption of proposed Title 92, Nebraska Administrative Code, Chapter 6. By a memorandum dated April 10, 2014, the Commissioner appointed a representative from the General Counsel’s Office to conduct a hearing on this Rule on May 14, 2014, commencing at 10:00 a.m. After the proper legal notice was published, this hearing was held at the Nebraska State Office Building, Nebraska Department of Education, State Board Meeting Room, 301 Centennial Mall South, Sixth Floor, Lincoln, Nebraska. Pursuant to State Board of Education Policy B9, what follows is a written summary of the hearing testimony.

An audio recording of the hearing is available if any members of the Board wish to hear it.

**SUMMARY OF TESTIMONY ON THE PROPOSED REVISIONS TO 92 NAC 6
Regulations and Standards for Uniform Sharing of Student Data, Records and
Information**

Scott Summers, Legal Counsel III and the hearing official, called this hearing to order, read into the record the name of the newspaper in which a legal notice of the hearing was published and the date the notice appeared, outlined the procedures for the hearing and introduced **Dr. Dean Folkers, Senior Administrator - Data, Research and Evaluation, Nebraska Department of Education**.

Dr. Folkers testified that the proposed Rule 6 is the result of the passage of LB262 in 2013 and codified at §79-2,104 of the Revised Statutes of Nebraska (R.R.S.). This statute requires that the Department of Education promulgate a rule around data sharing between school districts, Educational Service Units, learning communities and the Department of Education. An internal group drafted a rule, then engaged an external advisory group with representatives from districts, learning community, ESU's, and the Department for review and revisions. The current draft is the result of that work and is offered for review and public hearing review.

Dr. Folkers testified that the proposed rule was presented at the 2014 Data Conference in Kearney, Nebraska and was met with appreciation for clarification of this sometimes disconcerting issue.

No other oral or written testimony was received.

TITLE 92 -NEBRASKA DEPARTMENT OF EDUCATION
CHAPTER 6 -REGULATIONS AND STANDARDS FOR UNIFORM SHARING OF STUDENT
DATA, RECORDS AND INFORMATION

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<u>SUBJECT</u>	<u>STATUTORY AUTHORITY</u>	<u>CODE SECTION</u>
<u>General Information</u>	<u>79-2,104</u> <u>79-318(5)(e), 79-318(5)(i)</u>	<u>001</u>
<u>Definitions</u>	<u>79-2,104, 79-318</u>	<u>002</u>
<u>Required Directory Information</u>	<u>79-2,104, 79-318</u>	<u>003</u>
<u>Sharing of Personally Identifiable Information</u>	<u>79-2,104, 79-318</u>	<u>004</u>
<u>Compliance</u>	<u>79-318(5), 79-318(6),</u> <u>79-703,</u>	<u>005</u>
<u>Dispute Resolution</u>	<u>79-2,104, 79-318(11)</u>	<u>006</u>

Appendix A – Written Agreement for Disclosure of Personally Identifiable Information from
Education Records for Purposes of an Audit, Evaluation or to Comply with Federal, Legal or
Program Requirements

Appendix B – Written Agreement for Disclosure of Personally Identifiable Information from
Education Records for Purposes of Conducting Studies for or on behalf of an Education Agency
or Institution

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<u>Compliance</u>	<u>79-318(5), 79-318(6), 79-703</u>	<u>005</u>
<u>Definitions</u>	<u>79-2,104, 79-318</u>	<u>002</u>
<u>Dispute Resolution</u>	<u>79-2,104, 79-318(11)</u>	<u>006</u>
<u>General Information</u>	<u>79-2,104 79-318(5)(e), 79-318(5)(i)</u>	<u>001</u>
<u>Required Directory Information</u>	<u>79-2,104, 79-318</u>	<u>003</u>
<u>Sharing of Personally Identifiable Information</u>	<u>79-2,104, 79-318</u>	<u>004</u>

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001 General Information

001.01 Statutory Authority. This Chapter is adopted pursuant to Section 79-2,104(4) of the Revised Statutes of Nebraska (R.R.S.), which states that: “The Legislature finds and declares that the sharing of student data, records, and information among school districts, educational service units, learning communities, and the State Department of Education, to the fullest extent practicable and permitted by law, is vital to advancing education in this state. Whenever applicable law permits the sharing of such student data, records, and information, each school district, educational service unit, and learning community shall comply unless otherwise prohibited by law. The State Board of Education shall adopt and promulgate rules and regulations providing for and requiring the uniform sharing of student data, records, and information among school districts, educational service units, learning communities, and the department.”

In addition, Section 79-318(5)(e) R.R.S. provides that, through the Commissioner, the State Board shall prescribe a uniform system of records and accounting for keeping adequate educational records, for gathering and reporting necessary educational data and for evaluating educational progress. Finally, Section 79-318(11) R.R.S. provides that the State Board shall interpret its own policies, standards, rules, and regulations and, upon, reasonable request, hear complaints and disputes arising therefrom.

001.02 Scope and Application of this Chapter. This Chapter contains provisions that address the disclosure of personally identifiable student information from or in education records maintained by or on behalf of a public school district, educational service unit (ESU), a learning community or the Nebraska Department of Education (the Department) to any one or more other school districts, educational service units, learning communities, or the Department.

001.03 Related Law and Regulations. Several provisions of both state and federal law and regulations relate to matters concerning the disclosure and confidentiality of student records and information.

The federal Family Educational Rights and Privacy Act, (FERPA), Title 20, *United States Code*, Sec. 1232g and implementing regulations at Title 34, *Code of Federal Regulations*, Part 99, address the rights of inspection and review and amendment of education records by parents and eligible students, as well as the disclosure of personally identifiable information from education records by educational agencies or institutions to which funds have been made available by the United States Secretary of Education as described at 34 CFR 99.1. The federal laws and regulations of the Individuals with Disabilities in Education Act (IDEA) incorporates FERPA and provides additional measures and requirements concerning the confidentiality and maintenance of education records of students under that law. (See 20 U.S.C. 1417(c), 20 U.S.C. 1439(a)(2) and 34 CFR 300.610 – 300.627).

The National School Lunch Act at Title 42, *United States Code*, Sec. 1758 limits the use or disclosure of any information obtained from an application for free or reduced priced meals or from a state or local education agency and provides criminal penalties for non-compliance.

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Section 79-2,104 R.R.S. addresses access to student files and records in public schools in Nebraska. That statute specifically provides that it “does not preclude or prohibit the disclosure of student records to any other person or entity which may be allowed to have access pursuant to [FERPA]. Section 79-2,105 R.R.S. provides that a copy of a Nebraska public or private school’s files or records concerning a student shall be provided at no charge, upon request, to any public or private school to which the student transfers. Section 85-712.05(1) R.R.S. states that personal information in records regarding a student, prospective student or former student of any educational institution may be withheld from the public by the lawful custodian of records, other than routine directory information specified and made public consistent with FERPA.

In addition, other Chapters of Title 92 of the *Nebraska Administrative Code* (NAC) address education records. Chapter 51 (92 NAC 51) at Section 009 provides for certain procedural safeguards concerning records of children with disabilities. Chapter 27 (92 NAC 27) contains a professional practices requirement that all holders of public school teaching, administrative or special service certificates shall keep in confidence personally identifiable information as described in that regulation.

002 Definitions

002.01 Department means the Nebraska Department of Education, which is comprised of the State Board of Education and the Commissioner of Education.

002.02 Directory Information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

002.03 Disclose/Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provide or created the record.

002.04 Education Record(s) means those records that are directly related to the student and maintained by an educational agency or institution. Specific examples of what this term does not include are described in FERPA at 34 CFR 99.3 where this term is further defined.

002.05 Educational Agencies or Institutions means a Nebraska school district, educational service unit (ESU), learning community or the Department.

002.06 Eligible Student(s) means a student who has reached 18 years of age.

002.07 ESU means an educational service unit as described in the Educational Service Unit Act at Sections 79-1202 through 79-1204 R.R.S.

002.08 FERPA means the federal Family Educational Rights and Privacy Act, Title 20, *United States Code*, Sec. 1232g and implementing regulations at Title 34, *Code of Federal Regulations*, Part 99.

002.09 Institutional Service or Function means a service or activity that an educational agency or institution is authorized to and could perform on its own using its own employees and is for its own benefit or for purposes of compliance with law, regulation or other requirements.

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002.10 Learning Community means a political subdivision which shares the territory of member school districts and is governed by a learning community coordinating council as set forth in Sections 79-2101 R.R.S. et seq.

002.11 Parent means 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 a guardian.

002.12 Personally Identifiable Information means, but is not limited to:

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) The personal identifier of such as a student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; and,
- (f) 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 the student with reasonable certainty.

002.13 State and Local Educational Authorities means a Nebraska school district, ESUs, learning communities, the Department, and the authorized representatives of such entities.

003 Required types of information that each school district shall designate as "directory information"

003.01 General Background and Required Designations. In order to promote a more uniform exchange of information between educational agencies or institutions, each educational agency or institution shall, at a minimum, designate the following as directory information:

003.01A Current and former students' names, date and place of birth, dates of attendance and school(s) attended, graduation, descriptions of participation in officially recognized activities and sports, honors and awards received, and;

003.01B The grade level of current students.

003.02 Directory Information "Opt-Out" by Parent. A parent or eligible student has a right to refuse to let an educational agency or institution designate as directory as to their child(ren) any or all types of information the educational agency or institution has designated as directory information. Any refusal must be in writing and provided by the parent or eligible student to the agency or institution within thirty days of enrollment each year.

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004 Sharing of Personally Identifiable Student Records Between School Districts, Learning Communities, ESUs and the Department

004.01 General Background. Applicable law permits an educational agency or institution to disclose personally identifiable information from a student's education record maintained by it, or on behalf of it, in the following circumstances:

004.01A To a party to whom the educational agency or institution has outsourced institutional services or functions, provided that the party (i) performs an institutional service or function for which the educational agency or institution would otherwise use its own employees; (ii) is under the direct control of the educational agency or institution with respect to the use and maintenance of the education records; (iii) the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student; and (iv) only uses the information for which the disclosure was made;

004.01B To authorized representatives as set forth in Section 79-2,104(3)(a) R.R.S. of state and local educational authorities when in connection with an audit or evaluation of any federal or state supported education program or for the enforcement of or compliance with federal legal requirements that relate to those programs. The disclosing educational agency or institution and the state or local educational authority must also adhere to the requirements concerning the use, protection and destruction of the personally identifiable information, and utilize the written agreement provided for in Appendix A of this Chapter; or

004.01C To other educational agencies or institutions or state or local educational authorities conducting studies for it or on its behalf to (i) develop, validate, or administer predictive tests; (ii) administer student aid programs; or (iii) improve instruction. The study must be conducted in accordance with the requirements of Appendix B of this Chapter.

004.02 Requirement for school districts, ESUs, learning communities, and the Department. Whenever any school district, ESU, learning community, or the Department may disclose personally identifiable information in or from education records under one or more of the circumstances described in Sections 004.01A – 004.01C of this Chapter to a school district, ESU, learning community, or the Department, it shall do so when a written request is made of it for such information or records by authorized representatives of such school district, ESU, learning community, or the Department. If the school district, ESU, learning community, or the Department decides not to provide such information as requested, then the school district, ESU, learning community or the Department shall provide written notification to the entity making the request and its reason(s) for denying the request.

004.03 De-Identified Student Information. Information from student records that contains personally identifiable information as defined in Section 002.11 of this Chapter may be altered so as to remove or mask elements and cause such records to be de-identified. In such cases, the records are then not personally identifiable information from student records, may be disclosed generally, and shall be de-identified and disclosed upon request as between school districts, ESUs, learning communities and the Department when such de-identified information satisfies the request and purpose of the requesting entity, and such de-identification can be reasonably accomplished.

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004.04 Data Security. Information exchanged between all parties shall be maintained and supported through secure transfer methods. Every effort and process should be ensured to protect the integrity and confidentiality of any related data records. In addition, Section 004.03E of 92 NAC 27 provides that an educator shall keep in confidence personally identifiable information that has been obtained in the course of professional service, unless disclosure serves professional purposes, or is required by law.

005 Compliance is Mandatory

005.01 School Districts. Compliance by school districts with the requirements of this Chapter is a condition of continuing accreditation under Title 92, *Nebraska Administrative Code*, Chapter 10, beginning the first full school year (July 1-June 30) following the effective date of this Chapter.

005.02 ESUs. Compliance by ESUs with the requirements of this Chapter is a condition of continuing accreditation under Title 92, *Nebraska Administrative Code*, Chapter 84, beginning the first full school year (July 1-June 30) following the effective date of this Chapter.

006 Dispute Resolution (Complaints)

006.01 Administrative Review. Any educational agency or institution that believes its request for student information as provided under Section 79-2,104 R.R.S. and this Chapter has been unlawfully denied may request in writing a review by the Commissioner of Education within thirty (30) days after receiving a denial letter as set forth in Section 004.02 of this Chapter, and a copy of the written request for review shall be provided to the entity that issued the denial letter under Section 004.02 of this Chapter. The parties may submit in writing any additional information to the Commissioner of Education to further explain their positions in the matter and shall simultaneously provide copies to all entities involved. The Commissioner of Education shall provide written notification to the entities regarding any decision in the matter.

006.02 Appeal. Within thirty (30) days of the date of the Commissioner of Education's written decision, an educational agency or institution may appeal the Commissioner of Education's decision pursuant to Chapter 61 (92 NAC 61).

Appendix A – Written Agreement for Disclosure of Personally Identifiable Information from Education Records for Purposes of an Audit, Evaluation or to Comply with Federal, Legal or Program Requirements

(1) The educational agency or institution must use a written agreement to designate any authorized representative, other than an employee. The written agreement must--

(a) Designate the individual or entity as an authorized representative;

(b) Specify--

(i) The personally identifiable information (PII) from education records to be disclosed;

(ii) That the purpose for which the PII from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and

(iii) A description of the activity with sufficient specificity to make clear that the work falls within the exception of FERPA at 34 CFR § 99.31(a)(3), including a description of how the personally identifiable information from education records will be used;

(c) Require the authorized representative to destroy PII from education records when the information is no longer needed for the purpose specified;

(d) Specify the time period in which the information must be destroyed; and

(e) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect PII from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of PII from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

Appendix B – Written Agreement for Disclosure of Personally Identifiable Information from Education Records for Purposes of Conducting Studies for or on behalf of an Education Agency or Institution

Written agreements under Section 004.01C of this Chapter must:

1. Specify the purpose, scope, and duration of the study and the information to be disclosed. The agreement must specify the purpose of the study, describe its scope and its duration, and identify the information being disclosed.

2. Require the receiving educational agency or institution to use personally identifiable information (PII) from education records only to meet the purpose or purposes of the study as stated in the written agreement. The agreement must specify that the PII from education records must only be used for the study identified in the agreement.

3. Require the receiving educational agency or institution to conduct the study in a manner that does not permit the personal identification of parents and students by anyone other than representatives of the organization with legitimate interests. The agreement must require the receiving educational agency or institution to conduct the study so as not to identify students or their parents. This typically means that the organization should allow internal access to PII from education records only to individuals with a need to know, and that the receiving educational agency or institution should take steps to maintain the confidentiality of the PII from education records at all stages of the study, including within the final report, by using appropriate disclosure avoidance techniques.

4. Require the receiving educational agency or institution to destroy all PII from education records when the information is no longer needed for the purposes for which the study was conducted, and specify the time period in which the information must be destroyed. The agreement must require the receiving educational agency or institution to destroy the PII from education records when it is no longer needed for the identified study. You should determine the specific time period for destruction based on the facts and circumstances surrounding the disclosure and study. The parties to the written agreement may agree to amend the agreement to extend the time period if needed, but the agreement must include a time limit.