

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE

House Bill 22 (Delegate Schulz)
 Ways and Means

Education - Privacy of Education Records and Personal Information of Students

This bill limits the collection or disclosure of the education records or personally identifiable information contained in the education records of a student by the Maryland State Department of Education (MSDE), the State Board of Education, a local board of education, a local school system, a primary school, or a secondary school to specified purposes. The bill does not prohibit the disclosure of aggregate data from education records under specified circumstances. In addition, the bill limits the collection of specified student survey data without prior written consent from a parent or guardian unless the survey is explicitly mandated by federal or State law.

The bill takes effect July 1, 2015.

Fiscal Summary

State Effect: Beginning in FY 2017, general fund expenditures for the Department of Health and Mental Hygiene (DHMH) increase by \$175,000 every odd fiscal year due to increased contract costs associated with collecting opt-in permission forms for all 100,000 students selected to participate in the Maryland Youth Tobacco Risk Behavior Survey (YTRBS). MSDE can develop the required security measures and procedures using existing resources. Federal education revenues *may* be jeopardized due to the restrictions placed on the collection and disclosure of education records or personally identifiable information; however, no specific funds have been identified.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	175,000	0	175,000	0
Net Effect	\$0	(\$175,000)	\$0	(\$175,000)	\$0

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: None. However, teachers in selected classrooms may be required to distribute and track the required consent forms.

Small Business Effect: None.

Analysis

Bill Summary: MSDE, the State Board of Education, a local school system, a primary school, or a secondary school may collect or disclose the education records or personally identifiable information contained in the education records of a student only as necessary or required to (1) evaluate the academic progress of the student; (2) calculate funding for public education; (3) comply with the data requirements and implementation schedule of the Maryland Longitudinal Data System (MLDS); (4) comply with federal migrant student programs; or (5) comply with a reporting requirement or any other duty imposed by federal or State law, except for any personally identifiable information required to receive federal funds.

In addition, unless explicitly mandated in federal or State law, a person may not require a student in kindergarten through grade 12, without prior written consent (of the student's parent or guardian), to submit to a survey, analysis, or evaluation that reveals information concerning:

- a political affiliation or belief of the student or a parent or guardian of the student;
- mental or psychological problems of the student or the student's family;
- sexual behavior or attitudes of the student or the student's family;
- illegal, antisocial, self-incriminating, or demeaning behavior;
- a critical appraisal of an individual with whom the student has a close family relationship;
- a legally recognized privileged or analogous relationship with another individual, such as a lawyer, physician, or minister;
- a religious practice, an affiliation, or any other belief of the student or a parent or guardian of the student;
- personal or family gun ownership;
- income, unless the information is required by law to determine eligibility for participation in or receipt of financial assistance under a program that MSDE, the State Superintendent of Schools, the U.S. Department of Education, or the U.S. Secretary of Education is responsible for administering; or
- any other information of a similar nature as determined by MSDE and specified in a regulation adopted to implement the bill.

The written consent required must be signed by a parent or guardian of the student or by the student if the student is an adult.

MSDE must develop security measures and procedures to protect personally identifiable information contained in education records from release to any unauthorized purpose and comply with all federal and State privacy protection laws when collecting, maintaining, or disclosing education records.

The bill does not prohibit the disclosure of aggregate data from education records if all personally identifiable information has been removed and the disclosure of the aggregate data is allowed under federal and State privacy protection laws. The bill also does not prohibit the disclosure of aggregate data from education records if the disclosure is necessary to apply for impact aid under Title VIII of the federal Elementary and Secondary Education Act of 1965.

MSDE may adopt regulations to carry out the bill.

Current Law: The federal Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g) is a federal law that protects the privacy of student education records. Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions:

- school officials with legitimate education interest;
- other schools to which a student is transferring;
- specified officials for audit or evaluation purposes;
- appropriate parties in connection with financial aid to a student;
- organizations conducting certain studies for or on behalf of the school;
- accrediting organizations;
- to comply with a judicial order or lawfully issued subpoena;
- appropriate official in cases of health and safety emergencies; and
- state and local authorities, within a juvenile justice system, pursuant to specific state law.

Specifically, FERPA allows the disclosure of individualized student data to organizations conducting studies for, or on behalf of, educational agencies or institutions to (1) develop, validate, or administer predictive tests; (2) administer student aid programs; or (3) improve instruction.

FERPA, as amended by the Uninterrupted Scholars Act, allows the disclosure of a student's records to an agency caseworker or other representative of a state or local child welfare agency, or tribal organization, who has the right to access a student's case plan, as defined and determined by the state or tribal organization, when such agency or organization is legally responsible for the care and protection of the student. However, the education records, or the personally identifiable information contained in such records, may not be disclosed except to an entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure, and such disclosure must be consistent with the state or tribal laws applicable to protecting the confidentiality of a student's records.

According to federal regulations, the release of de-identified records and information is allowed.

"Education record" is defined in federal regulations as a record directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. It does not include specified records, including records that are kept in the sole possession of the maker or grades on peer-graded papers before they are collected and recorded by a teacher.

According to federal regulations, "personally identifiable information" includes, but is not limited to, (1) the student's name; (2) the name of the student's parent or other family members; (3) the address of the student or the student's family; (4) a personal identifier, such as the student's Social Security number, student number, or biometric record; (5) other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (6) 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; or (7) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

According to federal law, no student can be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning (1) political affiliations or beliefs of the student or the student's parent; (2) mental or psychological problems of the student or the student's family; (3) sexual behavior or attitudes; (4) illegal, anti-social, self-incriminating, or demeaning behavior; (5) critical appraisals of other individuals with whom respondents have close family relationships; (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; (7) religious practices, affiliations, or beliefs of the student or student's parent; or (8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior

consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

Chapter 452 of 2010 established that, after June 1, 2010, a department or an independent unit in the State, to the extent practical, may not publicly post or display an individual's personal information on a website maintained or paid for by the department or independent unit. Additionally, a person whose personal information is contained in a public record or report may request the information be masked in the Internet version of the public record. An official custodian must then mask the public record within 30 days of the request and give the requestor a written notice of the action taken.

Disclosure of personally identifiable information by a public school or a local board of education is not specifically addressed in statute; however, educational agencies and institutions that receive federal education funds are bound by FERPA to protect the privacy of student and family information. In addition, MSDE follows guidelines specified by the Maryland Department of Information Technology's Information Security Policy.

Background:

The Maryland Youth Tobacco Risk Behavior Survey

YTRBS is part of the U.S. Centers for Disease Control and Prevention's (CDC) Youth Risk Behavior Surveillance System developed to monitor behaviors affecting disease and death of middle and high school students. YTRBS focuses on risk behaviors among youth that cause the most important health problems in the State. The data collected is essential to both the State Health Improvement Plan and the community health improvement plans developed and implemented in the counties and Baltimore City. State and local agencies in collaboration with numerous community organizations use the data collected to monitor, evaluate, and change school and community health programs intended to reduce the number of youth who engage in risky health behaviors.

CDC developed the core questions of YTRBS, and all 50 states ask those questions on their various student health surveys. YTRBS provides county and State data, not school, classroom, or student-level data. To that end, CDC randomly selects schools and classrooms to participate in YTRBS to collect a statically sound sample; however, no identifying information about a student is collected on the survey. Instead, all identifying information is captured using separate forms that are forwarded in batches to a CDC contractor for analysis.

Students in each selected classroom may participate; however, parents may choose to opt out their children, and students may indicate that they wish not to participate in the survey either prior to the survey being administered or at the time the survey is

administered. To protect privacy, the survey environment is very similar to a testing environment; students cannot look at other students' responses, and teachers do not wander among the students during the survey and cannot see their responses.

Since YTRBS is attempting to discern the percentage of students who engage in various risky behaviors, some questions address sensitive topics, including sexual behavior, attempted suicide, tobacco use, alcohol and other drug use, and weapon carrying. Students are instructed to leave a question blank if they feel uncomfortable answering it. A copy of the survey can be found [here](#).

CDC has determined that a minimum of 60% of students selected to participate in YTRBS must participate for the survey to be statistically significant. If that standard is not met, then the money has been spent on unusable data. Prior to 2008, Maryland conducted YTRBS using active consent (*i.e.*, opt-in) and barely reached the 60% participation rate. Since switching to passive consent (*i.e.*, opt-out), Maryland's survey completion rates have increased to an all-time high of 86.3% for the most recent data available.

YTRBS is administered in the fall of even calendar years; thus, the next time the survey will be administered is fall 2016 (*i.e.*, fiscal 2017).

The Office of School Health

The Office of School Health (OSH) within DHMH is legislatively mandated to coordinate with MSDE to support local school systems and local health departments to provide school health services. OSH coordinates with MSDE to support quality health care provided through local school health services programs, including school-based health centers. Responsibilities of OSH include development of policies, procedures, and programs to meet the health and health-related needs of school aged children as well as coordination of data collection on local school health programs as mandated by the school health law and analysis of school health data at the State and local levels.

Maryland Longitudinal Data System

Chapter 190 of 2010 established MLDS to contain individual-level student data and workforce data from all levels of education and the State's workforce. The legislation also established the MLDS Center within State government to serve as a central repository for the data, to ensure compliance with federal privacy laws, to perform research on the data sets, and to fulfill education reporting requirements and approved public information requests.

Privacy issues, including FERPA compliance, were a major consideration in the creation of MLDS. Prior to beginning system testing, as required by Chapter 190, the center's

governing board submitted to the Governor and the General Assembly the inventory of individual student data proposed to be maintained in the system, the privacy policies of the center, and a data security and safeguarding plan for the center. Chapter 190 requires the center to ensure routine and ongoing compliance with FERPA and other relevant privacy laws and policies, including the required use of de-identified data (in which individual-level identity information, including State-assigned student identifiers and Social Security numbers, has been removed) in data research and reporting, the required disposition of information that is no longer needed, and the reporting of other potentially identifying data. The center is also required to provide for the performance of regular audits for compliance with data privacy and security standards.

To meet these requirements, an expert was hired to develop the center's data security and safeguarding plan. The plan establishes that the center must employ the concept of least privilege, that is, allowing only authorized access for users (and processes acting on behalf of users) that are necessary to accomplish assigned tasks in accordance with the MLDS mission and functions. The plan also outlines policies to limit access to authenticated authorized users, and it requires the center to assign an employee as the privacy officer.

To further reduce privacy concerns and in response to the technical issues experienced by other states that attempted to capture all state data into a single system, the scope of the data in the MLDS data warehouse is limited by the policy questions it is designed to answer. The governing board, working in consultation with the Governor's P-20 Council, has developed 15 priority policy questions that MLDS has been designed to address. These policy questions include whether Maryland students are academically prepared for college and graduate in a timely fashion, whether financial aid programs are effective in supporting access and success, and whether students are successful in the workplace. Some of the questions will require the State agencies, particularly the Maryland Higher Education Commission, to expand their data collection efforts. The MLDS data inventory documents the specific data elements included in MLDS. The scope of the data incorporated into MLDS is not permanent and could be updated if new policy questions are added.

Currently, the database contains both aggregate data sets and de-identified, encrypted student and workforce data. Data associated with an individual is not available for viewing in the MLDS database, and workforce-related data is only retained for five years after an individual leaves school.

FERPA compliance concerns of local school systems and institutions of higher education have been addressed through limiting the personally identifiable information entered into MLDS and by assuring them that the redisclosure of personally identifiable information to the center is permitted according to revised federal FERPA regulations. FERPA governs the protection and permissible uses of student administrative data, including the disclosure and transfer of personally identifiable information in education records. The federal

FERPA regulations were revised in December 2011 to reconcile them with the federal laws (e.g., Race to the Top) that provided incentives for the development and use of state longitudinal data systems. The revised regulations clarified that FERPA does not prevent the redisclosure of personally identifiable information as part of agreements from FERPA-permitted entities to researchers to conduct studies for, and on behalf of, educational agencies and institutions.

Local school systems, community colleges, public four-year higher education institutions, and State agencies must make every effort to comply with the data requirements and implementation schedule for MLDS as set forth by the governing board and transfer student-level and transcript-level data and workforce data to MLDS in accordance with its data security and safeguarding plan.

Directory/Demographic Data

MSDE reports that each local school system allows parents and guardians to “opt out” of MSDE’s directory/demographic student-level data.

State Expenditures: Beginning in fiscal 2017, general fund expenditures for DHMH increase by \$175,000 every odd fiscal year due to increased contract costs associated with collecting opt-in permission forms for all 100,000 students selected to participate in the YTRBS. DHMH can absorb operational changes using existing resources. This estimate was based on the following information and assumptions.

- DHMH contracts for the administration of YTRBS. Approximately 100,000 students are in the schools and classrooms selected by CDC to participate in the survey. As stated above, CDC has determined that a minimum of 60% of students selected to participate in YTRBS must participate for the survey to be statistically significant. Prior to 2008, when active consent was used, barely over 60% of the selected students participated in the survey.
- To ensure that the 60% participation rate is met, the survey contractor must track consent forms for all selected students and follow up with the families who do not return their consent forms. Thus, at a minimum, information packets with consent forms must be developed and sent to all selected students, and an additional 75,000 consent forms must be printed for follow-up activities.
- DHMH advises that, to meet the 60% participation rate, follow-up phone calls and mailings are required.

- To ensure that only students with consent forms participate, the contractor needs to develop final lists for each class, noting students whose parents have returned permission forms and given permission for survey participation. On the day of the survey administration, the list must be reviewed prior to administering the survey.
- DHMH reports an additional \$25,000 is required to contract with a separate contractor to develop materials to be distributed to the schools to promote participation in the survey. The Department of Legislative Services advises that this is not required due to the intense follow-up activities conducted by the other contractor.

MSDE can develop the required security measures and procedures using existing resources.

Federal education aid revenues *may* be jeopardized due to the restrictions placed on the collection and disclosure of education records or personally identifiable information; however, no specific funds have been identified. MSDE was unable to provide information on which, if any, federal funds *may* be jeopardized in time for inclusion in this fiscal and policy note. Thus, any such impact has not been accounted for in the estimate.

Additional Information

Prior Introductions: None.

Cross File: Although not identified as a cross file, this bill is identical to SB 266 (Senator Hough, *et al.* - Education, Health, and Environmental Affairs) and HB 436 (Delegate Long, *et al.* – Ways and Means).

Information Source(s): Department of Health and Mental Hygiene, Maryland Longitudinal Data Center, Maryland State Department of Education, Department of Legislative Services

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Analysis by: Caroline L. Boice

Direct Inquiries to:
(410) 946-5510
(301) 970-5510