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December 10, 2023

Representative Bedey  
Chair, Education Interim Budget Committee

RE: Access to student-level data by local, state, federal, and third-party entities

Dear Chairman Bedey,

This letter follows our recent conversation regarding questions from the Education Interim Budget Committee about the laws that govern student data, including access to individual education records, data privacy, and sharing data across entities. You asked me to provide a written response to the questions you had asked, and this letter constitutes that response.

**QUESTIONS PRESENTED**

- I. Do the amendments to 20-7-104, MCA, from House Bill 949 (2023) limit or prohibit the Office of Public Instruction (OPI) from collecting student-level data from local school districts?
- II. Does the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g, limit or prohibit collection and sharing of student data necessary to implement a state integrated data system?

**SHORT ANSWERS**

- I. While HB 949 struck several instances of the modifier "student-level" in 20-7-104, MCA, this does not impede OPI's ability to collect student-level data, because that has never been the only statute that authorized OPI to collect that data. OPI has the authority and the obligation to collect student-level data under other laws, including federal laws, and OPI began collecting student-level data in the statewide K-12 student data system several years before 20-7-104, MCA, with the language specifying student-level data, was enacted by the Legislature.
- II. While FERPA is intended to protect the privacy of personally identifiable information of students by generally prohibiting disclosure of that information, the law also contains several exceptions, at least two of which are likely applicable to this question. Under at least one of these exceptions, OPI should be able to both collect student-level data from local school districts and share personally identifiable information with other state agencies or third-party contractors, albeit under certain circumstances and with safeguards in place.

**Question 1: Did the amendments to 20-7-104, MCA, from HB 949 (2023) limit or prohibit the Office of Public Instruction (OPI) from collecting student-level data from local school districts?**

[House Bill 949 \(2023\)](#) revised and expanded statutory language governing the collection, use, and dissemination of student-level data. While HB 949 amended 20-7-104, MCA, to strike specific "student-level" phrases, these changes were part of a broader effort to revise and clarify the way the statewide K-12 student data system is operated. Because the stricken language in question was enacted in 2011, years

after the creation of the statewide student data system, the amendments in 20-7-104, MCA, did not result in a blanket prohibition against OPI collecting student-level data.

To provide a complete answer to this question first requires an examination of the multiple sections of the Montana Code Annotated (MCA) that govern student data and student data privacy. Following the Montana Supreme Court's decision in Columbia Falls Elem. School Dist. No. 6 v. State, 2005 MT 69, the 2005 Legislature enacted Senate Bill 152 (2005), establishing a definition of a "basic system of free quality public elementary and secondary schools", which was codified at 20-9-309(2), MCA.

Relevant to this letter, the definition required establishment of "a procedure to assess and track student achievement in the [educational] programs" that are required as part of the basic system of public education. 20-9-309(2)(g), MCA. Additionally, legislative history shows that the first appropriation for a student information system was made in the 2005 session and went to OPI for Fiscal Years 2006 and 2007. The Legislature appropriated \$2,455,026 in Fiscal Year 2006 for the creation of a statewide data collection system for student data, and \$370,974 in Fiscal Year 2007 for the ongoing operation costs. As described in the postsession 2005 OPI Fiscal Report<sup>1</sup> prepared by the Legislative Fiscal Division (LFD), the appropriation was for "the development of a comprehensive education information system to be used by K-12 public schools and [OPI]" to, among other purposes:

- "Provide information about student achievement and progress toward standards";
- "Assist policymakers in understanding the relationship among education policies, strategies and outcomes";
- "Maintain an effective method of transferring and accessing accurate and timely educational information among school districts and the educational community";
- "Improve the state's ability to collect and report state and federal mandated data"; and
- "Interact with data systems at the Office of the Commissioner of Higher Education and programs in the workforce development arena (including Department of Labor, Workforce Investment, Department of Revenue, Adult Basic and Literacy Education, and Temporary Assistance for Needy Families)."

As documented in the pre-session 2007 OPI Budget Analysis<sup>2</sup> prepared by LFD, the development of the state student information system, known as "Achievement in Montana" or "AIM", was part of a national trend "driven by the data needs required by No Child Left Behind, and by various adequacy lawsuits around the country." The Budget Analysis noted that the Data Quality Campaign<sup>3</sup> had identified the following data elements as necessary to a quality school data system:

- a unique student identifier;
- student-level enrollment, demographics, and program participation;
- the ability to match an individual student's test records from year to year to measure academic growth;

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<sup>1</sup> See 2005 OPI Fiscal Report, Legislative Fiscal Division, pages E-10 and E-11 (available on request).

<sup>2</sup> See 2007 OPI Budget Analysis, Legislative Fiscal Division, pages E-2-E-3, E-10-E-13.

<sup>3</sup> Data Quality Campaign is "the only national nonprofit policy and advocacy organization dedicated to ensuring that education data works for individuals, families, educators, communities, and policymakers."

- information on untested students;
- a teacher identification system with the ability to match teachers with students;
- student-level transcript information, courses completed, grades earned;
- college readiness test scores;
- graduation and dropout data;
- ability to match student records between K-12 and postsecondary educational systems;
- a state audit system to assess data quality, validity and reliability; and
- collection of financial data at the school and program level with links to individual student achievement.

Pursuant to its agency goals, by October 2006, OPI had assigned all K-12 students in public and private accredited schools a unique student identifier and had hired a student records manager to manage the assignment of student identifiers to the approximately 146,000 students served in the K-12 public school system. Subsequently, Congress passed the 2007 America COMPETES Act<sup>4</sup>, which was meant to "support the establishment or improvement of statewide P-16 education<sup>5</sup> systems that assist States in improving the rigor and quality of State academic content standards and assessments... and enable States to have valid and reliable information to inform education policy and practice." 20 U.S.C. 9871(a). To achieve this congressional purpose, the law adopted many of the recommendations from the Data Quality Council and required the statewide student information system to collect the following data points for K-12 students:

- a unique statewide student identifier;
- student-level enrollment, demographic, and program participation information;
- student-level information about the points at which students exit, transfer in, transfer out, drop out, or complete P-16 programs;
- yearly test scores of individual students on tests required by the Elementary and Secondary Education Act;
- information on students not tested, by grade and subject;
- a way to match teachers to students;
- student-level transcript data, including courses completed and grades earned;
- data on students' success in college, including enrollment in remedial courses;
- data on whether K-12 students are prepared to succeed in college;
- a system of auditing data for quality, validity, and reliability; and
- the ability to share data from preschool through postsecondary education data systems.

See 20 U.S.C. 9871(e)(2)(D)(i)-(iii). In 2009, OPI received a 4-year federal grant of \$5,798,457 for the "Montana Data Warehouse: Foundation for a Longitudinal Data System" project, which was meant to establish the data warehouse and migrate data from numerous legacy systems to the data warehouse.<sup>6</sup>

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<sup>4</sup> America COMPETES Act, [Public Law 110-69](#), codified at 20 U.S.C. 9801 et seq.

<sup>5</sup> "P-16 education" is defined as "the educational system from preschool to the conferring of a baccalaureate degree." 20 U.S.C. 9871(b)(1).

<sup>6</sup> For more information, including links to the project application and project abstract, see the [National Center for Education Statistics website](#).

Following on the heels of the federal activity, the Legislature enacted [Senate Bill 329 \(2011\)](#), which made changes to many different areas of education policy; relevant to the question presented was the creation of the Montana Pathway to Excellence Program. The new sections creating that program were codified at 20-7-103 and 20-7-104, MCA. The language in the bill required OPI to create educational profiles for each school district and make those profiles publicly available; to develop and continuously enhance the statewide data system to make it easier to collect data from schools and reduce redundant data requests; and to produce actionable data analysis to promote academic achievement. SB 329, sections 4(1) and (6).

The Legislature also adopted language mirroring the requirements in the America COMPETES Act, directing the Superintendent of Public Instruction to "gather, maintain, and distribute longitudinal, actionable data" including student-level enrollment data, student-level statewide assessment data, a system to track student achievement including a direct teacher-to-student match, and student-level course completion data, including transcripts. SB 329, section 4(7). However, as noted above, while SB 329 introduced the phrase "student-level" as a modifier of several specific data elements into the MCAs, this effort at the state level duplicated the previously enacted federal legislation that already required collection of student-level data for the statewide student information system.

Returning for the 2013 session, the Legislature refined some of the requirements in 20-7-104, MCA, created the K-12 Data Task Force, and instituted the Data-for-Achievement payment, a component of a school district's general fund budget, in [Senate Bill 175 \(2013\)](#). The Task Force was created to advise OPI by reviewing, monitoring, and providing "input and guidance in enhancing the statewide K-12 data system pursuant to 20-7-104." SB 175, section 1(3). The funds generated by the Data-for-Achievement payment were required to be spent on "access fees or other costs associated with use of or participation in the statewide data system administered by [OPI] or a comparable data system provided by a private vendor[.]" SB 175, section 2(2). Finally, the amendments to 20-7-104, MCA, clarified that the statewide data system must provide for automated conversion of data from systems already in use by school districts or OPI to "collect, manage, and present local classroom assessment scores, grades, attendance, and other data to assist in instructional intervention alongside the existing school accountability and statewide student achievement results"; spelled out that the school district profiles, while being made available to the public, must also comply with FERPA requirements (see discussion of FERPA below, starting on page 6); and specified that the Superintendent could only share the collected personally identifiable information (PII) within OPI, with the school district where the student is or was previously enrolled, the parent, and the student. SB 175, sections 4(1) and (9).

In 2019, the Legislature enacted [House Bill 61 \(2019\)](#), amending 20-7-104, MCA, to explicitly authorize the Superintendent to release, with the consent of the student, PII associated with a student's results on a "statewide assessment that also serves as a college entrance exam" to accredited postsecondary institutions, testing agencies contracted to provide college entrance exams, and scholarship organizations. The purpose of the amendment was to increase students' access to higher education opportunities. HB 61, section 1(9)(b).

The Legislature also passed [House Bill 619 \(2019\)](#), which provided a similar authorization to the Superintendent to release PII to the Commissioner of Higher Education (CHE) and the Department of Labor and Industry (DLI), for the sole purpose of conducting research to ensure the K-12 education system meets the expectation of the university system and workforce needs of the state. While a student's

consent was not required under this amendment, the bill also required CHE and DLI to destroy student-level information upon completion of the research, no more than 18 months after a research request was approved by the Superintendent. HB 619, section 1(9)(b).

This brings us to legislation enacted in the most recent session. [House Bill 949 \(2023\)](#) generally revised laws related to data governance. The bill created the Education and Workforce Data Governing Board (Board) with the intention of having a central body to oversee the uses and linkages of education and workforce data between state agencies, both to help develop the full educational potential of Montanans<sup>7</sup> as well as to maximize the effectiveness of the state's investments in education and workforce systems. HB 949, sections 1 and 3. The duties statutorily assigned to the Board include development and implementation of policies and procedures to link and share education and workforce data between OPI, the Office of the Commissioner of Higher Education (OCHE), and DLI, which are also defined as the "contributing agencies." HB 949, sections 2(2) and 3(7)(a). The Board is also charged with facilitating the use of education and workforce data by state and local governments, education agencies, institutions of higher education, and other stakeholders to inform decision making to maximize efficiencies in the state's education and workforce systems. HB 949, section 3(7)(d).

While HB 949 uses the shorter phrase "education and workforce data" throughout, the meaning of that phrase should be read as "education data and workforce data." This might seem obvious at first glance, but it is an important detail to make note of because section 2 contains definitions for "education data" and "workforce data" as separate terms. HB 949, section 2(3)-(4). The term "education data" is defined to mean "data collected or reported at the student level that is included in a student's educational record." The definition also contains a nonexhaustive list of examples, "including but not limited to" state and national assessment results, attendance, and demographics. HB 949, section 2(3) (emphasis added).

Additionally, the Board is empowered to develop the policies and procedures that the contributing agencies are subject to. HB 949, section 2(2). The section providing the Board's duties specifically contemplates sharing PII, as the Board is required to adopt policy specifically describing the "manner in which personally identifiable information is secured," as well as defining the "appropriate use" of PII in compliance with FERPA. HB 949, section 3(7)(a)(ii)-(iii); see also section 1(1)(b). The Board's policies must also describe "the specific types of educational and workforce data that must be shared by the contributing agencies." Section 3(7)(a)(i). Taking the language in the bill as a whole, the Board was created specifically to identify existing barriers and otherwise facilitate the sharing of education and workforce data between OPI, OCHE, and DLI.

HB 949 also amended 20-7-104, MCA, to update the requirements governing the statewide K-12 data system. In addition to the existing requirement to include data entry and intuitive report options to allow districts to make timely decisions to improve instruction and impact student performance, new requirements include the elimination of redundant data collections and siloed data systems, facilitation of data sharing within OPI's divisions, and facilitation of matching student-level data from the K-12 data system with higher education and workforce data. 20-7-104(1)(a)-(c), MCA.

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<sup>7</sup> [Article X, section 1\(1\)](#) of the Montana Constitution opens with, "It is the goal of the people to establish a system of education which will develop the full educational potential of each person."

The amendments in HB 949 struck language in former subsection (7), now subsection (6), that previously used the modifier "student-level" to describe certain data elements to be collected by OPI. However, that section previously read, "The superintendent of public instruction shall gather, maintain, and distribute longitudinal, actionable data in [several types of student-level data elements.]" See HB 949, section 4(6). The amendments clarified that subsection so that rather than requiring the Superintendent to distribute student-level data in some sort of public manner in violation of FERPA's prohibitions against broadly sharing PII, instead the Superintendent is instructed to gather and make available aggregated data by posting the longitudinal data on OPI's website.

While HB 949 struck several instances of the modifier "student-level" in 20-7-104, MCA, this does not impede OPI's ability to collect student-level data, because that has never been the only statute that authorized OPI to collect that data. OPI has the authority and the obligation to collect student-level data under other laws, including federal laws, and OPI began collecting student-level data in the statewide K-12 student data system for several years before 20-7-104, MCA, with the language specifying student-level data, was enacted by the Legislature.

**Question 2: Does the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g, limit or prohibit collection and sharing of student data necessary to implement a state integrated data system?**

It is almost impossible to talk about student data without mentioning FERPA<sup>8</sup>, but there is often some confusion about who FERPA applies to and how it works. While FERPA is intended to protect the privacy of personally identifiable information (PII) of students by generally prohibiting disclosure of that PII, the law also contains several exceptions, at least two of which are likely applicable to this question. Under at least one of these exceptions, OPI should be able to both collect student-level data from local school districts and share PII with other state agencies or third-party contractors, albeit under certain circumstances and with safeguards to protect privacy in place.

Before exploring the exceptions provided under FERPA, it's important to understand first what FERPA does and who it applies to. FERPA is a federal privacy law intended to protect the privacy of students' education record and to provide parents and eligible students<sup>9</sup> the right to inspect and review their student's education records, request amendments to those records, and to consent to the disclosure of PII from those records. See 20 U.S.C. 1232g(a); 34 CFR §§ 99.10, 99.20, 99.30.

FERPA applies to an "educational agency or institution" that receives funds under a program administered by the U.S. Department of Education. 20 U.S.C. 1232g(a)(3); 34 CFR § 99.1. However, while OPI may receive federal funds, FERPA generally does not apply directly to records created and maintained by state education agencies (SEAs). FERPA defines "education records" as information directly related to a "student," thus excluding a person who has not attended the educational agency or institution. 20 U.S.C.

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<sup>8</sup> FERPA is codified at [20 U.S.C. 1232\(g\)](#) and its implementing regulations are found at [34 CFR Part 99](#).

<sup>9</sup> Although "eligible student" is not a defined term under FERPA, the law authorizes students who are at least 18 years old or who attend a postsecondary institution to give consent regarding their own records. See 20 U.S.C. 1232g(d).

1232g(a)(4), (a)(6); 34 CFR § 99.3. Therefore, FERPA does not generally apply directly to OPI, because students are not in attendance at OPI.

However, some provisions of FERPA are directly applicable to SEAs, such as the requirements around redisclosure and recordation of certain transactions involving further disclosure of PII. These requirements apply when an SEA rediscloses PII from students' education records that the SEA received from educational agencies and institutions to additional parties on behalf of those educational agencies or institutions without the prior consent of parents or eligible students under one of FERPA's exceptions.<sup>10,11</sup> See 34 CFR §99.31(a)(6)(ii)-(iii).

The default rule under FERPA is that a student's PII may not be disclosed without the prior written consent of a parent or eligible student. 20 U.S.C. 1232g(b)(1). However, FERPA provides several exceptions to this default, in which an educational agency or institution or a state educational authority may disclose PII without prior written consent. See 20 U.S.C. 1232g(b)(1)(A)-(L). Two of those exceptions are relevant to this discussion: the "audit or evaluation exception" and the "studies exception." These exceptions are discussed in turn below.

#### The Audit or Evaluation Exception:

The audit or evaluation exception is one way that PII may be disclosed to state and local educational authorities from education records without consent under FERPA and its implementing regulations. See 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5) and 34 CFR §§ 99.31(a)(3) and 99.35. State and local educational authorities, such as OPI, are permitted to have access to "student or other records which may be necessary 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." 34 CFR §§ 99.31(a)(3)(iv) and 99.35(a)(1). While the regulations impose several sideboards on the use of PII when performing the audit or evaluation, importantly:

"...such local-to-state disclosures need not be for an audit and evaluation that the SEA is currently undertaking or is otherwise imminent. Rather, the disclosure can be to facilitate future audits or evaluations. This interpretation enables SEAs to receive data from schools or school districts on a regular interval and maintain the data in an SEA-administered records management system to support audits or evaluations the SEA may undertake at a future date."<sup>12</sup>

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<sup>10</sup> Much of this discussion was informed by the U.S. Department of Education's "[Annual Notice to Chief State School Officers Regarding Responsibilities Under FERPA and \[the Protection of Pupil Rights Amendment, 20 U.S.C. 1232h\]](#)" from April 2020.

<sup>11</sup> See also "[State Education Agency Data Sharing and \[FERPA\]](#)", a guidance document created by National Council of State Education Attorneys (NCOSEA document) and published in June 2020.

<sup>12</sup> NCOSEA document, *supra* footnote 11, at page 8 (citing U.S. Department of Education Privacy Technical Assistance Center, [Integrated Data Systems and Student Privacy](#), PTAC-IB-4, January 2017).

The [Privacy Technical Assistance Center](#) is a "'one-stop' resource for education stakeholders to learn about data privacy, confidentiality, and security practices related to student-level longitudinal data systems and other uses of student data." Privacy Technical Assistance Center, [\[FERPA:\] Guidance for Reasonable Methods and Written Agreements](#), PTAC-FAQ-5, June 2015.

An SEA is also permitted to redisclose PII to another entity for audit, evaluation, enforcement, or compliance activities. Several provisions in FERPA and its regulations provide safeguards around the redisclosure of PII under this exception. The SEA must designate "authorized representatives" to access PII, and designation of an outside entity or researcher as an authorized representative must be done by written agreement. The agreement must identify what PII will be disclosed, specify that the purpose for which the PII is being disclosed is to perform an audit or evaluation, and describe the activity with enough specificity to make it clear the agreement falls under this FERPA exception. 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5); 34 CFR § 99.35(a)(3).

In addition to having a written agreement, the educational authority is required to use "reasonable methods" to ensure "to the greatest extent practicable" that the authorized representative receiving the PII also complies with FERPA and its regulations. 34 CFR § 99.35(a)(2). This requires ensuring that the authorized representative uses the PII for the authorized purposes only, that the authorized representative protects PII from further disclosures or other uses (unless explicitly authorized), and that the authorized representative destroys the PII in its possession when that PII is no longer needed for the audit or evaluation or at the latest by the date specified in the written agreement. Finally, the SEA must maintain its own record of each request for access to and each disclosure of PII from education records. See 34 CFR §§ 99.32(b)(2), 99.35.

#### The Studies Exception:

The studies exception is another avenue by which PII may be disclosed from education records without consent under FERPA and the implementing regulations. This exception is not a grant of blanket access to PII; rather, the exception applies to an organization that is conducting a study for, or on behalf of, a state or local educational authority for the following purposes only: to develop, validate, or administer predictive tests; to administer student aid programs; or to improve instruction. 20 U.S.C. 1232g(b)(1)(F); 34 CFR §99.31(a)(6)(i)-(ii). Because the studies exception is limited to the three specified purposes, this exception is narrower in scope than the audit or evaluation exception, but still allows broad research and access to PII from education records within these three areas.

The studies exception also requires the educational agency to have a written agreement before redisclosing PII to another organization. The agreement under this exception must specify the purpose, scope and duration of the study and the information to be disclosed. The agreement must require the organization to use the PII only to meet the purpose of the study and require the organization to conduct the study in a manner that does not permit identification of parents or students by anyone other than the representatives of the organization with legitimate interests. Additionally, the agreement must require the organization to destroy all PII when the information is no longer needed for the study, or at the latest by the date specified in the agreement. 34 CFR 99.31(a)(6)(iii)(C).

Amendments enacted by the Legislature in HB 949 (2023) also served to improve the flow of PII for appropriate purposes between OPI and other entities. HB 949 struck former subsection (9) in its entirety. Section 20-7-104, MCA, no longer contains the language from former subsection (9)(a) that prohibited the Superintendent from sharing PII with anyone other than OPI itself, the school district where the student is or has been enrolled, the parent, and the student. The only way to share PII in light of the restriction in subsection (9)(a) was for the parent to provide written consent identifying the PII to be released, the



specific purpose for the release, and the recipient to whom the PII was to be released. Now, the language in 20-7-104, MCA, clarifies that, regarding student educational records, OPI may not share more freely or restrict more heavily the sharing of PII than what is allowed or restricted by FERPA and its implementing regulations. 20-7-104(7), MCA.

The Education and Workforce Data Governing Board was created in part to facilitate the development of consistent written agreements for data sharing between OPI, OCHE, and DLI.<sup>13</sup> The Board is tasked with developing model policies and agreements that comply with the requirements of FERPA; the Board may consider addressing either the audit and evaluation exception or the studies exception in the model policies to simplify the flow of designated PII for specified purposes and ensure that PII is consistent between the contributing agencies. HB 949, section 3. Ultimately, the goal of the Board is to improve the use of education and workforce data to benefit the people of Montana and maximize the effectiveness of state investments in education and workforce systems. HB 949, section 1. The changes to 20-7-104, MCA, made by HB 949 or the requirements of FERPA and its implementing regulations do not prevent OPI from participating in sharing PII with other contributing agencies. Instead, the Board and the contributing agencies can ensure that written agreements for the (re)disclosure of PII between the agencies under the audit or evaluation exception or the studies exception comply with the safeguards demanded by FERPA and protect the privacy of student-level data as required by law.

I hope this answers the committee's questions in a satisfactory manner. Chairman Bedey, if you or the committee have further questions regarding any of my analysis or would like additional information, please let me know and I would be happy to provide further assistance.

Sincerely,

/s/ Laura M. Sankey Keip

Laura M. Sankey Keip  
Staff Attorney, Legislative Services Division

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<sup>13</sup> As a reminder, these are the three contributing agencies that are subject to the policies developed by the Board. HB 949, sections (2)(2) and (3).