

HEARING REPORT AND COMMENTS ON RULE 277-419-9 PERTAINING TO PROVISIONS FOR MAINTAINING STUDENT MEMBERSHIP AND ENROLLMENT DOCUMENTATION AND DOCUMENTATION OF STUDENT EDUCATIONAL SERVICES PROVIDED BY THIRD PARTY VENDORS

I. Introduction

On December 4, 2014, a public hearing was held Rule 277-419-9 which is entitled "Provisions for Maintaining Student Membership and Enrollment Documentation and Documentation of Student Educational Services provided by Third Party Vendor." This hearing was held pursuant to UCA 63G-3-302 and Utah Administrative Code Rule R15-1-1. This document constitutes a summary report of that public hearing which is to be appended to the hearing record.

During the one hour public hearing six members of the public addressed the Board. Those persons were: Matt Bowman, Morgan Fife, Stacey Hutchings, Chris Bleak, Lisa Watkins and Laura Belknap. In addition, Mr. Bowman provided the Board a three page document entitled "Executive Summary for the Public Hearing on Proposed Amendment to the Pupil Accounting Rule (R277-419). Likewise, Morgan Fife prepared a two page letter with 3 attachments comprising an additional 11 pages. A copy of the draft minutes, Executive Summary and Fife letter dated November 26, 2014 are attached.

During the one hour public hearing Board Members Griffiths, Thomas, Castle, Allen, Buswell, Openshaw and Johnson provided comments or asked questions regarding the proposed rules.

II. Issues or Concerns Raised

During the public hearing, the majority of comments concerned sections F and G of the rule. In addition, a number of other wording changes were proposed by the Bowman and Fife submissions to Sections C, E, H, I, J, K, L, M and N.

In summary, the issues or concerns raised for Sections F and G are as follows:

1. Section G's provision that "... an LEA is the only entity authorized by the Board to collect and store public school enrollment verification records" is overly restrictive and does not allow Third Party Vendors to collect and access enrollment verification records. Furthermore, the rule does not reflect the actual practice within the regulated community.
2. Section F's prohibition of incentives and reimbursements potentially interferes with lower income student access to the internet service and may deny K-6 students of their right to a Free and Appropriate Public Education (FAPE).

III. Section G-Collection, Storage and Access of School Enrollment Verification by Third Party Vendors.

While most speakers addressed frustration with the awkward nature by which the rule prevents Third Party Vendors from collecting, storing and accessing student enrollment data, Stacey Hutchings of Utah Virtual Academy best stated her concern with this section by requesting “a change to Section 9G to allow third party vendor to have appropriate contractual agreements and FERPA policies in place to be able to collect data for schools.”

Ms. Hutchings added that “even though the data is controlled and stored at the school site, the school allows its management company to collect the data through a secure website and the school would like that practice to continue.” She further states “that when parents enroll their students in her school they sign a FERPA agreement prior to submitting documentation to the management company, acknowledging that the management company will have possession of the data.”

The portion of section G which does not reflect the apparent standard practice is as follows:

“ . . . An LEA is the only entity authorized by the Board to collect and store public school enrollment verification records including:”

This restrictive language precludes Third Party Vendors from collecting, storing and accessing public school enrollment verification records. Section G's restrictive terms are the result of Federal Education Right to Privacy Act (FERPA). FERPA is a federal law which protects the privacy of student records. 20 U.S.C. § 1232g and 34 CFR Part 99.

Under 34 CFR §99.30 (a), it states that “the parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, **except as provided in §99.31. (emphasis added)**”

34 CFR §99.31 sets forth the conditions when prior consent is not required to disclose information. This part states that “(a) an educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions. . .”

Subsection B provides the consent exception which is most applicable in this particular circumstance. This subsection states as follows:

“(B) A **contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official** under this paragraph provided that the outside party—

- (1) **performs an institutional service or function** for which the agency or institution would otherwise use employees;
- (2) Is under the **direct control of the agency or institution** with respect to the use and maintenance of education records; and
- (3) Is **subject to the requirements of §99.33(a) governing the use and redisclosure** of personally identifiable information from education records.”
(emphasis added)

The relationship between an LEA and third party vendor is essentially a contractual relationship. The vendor is overseeing the education of students in non-traditional settings. As a result, this third party vendor can be considered a school official because the district has in effect outsourced institutional services. Clearly, the third party vendor, which oversees the non-traditional education environment, is performing an institutional service. As a result, a reasonable interpretation exists, under FERPA, that these third party vendors can access these educational records without parental consent.

A. Revisions to Section G which Should Be Considered

During the Public Hearing, Member Griffith's proposed that the Board work on amending the rule to address the issue of improving Third Party Vendors Access to student data. Given these circumstances, the Board should consider revisions to Section G of this rule as follows:

G. LEAs shall ensure school enrollment verification records are collected consistent with sound data collection and storage procedures, established by the LEA, and that these records are transmitted securely. It is the LEAs' responsibility to verify the accuracy and validity of student enrollment records, prior to enrolling students in an LEA, and provide students and their parents with notification of enrollment in a public school. An LEA is the only entity authorized required by the Board to collect and store public school enrollment verification records including:

- (1) birth certificates or other verification of age and identity;
- (2) verification of immunization or exemption form;
- (3) proof of Utah public school residency;
- (4) family income verification; or
- (5) special education records, including:
 - (a) individualized education program;
 - (b) 504 plan; or
 - (c) English learner plan.

An LEA may provide written authorization a Third Party Vendor, who meets the definition of school official under 34 CFR 99.31 (a) (1) (i) (B), to collect and have access to public school enrollment verification records. In the event that such authorization is provided, parents or guardians of the affected students shall be notified in writing.

IV. Section F- LEA and Third Party Vendor Use of Public Funds for Incentives and Reimbursements

Some discussions and written submissions addressed concerns with this sections incentives and reimbursements provisions.

Chris Bleak of Utah Connections Academy expressed concern that the breath of section F's prohibition against the use of public funds for incentives and reimbursement denies some student of access to an internet connection. Mr. Bleak maintained that this restriction would

deny K-6 students their legal right to a Free and Appropriate Public Education (FAPE). Meanwhile, given the importance of internet access in the learning process, consideration should be given to allowing reimbursement for such services for grade 7 -12 students who cannot afford such services.

Member Thomas, upon hearing Mr. Bleak's comments, suggested the Board work on changing Section 9 F (2) so that such internet reimbursements are not prohibited. Member Openshaw expressed similar sentiments. Member Allen emphasized the importance of online programs to Utah students, particularly in remote areas.

A. Revisions to Section F which should be Considered

Given the concern raised on this internet reimbursement issue, the Board should consider revisions to Section F (2) of this rule as follows:

F. LEA and Third Party Vendor Use of Public Funds for Incentives and Reimbursements. . .

(2) LEAs or their third party vendors shall not use public funds to provide educational, curriculum, instruction, private lessons, or technology reimbursements to individuals, groups of individuals or third party vendors that are not available to all students enrolled in the LEA or required by an IEP or 504 plan that is approved by the LEA. This section shall not prohibit an LEA from providing internet reimbursements for students on the K-6 grade level. Furthermore, such internet reimbursement may be provided to students in grades 7-12 if failure to provide such reimbursement will cause economic hardship. This determination should be made in accordance with the fee waiver policy language set forth in R277-407-6.

V. Other Changes Proposed by the Public or Board Members at the Public Hearing.

Mr. Bowman, in his Executive Summary recommended 10 edits to the proposed rule. With the exception of Sections F and G, no other speakers seemed to share his concern at the hearing. While Mr. Bowman's recommended wording change to Section G has been recommended for incorporation, his wording changes to Section F has not been incorporated.

In the interest of brevity, I would recommend that his proposed changes to Sections C, E and F not be considered due to their vagueness and over breadth. Mr. Bowman's proposed revision to Sections H, I, J, K and M don't seem necessary. It is also recommended that proposed changes to Sections L and N are not warranted.

I would also add that the second and third pages of Mr. Bowman's Executive Summary diplomatically challenges the Board's authority to promulgate this rule and emphasizes it conflict with other statutes. In a similar vein, Mr. Fife's letter exhibit makes somewhat similar arguments.

VI. Supplemental Matters Which Should Be Taken Into Consideration-HB 68

On or about January 6, HB 68 was released. This Bill is entitled the "Student Privacy Act" and addresses the release of public school information. HB 68 establishes requirements for the State Board of Education related to the collection, usage and storage of student data. A preliminary review of HB 68 appears to provide that "subject to the requirements of this section, an education entity may release a student's personally identifiable information without student authorization to . . . a third party contractor, consultant or other party to whom the educational entity has outsourced services or function . . . to perform a service or function for which the education entity would otherwise use employees." See lines 245-254.

With respect to the collection of educational data, HB 68 appears to allow "educational entities" to collect student data; however the proposed law does not appear to include a Third Party Vendor in its definition of an "educational entity. See lines 358-386 for data collection requirements. Likewise, see lines 154 to 160 for the definition of "educational entity". In addition, HB 68 has a penalty provision which authorizes the assessment of a civil penalty of up to \$25,000 for violation of this student privacy law. See line 462.

While HB 68 is not currently valid law, if adopted, it could have a significant impact on this rule. HB 68 should be carefully reviewed and the State Board of Education should consider providing comments on this proposed law.

VII. Conclusion

In closing, the crux of this report addresses the public's concern with sections F and G of this rule which is now in effect. If the Board desires to adopt the recommended changes, it will be necessary to go through the rule making process. If the Board opts to proceed in this manner, the matter should be referred back to committee for its consideration of the changes to the language.

It is recommended that the Board delay making changes to this rule until the status of HB 68 is clarified. Furthermore, it is recommended that the Board of Education be an active participant in the State Legislature's deliberation on this bill.

Date: January 7, 2014.

/s/

Christopher A. Lacombe
Assistant Attorney General
Hearing Officer

Attachments:

1. Rule 277-419-9
2. Draft Minutes of Utah State Board of Education Public Hearing on R277-419-9.
3. Executive Summary of Public Hearing on Proposed Amended to Pupil Accounting Rule (R277-419) prepared by Matt Bowman.
4. November 26, 2014 letter from Morgan Fife, Attorney and Counselor at Law.