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TO: School District Superintendents
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FROM: Louise DeCandia, Chief Privacy Officer

DATE: June 7, 2023

Commercial and Marketing

This memorandum provides general guidance regarding the terms “commercial” and “marketing” in Education Law § 2-d and how an educational agency can avoid the use of student data for such purposes.

Education Law § 2-d (3) (b) (1) states that: “a student’s personally identifiable information (PII) cannot be sold or released for any commercial purpose.” Additionally, Education Law § 2-d (4) (f) states that PII maintained by educational agencies, including data provided to third party contractors and their assignees, shall not be sold or used for marketing purposes. Together, these provisions prohibit educational agencies and their third-party contractors from disclosing student data for commercial and marketing purposes. The regulations of the Commissioner of Education further define a commercial or marketing purpose as the sale of student data; its use or disclosure for purposes of receiving remuneration, whether directly or indirectly; its use for advertising purposes; or its use to develop, improve or market products or services to students.¹

As educational agencies consider the applicability of the commercial and marketing prohibition, they should ask the following questions:

1) Is student data involved?

- a. Education Law § 2-d defines student data as PII² from student records of an educational agency.
- b. The Family Educational Rights and Privacy Act (FERPA) prohibits the improper disclosure of PII derived from an education record.
- c. Thus, educational agencies should ask whether the PII in question is derived from students’ education records. If it is not, Education Law § 2-d does not apply. If it is, you must consider the following two questions.

¹ 8 NYCRR 121.1 (c).

² Education Law § 2-d incorporates the definition of PII in the Family Educational Rights and Privacy Act (FERPA). FERPA defines PII as information that directly (e.g., name, parent’s name, address) or indirectly (e.g., social security number, student number or biometric record) allows a person to reasonably infer the identity of a student.

2) Is the educational agency selling or releasing student data?

- a. An educational agency cannot sell student data, but it may need or desire to release student data when, for example, contracting for educational technology services.
- b. Consider whether student data is going to be shared with a third-party contractor, i.e., the educational agency needs to contract for a student management system, or the educational agency, using its directory policy, would like to announce its graduating seniors in the local paper.
 - i. If so, will the educational agency directly or indirectly receive remuneration in connection with the release? If yes, the sale or release is prohibited.
 - ii. If not, and student data will be released to a third-party contractor with the educational agency receiving no remuneration (i.e., the educational agency needs a student management system, it receives no remuneration from sharing student data with the third-party contractor or, in our second example, the educational agency receives no remuneration from sharing student data with the local paper) consider the below question.

3) Will the third-party contractor use the student data for advertising or to develop, improve or market products or services to students?

- a. Educational agencies must ensure that its contracts and data protection agreements prohibit third-party contractors from using student data for these purposes.
- b. Violations of any contractual terms of any contractual terms or a contractor's written agreement to adhere to Education Law § 2-d should be referred to the New York State Education Department's (NYSED) Chief Privacy Officer.

This document is not meant to serve as legal advice from NYSED. For additional information on Education Law § 2-d and data privacy and security requirements in New York schools, please visit NYSED's [data privacy and security website](#). Questions can be sent to privacy@nysed.gov.