



NDSBA
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HB 1357

Testimony of KrisAn Norby-Jahner
House Education
January 28, 2025

Chair Heinert and members of the House Education Committee, for the record my name is KrisAnn Norby-Jahner. I am in-house legal counsel for the North Dakota School Boards Association. The NDSBA represents all 168 North Dakota public school districts and their boards. I am here today in a neutral capacity, but in opposition of HB 1357 as currently written.

The NDSBA supports efforts to protect student data at all times, and our licensed attorneys field a number of questions and provide routine information and legal counsel to school districts related to the protection of student data throughout each year. Current federal laws already provide appropriate safeguards over student data and educational records and identify the proper methods that legally allow for the sharing of student data, including with other state and federal agencies. These federal laws include the Family Educational Rights and Privacy Act (FERPA), the Child Abuse Prevention and Treatment Act (CAPTA), the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act. A state law that would allow school districts to share student data with a state entity would be in direct conflict with federal laws that require eligible student or parent/guardian permission, absent very narrow exceptions and safeguards that are required to be put in place prior to disclosure. Overall, this bill does not provide adequate exception language that would bring state law in compliance with federal law.

For example, under FERPA regulations, eligible students or parents/guardians must typically provide consent for the release of educational records prior to release, except in narrow circumstances such as a health or safety emergency (34 CFR 99.31 (10)); when the disclosure is in compliance with a judicial order or lawfully issued subpoena (34 CFR 99.31 (9)); or when the disclosure is to a State and local official with authority to request the information (34 CFR 99.31 (5)). However, even in certain exception circumstances, FERPA regulations often require that the school district make a reasonable effort to notify the parent or eligible student in advance of compliance, so that the parent or eligible student may seek protective action in a court of law. HB 1357 does not allow for this type of parental notification prior to production.

In addition, other federal laws, including the ADA, the IDEA, Section 504, and CAPTA supersede FERPA in relation to records related to a student's confidential medical information, disability information, or information related to suspected child abuse or neglect. Disability-related laws provide for very limited exceptions for disclosure of confidential student information without eligible student or parent consent. CAPTA would allow for the release of certain student information when there is a suspected case of child abuse or neglect, specifically when a school district has filed a 960 report as part of mandated reporter requirements. However, CAPTA does not allow for the disclosure of *all* student records and only allows for information that a school district may have on file that is narrowly and directly related to the suspected child abuse or neglect. HB 1357 does not properly limit the type of student data that will be allowed to be released to a state entity.

When looking at suspected child abuse or neglect, in particular, federal regulations already allow for the production of records to a state or local educational authority with respect to federal or state-supported education programs under the "audit or evaluation" exception of FERPA (34 CFR 99.35). This is a FERPA exception that is sometimes cited by state agencies when requesting information (particularly as related to suspected child abuse or neglect). This exception would require school districts to disclose educational records when an agency is auditing or evaluating a federal- or state-supported education program. However, in order to use this exception, FERPA requires the school district and the state agency to enter into a written agreement with a number of requirements safeguarding the student's personally identifiable information (PII) from the education records. In this manner, HB 1357's requirement for a "data sharing agreement" is duplicative of federal regulations that already control student data, making the proposed state law unnecessary.

In addition, HB 1357 does not use the same language and safeguards required under FERPA in order to ensure that the student's PII is safeguarded when a school district makes a disclosure to a state entity. In accordance with FERPA regulations, in order to legally allow for the sharing of student data with a state entity for the sole purpose evaluating or auditing an educational program, without requiring individual parental consent for each disclosure, a data sharing agreement must include specific elements, including clear identification of the authorized representative, the specific purpose of the data sharing, data limitations, confidentiality provisions, data security measures, and termination clauses in the event FERPA regulations are violated. The U.S. Department of Education already monitors FERPA compliance related to the sharing of information with state-supported education programs and provides a very specific [Written Agreement Checklist](#) for school districts to follow.

That being said, if the intention of HB 1357 is to ensure that a "data sharing agreement" (which is already required under federal law) is mirrored in state law and more consistently followed by state entities

when requesting student data, then we would propose the following amendments to ensure continued compliance with applicable federal regulations (as outlined throughout this testimony):

N.D.C.C. § 15.1-07-25.3. Protection of student data – School district policy.

...

2. The policy must:

...

- b. Permit a school district to share student data with a state entity using a student information system or the state longitudinal dashboard system **only as allowed under the law and** if the school district and the state entity have entered **into a written data sharing agreement in accordance with applicable laws and regulations.**

Based on the foregoing reasons, NDSBA asks this Committee for a **do not pass** recommendation on the bill as written and consider making amendments. Thank you for your time.