

Record Keeping for Students with Disabilities*

Charles J. Russo, J.D., Ed.D., Allan G. Osborne, Jr., Ed.D., and David A. Dolph, Ph.D.**

EDUCATION LAW INTO PRACTICE

A Special Section of West's EDUCATION LAW REPORTER Sponsored by the Education Law Association

Introduction

Record keeping for students with disabilities is governed by a combination of the Family Educational Rights and Privacy Act (FERPA)¹ and the Individuals with Disabilities Education Act (IDEA).² FERPA, which applies more broadly to recipients of federal financial aid, protects the privacy of educational records by affording parents and eligible students access to records, while limiting the access of outsiders, or third parties, to these records.

At the same time, consistent with FERPA, the IDEA specifically requires educational officials to take steps to ensure the confidentiality of “personally identifiable data, information, and records” maintained by schools,³ while its regulations incorporate FERPA into its statutory scheme.⁴ Further, the IDEA and its regulations include provisions about parental rights to examine records,⁵ the transmittal of special education records when students move⁶ (including disciplinary records),⁷ and the forwarding of records to juvenile authorities when school officials report crimes.⁸

FERPA and, by incorporation, the appropriate provisions in the IDEA both focus on educational records maintained by schools containing personally identifiable student information. The statutes and their regulations further cover directory information such as students’ names, addresses, telephone listings, and other miscellaneous data.



Protecting students’ rights under FERPA and the IDEA is complicated, due to the amount of information now preserved electronically⁹ and the myriad records, both temporary and permanent, generated by students with disabilities. Accordingly, this article offers a basic overview of the record-keeping provisions of FERPA and the IDEA before providing recommendations for practice.

Confidentiality of Records - FERPA Requirements

Insofar as FERPA applies to all students, it covers children with disabilities. As such, this section provides a brief overview of FERPA’s major provisions.¹⁰

Types of Records Covered

FERPA applies to educational records generated by school staff containing personally identifiable information about students.¹¹ The most common form of student records preserved by school officials are their so-called cumulative files containing a range of information such as transcripts, report cards, and standardized test results. Other types of records may be kept separately, such as those specific to health, guidance, or special education. Further, most school systems retain directory information, which includes demographic data on students such as their names, addresses, telephone numbers, dates and places of birth, major fields of study, participation in officially recognized extracurricular activities and sports, weight and height measurements of athletes, degrees and awards received, and the most recent previous educational agency or institution attended by the student.¹²

Not all documents kept by school personnel are classified as educational records subject to FERPA’s provisions.¹³ For example, records made by educational personnel kept in their sole possession and which are unavailable to others, except temporary substitutes,¹⁴ are exempt. This includes notes teachers commonly make and retain for their own use in the course of their duties.

In *Owasso Independent School District v. Falvo*,¹⁵ a case involving FERPA in a K-12 context, the Supreme Court upheld the practice of “peer grading,” whereby teachers permit students to grade each oth-

ers’ assignments, because this does not turn the papers into educational records covered by FERPA. The Justices held that a school board in Oklahoma did not violate the law by allowing teachers to employ the practice, over the objection of a mother whose children attended schools in the district. Rather, the Court explained that students’ papers do not become educational records within the meaning of FERPA until their teachers enter their marks into their grade books.¹⁶

Notification

FERPA mandates that school personnel notify parents and eligible students annually of their right to inspect and review, request amendment of, and consent to disclosure of educational records, as well as to file complaints with the federal Department of Education (DOE) concerning alleged failures of schools to comply with the statute.¹⁷ School personnel must notify parents and eligible students before releasing directory information about current students, informing them of the categories of records that are considered directory, and allow them sufficient time to request that the information not be released without their consent.¹⁸

Rights to Access Student Records

Parents and eligible students have the right to inspect and review records containing personally identifiable information regarding the education of their children.¹⁹ FERPA affords noncustodial parents the same right of access to educational records as custodial parents, unless their rights have been restricted by court order.²⁰ Moreover, FERPA requires school officials to give parents and eligible students reasonable interpretations and explanations of the information contained in students’ records.²¹

Students who have reached their eighteenth birthdays, or who attend postsecondary institutions, have the right to inspect and control access to their own school records.²² FERPA does allow educational officials to take the age and types or severity of students’ disabilities into account when considering whether to grant rights of access to special education students.²³

Third parties are allowed access to students’ records, other than directory information, only if parents provide written consent.²⁴ However, exceptions to this rule

allow for the efficient daily operation of schools. For example, school employees who have legitimate educational reasons can access student records.²⁵ Also, in emergency situations, school personnel can allow individuals charged with protecting the health and safety of students to view records.²⁶ Student records also may be subject to judicial subpoenas.

Third parties seeking access to student records must have written consent from parents identifying the information to be released, the reason for the requested release, and to whom the information is being given.²⁷ Parents and eligible students have the right to receive copies of documents that are released.²⁸ In this respect, school staff must maintain logs of all individuals or groups, except exempted parties, granted access to student records.²⁹ These accounts must be kept with the students' records and should explain the legitimate interests of those who were allowed access.³⁰

Officials of educational agencies that maintain student records must comply with parental requests for review without unnecessary delay. More specifically, unless parents and qualified students agree otherwise, officials must grant them access no later than forty-five days after receiving their requests.³¹ Needless to say, nothing prohibits officials from granting requests for access to records more quickly. Agencies receiving requests for access to records cannot charge fees to search for or to retrieve student records.³² Once materials are located, officials can charge for copies as long as a payment does not effectively prevent parents and qualified students from exercising their rights to inspect and review educational records.³³

Correcting or Amending Records

Parents or qualified students who disagree with data in educational records have the right to ask school officials to amend the disputed information.³⁴ If school authorities refuse their requests to amend the records in question within a reasonable time,³⁵ parties are entitled to hearings at which hearing officers evaluate whether the challenged material is accurate and appropriately contained within the educational records.³⁶ If hearing officers agree that challenged materials are inaccurate, misleading, or otherwise violate the rights of students to privacy, school personnel must amend the records accordingly.³⁷ Conversely, if hearing officers determine that the contested materials are not inaccurate or misleading, or do not otherwise violate students'

privacy rights, the records do not have to be removed or amended.³⁸ Still, parents and qualified students may add statements explaining their objections to the records, and these declarations must be kept with the contested information for as long as the records are kept on file.³⁹

Enforcement

School officials who deny parents or eligible students the opportunity to review requested educational records, or release them without authority, can be charged with violating FERPA, thereby triggering its enforcement provisions. As the Supreme Court confirmed in *Gonzaga University v. Doe*,⁴⁰ the sole remedy available to aggrieved parties is to file written complaints detailing the specifics of the alleged violation with the DOE's Family Policy Compliance Office (FPCO).⁴¹

Parties and eligible students must file complaints of FERPA violations within 180 days of either claimed violations or the date when claimants knew or reasonably should have known about the alleged violations.⁴² When FPCO officials receive complaints, they notify authorities at educational institutions in writing, outlining the alleged violations and asking them to respond before they decide whether to proceed with investigations.⁴³ If FPCO officials agree that violations occurred, the DOE can withhold future payments under its programs, issue orders to compel compliance, or ultimately terminate institutional eligibility to receive federal funding if officials refuse to comply within a reasonable time.⁴⁴

The IDEA and Student Records

The special education process generates mountains of data on students with disabilities, most of which finds its way into their records. In addition to the information contained in the records of all students, files of children with disabilities may include materials such as their individualized education programs (IEPs), progress reports, test reports, health and medical information, reports from various therapists and service providers, and data provided by parents. Although FERPA dictates requirements for all school records on students, including those in special education programs, the importance of keeping information on these students confidential is so important that Congress added additional requirements in the IDEA. As noted earlier, FERPA has been incorporated into the IDEA by reference⁴⁵ and is reiterated in its regulations.⁴⁶

Confidentiality

In the IDEA, Congress charged the Secretary of the DOE to "take appropriate action, in accordance with [FERPA], to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State educational agencies and local educational agencies...."⁴⁷ A separate section specifically requires state agencies to comply with this mandate.⁴⁸

Two federal cases highlight the importance of safeguarding the confidentiality of the records of students with disabilities. In the first, the Eighth Circuit, agreeing that public policy favors protection of the privacy of minors where sensitive matters are concerned, affirmed an order of a federal trial court in Missouri that judicial proceedings under the IDEA can be closed to the public.⁴⁹ The court observed that the IDEA restricts the release of information about students with disabilities without parental permission. In order to safeguard the information while preventing the child's stigmatization, the panel explained that access to the courtroom could be restricted and the files sealed. It should also be noted that the IDEA's regulations give parents the option of having administrative due process hearings open to the public.⁵⁰

In the second case, the federal trial court in Connecticut reasoned that school board officials violated the privacy rights of parents when they released their names and that of their son to a local newspaper following a due process hearing conducted pursuant to the IDEA.⁵¹ The court wrote that the parents and their child had an expectation of privacy based on the IDEA and its procedural safeguards. The court pointed out that the IDEA's regulations not only prohibit disclosure of personally identifiable information, but also require school boards to protect such data. The court found that the board violated these safeguards when the names were publicly disclosed, and that such a violation constituted a deprivation of the rights secured under Section 1983 of the Civil Rights Act.⁵²

Opportunity to Examine Records

The IDEA's due process procedures require school boards to provide the parents of students with disabilities opportunities to examine all records relating to their children as part of their right to participate in any meetings regarding the children's identification, evaluation, and placement.⁵³ In addition, boards must provide parents and

eligible students with notice of the procedural safeguards available to them, and the notice must state that they have the right to access desired records.⁵⁴

Disciplinary Information

The IDEA allows states to require school boards to include information about current or past disciplinary actions in the records of students with disabilities, and to transmit this data to the same extent as with students who do not have disabilities.⁵⁵ The records may include descriptions of behavior requiring disciplinary actions, the actions taken, and other data that may be important to the safety of the students or others who may be in contact with them.

Transmittal of Records

When students transfer to new districts, personnel in their new schools must act promptly to obtain their records from their previous schools, including their IEPs and any other significant information regarding the provision of a free appropriate public education.⁵⁶ Another section requires officials in the students' former schools to take prompt action supplying these records.⁵⁷ While the statutory provision applies only to students who transfer to districts within a state, the regulations apply to children who transfer to systems in other jurisdictions. When disciplinary information is transmitted to students' new schools, it must include copies of their current IEPs along with statements of current or previous disciplinary actions.⁵⁸

The IDEA includes a clarification declaring that school officials are not prohibited from reporting crimes committed by students with disabilities to appropriate authorities.⁵⁹ However, when officials do so, they must also transmit copies of the children's special education and disciplinary records.⁶⁰ The regulations add a disclaimer that this may be done only to the extent that the transmission is allowed by FERPA.⁶¹

Destruction of Records

The files of students with disabilities, especially those with severe disabilities who are in special education programs throughout their schooling, can become voluminous. At some points, then, much of this information may no longer be relevant because it is outdated. Recognizing how records can quickly become cumbersome, the DOE promulgated regulations allowing for the destruction of those no longer needed. Although neither the IDEA nor its regulations specify precisely what and when

records can be destroyed, they indicate that this may be done when the information is no longer needed to provide children with services.⁶²

Documents that may be destroyed include, but are not limited to, outdated IEPs and evaluation reports. The regulation states that parents must be advised when records are no longer needed and the information must be destroyed at the parents' request.⁶³ Further, the regulations specify that school officials can save, without time limitations, records including students' names, addresses, phone numbers, grades, attendance records, classes attended, and grade levels completed, along with the years they were completed.⁶⁴

Recommendations for Practitioners

In light of the complexity of FERPA, and the additional record-keeping requirements outlined in the IDEA, educational leaders and their attorneys may wish to consider the following recommendations in developing policies and responsible practices:

- Periodically, and at least annually, convey notices to parents and eligible students explaining their rights to inspect, review, request amendment of, and consent to disclosure of educational records. Notice can be sent via newsletters, student handbooks, brochures, district websites, local access TV, and/or e-mail. Notices sent to parents of students with disabilities, informing them of their rights under the IDEA, must inform them of their right to examine the records of their children.
- Notify parents that if they wish to amend the records of their children, but school officials refuse, they may attach statements to the files noting their disagreement with the contents that must be included whenever records are disclosed.
- Include information in all notices on how parents can enforce their rights by filing complaints with the DOE for alleged failures to comply with FERPA.
- Recognizing that parental permission or consent is transferred to students who turn eighteen, provide all notices to those who have reached this age. However, as to students with disabilities, establish procedures for taking their ages and the types or severity of their disabilities into account when considering whether to grant them ac-

cess. This is best done in consultation with their parents.

- Ensure access to records within the forty-five days set by FERPA. Policies should pay particular attention to giving timely access to the records of students with disabilities, particularly since parents may require these files for outside evaluations or to prepare for IEP meetings. Failure to provide records prior to IEP meetings could be viewed as limiting parental rights to participate fully in the IEP process.
- Inform stakeholders that records made by, and in the sole possession of, educational personnel and not accessible to others except temporary substitutes are not subject to release.
- Inform stakeholders that permission is unnecessary before data can be accessed by school staff with legitimate educational interests in the content of the records. For example, personnel conducting assessments as part of a special education evaluation may access students' records to obtain pertinent information about the students' educational histories. Further, in emergencies individuals who protect the health and safety of students may access records if necessary.
- Principals should appoint a custodian of records to supervise access to records in order to prevent access by unauthorized parties. Custodians should keep logs including names, dates, times, and durations that users had materials, of all who access files. Electronic files should be password-protected, and the password should be changed periodically.
- Take great care in guarding the confidentiality of the records of students with disabilities. While it is important to respect the confidentiality of all students' records, failure to keep records of special education students confidential can have a stigmatizing effect on children.
- While ensuring the confidentiality of special education records, develop efficient procedures to share important information with all staff responsible for implementing the IEPs of students with disabilities.
- Even though the Supreme Court ruled that the practice of peer grading of assignments does not violate FERPA, educators should consider whether this is a prudent practice, especially when students with disabilities are involved

who may be stigmatized by having their peers view their work.

- Provide annual professional development sessions to remind staff of record-keeping requirements and to keep them abreast of changes in the law or school board policy. Since many IEPs are revised annually in the spring, it would be wise to review all record-keeping requirements with special education staff at that time.
- It is equally as important to review FERPA's and the IDEA's requirements, along with the board's record-keeping procedures, with administrative and secretarial staff prior to the beginning of each school year.
- Create posters outlining FERPA's major requirements and display these prominently in faculty lounges to serve as reminders.
- Insofar as most new teachers may not be aware of FERPA, it would be prudent to include detailed information in their orientation packets and provide them with an overview as part of any orientation sessions. By the same token, new special education teachers should be instructed in the IDEA's requirements regarding confidentiality and record keeping.
- Due to the importance of continuity of programming for students with disabilities, immediately request that the records of students transferring from another school system be forwarded. By the same token, immediately send to their new schools the records of students with disabilities who are moving to a new district. It would be helpful to give their parents copies of their current IEPs to hand-carry to the new schools. For purposes of the efficient transfer of records, it is good practice to establish and maintain good working relationships with school officials in neighboring districts.
- Develop procedures to allow access by noncustodial parents who have the same access rights as custodial parents. These procedures need to include safeguards to make sure that parents whose rights have been abrogated by court decrees are denied access to restricted records. As such, custodial parents should be notified that they need to keep school personnel informed of any changes in noncustodial parents' rights to access records.
- Develop a systematic means of destroying records, with parental consent, that

are no longer needed. In this respect, keep in mind that the IDEA has a two-year statute of limitations for parents to request hearings,⁶⁵ and state law may provide a longer limitations period.

- Insofar as jurisdictions may have their own student records laws, school personnel need to be cognizant of any differences between federal and state laws.
- Document all steps the school district has taken to notify parents of their rights under FERPA and the IDEA, as well as those to train staff.
- Review and update all procedures annually.

ENDNOTES

* *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 318 Ed.Law Rep. 616 (Aug. 13, 2015).

** Dr. Russo is Panzer Chair in Education and Director of the Ph.D. Program in Educational Leadership in the School of Education and Health Sciences and Adjunct Professor of Law, University of Dayton, Dayton, OH. Dr. Osborne is Principal (Retired), Snug Harbor Community School, Quincy, MA; Drs. Russo and Osborne are both Past Presidents of the Education Law Association. Dr. Dolph is an Assistant Professor in and Chair of the Department of Educational Administration in the School of Education and Health Sciences at the University of Dayton, Dayton, OH.

¹ 20 U.S.C. § 1232g (2012).

² 20 U.S.C. §§ 1400-1482 (2012).

³ 20 U.S.C. § 1417(c).

⁴ 34 C.F.R. §§ 300.610-627 (2013).

⁵ 20 U.S.C. § 11415(b)(1); 34 C.F.R. § 300.501(c)(4).

⁶ 20 U.S.C. § 1414(d)(2)(C)(ii); 34 C.F.R. § 300.323(g).

⁷ 20 U.S.C. § 1413(i); 34 C.F.R. § 300.229). For a relevant discussion, see John Decman & Cassandra Bauer, *Student Discipline and the Sharing of Records: FERPA, IDEA, and the Duty to Ensure Safety*, 171 Ed.Law Rep. 407 (2003).

⁸ 20 U.S.C. § 1415(k)(6)(B); 34 C.F.R. § 300.535(b).

⁹ For a commentary on managing electronic records, see Gregory D. Shelton, *Proactive Management of Electronically stored Information: Is Your School Prepared for the Next Records Request?*, 244 Ed.Law Rep. 893 (2009).

¹⁰ For more complete coverage of FERPA, see Chapter 8 in Allan G. Osborne & Charles J. Russo, *THE LEGAL RIGHTS AND RESPONSIBILITIES OF TEACHERS: ISSUES OF EMPLOYMENT AND INSTRUCTION* (2011).

¹¹ 20 U.S.C. § 1232g(a)(4)(A).

¹² 20 U.S.C. § 1232g(a)(5)(A).

¹³ 34 C.F.R. § 99.3(b).

¹⁴ 20 U.S.C. § 1232g(a)(4)(B)(1).

¹⁵ 534 U.S. 426 (2002).

¹⁶ For further information on this decision, see Kathleen Conn, *Owasso: A Synonym for Missed*

Opportunity?, 177 Ed.Law Rep. 765 (2003) and Charles J. Russo & Ralph D. Mawdsley, *FERPA, Student Privacy and the Classroom: What Can be Learned from Owasso School District v. Falvo?*, 171 Ed.Law Rep. 397 (2003).

¹⁷ 34 C.F.R. §§ 99.7, 300.612.

¹⁸ 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37.

¹⁹ 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 300.613).

²⁰ 34 C.F.R. § 99.4.

²¹ 34 C.F.R. § 99.10(c).

²² 20 U.S.C. § 1232g(d); 34 C.F.R. § 300.625(b).

²³ 34 C.F.R. §§ 300.574, 300.625(a).

²⁴ 20 U.S.C. §§ 1232g(b)(1), 1232g(b)(2)(A).

²⁵ 20 U.S.C. § 1232g(b)(1)(A).

²⁶ 20 U.S.C. § 1232g(b)(1)(I).

²⁷ 34 C.F.R. § 99.30.

²⁸ 20 U.S.C. § 1232g(b)(2)(A).

²⁹ 20 U.S.C. § 1232g(b)(4)(A).

³⁰ 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 300.614.

³¹ 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(b).

³² 34 C.F.R. §§ 99.11(b), 300.614(b).

³³ 34 C.F.R. §§ 99.11(a), 300.614(a).

³⁴ 34 C.F.R. § 99.20(a), 300.618(a).

³⁵ 34 C.F.R. §§ 99.20(b)(c), 300.618(b)-(c).

³⁶ 34 C.F.R. §§ 99.21, 300.619.

³⁷ 34 C.F.R. §§ 99.21(b)(1), 300.620(a).

³⁸ 34 C.F.R. §§ 99.21(b)(2), 300.620(b).

³⁹ 34 C.F.R. §§ 99.21(c), 300.620(c).

⁴⁰ 536 U.S. 273 (2002). For a discussion of this decision and its implications under the IDEA, see Ralph D. Mawdsley, *A Section 1983 Cause of Action Under IDEA? Measuring the Effect of Gonzaga University v. Doe*, 170 Ed.Law Rep. 425 (2002).

⁴¹ 34 C.F.R. § 99.63.

⁴² 34 C.F.R. § 99.64.

⁴³ 34 C.F.R. § 99.65.

⁴⁴ 34 C.F.R. § 99.67.

⁴⁵ 20 U.S.C. § 1417(c).

⁴⁶ 34 C.F.R. § 300.610.

⁴⁷ 20 U.S.C. § 1417(c).

⁴⁸ 20 U.S.C. § 1412(a)(8).

⁴⁹ *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371 (8th Cir. 1990).

⁵⁰ 34 C.F.R. § 300.512(c)(2).

⁵¹ *Sean R. v. Board of Education of the Town of Woodbridge*, 794 F. Supp. 467 (D. Conn. 1992).

⁵² Civil Rights Act of 1871, Section 1983, 42 U.S.C. § 1983 (2012).

⁵³ 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(c)(4).

⁵⁴ 20 U.S.C. § 1415(d)(2)(D); 34 C.F.R. § 300.504(c)(4).

⁵⁵ 20 U.S.C. § 1413(i); 34 C.F.R. § 300.229(b), (c).

⁵⁶ 20 U.S.C. § 1414(d)(2)(C)(ii)(I); 34 C.F.R. § 300.323(g)(1).

⁵⁷ 20 U.S.C. § 1414(d)(2)(C)(ii)(II); 34 C.F.R. § 300.323(g)(2).

⁵⁸ 20 U.S.C. § 1413(i); 34 C.F.R. § 300.229(c).

⁵⁹ 20 U.S.C. § 1415(k)(6)(A); 34 C.F.R. § 300.535(a).

⁶⁰ 20 U.S.C. § 1415(k)(6)(B); 34 C.F.R. § 300.535(b)(1).

⁶¹ 34 C.F.R. § 300.535(b)(2).

⁶² 34 C.F.R. § 300.624(a).

⁶³ 34 C.F.R. § 300.624(a), (b).

⁶⁴ 34 C.F.R. § 300.624(b).

⁶⁵ 20 U.S.C. § 1415(f)(3)(C).

