



## **Informational Paper: Retention and Destruction of Educational Records for Students with Disabilities**

### **April, 2019**

#### Sources

- What Do I Do When ... The Answer Book on the Family Educational Rights and Privacy Act, an LRP publication
- Beyond FERPA: A Guide to Student Records Under the IDEA, an LRP publication
- North Dakota Century Code

#### Definitions

FERPA definition of a record (34 CFR 99.3)- a record is defined as any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche

FERPA definition of an educational record (34 CFR 99.3) (IDEA incorporates this same definition)-

Educational records are those records that are:

1. Directly related to a student
  - a. Most experts say this is synonymous with personally identifiable information
    - i. IDEA (34 CFR 300.32)- Personally identifiable information is information:
      1. that contains the name of child, child's parent, or other family member
      2. that contains the address of child
      3. that contains a personal identifier, such as social security number, student number, or biometric record (fingerprints, record of voice, photo of face, etc.)
      4. that contains other indirect identifiers, such as the student's date of birth, place of birth and mother's maiden name
      5. that contains a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty
2. Maintained by an educational agency or institution or by a party acting for the agency or institution
  - a. Designation of a document as an educational record subject to FERPA and IDEA, depends on who maintains the record, not who originates it.

Both FERPA and IDEA require that all student educational records be protected and subject to parental inspection and review.

In summary- A record is considered an educational record and subject to protection by the agency and to parent inspection and review if it is maintained by the school, district, or special education unit; and, it's directly related to a student because it has some sort of identifiable information.

**FERPA specifically excludes (34 CFR 99.3):**

1. Records of instructional, supervisory, and administrative personnel (and educational personnel ancillary there to) which are in the “sole possession” of the maker thereof and which are not accessible or revealed to any other person except as a substitute.
2. Records maintained by a law enforcement unit of the educational agency that were created by that unit for the purpose of law enforcement.
3. In cases of individuals employed by the educational agency, but not in attendance at such agency, records made and maintained in the normal course of business that related exclusively to such person in that person’s capacity as an employee and not available for any other purpose.
4. Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity and are used only in connection of treatment.
5. Records created or received by an educational agency after an individual is no longer a student in attendance and that are not directly related to the individual’s attendance as a student, and
6. Grades on peer-graded papers before they are collected and recorded by a teacher.
  - a. (*Independent School District No. 1-011 vs. Falvo*, Supreme Court Decision)- Once collected and recorded in teacher grade book, it’s a protected educational record under FERPA, but not up until then.

**What’s included (list not exhaustive):**

1. IEP, progress reports, IWARs, Profiles, PWNs, IEP meeting notes etc.
2. Video and audio recordings of meetings
3. Video and audio recordings of the student if they are maintained in any way by the agency
4. Test Results, Test protocols- depends on the circumstances
  - a. A psych evaluation or other assessment document that is identifiable to a particular student would generally meet the definition of educational record.
  - b. Any test protocols or test question booklets that do not contain information directly related to the student are not educational records
  - c. The test booklet, questions, etc. where you might record data are not educational records unless they have the student name or some other identifier on them. The summary page with identifiable information, scores, charts, graphs, etc. are considered educational records and should be separated from the test booklet or test questions.
  - d. OSEP Letter to MacDonald (1993)- Document must be directly related to the student. Test protocols, teacher manuals, films and tapes used for testing are not generally directly related to an individual student and therefore do not meet the definition of educational record. However, if student’s name on a document, or answers or work appear in a document, then it is an educational record.
  - e. Family Policy Compliance Office (FPCO) of the US Dept. of Education in Letter regarding Westport Central Schools (2005)- a test protocol or question booklet which is separate from the sheet on which student records answers and which is not personally identifiable would not be an educational record.
  - f. Sole possession- Even if the test protocol, questions, booklet have a name on it, it could be considered a sole possession record if examiner has not shared it with others.

- g. Copies- Even though parents may have access to test protocols, etc., they are automatically entitled to a copy, unless a provision of state or local law provides otherwise. And, manufacturers of tests hold copyrights to the protocols and consider copying as an infringement on those copyrights. There may be circumstances where it's not, such as in the case of "Fair Use."
  - i. The fair use of a copyrighted work, including such use by reproduction in copies... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarships, or research, is not an infringement of copyright. To determine whether a document is within fair use, the following factors must be considered:
    - 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
    - 2. The nature of the copyrighted work.
    - 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
    - 4. The effect of the use upon the potential market for or value of the copyrighted work.
- 5. Access logs must be kept and are considered an educational record subject to protection and parent inspection.
- 6. Disciplinary records- FERPA (34 CFR 99.8(b)(2)(ii)) states that "records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency, are not law enforcement unit records." (See #2 under "Exclusions.")
  - a. In 1995 FERPA (34 CFR 99.3) added the following definition of a disciplinary proceeding:
    - i. "The investigation, adjudication, or imposition of sanctions by an educational agency with respect to a violation of the internal rules of conduct applicable to students of the agency."
  - b. So long as an investigation or action is confined to the enforcement of school policy (even if it's something illegal like a school's investigation into weapons or drugs), any documentation of the incident is considered an educational record.
  - c. When the information from the school's policy investigation is turned over to the law enforcement unit of the agency because there was an illegal act committed, any additional information of the law enforcement agency concerning the illegal act, is not considered an educational record.

## Retention

General Educational Provisions Act (GEPA)- establishes record retention requirements with which all agencies receiving federal financial assistance must comply.

- Retain for 3 years after the completion of the activity for which the funds are used
- Must maintain records (IEPs, IWARs, Profiles, Notices, Invites, IDEA paperwork, expenditures, etc.) to allow government access to them for purposes of monitoring compliance and auditing expenditures.

The State or local school districts can set policy that would extend the three-year timeline established by GEPA. North Dakota Century Code (15.1-32-11) requires that each district shall make and keep current a record of all students with disabilities who are residents of the district. It does not, however, require a timeline for retention of student records.

Local school districts or the local special education unit may have policy that extends the retention timeline. If so, special education student records would be required to be retained for that length of time.

Summary- If the district annually receives federal funds for special education, student special education records must be retained and maintained during the time that the child resides in the district and is receiving benefit of the federal funds. After 3 years where the student no longer resides in the district, or no longer receives benefit from the federal funds, the district has no obligation to retain and maintain the records unless the local school district or special education unit policy requires a longer retention timeline. The district can't, however, destroy the records until they have provided notice that the records are no longer needed to provide educational services.

## **Destruction**

IDEA definition of destruction (34 CFR 300.611(a)- either physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

FERPA and IDEA have requirements to allow access and provide parents a right to inspect their child's educational records. FERPA does not provide parents the right to request destruction, under the IDEA parents are provided the right to request the school destroy their child's educational record when it is no longer needed to provide educational services (34 CFR 300.624).

Decision as to when it is no longer needed is within the district's discretion, not the parents.

Under FERPA schools must inform parents of children with disabilities when they decide that such information is no longer needed and advise them that the agency is under no obligation to destroy the record if the parents so request. (Exception is required in North Dakota Century Code (15.1-19-15) and noted above.) Even when parents respond to notice and request destruction, or even if it's because of NDCC, the agency retains the right to preserve a permanent record of name, address, phone number, along with certain basic academic information including attendance records and grades.

If the request to destroy a record comes before such notice, or while the parent or after the parent exercises their right to inspect and review their child's record, the district may have to make the decision whether it's no longer needed before providing the notice.

## **Notice**

FERPA requires notice be provided when the agency decides that the record is no longer needed to provide educational services (34 CFR 99.7(a)(2)), typically graduation, or according to NDCC when a student graduates or no longer resides in the district, whichever is later. The notice must inform parents of right to:

- Inspect and review their child's educational record

- Seek amendment of the record that they believe to be inaccurate, misleading, or otherwise a violation of student’s privacy rights.
- Consent to disclosures of personally identifiable information contained in their child’s records except to the extent that FERPA authorizes disclosure without consent.
- File a complaint with the Family Policy Compliance Office (FPCO) of the US Dept. of Education, alleging district’s failure to comply, and
- The notice must include explanation of the procedures for exercising their rights.

Parents should also be informed that even though the records are no longer needed by the school to deliver educational services, the records may be needed for future services from various social service agencies, university/post-secondary program applications, etc. Such information, however, is not required to be on the notice.

**When a request to destroy special education information comes in, consider the following:**

Is it an educational record?

Has the agency provided notice to the parent that the record is no longer needed to provide educational services? Or does the agency need to decide whether the record is no longer needed and then provide the notice?

Deliver an appropriate PWN to the requesting parent with complete information about the district’s actions, especially a refusal.

Please direct questions to the North Dakota Department of Public Instruction/Office of Special Education at 701-328-2277.