

# Charleston County School District Department of Exceptional Children Services

## ***CONFIDENTIALITY/RECORDS ACCESS PROCEDURES***

*From the CCSD Special Education Process Guide  
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**Note:** This manual is in alignment with the SCDE OEC Special Education Process Guide/Appendix 11 (Zais: 10/11)  
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## **Request Special Education Records**

All requests must be made in writing and mailed/faxed and include the following:

Name of student

Date of birth of the student

Signature of the holder of educational signing rights for the minor and today's date on the request

Authorization to obtain and/or release records, must be signed by the holder of educational signing rights if the student is less than 18 years old; otherwise, 18-year-old students must sign and date their own authorization to obtain release records or information.

Parents/guardians or eligible (adult) students may request a copy of their records in writing or in person at the following address:

Department of Exceptional Children Services  
Attention: Special Education Records Request  
Annette Nelson, Secretary  
75 Calhoun Street  
Charleston, SC 29401  
Telephone (843) 937-6340 or 937-6500  
FAX (843) 937-6501

\*Special Education Records are kept in a central and secure location. Copying of special education records may require a fee.

## CONFIDENTIALITY OF RECORDS

### INTRODUCTION

Confidentiality of educational records is a basic right shared by all students in LEAs and their parents. These fundamental rights are described in the FERPA of 1974, as amended (2008).

Confidentiality regulations apply to the State, to all LEAs and to private schools that accept federal funds. In addition, all school personnel (including contracted employees) are governed by confidentiality requirements of the IDEA, which apply to students with disabilities.

Confidentiality is one of the rights afforded to parents and is included in the Parent Rights document. All people involved in special education should be aware of the laws and regulations ensuring that all records and information will be kept secure and remain confidential.

This guide provides specific information about confidentiality requirements for schools:

- A. Federal and State Requirements**
- B. Access to Records**
- C. Transfer of Records**
- D. Release of Information**
- E. Amendment of Records**
- F. Destruction of Records**
- G. Age of Majority**
- H. Test Protocols**
- I. Discipline Records**
- J. Child in Need of Care**

### A. FEDERAL AND STATE REQUIREMENTS

Each school shall annually notify parents of their rights under FERPA. The notice must inform parents or adult students that they have the right to:

- Inspect and review the student's education records;
- Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;
- Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that § 99.31 of FERPA authorize disclosure without consent; and
- File a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of FERPA.

The LEA must also inform parents of:

- The procedure for exercising the right to inspect and review education records.
- The procedure for requesting amendment of records.

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The LEA may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights. The LEA shall effectively notify parents who have a primary or home language other than English. (34 CFR § 99.7) This notice should adequately inform parents prior to any identification, location, or evaluation activity taking place.

Definitions of terms used are as follows (34 CFR § 300.32):

**Personally identifiable** means information includes information such as the name of the child, child's parents, or other family member; address; personal identifier such as the child's social security number or student number; or list of personal characteristics or other information that would make it possible to identify the child.

**Destruction** means physically destroying the medium on which information is recorded or removing all personal identifiers from the information so no one can be identified.

**Educational records** means any document or medium on which information directly related to one or more students is maintained by a participating agency.

**Participating agency** means any educational agency or institution that collects maintains or uses personally identifiable student information to provide special education and related services to children with disabilities.

In addition to these federal requirements, the SCDE is obligated to establish policies and procedures to ensure that confidentiality requirements are in place at every participating agency. The SCDE does this by having each public agency accessing funds sign assurances and adopt or establish local policies and procedures consistent with confidentiality requirements.

## B. ACCESS TO RECORDS

The FERPA and federal and state special education laws and regulations require schools to have reasonable policies in place to allow parents to review and inspect their child's records. An education record means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

Educational records may include, but not limited to:

- academic work completed and level of achievement
- attendance data
- scores and test protocols of standardized intelligence, aptitude, and psychological tests
- interest inventory results
- health data
- family background information
- information from teachers or counselors
- observations and verified reports of serious or recurrent behavior patterns
- IEPs
- documentation of notice and consent

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Under certain circumstances, a teacher's working file would not be considered to be part of the child's record. FERPA regulation 34 CFR § 99.3, states that the term "education records" does not include records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

The LEA must prevent the disclosure to any unauthorized person of personally identifiable information pertaining to all students. Disclosure is the release, transfer or other communication of records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic.

The FERPA allows parents to inspect and review all education records of their children maintained by an educational agency that receives federal funds. This includes all LEAs and private schools that accept federal funds. The school must comply with a request to inspect records within a reasonable time, not to exceed 45 calendar days.

The FERPA regulations allow some exceptions to the requirement to obtain parent consent before releasing records. All of these exceptions also apply to the confidentiality requirements in the federal special education regulations (34 CFR § 300.622(a)). For example, FERPA allows the school to release records to authorized individuals, such as:

- other school officials, including teachers at the school where the student attends, who have a legitimate educational interest (34 CFR § 99.31(a)(1));
- officials of another school, LEA, or postsecondary educational institution where the student is enrolled or seeks or intends to enroll, if (a) the LEA's annual notice included a notice that the LEA forwards education records to other agencies that request records and in which the student seeks or intends to enroll; or (b) the LEA makes a reasonable attempt to notify the parents or the student of the disclosure at the last known address (34 CFR § 99.31(a)(2)), however no notice is required if the disclosure is initiated by the parent or adult student;
- authorized representatives of the US Comptroller General, US Secretary of Education, and State Educational Agencies in connection with an audit or evaluation of Federal or State supported programs, or for the enforcement or compliance with Federal legal requirements related to those programs (34 CFR § 99.31(a)(3));
- disclosure in connection with financial aid for which the student has applied or received to determine eligibility, amount, or conditions of the aid or to enforce the terms and conditions of the aid (34 CFR § 99.31(a)(4));
- disclosure to State and local officials to whom the information is specifically allowed to be reported pursuant to State statute (34 CFR § 99.31(a)(5));
- disclosure to organizations conducting studies for educational agencies to develop, validate or administer predictive tests; administer student aid programs; or improve instruction, but only if the study does not allow personal identification of parents and students to anyone other than representatives of the organization conducting the study, and if the information is destroyed when no longer needed for the purposes for which the study was conducted (34 CFR § 99.31(a)(6));
- disclosure to accrediting organizations to carry out their functions (34 CFR § 99.31(a)(7));
- disclosure to a parent of a student who qualifies as a dependent under section 152 of the Internal Revenue Service Code (34 CFR § 99.31(a)(8));
- disclosure of relevant educational records to a court in a legal action initiated by the LEA against a parent. Also, disclosure to comply with a judicial order or subpoena. However, these disclosures may be made only if the LEA makes a reasonable effort to notify the parents or eligible student of

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the order or subpoena in advance of compliance with the order or subpoena, unless the order or subpoena states that the existence or contents of the order or subpoena not be disclosed (34 CFR § 99.31(a)(9));

- disclosure in connection with a health or safety emergency, if knowledge of the information is necessary to protect the health or safety of the student or other individuals (34 CFR § 99.31(a)(10));
- disclosure of directory information. This is information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most previous educational agency or institution attended (34 CFR § 99.31(a)(11));
- disclosure to the adult student or student of any age if attending a postsecondary school, or to the parents of a student who has not reached 18 years of age and is not attending an institution of postsecondary education (34 CFR § 99.31 (a)(12)); and
- disclosure of the results of any disciplinary proceeding conducted by an institution of postsecondary education against an alleged perpetrator to an alleged victim of any crime of violence, as defined by § 16 of Title 18, United States Code (34 CFR § 99.31 (a)(13)); or
- disclosure to a parent of a student attending an institution of post secondary education regarding the illegal use of alcohol (34 CFR § 300.622(a)).

To ensure protection of education records, the LEA must:

1. Obtain written consent before disclosing personally identifiable information to unauthorized individuals. A parent must provide consent if the child is under 18 years of age (unless one of the exceptions listed above applies).
2. Designate and train a records manager to assure security of confidential records for students with disabilities.
3. Keep a record or log of all parties obtaining access to education records, including the name of the party, the date access took place, and the purpose of the authorized use.
4. Maintain for public inspection a current listing of names and positions of employees who may have access to personally identifiable information.
5. Ensure the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.
6. Ensure that, if any education record includes information on more than one student, a parent of a child must have the right to inspect and review only the information relating to his or her child, or to be informed of that specific information.
7. Ensure that each person collecting or using personally identifiable information receives training or instruction regarding the policies and procedures governing confidentiality of personally identifiable information. The LEA must maintain a record of the training provided, the person or persons providing the training, dates of the training, those attending, and subjects covered.
8. Provide a parent, upon request, a list of the types and locations of records collected, maintained, or used by the LEA.
9. Respond to any reasonable request made by a parent for an explanation and interpretation of a record.
10. Provide a parent, upon request, access to the child's records, and under certain circumstances, a copy of the records (34 CFR § 300.613). Most LEAs copy records for parents without

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charge. However, the law does allow for fees for copies of records made for a parent if the fee does not prevent a parent from exercising the right to inspect and review those records. A fee may not be charged to search for or retrieve information.

### C. TRANSFER OF RECORDS

Education records include personally identifiable information, and may not be released to another agency or organization without parent consent. However, when a student transfers to another LEA, education records may be forwarded without student or parent consent if the annual FERPA notice to parents includes a statement that these records will be forwarded to the receiving school. Immunization records are included in the educational records (under the annual notification exception) that may also be shared with a receiving school without student or parent consent. By sharing such information between schools, the unnecessary immunization of children can be avoided.

South Carolina schools may NOT withhold records because of fines or other such reasons. The sending LEA is to transfer the original school record to the requesting LEA. The sending LEA should maintain a copy of the educational record that is sent. In addition, South Carolina special education regulations require the sending LEA to immediately transfer the IEP, and any additional educationally relevant information regarding a child with a disability, to the receiving LEA. If the school's annual FERPA notification does not contain a statement that the school sends educational records to a receiving school, it must make a reasonable attempt to notify the parent at the last known address of the parent.

When a child transfers from a LEA in another state to a LEA in South Carolina, the South Carolina school must obtain parental consent to access the records from the LEA in the other state.

### D. RELEASE OF INFORMATION

As discussed in previous sections, consent from the parent or adult student is required before education records may be released (34 CFR § 300.622). Some examples of when parent consent is required include:

- If a child is enrolled, or is going to enroll in a private school that is not located in the parent's LEA of residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (34 CFR § 300.622(a)(3)).
- Parental consent must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services according to an IEP.
- Additionally, parent consent is required when a school accesses reimbursement from Medicaid or private insurance for special education services. To bill Medicaid, the school must release to the Medicaid billing agency personally identifiable information, such as the student's name, social security or other student number, category of disability, and other pertinent information.

The IDEA requires LEAs to obtain parental consent each time access to public benefits or insurance is sought. They must also notify parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

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The OSEP has provided informal guidance that LEAs can obtain consent one time annually for the specific services, and duration of services identified in a child's IEP, and not be required to obtain a separate consent each time a Medicaid agency or other public insurer is billed for the provision of required services. If the specific services or the duration of services change, the school must obtain consent to access Medicaid for the change in services (34 CFR § 300.154(d)(2)(iv))

## **E. AMENDMENT OF RECORDS**

Parents have the right to request that their child's education records be changed if something is inaccurate, misleading, or in violation of the student's rights of privacy. For example, if a child is evaluated and is identified with a disability or health condition that later is determined to be wrong, the parents may ask that the school remove the records relating to the inaccurate diagnosis.

If the school does not agree that the education records should be changed, staff must provide an opportunity for a hearing, following FERPA requirements. The hearing officer would be the school's hearing officer, not a special education due process hearing officer (34 CFR § 300.618).

## **F. DESTRUCTION OF RECORDS**

Federal auditing requirements necessitate the availability of education records for identified students for 5 years after they exit from special education services. After that period of time, LEAs may destroy records. However, before destroying special education records, the LEA must notify the parent (or the adult student) that the information is no longer needed to provide services to the student and that the school is proposing to destroy them.

The requirement to notify the parent or the adult student before records are destroyed may be problematic, if the student moves from the address last known to the LEA. In such cases, the LEA is advised to send a certified letter to the student at the last known address. If that letter is returned to the LEA, that return becomes the documentation of the LEA's attempt to inform the student of the proposed destruction of records. In such cases, the LEA may publish a public notice to students who graduated or left school five years previously. The notice should be addressed to students and guardians, advising them of the proposed destruction of records and asking them to contact the LEA if they object to the destruction.

Many LEAs inform parents of when the special education records of their child will be destroyed with a statement in the LEA's handbook. The following statement is an example:

“NOTICE OF DESTRUCTION OF SPECIAL EDUCATION RECORDS: Special education records for each child with a disability are maintained by the LEA until no longer needed to provide educational services to the child. This notice is to inform you that the special education records for this student will be destroyed after five (5) years following program completion or graduation from high school, unless the student (or the student's legal guardian) has taken possession of the records prior to that time.”

Parents may also ask that their child's records be destroyed. However, a permanent record of the following information may be maintained without time limitation:

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- A student's name, address, and phone number;
- His or her grades;
- Attendance record;
- Classes attended;
- Grade level completed; and
- Year completed.

## G. AGE OF MAJORITY

In South Carolina, the age of majority is 18. Students who are 18 years or older, unless they have a guardian appointed under State law, have the right to grant or withhold consent, have access to records, to amend records, and to file a complaint, etc. (See Chapter 1, Parent Rights In Special Education, for additional information on age of majority.)

## H. TEST PROTOCOLS

Some individualized testing involves the use of test protocols. Test protocols commonly refer to written instructions on how a test must be administered and the questions posed. Generally, these test protocols are original creations of independent authors and/or organizations. Therefore, they may be protected by the U.S. Copyright Act of 1976, the Digital Millennium Copyright Act of 1988, as well as other State, Federal, and international acts and conventions. If a given test protocol is copyrighted, it may not be reproduced, transmitted, distributed, publicly displayed, nor may a derivative work be created therefrom, without express permission from the copyright owner, unless such use is allowed under the Fair Use Doctrine.

The Office of Special Education and Rehabilitative Services (OSERS) has noted that if a document is copyrighted, the IDEA's inspection and review rights generally do not implicate copyright law. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations. *However, when a test protocol contains personally identifiable information directly related to a particular student, that protocol is an education record.*

Requests for test protocols occur in varying contexts. Sometimes, parents ask to inspect or photocopy protocols maintained by LEAs or their personnel. Occasionally, LEAs want to review or copy protocols of the parents' independent educational evaluators. The variables here are whether one seeks to inspect the protocols or to copy them.

“A test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be part of his or her ‘education records’.” Analysis, 64 Fed. Reg. at 12641. When a child's information is integrated throughout the test protocol, it contains child-specific information that is factual, personally identifiable information, and reflects the child's level of functioning, it becomes an educational record.

When a student with a disability is the subject of a court or administrative hearing, parents may have additional legal tools for accessing test protocols. These tools include pretrial discovery, subpoenas, and the right to question witnesses about their records. Also, the U.S. Department of Education has

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advised that a parent's FERPA right to inspect test protocols may include a right to copy them if ordered by a special education due process hearing officer or a judge in a legal proceeding.

If failure to provide a copy of a requested protocol would effectively prevent the parent from exercising the right to inspect and review their child's educational records, the LEA may be required to provide a copy to the parent. In a situation where a copyrighted document has been made part of a child's education record because it includes child-specific information, the LEA may wish to contact the copyright holder to discuss whether a summary or report of the child's evaluation and assessment results can be prepared that can be provided to the parents as part of the child's education record, in lieu of providing a copy of the copyrighted document. Such a summary or report would provide parents with the necessary and pertinent information regarding their child's developmental functioning and areas of strengths and need.

Separately, we note that the LEA must provide parents with an explanation of the results of their child's evaluation and assessment as part of the notice that must be provided to before the agency proposes or refuses to initiate or change the identification, evaluation, or placement their child, or the provision of appropriate early intervention services to the child and the child's family. This notice must provide an explanation of the child's evaluation and assessment results in a manner that would adequately inform the parent about how and in what areas the child was evaluated and assessed, and include the child's data or performance against such measures in order to explain the basis of the child's eligibility determination. A summary or report may both meet this requirement.

## I. DISCIPLINE RECORDS

LEAs reporting a crime are allowed to forward the student's special education and disciplinary records to the appropriate authorities only if they have parent consent or if one of the FERPA exceptions to the consent requirement applies (34 CFR § 300.535(b)). See Section A of this chapter, and also Chapter 13 for more information about release of discipline records to law enforcement.

In addition, other federal and state requirements are as follows:

- When LEAs send records of students to other LEAs, they are also required to include the discipline records.
- If LEA employees are required to make a report to a law enforcement agency, they may be charged with failure to report if they do not comply.
- If LEA employees report a crime, the LEA may not impose sanctions on them.
- If LEA employees report a crime in good faith, they have immunity from civil liability.

## QUESTIONS AND ANSWERS ABOUT CONFIDENTIALITY

### **1. What must an LEA do to provide parents reasonable access to their child's records?**

Records should be in a location that parents can find, maintained during normal business hours, and not in a physically inaccessible area (downstairs or upstairs, with no elevator available). Upon request, someone who can interpret the records should be available to the parents. Parents may also request that copies of their child's education records be made for them. However, an LEA is required to provide copies of educational records only if failure to provide those copies would effectively prevent the parent from exercising the right to review and inspect the records. If copies are provided LEAs may charge a reasonable fee and may take a reasonable time to provide the copies to the parents. In cases where failure to provide copies of records would effectively prevent a parent from exercising the right to inspect and review education records, and the parents are unable to pay the fee, the LEA must provide the records without charge.

### **2. Are LEA personnel required to provide parents access to their working files and anecdotal records?**

The FERPA and the IDEA include definitions of "education records." These definitions, while expansive, do not include the staff's working files and anecdotal records. FERPA regulation 34 CFR § 99.3 states that the term "education records" does not include "records that are kept in the sole possession of the maker of the record, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record."

### **3. Only a limited amount of information is needed to bill Medicaid (not the entire education record). May this limited information be released without parent consent to the Medicaid billing agency in order to access reimbursement for special education services?**

No. Parent consent is required by FERPA, because the information being released is personally identifiable (student's name, social security or other student number, category of disability, etc.). In addition, LEAs must obtain parental consent to access public insurance such as Medicaid, at least annually for the specific services, and duration of those services identified in the child's IEP. The LEA must obtain parental consent to access Medicaid for any change in a service or amount of a service.

### **4. When a student is in a private school and receives special education services from the LEA, who keeps the student's educational record?**

If the student receives special education services through the LEA, the LEA is responsible for maintaining the student's educational record. The private school may also have records, or copies of the LEA records, including the student's IEP, if appropriate.

### **5. What should the LEA do if during a due process hearing, the parents request a copy of their child's test protocol?**

According to the U.S. Department of Education, under FERPA, if the protocol contains personally identifiable information, parents have the right to inspect test protocols, which may include a right to copy them if ordered by a special education due process hearing officer or a judge in a hearing. Due to concerns about violating the test publisher's copyright rules, the LEA may want to consult with their

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attorney. However, LEAs are required to provide copies of the records if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records (34 CFR § 300.613(b)(2)).

## **6. How long must an LEA retain special education records for children with disabilities?**

Federal auditing requirements mandate the availability of education records for identified students for 5 years after they exit from special education services. After that period of time, LEAs may destroy records. However, before destroying special education records, the LEA must notify the parent (or the adult student) that the information is no longer needed to provide services to the student and that the school is proposing to destroy them.

### **Statutory authority**

On 24 June 1994, the General Assembly approved the school district general schedules as Regulation 12-901 through 12-906.6. Additions/revisions to the school district general schedules were approved by the General Assembly as Regulation 12-901 through 12-906.16 and became effective on May 23, 2003.

### **12-906.2. Special Education Records (Local School District Program Scholastic Records For Handicapped Students)**

A. Description: Documents a handicapped student's participation and progress in a special education program. Information includes handicapped/psychological needs, placement forms, record of staffing, individual educational programs, confidential education reports, and least restrictive environment verification papers.

B. Retention: Until no longer needed to provide educational services to the student or for the necessary school district purposes such as auditing or monitoring, then notify the parents that they have a right to have these records destroyed. If the parents so request, the records must be destroyed. If the parents do not request destruction, the school district may retain these records permanently or destroy them at their discretion. In all instances of destruction, the parents of the student must be notified 45 calendar days prior to destruction that they have a right to request and be provided a copy of any personally identifiable data which has been obtained or used while providing educational services for their children. Documentation of the notification of parents must be retained permanently. (Note: This retention does not apply to the permanent record of a student's name, address, telephone number, grades, attendance record, classes attended, grade level completed, and year of completion.)