

**Riverside County Special Education Local Plan Area (SELPA)**  
**Pupil Records: Policy and Procedures**  
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**Introduction**

Pupil records are a necessary element in describing a pupil’s development in school. It is also essential for the records to be accurate, appropriate, and secure, in accordance with state and

federal laws. Per the Title 5 California Code of Regulations (CCR, § 431) such policies and procedures must:

1. Guarantee access to authorized persons within five (5) work days of the request.
2. Assure security of all confidential records.
3. Enumerate and describe pupil records collected and maintained.
4. Provide for the annual notification of right of access by parent, legal guardian or eligible pupil.
5. State that a nominal fee may be charged for copies of records.
6. Specify access restrictions, including criteria for disclosure to “school official with legitimate educational interest”.
7. Provide for an access of disclosure log.
8. Provide the process for the correction or removal of information.

All individually identifiable information is confidential and covered by the rules of access. Essentially all information about a pupil is confidential at the collection, storage, disclosure and destruction stages. Access is limited to those school employees with an “educational need to know” and the parent (or pupil over 18 years of age). Only the parent (or pupil over 18) may authorize the release of any information except under the specific and narrow set of circumstances listed herein. Thus, discussion of a specific pupil in a teachers’ lunchroom, in a manner which identifies the pupil, is a clear violation of that pupil’s right to privacy. Likewise, posted class lists or lists with pupil’s names and/or addresses are also confidential and governed by the same rules.

## **Policy**

The SELPA members recognize the importance of keeping accurate, comprehensive pupil records as required by law. Each Superintendent or designee shall ensure that the district’s administrative rule and school site procedures for maintaining the confidentiality of pupil records is consistent with state and federal law. Each Superintendent or designee shall also establish administrative regulations governing the identification, description and security of pupil records, as well as timely access for authorized persons. These regulations shall ensure parental right to review, inspect and copy pupil records and shall protect the student and his/her family from invasion of privacy. The local educational agency (LEA) members of the SELPA may utilize this document to meet these requirements and/or adopt local policies and regulations approved by their local Board of Education.

The Superintendent or designee shall designate a certificated employee to serve as custodian of records, with responsibility for pupil records at the district level. At each school, the principal or a certificated designee shall act as custodian of records for students enrolled at that school. The custodian of records shall be responsible for implementing the Board policy and administrative regulation regarding student records. Such persons should receive training or instruction regarding pupil record policies and procedures.

## **The Relationship between FERPA and HIPAA**

Sometimes school personnel are confused about how to apply the *Family Educational Rights and Privacy Act* (FERPA) and the *Health Insurance Portability and Accountability Act* (HIPAA) when working with pupil records. The following section will provides clarification regarding FERPA and HIPAA.

## **FERPA**

FERPA is a federal law that applies to educational agencies and institutions that receive funds under any program administered by the US Department of Education. This virtually includes all public schools and school districts and most private and public postsecondary institutions. FERPA applies to the institution as a whole and to each of its components (i.e., departments).

K-12 private and religious schools generally are not subject to FERPA as they do not receive funds from the Department of Education. When a public school places a student with a disability in a private school that is acting on behalf of the local educational agency (LEA) with regard to providing services to the student, the records of that student are subject to FERPA, but not records of other students in the private school because the school itself is not subject to FERPA. In such cases, the LEA remains responsible for complying with FERPA with respect to the student placed at the private school.

Under FERPA, "Education Records" is broadly defined to mean those records that are directly related to a student and maintained by an educational agency. Parents and "eligible students" (a student who is at least 18 years of age or who attends a postsecondary institution at any age) have the right to inspect and review the pupil's record and to seek to have the record amended in certain circumstances. At the elementary or secondary level, such records may be comprised of student's health records, including immunization records, records maintained by a school nurse, and records those schools maintain on special education students, such as records on services provided to students under the IDEA. At postsecondary institutions, medical and psychological treatment records of eligible students are excluded from the definition "education records" if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment. If such records are disclosed for purposes other than treatment, the records become subject to FERPA requirements.

## **HIPAA**

HIPAA was enacted in 1996 to improve the efficiency and effectiveness of the health care system through the establishment of national standards and requirements for electronic health care transactions and to protect the privacy and security of individually identifiable health information. Entities subject to the HIPAA Administrative Simplification Rules are health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with covered transactions. "Health care providers" include hospitals, physicians, dentists, and other practitioners or organizations that furnish, bill, or are paid for health care in the normal course of business. Covered transactions are those for which the US Department of Health and Human Resources has adopted standards, such as health care claims submitted to a health plan.

### **Where FERPA and HIPAA May Intersect**

When a school provides health care to students in the normal course of business, such as through a health clinic, it becomes a "health care provider" as defined by HIPAA. It must comply with the HIPAA Simplification Rules if it sends information about any covered transactions electronically. However, many schools, even those that are HIPAA covered entities, are not required to comply with the HIPAA Privacy Rule because they are not a HIPAA covered entity. The only health records maintained by the school are "education records" or "treatment records" of eligible students which is covered under FERPA. However, both these types of records are excluded from coverage under the HIPAA Privacy Rule. Schools typically do not maintain "protected health information" which is covered under HIPAA. Mental health related records utilized for Medi-Cal billing must be maintained, in either a written or an electronic format, for a minimum of seven years from the date the therapy is terminated.

## Definitions

**“Access”** means a personal inspection and review of a record or an accurate copy of a record; an oral description or communication of a record or an accurate copy of such a record, and a request to release a copy of any record.

**“Adult Pupil”** is a person who is or was enrolled in school and who is at least 18 years of age.

**“Custodian of Records”** is the Program Administrator (principal, program manager, coordinator, or consultant) designated by the Superintendent. Each program administrator (Custodian of Records) is responsible for the security of pupil records maintained by the LEA and shall devise procedures for assuring that access to such records is limited to authorized persons. The task of the custodian of records is to:

- Ensure that records are properly assembled, dated, signed, and maintained.
- Maintain the “Pupil Access Log”.
- Classify records as to status: Mandatory Permanent, Mandatory Interim or Permitted
- Ensure the proper release and/or transfer of the pupil’s records.
- Receive and process parental requests for access or challenge to the record.
- Supervise the proper destruction of the records where appropriate.

Some of the above responsibilities may be delegated to appropriate certificated personnel.

**“Destruction”** means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

**“Disclosure”** means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records, to any party, by any means including oral, written or electronic means.

**“Education Records”**, as defined by FERPA, means “records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution”.

**“Legitimate Educational Interest”** is one held by officials or employees whose duties and responsibilities to the district, whether routine or as a result of special circumstances, require that they have access to pupil records.

**“Local Educational Agency (LEA)”** includes school districts, county offices of education, and charter schools approved to operate as a LEA in a SELPA.

**“Mandatory Permanent Pupil Records” (Class 1)** are those records, which the schools have been directed to compile by California statute authorization, or authorized administrative directive. Each school district shall maintain indefinitely all mandatory permanent pupil records or an exact copy thereof for every pupil who was enrolled in a school program within said district. The mandatory permanent pupil record or copy thereof shall be forwarded by sending district upon request of the public or private school in which the pupil has enrolled or intends to enroll. Such records include the following:

- Legal name of pupil
- Date of birth
- Method of verification of date of birth

- Gender of pupil
- Place of birth
- Name and address of parent of minor pupil
  - Address of minor pupil if different than above
  - An annual verification of the name and address of the parent and the residence of the pupil
- Entering and leaving date of each school year and for any summer session or other sessions
- Subjects taken during each year, half year, summer session, or quarter
- If marks or credit are given, the mark or number of credits towards graduation allowed for work taken
- Verification of or exemption from required immunizations
- Date of high school graduation or equivalent

**“Mandatory Interim Pupil Records” (Class II)** are those records which schools are required to compile and maintain for at least three years. After the pupil leaves the SELPA and the records are no longer needed, they can be destroyed as per LEA procedures. Such records include:

- A log or record identifying those persons (except authorized school personnel) or organizations requesting or receiving information from the record. The log or record shall be accessible only to the legal parent or guardian or eligible pupil, or a dependent adult pupil, or an adult pupil, or the custodian of record
- Health records, including Child Health Developmental Disabilities Prevention Program verification waiver
- Participation in special education programs including required tests, forms, case studies, authorizations and actions necessary to establish eligibility for admission or discharge
- Language training records
- Progress notices/reports as required by Education Code (EC) § 49066 and 49067
- Parental restrictions regarding access to directory information
- Parent or adult pupil rejoinders to challenged records and to disciplinary action
- Parental authorizations or prohibitions of pupil participation in specific programs
- Results of standardized tests administered within the preceding three years
- Work Permits/Permits to Employ
- Absence slips and verification needed for fiscal audit
- Suspension Notices/Expulsion Records

**“Parent/Guardian”** means a natural parent, an adopted parent or legal guardian. If the parents are divorced or legally separated, only the parents having legal custody of the pupil may challenge the content of a record pursuant to EC § 49072.5 or consent to release records to other pursuant EC § 49075. However, either parent may grant consent if both parents have notified, in writing, the Program Administrator that such an agreement has been made. Whenever a pupil has attained the age of 18 years or is attending an institution of post-

secondary education, the permission or consent required of, and the rights accorded to, the parents or guardian of the pupil shall thereafter be required of, and accorded to, the pupil.

Where the courts have assigned “**joint custody**” to both parents, both have full rights of access, consent, etc. If both parents have “joint legal custody”, but one has physical custody, the custodial parent is the one whose signature is required for authorization. If both parents have joint physical custody, either parent can agree/consent and the dissenting parent would then have to seek a court order to stop the evaluation, placement, release of records, etc.

Since the court may declare a child “**a ward of the court**” and place the child with the natural parents, the exact wording of the court order may be needed to determine who has custody. If a child has been referred to the court, but custody has not yet been determined, the parent retains their rights and except for an “emergency”, a court order (or parent consent) would be necessary in order to show the records to any person other than the parent.

“**Permitted or Disposable Records**” (Class III) are those pupil records, which districts may maintain for appropriate educational purposes and six months after the pupil leaves, they are destroyed. Such records may include:

- Objective counselor and/or teacher ratings
- Standardized test results older than three years
- Routine discipline data
- Verified reports of relevant behavioral patterns
- All disciplinary notices
- Attendance records not otherwise required or adult pupil rejoinders to challenged records and to disciplinary action

“**Personal or Informal Notes**” which remain the sole possession of the maker and which are not accessible to any other person do not constitute part of a pupil’s record. Such notes may be related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person, except a substitute. However, the moment any of these notes (sometimes called “personal memory aids”) are shared with another, they become part of the pupil’s record (Permitted Pupil Records) and all procedures for access, storage, and/or destruction apply. Informal notes are subject to subpoena if they are the basis for any evidence in a hearing or court. Atkinson, Andelson, Loya, Ruud & Romo (July 3, 2013) remind LEAs of the following:

- Emails with a student’s name that are printed and placed in the educational file, or are maintained electronically, are part of the student record.
  - It is recommended not to indicate the student’s specific name within the email subject line.
- Electronic email messages that are not maintained are not educational records for purposes of FERPA because, while they relate to the student, they were not maintained by the educational institution (i.e. emails purged as maintenance of the institution’s email network system).

“**Personally Identifiable Information (PII)**”, per FERPA, includes direct identifiers (such as a student’s or other family member’s name) and indirect identifiers (such as a student’s date of birth, place of birth, or mother’s maiden name)

**“Pupil”** means any individual who is or has been in attendance at the district and regarding who the district maintains pupil records.

**“Pupil records”** means any item of information directly related to an identifiable pupil, which is maintained or required to be maintained by any employee in the performance of his/her duties whether recorded by handwriting, print, tapes, film, microfilms, or other means. Pupil records are divided into several categories:

- Mandatory Permanent Records – must be kept in perpetuity.
- Mandatory Interim Records – kept for stipulated periods of time, then destroyed.
- Permitted Pupil Records – kept only as long as they are considered useful.
- Personal or Informal Records – kept as personal information only.

Pupil records do not include:

- Informal notes compiled by a school officer or employee which remain 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 substitute.
- Records of the law enforcement unit of the district, subject to the provisions of 34 CFR §99.8.
- Records created or received by the district after an individual is no longer a pupil in attendance and that are not directly related to the individual’s attendance as a pupil.
- Grades on peer-graded papers before they are collected and recorded by a teacher.
- Test protocols, test instruments, and interpretative materials that do not contain the pupil’s name or other personally identifiable information.

**“School Officials and Employees”** are officials or employees whose duties and responsibilities to the district, whether routine or as a result of special circumstances, require that they have access to pupil records. School officials and employees include contractors, consultants, volunteers, or other parties to whom the district has outsourced district functions and who perform services for which the district would otherwise use employees.

**“Special Education Local Plan Area (SELPA)”** is a geographical region of sufficient size and scope to provide for all special education service needs of children residing within the region boundaries. Each region, SELPA, develops a local plan describing how it provides special education services.

**“Special Education Records”** are records directly related to the student and maintained by an educational agency or a party that acts for the educational agency. Such records include the following documents:

- Individualized Education Program (IEP) and tape recording of an IEP meeting;
- Tests, including protocols and questions, after a test is administered to a student provided the agency retains the tests in personally identifiable form;
- Evaluations and private evaluations (e.g., independent educational evaluations), including medical evaluations, if the medical evaluation is included as part of the pupil’s educational records;
- Treatment plans of students at psychiatric hospitals;
- Other documents that pertain to the pupil’s educational performance / conduct;

- Due process decisions, including transcripts of a due process hearing;
- A complaint filed in a state complaint system that names the child or children involved in the complaint; and
- Correspondence and investigative findings regarding a complaint, if the document contains information directly related to the pupil and are maintained by the educational agency.

## **Storage of Pupil Records**

All pupil records must be kept in a safe, secure manner so as to maintain the confidentiality of that information (CCR § 433). Locked file cabinets are the preferred method. FERPA requires school districts to use “reasonable methods” to ensure teachers and other school officials obtain access to only those education records in which they have a legitimate education interest. It is the responsibility of the Custodian of Records to ensure that only those with proper access rights are allowed to use or review the records. A sample Pupil Log Access Sheet is available in Appendix 1.

Records for each individual pupil shall be maintained in a central file at the school attended by the pupil or if records are maintained in different locations, a notation in the central file as to where such other records may be found is required. Parents/Guardian shall be notified of the location of pupil records if not centrally located. It is recommended that a copy of the most recent IEP be placed in the student’s cumulative folder with a notification page indicating where the complete confidential file is maintained.

The Riverside County SELPA maintains a pupil file for students attending a Nonpublic School (NPS) who reside within a member LEA. At the minimum, these files contain the most current IEP and current Psycho-educational Report. As appropriate, report cards, change notices, incident reports and absent notices are maintained as well. Since the files maintained by SELPA mirror the files maintained by the pupil’s district of residence, the files at the SELPA are considered “Permitted Files” and maintained as such.

Once a pupil has been inactive in a NPS setting for six months or more, the SELPA pupil file is pulled, tagged as “drop” and returned to the last known district of residence. The district is responsible for maintaining such records as “Mandatory Interim Pupil Records”. Duplicate records can be shredded.

## **Access to Pupil Records**

The custodian of records is responsible for the security of pupil records and shall assure that access is limited to authorized personnel. A table displaying the rights of parents and pupils regarding records is in Appendix 2. The program administrator of the program to which a child is being enrolled shall notify a parent/guardian of their rights pertaining to pupil records upon the date of the pupil’s initial enrollment, and thereafter on an annual basis.

### **Access by Authorized Personnel**

The program administrator shall grant parents access to inspect and review records related to their children during regular school hours and no later than five (5) business days following the date of the written request.

- The Program Administrator or psychologist will review the record with the parent and the program administrator shall be responsible for ensuring that qualified certificated personnel are present to interpret records, if requested.

- Whenever any known information that is part of a pupil's record is not available to the parent at the time of his/her inspection and review, the program administrator shall notify the parent of the location of the information and the reason why the information was unavailable.
- Access to pupil records and information shall not be denied to a parent/guardian because he or she is not the child's custodial parent.
- The Program Administrator shall maintain a log for each pupil's record, which lists all persons or organizations requesting or receiving information from the record (except parents/guardians, adult pupils, school officials/employees with a legitimate education interest). No information shall be released to any person or organization, except certificated school personnel with a legitimate education interest without prior written consent of the parent. The log shall be open to inspection only to a parent/guardian, adult pupil, dependent adult pupil, and the school official or his/her designee responsible for the maintenance of pupil records.
- Whenever a parent requests a copy of any pupil record, the LEA may make a reasonable charge in an amount not to exceed the actual (direct duplication) cost of furnishing copies. The LEA cannot include "ancillary" costs associated with retrieving, inspecting or handling the documents. However, no charge shall be made for furnishing:
  - Up to two transcripts of former pupil's records, or
  - Up to two verifications of various records of former pupils.

### **Mandatory Access**

California's EC §49076 was revised in 2013 to clarify access to records by persons without written parental consent or under judicial order. The following persons or agencies with a legitimate educational interest shall have access to pupil records:

- Natural parents, adoptive parents, or legal guardian of pupil younger than age 18 (within 5 days of request).
- School officials and employees with a legitimate educational interest.
- School Attendance and Review Board (SARB) members, including those trained for the purpose of providing follow-up services to pupils referred to SARB.
- Officials and employees of other public schools or school systems, including local, county or state correctional facilities where educational facilities leading to high school graduation are provided or where the pupil intends or is directed to enroll.\*
- Federal, state, and county officials for program audit or compliance.
- Other state and local officials to the extent that information is specifically required to be reported pursuant to state law.
- Natural parent or adoptive parent of dependent pupil who is 18 years of age or older (within 5 days of request).
- Pupil 16 years of age or older or has completed the tenth grade.
- Those so authorized in compliance with court order. Examples:
  - A district attorney, judge or probation officer who is participating in or conducting a truancy program, presenting evidence in a truancy petition, or for consideration against a parent for failure to comply with Compulsory Education Law. A judge

or probation officer must certify in writing to the LEA that the information will only be used for truancy purposes. The LEA releasing such information must inform, or provide written notification to, the parent or guardian of the pupil within 24 hours of the release of the information.

- A probation officer, district attorney, or counsel of record for a minor for purposes of conducting a criminal investigation in regards to declaring a person a ward of the court or involving a violation of a condition of probation.
- Private schools or out-of-state school of anticipated or new enrollment (Mandatory Permanent Pupil Records only).

### **Permitted Access**

As a general rule, agencies that have a legitimate educational interest in the educational records of a pupil have access without parental consent. However, parental consent is required to release special education records to other agencies participating in the pupil's education under the following circumstances:

- Prior to releasing records to an agency providing or paying for transition services.
- If a child is enrolled or is going to enroll in a private school that is not located in the LEA of the parent's residence prior to releasing information to the LEA in which the private school is located.

The following persons or agencies may also have access:

- Appropriate persons in an emergency when the health or safety of a pupil or other person is threatened.
- Agencies or organizations in connection with the pupil's application for, or receipt of, financial aid.
- Accrediting associations in order to carry out their accrediting functions.
- Organizations conducting studies for or on behalf of educational agencies ...if the studies are conducted in a manner that will not permit the personal identification of pupils or their parents by persons other than representatives of the organization, the information will be destroyed when no longer needed for the purpose for which it was obtained, and the organization entered into a written agreement with the educational agency.
- Officials and employees of private schools or school systems where the pupil is enrolled or intends to reenroll (Mandatory Interim and Permitted Pupil Records in addition to the pupil's permanent record transfer).
- Those persons or agencies who have written authorization by parent, guardian with custody, or pupil age 18 or older.
- A contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the LEA regarding the provision of outsourced institutional services or functions by the contractor or consultant.

### **Prohibited Access**

No access to pupil records shall be permitted to any other person without written parental permission or under judicial order. Such permission must:

- State the nature of the information to be released; and

- State the purpose for which the information is released.

In addition, the recipient must be informed of, but need not acknowledge in writing, restrictions upon further release to another agency, person, persons or organization without specific written authorization. However, this paragraph shall not be construed as to require prior parental consent when information within the educational institution, agency, or organization obtaining access, so long as such persons have an equal legitimate interest in the information.

When the Custodian of Records furnishes information in compliance with a court order, he/she should notify the parent and pupil in advance of the compliance, if lawfully possible, within the requirements of the judicial order.

## **Parental Inspection and Review**

Educational agencies must adequately inform parents about the Individuals with Disabilities Educational Act (IDEA) confidentiality requirements. Such agencies can presume that the parent possesses authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable state law. Parents can make requests to inspect or review their child's educational records at any time during the course of their child's education. The parent's rights in this area include:

- The right to a response from the participating agency to reasonable requests for explanations and interpretations of records;
- The right to request that the agency provide copies of the records containing the information, if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review and records; and
- The right to have a representative of the parent inspect and review the records.

A school district may require proof that a person claiming to be a parent's representative is, in fact, acting with the permission of parents, prior to granting access to the records in question. Prior access does not imply a right to continuing access. Rights pertaining to educational records must also be transferred if the rights normally accorded to parents are transferred to a pupil who reaches the age of majority.

Parents are entitled to an opportunity to examine records regarding an evaluation of their child. The LEA has a duty to explain the tests to a parent and inform the parent regarding the test instruments that constitute the basis for educational decisions regarding the child. Once a test is administered to a pupil, the questions become educational records if the educational agency retains the tests in personally identifiable form. A LEA must permit parents of a pupil with a disability to review any educational records relating to their child, including test protocols, within 5 business days of their request. A LEA is not required to furnish parents with copies of such records available unless the parents are unable to come to the school to conduct their review, or unless the records are to be submitted as evidence in a due process hearing.

The legal IEP is the one with the fresh ink signature. The document the parent has must match the one that they signed. The draft or future IEP in the web based system is a management tool to assist in timely development of the IEP but not the legal document. If an error is found in the web-based IEP that needs to be corrected, there are two options. If it is a substantial change another IEP meeting needs to be held. If it is a clerical clean up, staff can make the correction, obtain the parent's initials or other form of consent, and provide a copy of the changed IEP to the parent and service providers. Neither the SELPA nor LEA is obligated to provide parents with access to electronic versions of pupil records, including computerized IEPs, as long as the SELPA or LEA is able to provide parents with an accurate hard copy. If a LEA is unable to

provide a parent or authorized person with an accurate hard copy of a pupil record, the parent or authorized person may be entitled to access the electronic version, or access the LEA's computer server, in order to inspect and review the record.

### **Rights of Parents to Challenge Pupil Records**

Following an inspection and review of his/her pupil's records, the parent of a pupil may challenge the content of any pupil record, which he/she alleges to be:

- Inaccurate, misleading or violates the privacy or other rights of the child
- An unsubstantiated personal conclusion or inference
- A conclusion or inference outside the observer's area of competence
- Not based on the personal observation of a named person with the time and place of the observation noted
- Misleading
- In violation of the privacy or rights of the pupil

Agencies must decide whether to amend the information in accordance with a parental request to amend information in a record. While LEAs have some choice in how this is accomplished, the following procedure for responding to challenges of a pupil record content is recommended.

1. Should the parent elect to challenge any pupil record, he or she shall file a written request with the Superintendent, or his/her designee, to correct or remove any information recorded in the written records concerning his/her child.
2. Within 30 days of receipt of such request, the Superintendent or his/her designee shall meet with the parent and the certificated employee who recorded the information in question, if any, and if such employee is presently employed by the school district. The Superintendent shall then sustain or deny the allegations.
  - a. If the Superintendent sustains the allegations, he/she shall order the removal and destruction of the information. If the Superintendent denies and refuses to order the removal of the information, the parent may, within 30 days of the refusal, appeal the decision in writing to the Governing Board of the LEA.
  - b. Within 30 days of receipt of such an appeal, the Governing Board shall, in closed session with the parent and the certificated employee who recorded the information in question, if any, and if such employee is presently employed by the LEA, determine whether or not to sustain or deny the allegations. If the Governing Board sustains the allegations, it shall order the Superintendent to immediately remove and destroy the information from the written records of the pupil and so inform the parent in writing.
  - c. The decision of the Governing Board shall be final. Records of the these administrative proceedings shall be maintained in a confidential manner and shall be destroyed one year after the decision of the Governing board unless the parent initiates legal proceedings relative to the disputed information within the prescribed period.
  - d. If the final decision of the Governing Board is unfavorable to the parent or if the parent accepts an unfavorable decision by the Superintendent, the parent shall have the right to submit a written statement of his/her objections to the information. This

statement shall become a part of the pupil's school record until such time as the information objected to is corrected or removed.

3. To assist in making determination to challenge the content of pupil records, the Superintendent/Governing Board may convene a hearing panel composed of the following persons, provided that the parent has given written consent to release the information from the relevant pupil's records to the members of the panel so convened:
  - a. Principal of a public school other than the public school at which record is on file. (Principal is appointed to hearing panel shall serve as chairperson.)
  - b. A certificated employee appointed by the chairperson of the certificated employee council, or if no such council exists, a certificated employee appointed by the parent.
  - c. A parent appointed by the Superintendent/Governing Board, depending upon who convenes the panel.
4. The persons appointed pursuant to paragraphs b. and c. of subdivision (3) shall, if possible, not be acquainted with the pupil, his parent or guardian, or the certificated employee who recorded the information, except when the parent or guardian appoints the person pursuant to paragraph 3(b).
5. The hearing panel shall, in closed session, hear the objections to the information of the parent and the testimony of the certificated employee who recorded the information in question, if any, and if the LEA presently employs such employee. The hearing panel shall be provided with verbatim copies of the information, which is the subject of the controversy. Written findings shall be made setting forth the facts and decisions of the panel, and such findings shall be forwarded to the Superintendent/ Governing Board. The proceedings of the hearing shall not be disclosed or discussed by the panel members except in their official capabilities.
6. Whenever a pupil record contains information concerning any disciplinary action taken by the LEA personnel in connection with the pupil, the LEA shall allow the pupil's parent(s) to include in such pupil record a written statement or response concerning the disciplinary action.

### **Transfer/Release/Disclosure of Pupil Records**

Whenever, a pupil transfers from one LEA to another or to a private school, or transfers from a private school to a LEA within California, the pupil's permanent record or copy shall be transferred by the former LEA or private school upon request of the district or private school where the pupil intends to enroll. Any district requesting a transfer of a record shall notify the parent of his/her right to receive a copy of the record and a right to a hearing to challenge the content of the record. The transfer date and the destination of the pupil record shall be recorded on the LEA's copy of the Mandatory Permanent Record, which must be kept in perpetuity. This section provides information on specific circumstances related to (1) Transfer of Special Education Records, (2) Release of Records without Parental Consent, (3) Disclosure of School Records to Riverside County Officials, (4) Disclosure of Records to Person with Private School Affidavit, and (5) Disclosure of Records in Relation to Special Education Disputes.

### **Transfer of Special Education Records**

Because LEAs frequently have treated special education records as if they were different from so-called cumulative records, separate consideration for such records is warranted. Simply stated, special education records are subject to the same privacy and access rights as other

Mandatory Interim Pupil Records. Even though records from physicians may be stamped “confidential” or a psychologist’s report contains sensitive or potentially upsetting information, the parent or eligible pupil has full rights of access. Of equal importance is the LEA’s obligation to retain all records required for admission to a special education class or program. Not only are they necessary for audit, but may be necessary to explain/interpret committee actions or Individual Education Plans (IEPs).

Upon receipt of a request by an educational agency when a special education pupil has enrolled, the former educational agency shall send the pupil’s special education records or a copy thereof within five (5) working days. As Mandatory Interim Pupil Records, special education records may be classified as Class II or III, Disposable or Permitted, when they are deemed as no longer useful. This could occur only after transfer or withdrawal from a special education program. Even after classified as disposable, Mandatory Interim Pupil Records must be retained at least three years beyond the date of such classification(CCR § 437(c)).

An LEA cannot assume its obligation to maintain a student’s mandatory interim pupil record ceases when it forwards a student’s original file to a new LEA after a student withdraws and enrolls in another LEA. Per the IDEA, an LEA is required to keep records to show its compliance with program requirements, including records demonstrating that all eligible children with disabilities are provided a free appropriate public education (FAPE) consistent with their IEP (34 CFR §76.731 & §80.42(b)).

A student who received special education who transfers from the initial LEA has a two year window to initiate a request for due process hearing against that LEA. In addition, they also have the right to file a compliance complaint with the California Department of Education (CDE) Therefore, an LEA should maintain, at a minimum, a copy of the educational record of students who are eligible for special education in the event the LEA is required to defend itself in a due process hearing or to respond to the allegations in a compliance complaint.

Given these two potential scenarios, best practice mandates that the original or a copy of a student’s mandatory interim record, including the special education records, be maintained by the LEA for a minimum of three years following classification as disposable (when the student transfers out of the LEA), or longer if the record continues to be necessary or useful (Atkinson, Andelson, Loya, Ruud & Romo, June 19, 2013).

### **Release of Records without Parental Consent**

Under FERPA, others have the right to review a pupil’s educational records without specific consent from the parents. The Code of Federal Regulations governing FERPA (34 CFR § 99.1 et seq.) define when prior consent is not required. An educational agency or institution may disclose personally identifiable information from an education record of a pupil without parental consent if the disclosure meets one or more of the following conditions:

- The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
- A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party –
  - Performs an institutional service or function for which the agency or institution would otherwise use employees;
  - Is under the direct control of the agency or institution with respect to the use and maintenance of educational records; and

- Is subject to the requirements of §99.33(a) governing the use and redisclosure of personally identifiable information from education records.

Under IDEA, a Part C lead agency can disclose student information to a Part B LEA for child find purposes without parental consent. However, any educational records the lead agency disclosed to the LEA must be protected and destroyed after they are no longer needed. If a parent objects to the child find referral, then the parent is entitled to prior written notice before the child find referral can be made. Also, the lead agency must include in the child's Part C records a note indicating there has been a disclosure of the information to the LEA.

### **Disclosure of School Records to Riverside County Officials**

School districts, county offices of education, and county placing agencies may develop cooperative agreements to facilitate confidential access to and exchange of pupil information by email, facsimile, electronic format, or other secure means (EC § 49076(K)). On March 6, 2006, the Superior Court of California in the County of Riverside ordered that all school districts, the Riverside County Office of Education Schools, juvenile court schools, community schools, charter schools, and any public or non-public school operating within the county of Riverside California providing instruction to pupils in any grade, pre-kindergarten through 12<sup>th</sup>, shall permit release of pupil information and copies of any records concerning pupils enrolled in said schools or school districts to duly authorized probation officers of the Probation Department of Riverside County, social workers of the Department of Public Social Services of Riverside County, Riverside County District Attorney Investigators and Prosecutors, Riverside County Deputy Sheriffs, Officers from Police Departments in Riverside County, and Traffic Officers of the California Highway Patrol, of any pupil who is subject to the jurisdiction of the Juvenile Court of Riverside County, California, by reason of a filing of a petition with this court as provided by any law of the State of California or an application for Petition pursuant to Section 653 of the Welfare and Institutions Code of California. This order shall remain in affect as to any pupil under the jurisdiction of this court so long as such pupil shall be subject to the jurisdiction of this court or under informal supervision of the probation officer pursuant to Section 654 of the Welfare and Institutions Code of California.

### **Disclosure of Records to Person with Private School Affidavit**

California law (*California Education Code* Section 33190) requires private schools offering or conducting a full-time elementary or secondary level day school for pupils between the ages of 6 and 18 to file a private school affidavit (PSA) with the California Department of Education (CDE). Certified nonpublic, nonsectarian schools located in California shall also file the PSA. EC § 48222 states that a "full-time" private school offers instruction "... in the several branches of study required to be taught in the public schools of the state." Therefore, the PSA shall be filed by private schools physically located in California and offering full-time instruction in the subjects taught in the State's public schools. A private school shall not file until it has established full-time enrollment of pupils who are NOT also enrolled full-time in another private or public school.

Inclusion of a school in the CDE Private School Directory should not be interpreted as meaning that the State of California, the State Superintendent of Public Instruction (SSPI), the State Board of Education, CDE, or any other agency has made any evaluation, approval, or endorsement of any school listed. When schools receive a request for records from a private school, it is important to ensure that the school has a Private School Affidavit filed with CDE before releasing the records. To research if a private school affidavit is on file, go to <http://www.cde.ca.gov/ds/si/ps/index.asp>

## **Disclosure of Records in Relation to Special Education Disputes**

LEAs may disclose a pupil's relevant educational records during the course of an IDEA due process proceeding. FERPA regulations allow a district to disclose to a court, without parental consent or notice, student educational records that are necessary to defend itself or for the LEA to proceed with a legal action. The rule applies when the LEA is a defendant in an action brought on by a parent and conversely. In practice, this regulation has been extended to include disclosures to due process hearing officers and administrative law judges. The due process decision, including transcripts and recordings of the proceedings, become part of the educational records.

A complaint that is filed in the state complaint system that names a child or children involved is considered to be an educational record, as are correspondence and investigations related to the complaint if they contain the same. However, investigative findings and correspondence should not be readily available to all persons who have legal access to the records. The State Education Agency (SEA) is entitled to access education records in this role. Parents need not be notified that their child's records are involved in the investigation of a complaint by the SEA. Moreover, there is no requirement that a parent grant consent before the SEA can review the child's records during the investigation of the complaint.

## **Duty to Retain Documents for Litigation**

When litigation is filed, threatened, or reasonably foreseeable, the laws governing the "spoliation of evidence" take precedence over the provisions allowing the destruction of hard copies. Spoliation of evidence is the destruction, significant alteration, or failure to preserve evidence in anticipation of litigation. The duty to preserve evidence exists at the time the parties know or reasonably should know litigation is foreseeable. (See *Mosaid Technologies Inc. v. Samsung Electronics Co., Ltd.* (D.N.J. 2004) 348 F.Supp.2d 332, 336; *Silvestri v. General Motors Corp.* (4th Cir. 2001) 271 F.3d 583, 591.)

If information relevant to the case exists in both electronic and paper forms, agencies and their employees and agents must preserve both forms in anticipation of the litigation. Preserving the records requires placing an immediate "litigation hold" on potentially relevant electronic and tangible things, and communicating this hold to any employees or agents who might have access to these items. (Atkinson, Andelson, Loya, Rudd & Romo, April 23, 2018)

## **Destruction of Pupil Records**

The method of destruction shall assure that records are not available to possible public inspection in the process of destruction. (CCR § 437) All school records in California are divided into three groups for the purpose of defining how long records are kept before they are destroyed:

- **Class I - Mandatory Permanent:** Must be kept indefinitely by the school district unless microfilmed.
- **Class II - Mandatory Interim:** Unless forwarded to another district, Mandatory Interim records (i.e., access log, health records, special education programs, language training records, progress reports, standardized tests administered in preceding 3 years) may be reclassified as Disposable when the pupil leaves the district or when their usefulness ceases. Such records must be maintained for a minimum three or five years after the completion of the activity for which grant funds were used. Destruction of the file shall be during the third school year following reclassification.

- Class III – Disposable or Permitted: The only disposable records are Class III (i.e., objective staff ratings, standardized test results more than 3 years old, routine disciplinary data, behavior observations, disciplinary notices, and attendance records not otherwise required). Such records may be destroyed six months after the pupil completes or withdraws from the educational program. These are to be destroyed by “foolproof methods” so as to maintain the confidentiality of the record.

Each LEA shall inform parent(s) when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the pupil (34 CFR §300.624). A Sample Letter to Parents Regarding Destruction of Records is available in Appendix 3.

### **Electronic Copies for K-12 Districts**

Education Code section 35254 permits destruction of original records when a school district makes “photographic, microfilm, or electronic copies of any records of the district.” Under the Title 5 regulations, records include maps, books, papers, and documents of a school district required by law to be prepared or retained or which are prepared or retained as necessary or convenient to the discharge of official duty. (5 C.C.R. § 16020.) With limited exceptions, after an electronic copy is made, the original may be destroyed when provision is made for permanently maintaining the electronic copies. Electronic data storage must meet applicable security and accessibility requirements. (Atkinson, Andelson, Loya, Rudd & Romo, April 23, 2018)

## **Protecting Privacy with Technology**

With today’s high use of technology and online services, it is important to clarify what is required for a LEA to engage in a shared interagency data information system to use online educational services.

### **Shared Interagency Data Information System**

Notwithstanding any other law, LEAs are allowed to participate in an interagency data information system that permits access to a computerized database system within and between governmental agencies or school districts in regard to information or records that are nonprivileged, and where release is authorized to the requesting agency under state or federal law or regulation, if each of the following requirements are met:

- Each agency develops security procedures or devices by which unauthorized personnel cannot access data contained in the system;
- Each agency develops procedures or devices to secure privileged or confidential data from unauthorized disclosure;
- Each agency shall comply with the access log requirements of EC § 49064;
- The right of access granted shall not include the right to add, delete, or alter data without the written permission of the agency holding the data; and,
- An agency shall not make public or otherwise release information on an individual contained in the database if the information is protected from disclosure or release as to the requesting agency by state or federal law or regulation (EC § 49076(4)).

### **Using Online Educational Services**

The United States Department of Education (USDE, February, 2014) published guidance regarding protecting the confidentiality of student information when using online educational services such as the internet, technology and third parties. The USDE established the Privacy

Technical Assistance Center (PTAC) as a primary resource for educations on privacy, confidentiality, and security practices (see <http://ptac.ed.gov>).

LEAs will need to evaluate the use of online educational services on a case-by-case basis to determine if FERPA-protected information (i.e., PII from education records) is implicated. For example, some types of online educational services use FERPA-protected information while other resources do not. If students (and their parents) have to log in to access class materials via a student user account, the LEA will likely need to give the online provider the students' names and contact information from the pupil record. In contrast, if a teacher has students watch online video tutorials or complete interactive exercises offered by a provider that does not require individual student log in information, no student level data need be released. "Metadata" (such as how long a student took to perform an online task, how many attempts were made) that has been stripped of all direct and indirect identifiers are not considered protected under FERPA and can be used by the provider for development of new learning products and services.

"Directory information" can be a FERPA exception if the information is generally not considered harmful or an invasion of privacy if disclosed (i.e., student name and address). To disclose such information, the LEA must establish the specific elements of directory information they intend to disclose and these elements must be published in a public notice. Only information specifically identified as directory information in the public notice may be disclosed. Parents (and eligible students) have the right to "opt out" of disclosures. Because of these conditions, LEAs may not find this exception feasible for disclosing PII to providers to create student accounts or profiles. The better route is to use the FERPA "school official exception", which allows the LEA to disclose PII from students' educational records to a provider as long as the provider meets the following criteria:

- Performs an institutional service or function for which the school or district would otherwise use its own employees;
- Has been determined to meet the criteria set forth in in the school's or district's annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records;
- Is under the direct control of the school or district with regard to the use and maintenance of education records; and
- Uses education records only for authorized purposes and may not re-disclose PII from education records to other parties (unless the provider has specific authorization from the school or district to do so).

The Protection of Pupil Rights Amendment (PPRA) provides parents with certain rights with regard to some marketing activities in schools. For example, PPRA requires that a LEA must directly notify parents of students who are scheduled to participate in activities involving the collection, disclosure, or use of personal information for marketing purposes and to give parents the opportunity to opt-out of these activities. PPRA also requires LEAs to develop and adopt policies, in consultation with parents, about these activities. These requirements are not required if the LEA uses collected student information for the exclusive purpose of developing, evaluating or providing educational products or services for students or schools.

The parents' and eligible students' right to access the student's education record remains when a provider maintains a student's education records. LEAs should ensure that their agreements with providers include provisions to allow for direct or indirect (via school or district) parental access. Under FERPA, the LEA must comply with a request by a parent for access to

educational records within a reasonable period of time, but not more than 45 days after it has received the request.

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Approved: September, 2004; Revised: 12/10/10; 09/19/14; 02/06/15; 08/14/15; 6/15/18



## Rights of Parents and Pupils Regarding Records

### Definitions

*Access* - Disclosure of record including the right to receive a copy at direct duplication costs (cannot include "ancillary" costs associated with retrieving, inspecting or handling the documents).

*Pupil* - Any individual who is, or has been, in attendance at the institution maintaining an educational record.

*Dependent Pupil* - In accordance with Section 152 of the Internal Revenue Code of 1954.

<b>Records of Minor Pupils (below age 18)</b>	<b>Has Access to Record</b>	<b>Receives Annual Notification</b>	<b>Authorizes Release of Record</b>	<b>Challenges Contents of Record</b>
Natural Parent (or Guardian) with custody	Yes	Yes	Yes	Yes
Natural Parent (or Guardian) without custody	Yes, unless court order specifically denies parent access	Yes/No*	No, unless both parents notify school in writing that agreement made (49061(a))	No
Pupil below age 16 who has not completed 10th grade	No	No	No	No
Pupil age 16 or 17 or who has completed 10th grade	Yes	No	No	No
<b>Records of Pupils Age 18 or Older or Attending Post-Secondary Institutions</b>				
Natural Parent (or Guardian) of dependent eligible pupil	Yes	Yes	Yes	Yes
Natural Parent without custody	No**	No	No	No
Natural Parent of eligible pupil (not dependent)	No	No	No	No
Eligible Pupil	Yes	Yes	Yes	Yes

\* Technically, "yes", in practice it is often impossible

\*\* Unless pupil is dependent of parent without custody

**Sample Letter to Parents**  
**Regarding Destruction of Records**

(Date)

Dear Parents:

As you know, the school maintains various pupil records concerning your child. Although some of these records must be permanently maintained as mandatory permanent records, other records that are no longer needed or useful may be disposed pursuant to law.

In reviewing your child's records, we have determined that there are numerous items which are no longer needed and would therefore like to remove them from permanent file and shred them to prevent improper or unauthorized disclosure.

34 CFR 300.624(a) mandates that, "The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child."

This letter will serve as notice to you that if we do not hear from you prior to 15 days from the date of this letter, we shall assume that we have your approval to destroy those parts of your child's records which are no longer needed.

Should you have any questions or wish to discuss, in details, any part of this notice, please contact us at \_\_\_\_\_ at your convenience.

Sincerely,