




Producing and Maintaining Pupil Records

California Association of School
Social Workers (CASSW)

CSU Fresno
April 13, 2016

Presented by
Amanda E. Ruiz

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www.lozanosmith.com or call us Toll Free at 800.445.9430.**




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Agenda Overview



Sources of Law and Guidance

Defining "Student Records"


Rights of Parents and Students

Disclosure of Records

Records of Students with Disabilities

Sources of Law & Guidance

- Family Educational Rights and Privacy Act ("FERPA")
- Individuals with Disabilities Education Act ("IDEA")
- Education Code & California Code of Regulations
- Family Policy Compliance Office ("FPCO")


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Why We Have Protections

Sometimes, people do terrible things with student records.



L.S. and R.S. v. Mount Olive Bd. of Educ., 60 IDELR 60 (D.N.J. 2011).

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Defining "Student Records"

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What are "Student Records"?

Any item of information that:

- is directly related to an identifiable pupil (other than "directory information"), and
- maintained by a school district or required to be maintained by an employee in the performance of his or her duties.

Educ. Code § 49061(b)

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"Personally Identifiable Information"

"Information directly related to a student" means "personally identifiable information," and includes:

- Student's name.
- Parent's (or other family members') name and address.
- Social security or student numbers.
- Biometric records. — fingerprints
- Other indirect identifiers.



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"Other Indirect Identifiers"

- "Information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."
- "Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."

34 C.F.R. § 99.3.

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Records Maintained by District

To be a student record, a document must be "maintained" by the educational agency.



"Think this is hard? You should see the inside of my head."

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emails

work samples, peer graded paper

if part of grade book

Records Maintained by District



Are peer-graded papers and daily work student records subject to FERPA?

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Records Maintained by District

- No.
- "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database"



Owasso Indep. Sch. Dist. No. 1-011 v. Faluy, 36 IDELR 62 (U.S. 2002).

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Records Maintained by District

- A pupil record includes information recorded by handwriting, print, tapes, film, microfilm, other means.
- Is an audio recording of an IEP meeting a pupil record?



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yes

Records Maintained by District

Are e-mails student records?



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NO, unless printed out + in record
if the request is a record request

Public record request or subpoena
can get emails

Records Maintained by District

- At least one court has said no, unless printed and placed in student's file.

(S.A. v. Tulare County Office of Educ., 53 IDELR 111 (E.D. Cal. 2009).)

- OAH has also taken this position.

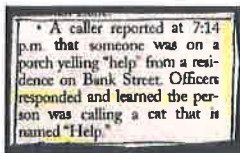
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Records Maintained by District



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Records Maintained by District



Records Maintained by District



- The definition of "pupil records" includes those that are maintained by a district, or required to be maintained by an employee in the performance of his or her duties.
- What information is "required to be maintained"?

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Categories of Records

- Three categories of pupil records:

- Mandatory Permanent
- Mandatory Interim
- Permitted



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Mandatory Permanent Records

- "Those records which are maintained in perpetuity and which schools have been directed to compile by California statute, regulation, or authorized administrative directive."
- Must be maintained indefinitely.

Cal. Code Regs., tit. 5, § 430(d)(1)

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Mandatory Permanent Records

- Mandatory permanent pupil records include:
 - Legal name
 - Date of birth and method of verification
 - Sex of pupil
 - Place of birth
 - Name and address of parent of minor pupil (and annual verification of same)
 - Entering and leave date for each school year/session
 - Subjects taken
 - Number of credits to graduation
 - Verification of or exemption from required immunizations
 - Date of high school graduation or equivalent

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Mandatory Interim Pupil Records

- "Those records which schools are required to compile and maintain for stipulated periods of time and are then destroyed as per California statute or regulation."
- This includes "participation in special education programs," such as:
 - Required tests
 - Case studies
 - Authorizations
 - Actions necessary to establish eligibility or discharge.

Cal. Code Regs., tit. 5, §432(b)(2)

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SPEP - keep at least 2 yrs (statute of limitations)

Permitted Records

- "Those pupil records which districts may maintain for appropriate educational purposes."
 - Objective counselor and/or teacher ratings,
 - Standardized tests older than three years,
 - Routine discipline data,
 - Verified reports of behavioral patterns,
 - All disciplinary notices,
 - Attendance records.

Cal. Code Regs., tit. 5, § 432(b)(3)

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until usefulness closes

Destruction of Records	
Mandatory permanent pupil records	Shall be preserved in perpetuity
Mandatory interim pupil records	Unless forwarded to another district, may be adjudged disposable when: • the student leaves the district, or • when their usefulness ceases
Permitted pupil records	May be destroyed: • when their usefulness ceases. • after six months following the pupil's completion of or withdrawal from the educational program.

2 yrs


6 months

Rights of Parents and Students




Right to Review Records

- Who has a right to review records?



- Parent?
- Student?
- Non-custodial parent?
- Parent's representative, such as an attorney or advocate?



Parent Rights of Access

- Parents of current or former pupils have an absolute right to access to any and all pupil records related to their children that are maintained by the school district or private school.
- A parent is
 - Natural parent
 - Adopted parent
 - Legal guardian
 - What if divorced or separated?

Educ. Code §§ 49081, 49089

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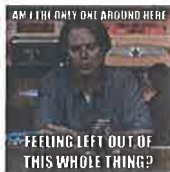
IEP- parent can record a meeting

Disciplinary or other - need

permission due to privacy concerns.

Parent Representative Right of Access

- Must a district make records available to a parent's advocate or attorney?
 - Access is not required, but use caution!



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Student Rights of Access

- All rights afforded to parent or guardian apply to the student once 18 years old, or attending postsecondary institution.
- FERPA does not prevent districts from giving students rights in addition to those given to parents.
- State law allows a student who is 16 years old or who has completed 10th grade to access their records without parent consent.

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Records Timelines

- Under FERPA, districts must make records available "within a reasonable period of time, but not more than 45 days" after request.

34 C.F.R. § 99.10(b).

- Under state law, districts must make records available within five business days of receipt of the request.

Educ. Code §§ 49009, 56043(n), 56504.

- School districts must comply with the shorter deadline set by the Education Code.

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Timelines Specific to Students with Disabilities

- Parents have the right to examine all school records, and to receive copies:
 - Within five business days after the request is made orally or in writing, and
 - Before any IEP meeting, due process hearing, or resolution session.
- District must comply with a request "without necessary delay" before any IEP meeting, hearing, or resolution session.

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Timelines Specific to Students with Disabilities

- Must the district provide copies of assessment reports five days prior to an IEP meeting?
 - Yes, but OAH has suggested, only to the extent reports are actually completed.



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not a student record yet

Provision of Records

- Districts must provide "an opportunity to inspect and review" student records.
- If circumstances effectively prevent the parent from inspecting and reviewing records, the district must provide a copy of the records, or make other arrangements for the parent to inspect and review the records.

34 C.F.R. § 99.10.

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Charging for Copies

Districts may charge for copies of records, *but*:

- Cannot charge if the fee would effectively prevent the parent from exercising the right to inspect and review the records.
- Cannot charge to search for or retrieve the records.



34 C.F.R. § 99.11; see also Educ. Code § 66504.

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Examples

- Parent does not live within commuting distance of the school. Parent argues that the school must make and provide copies of the requested record. Must the district do so?

Letter re: Kansas City Sch. Dist., 103 LRP 39325 (FPCO 2003).

- Parent requested that copies of records be mailed to her and refused to pick them up. Must the district mail the records?

Oakland Unified Sch. Dist., 114 LRP 34251, OAH Case No. 2013100534 (June 6, 2014)

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Disclosure of Records & Records of Students with Disabilities



Disclosure and Confidentiality

- Districts must not disclose information related to other students.
- If a student's records contain information about other students, the parents may review only the specific information about their child.



34 C.F.R. § 99.12; Educ. Code § 56504



Confidentiality - Example

- Parents of a teenager with multiple severe disabilities were not permitted to access the records of a student who sexually assaulted their son years earlier. The perpetrator's right to privacy outweighed the parents' desire for the requested information.

A.B. v. Clarke County Sch. Dist., 54 IDELR 146 (11th Cir. 2010).

- Note: Even if unavailable under FERPA or the IDEA, how else might the parents obtain the perpetrator's records?



suspense to court to get records

Access to Records – Policy

- School districts should adopt a policy establishing:
 - Procedures for providing records within applicable timeline.
 - When and where records can be reviewed.
 - When physical copies will be provided.
 - Charging for copies (including amount and waiver procedure).
- Reasonable restrictions are permitted, but cannot effectively prevent parents from exercising rights.

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Disclosure to 3rd Parties

School districts may not disclose student records to any third party unless:

- Parents provide written consent.
- An exception applies to the rule.



34 C.F.R. § 99.30; Educ. Code § 49076.

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Parent Consent

- Parents' signed and written consent must:
 - Specify the records that may be disclosed;
 - State the purpose of the disclosure; and
 - Identify the party to whom the disclosure may be made.
- Electronic consent is OK, as long as it identifies and verifies a particular person as the source of the consent.

34 C.F.R. § 99.30; see also Educ. Code § 49076.

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When Records May Be Disclosed Without Parent Consent

- Directory information.
- Disclosure to school officials with "legitimate educational interests."
- Disclosure to other schools.
- Social services workers.
- Health and safety emergencies.
- Court orders and subpoenas.
- Lots of miscellaneous categories, such as disclosures for financial aid, audits, and studies.

34 C.F.R. § 99.31; Educ. Code § 49076.

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Directory Information

- Districts may disclose educational records that would not generally be considered harmful or an invasion of privacy if disclosed.
- To do so, districts must provide annual notice of the following:
 - What types of information may be disclosed;
 - Parents' right to refuse disclosure of directory information; and
 - The period of time in which parents must notify district of refusal.

34 C.F.R. § 99.37; Educ. Code § 49073.

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What Counts as Directory Information?

Education Code:

- Name.
- Address.
- Phone number.
- E-mail address.
- Date of birth.
- Major field of study.
- Dates of attendance.
- Participation in officially recognized activities and sports (including weight and height for athletic teams).
- Degrees and awards received.
- Most recent previous public or private school attended.

FERPA:

- Same, plus:
 - Photograph.
 - Place of birth.
 - Grade level.
 - Enrollment status.

34 C.F.R. § 99.3; Educ. Code § 49001(c)

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What Counts as Directory Information?



What about:

- Race?
- Ethnicity?
- Disability?

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Disclosure to School Officials

- Districts may disclose records to:
 - “School officials” within the district,
 - Who have a “legitimate educational interest” in the information.
- Districts must have a policy defining “school officials” and “legitimate educational interest,” and must provide annual notice to parents of these definitions.

34 C.F.R. § 99.31(a)(1); 34 C.F.R. § 99.7(a)(3)(ii)

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Disclosure to School Officials

What sort of district employees might constitute school officials with a legitimate educational interest?

- School board members? *No*
- Other teachers?
- Related service providers?
- Lunchroom staff?
- Yard duty workers?
- Custodians?

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contracted SW - yes

Disclosure to School Officials

- People who are not district employees may be "school officials" if they:
 - Perform a service or function for which the district would otherwise use employees;
 - Are under direct control of the district with respect to the use and maintenance of education records; and
 - Are subject to FERPA requirements regarding use and nondisclosure of student record information.

School Officials



- Can a student volunteer count as a school official? *Yes*
 - District allowed high school student volunteers to view and record peers' grades while assisting a school counselor.
 - Did this violate FERPA?

Letter to Helligsohn, 112 LRP 58499 (FPCO 2012)

Disclosure to Other Schools

Student records may be disclosed without consent to other schools or school districts where the student:

- Seeks or intends to enroll, or
- Is already enrolled, and
- The disclosure is for purposes related to enrollment or transfer.



34 C.F.R. § 99.31(a)(2)

Disclosure to Other Schools

If disclosure is made to other schools, the district must attempt to notify parents at last known address, unless:

- Disclosure was initiated by parents, or
- District's annual notice specifies that the district forwards records to other qualified agencies that have requested them.

34 C.F.R. § 99.34.

Disclosure to Social Service Workers



- FERPA was amended in January 2013 by the "Uninterrupted Scholars Act."
- Districts may now disclose student records, without parent consent, to representatives of state or local child welfare organizations working with foster children.

New

Health and Safety Emergencies

Student record information may be disclosed without parent consent "in connection with an emergency If knowledge of the information is necessary to protect the health or safety of the student or other individuals."



34 C.F.R. § 99.36(a).

Health and Safety Emergencies

- To determine if there is a health and safety emergency, the district must:
 - "take into account the totality of the circumstances" and
 - conclude "there is an articulable and significant threat to the health or safety of a student or other individuals."



34 C.F.R. § 99.36(c).

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Health and Safety Emergencies

- So long as there is a "rational basis" for the threat determination, FPCO will not second-guess the district's judgment in determining that there was a significant threat.

34 C.F.R. § 99.36(c).



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Health and Safety Emergencies

- Emergency must be "actual, impending, or imminent."
- Examples include a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease.

"Addressing Emergencies on Campus," FPCO June 2011.

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Subpoenas

- Information may be disclosed without consent in order to comply with a lawfully issued subpoena.
- However, the district must make a reasonable effort to inform the parents of the disclosure, except...



34 C.F.R. § 99.31(a)(9).

Subpoenas

- Districts must release information requested in a subpoena *without* notifying the parents if:
 - A federal grand jury subpoena is issued, and the court has ordered that the subpoena not be disclosed;
 - A subpoena is issued for a law enforcement purpose, and the court has ordered that the subpoena not be disclosed; or
 - The U.S. Attorney General obtains a court order regarding investigations or prosecutions of international terrorism.

34 C.F.R. § 99.31(a)(9).

Compliance Investigations

- Student records may be released without parent consent to state and local educational authorities, if information is necessary to audit or evaluate an educational program, or in connection compliance with federal legal requirements.
 - This would include releasing information to CDE or OCR in response to a complaint.
- What if the record has information on more than just the student at issue?

Disclosure to Law Enforcement



- FERPA does not have a specific provision authorizing disclosure to law enforcement.
- However, disclosure may be permitted under several circumstances.

Disclosure to Law Enforcement

- Health or safety emergency.
- Subpoena.
- Records generated and maintained by law enforcement unit.
- Assisting juvenile justice system in serving a student.
- Opinions and observations.

Records of Disclosure

- Districts must maintain a log of each request and disclosure of each student's records.
- Districts must also keep a record of requests for disclosures that must be denied.



34 C.F.R. § 99.32.

Records of Disclosure

Recordkeeping requirement does *not* apply to requests from/disclosure to:

- Parents.
- A "school official."
- A party with written consent from parents.
- A party seeking directory information.
- A party with a subpoena or court order that specifies that the existence or contents of the subpoena or order must not be disclosed.

34 C.F.R. § 99.32(d).

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Challenges to Student Records

- Parents may request that student records be amended.
- Upon request, the district must decide within a reasonable time whether to amend the records.
- If the district decides not to amend the records, it must notify the parents of their right to a hearing regarding the request.

34 C.F.R. § 99.20; Educ. Code § 49070.

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Challenges to Student Records - Hearing

Legitimate grounds

for challenge – records must be:

CHALLENGE ACCEPTED



- Inaccurate.
- An unsubstantiated personal conclusion or reference.
- Not based on the personal observation of a named person with the time and place of the observation noted.
- Misleading.
- In violation of the student's privacy.

34 C.F.R. § 99.21(a); Educ. Code § 49070; 34 C.F.R. § 300.616

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Student Records Hearing

Procedural requirements:

- Hearing must be held a reasonable time after request.
- Parent must be given reasonable notice of hearing date and time.
- Hearing may be conducted by any individual who does not have a direct interest in the outcome.
- Parent must have full and fair opportunity to present evidence.
- Parent may be represented.
- Decision must be made in writing within a reasonable time after hearing.

34 C.F.R. § 99.22.

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Student Records Hearing

Possible outcomes:

- District agrees to amend or remove information from the record.
 - Must notify parents in writing.
- District does not agree to amend record.
 - Must notify parents in writing.
 - Must give parents a right to place a statement in the student's record regarding the contested record.



34 C.F.R. § 99.21(b); Educ. Code 49070.

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IDEA Confidentiality Provisions

- IDEA and FERPA's record requirements are generally the same, except the IDEA includes a few additional rules:
 - Districts must protect confidentiality of records at collection, storage, disclosure, and destruction stages.
 - One district official must have responsibility for ensuring confidentiality of records.
 - All individuals using or collecting records must receive instruction on student record policies and procedures.

34 C.F.R. § 300.610, et seq.; Educ. Code § 56515

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IDEA Confidentiality Provisions



- District must maintain for public inspection a list of the names/positions of employees with access to student records.
- District must notify parents when personally identifiable information is no longer needed to provide educational services to the child, and must destroy on request by parent (with exceptions).

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34 C.F.R. § 300.610 et seq.

old provisions - probably no longer followed

IDEA Confidentiality Provisions

• Consequences for Violations:

- FERPA: No individual right to enforce; can only file complaint with FPCO.
- IDEA: Could file due process or compliance complaint.



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IDEA Confidentiality Provisions

• Potential consequences for violation requirements relevant to student records:

- Denial of FAPE, only if the violation:
 - Impeded the child's right to FAPE.
 - Significantly impeded the parents' opportunity to participate in the decision-making process.
 - Caused a deprivation of educational benefit.



Educ. Code § 56505(f)(2)

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- Use of public benefits (e.g., Medi-Cal)
 - District may utilize a student's public benefits to pay for special education and/or related services.
 - Must obtain consent before doing so.
 - The consent from parent must specify that personally identifiable information may be disclosed to an outside agency, the type of information disclosed, and the purpose of the disclosure.
- Post-secondary transition services
 - Must obtain parent consent before disclosing personally identifiable information to agencies providing or paying for transition services.

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[illegible]



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California, 2012

Overview

Amanda E. Ruiz is an Associate in Lozano Smith's Fresno office. Ms. Ruiz represents school district clients, focusing on the Labor & Employment, Students, Special Education and Charter Schools practice areas. Ms. Ruiz has experience as a full-time staff attorney at a County Counsel's Office, where she counseled and represented the County in civil and criminal cases, including civil commitment proceedings, bench trials, and examination of witnesses. Her experience extends to the California Welfare and Institutions Code, California Evidence, Criminal, Probate, Family Law, and Civil Procedure. She has represented county departments of behavioral health, social services and agriculture, and assisted with research and drafting of documents related to a high-profile personnel matter and Public Employment Relations Board appeal.

During law school, Ms. Ruiz was a legal intern for the California Attorney General's Office, Criminal Division and the San Diego Public Defender. She also served as a judicial extern for the Honorable Charles S. Poochigian, California Court of Appeal. These experiences have given her deep experience in analytical and legal research and writing.

Education

Ms. Ruiz earned her Juris Doctor degree from the University of San Diego School of Law. She earned her Bachelor of Arts degree in Political Science from the University of California, Los Angeles.

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