

# CHAPTER 9

## CONFIDENTIALITY

### INTRODUCTION

Confidentiality of educational records is a basic right shared by all students in public schools and their parents. These fundamental rights are described in the Family Educational Rights and Privacy Act (FERPA) of 1974, as amended (2009). The federal regulations relating to FERPA are available at <http://www.gpoaccess.gov/ecfr/> as well as at <http://www.ksde.org/Default.aspx?tabid=3997>. In addition, Kansas Special Education Regulations at K.A.R. 91-40-50 have adopted by reference provisions in 34 C.F.R. 300.612-300.624, effective on January 1, 2007, regarding parental access to educational records and confidentiality of those records, are adopted by reference.

Confidentiality regulations apply to the State, to all public schools and private schools that accept federal funds. In addition, all school personnel (including contracted employees) are governed by confidentiality requirements of FERPA and the Individuals with Disabilities Education Act (IDEA), which apply to students with disabilities. Confidentiality is one of the rights afforded to parents and is included in the Parent Rights document (<http://www.ksde.org/Default.aspx?tabid=2832#rights>). Chapter 1 in this Handbook includes additional information about parent rights. All people involved in special education should be aware of the laws and regulations ensuring that information in education records will be kept secure and remain confidential.

This chapter 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:

1. Inspect and review the student's education records;
2. 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;
3. Consent or refuse to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA, Sec. 99.31, authorizes disclosure without consent; and
4. File a complaint under Sec. 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of FERPA.

Additionally, the notice must include all of the following:

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

The school district may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights. The school shall effectively notify parents who have a primary or home language other than English. (34 C.F.R. 99.7) This notice should adequately inform parents prior to any identification, location, or evaluation activity taking place. A sample of an annual notice regarding FERPA requirements may be found at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>.

Definitions of terms used are as follows (K.A.R. 91-40-50; 34 C.F.R. 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 Kansas State Department of Education (KSDE) is obligated to establish policies and procedures to ensure that confidentiality requirements are in place at every participating agency. KSDE does this by having each public agency accessing funds sign assurances and adopt or establish local policies and procedures consistent with confidentiality requirements.

**Sec. 300.32 Personally identifiable means that information includes--**

- (i) The name of the child, the child's parent, or other family member;
- (ii) The address of the child;
- (iii) A personal identifier, such as the child's social security number or student number; or
- (iv) a list of personal characteristics,
- (v) or other information that would make it possible to identify the child with reasonable certainty.

**Sec. 300.612. Notice to parents**

- (a) The SEA shall give notice that is adequate to fully inform parents about the requirements of Sec. 300.123, including--
  - (1) A description of the extent that the notice is given in the native languages of the various population groups in the State;
  - (2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;
  - (3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and
  - (4) A description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974 and implementing regulations in 34 C.F.R. part 99.
- (b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

**K.A.R. 91-40-50. Parental access to student records; confidentiality.**

- (a) As used in this regulation, the following terms shall have the meanings specified in this subsection:
  - (1) "Destruction" means physically destroying the medium on which information is recorded or removing all personal identifiers from the information so that no one can be identified.
  - (2) "Education records" means any document or medium on which information directly related to one or more students is maintained by a participating agency in accordance with K.S.A. 72-6214 and amendments thereto.
  - (3) "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.
- (b) The provisions in 34 C.F.R. §§ 300.612 through 300.624, as in effect on August 14, 2006, and published in 71 fed. reg. 46802-46804 (2006), which concern parental access to education records and confidentiality of those records, are hereby adopted by reference.

## B. ACCESS TO RECORDS

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 education 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. Education 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

Under certain circumstances, a teacher's working file would not be considered to be part of the child's record. FERPA regulation 34 C.F.R. 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."

Unless it has parent consent, a district must prevent the disclosure to any unauthorized person of personally identifiable information from student records. 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.

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 public schools and private schools that accept federal funds. The school must comply with a request to inspect education records without unnecessary delay. Even if a delay is necessary, a school must make education records available for inspection and review within 45 days after the parents request to review the records. In addition, a school must comply with a parent's request to review education records before any IEP meeting, due process hearing, or resolution session takes place.

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 C.F.R. 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 C.F.R. 99.31(a)(1));
- officials of another school, school district, or postsecondary educational institution where the student is enrolled or seeks or intends to enroll, IF (a) the district's annual notice included a notice that the district forwards education records to other agencies that request records and in which the student seeks or intends to enroll; or (b) the district makes a reasonable attempt to notify the parents or the student of the disclosure at the last known address (34 C.F.R. 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 C.F.R. 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 C.F.R. 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 C.F.R. 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 C.F.R. 99.31(a)(6));

- disclosure to accrediting organizations to carry out their functions (34 C.F.R. 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 C.F.R. 99.31(a)(8));
- disclosure of relevant educational records to a court in a legal action initiated by the district against a parent. Also, disclosure to comply with a judicial order or subpoena. However, these disclosures may be made only if the district makes a reasonable effort to notify the parents or eligible student of 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 C.F.R. 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 C.F.R. 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 C.F.R. 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 C.F.R. 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 section 16 of title 18, United States Code (34 C.F.R. 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 C.F.R. 300.622(a)).

To ensure protection of education records, the school district 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 exceptionalities.
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 district 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 district.
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 C.F.R. 300.613). Most districts copy records for parents without 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.

**Sec. 300.613. Access rights**

- (a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Secs. 300.507 and 300.521-300.528, and in no case more than 45 days after the request has been made.
- (b) The right to inspect and review education records under this section includes--
  - (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
  - (2) 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 the records; and
  - (3) The right to have a representative of the parent inspect and review the records.
- (c) An agency may presume that the parent has 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 governing such matters as guardianship, separation, and divorce.

**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 Kansas school district or nonpublic school, 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. (see sample FERPA notice at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>). 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.

Children in foster care who move from one community to another should be admitted to the receiving school without delay. The receiving school may access the education record (including the immunization portion of the record) without parent consent, if proper public notice has been provided to the parent (K.S.A. 1997 Supp. 72-5209(d)). If the receiving district is unable to determine the previous district, the school can access the Foster Care Database which includes information from SRS and JJA regarding custody and out of home placement, as well as educational records from the school districts the child has attended.

Kansas schools may NOT withhold records because of fines or other such reasons. The sending district is to transfer the original school record to the requesting district (K.S.A. 72-5386). The sending district should maintain a copy of the educational record that is sent. In addition, Kansas special education regulations require the sending district to immediately transfer the IEP, and any additional educationally relevant information regarding a child with an exceptionality, to the receiving district (K.A.R. 91-40-4(c)). 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.

**K.S.A. 1997 Supp. 72-5209**

- (d) If a pupil transfers from one school to another, the school from which the student is transferring shall forward the pupil's immunization certification to the new school.

**K.S.A. 72-5386**

- (a) This section shall apply to all school districts and to every pupil of any school district. As used in this section, the term "school records" means transcripts, grade cards, the results of tests, assessments or evaluations, and all other personally identifiable records, files and data directly related to a pupil.
- (b) All school district property in the possession of any pupil shall be returned to the proper school district authority or paid for by the pupil upon transfer of the pupil from the school district. The school records of any such pupil shall not be withheld for any reason. A school district authority, upon request, shall provide a fully itemized list of the school district property in the possession of the pupil. In the event that such school district authority receives an affidavit stating that the pupil's parents are unable to return the school district property which is lost or missing, such school district authority shall note in the school records of the pupil that the pupil has complied with the provisions of this section. In the event that a school district authority receives an affidavit from the board of education of another school district or from the governing authority of a nonpublic school stating that a pupil's records are being requested as proof of identity of the pupil pursuant to the provisions of K.S.A. 72-53,106, and amendments thereto, such school district authority shall forward a certified copy of that part of the pupil's records which provides information regarding the identity of the pupil.
- (c) The school records of each pupil are the property of the pupil and shall not be withheld by any school district. Upon request of a pupil or the parent of a pupil, the school records of the pupil shall be given to such pupil or parent, or, upon transfer of the pupil to another school district or to a nonpublic school, shall be forwarded to such school district or nonpublic school. A pupil's records forwarded to another

school district due to transfer will include original copies of all the student's records, including transcripts, grade cards, results of tests, assessments or evaluations, and all other personally identifiable records, files and data directly related to the pupil.

**K.A.R. 91-40-4**

(c) Unless otherwise expressly authorized by state law, when a student transfers from a state school to a school district or from one school district to another, the most recent individualized education program, as well as any additional educationally relevant information concerning the child, shall be forwarded immediately to the receiving school district.

## D. RELEASE OF INFORMATION

As discussed in previous sections, consent from the parent or adult student is required before information in education records or the education records themselves may be released (34 C.F.R.C.F.R. 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 district of residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the public school district where the private school is located and officials in the public school district of the parent's residence (34 C.F.R. 300.622(a)(3)).
- Parental consent must also 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 to release information and to access public benefits or insurance is required prior to requesting 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 exceptionality, and other pertinent information.

Further, IDEA 2004 has determined that schools must 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.

The Office of Special Education Programs (OSEP) has provided informal guidance that schools 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 during this annual period, the school must obtain consent to access Medicaid for the change in services (34 C.F.R. 300.154(d)(2)(iv)). A sample Parent Consent form to use to access Medicaid reimbursement is available on the KSDE website. (See Letter to Smith, OSEP Memo, Jan 2007 <http://www.ksde.org/Default.aspx?tabid=2833#memo>.)

This memo does not address private insurance. The federal regulations also require that schools obtain parental consent for release of information each time the school accesses the child's private insurance. They must also notify parents that the parents' refusal to allow access to their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

**Sec. 300.622 Consent.**

- (a) Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in education records, and the disclosure is authorized without parental consent under 34 C.F.R. part 99.
- (b) (1) Except as provided in paragraphs (b)(2) and (b)(3) of this section, parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of this part.
- (2) Parental consent, or the consent of an eligible child who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services in accordance with §300.321(b)(3).
- (3) 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, 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.

**Sec. 300.154**

- (d) Children with disabilities who are covered by public benefits or insurance.

(1) A public agency may use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under this part, as permitted under the public benefits or insurance program, except as provided in paragraph (d)(2) of this section.

(2) With regard to services required to provide FAPE to an eligible child under this part, the public agency--

(i) May not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive FAPE under Part B of the Act;

(ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or copay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parents otherwise would be required to pay;

(iii) May not use a child's benefits under a public benefits or insurance program if that use would--

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discontinuation of benefits or insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures; and

(iv) (A) Must obtain parental consent, consistent with §300.9, each time that access to public benefits or insurance is sought; and

(B) 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.

(e) Children with disabilities who are covered by private insurance.

(1) With regard to services required to provide FAPE to an eligible child under this part, a public agency may access the parents' private insurance proceeds only if the parents provide consent consistent with §300.9.

(2) Each time the public agency proposes to access the parents' private insurance proceeds, the agency must--

(i) Obtain parental consent in accordance with paragraph (e)(1) of this section; and

(ii) Inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

## 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 C.F.R. 300.618).

### Sec. 300.618. Amendment of records at parent's request

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing under Sec. 300.619.

## F. DESTRUCTION OF RECORDS

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

The requirement to notify the parent or the adult student when the information is no longer needed may be problematic, if the student moves from the address last known to the school. In such cases, the school is advised to send a certified letter to the student at the last known address. If that letter is returned to the school, that return becomes the documentation of the school's attempt to inform the student of the proposed destruction of records. In such cases, the school may publish a public notice to students who graduated or left school during a specified time period (for example, prior to 2005). The notice should be addressed to students and guardians,

advising them of the proposed destruction of records and asking them to contact the school if they object to the destruction.

Many schools inform parents of when the special education records of their child will no longer be needed and will be destroyed with a statement in the child's IEP. The following statement has been approved for insertion into an IEP:

*"NOTICE OF DESTRUCTION OF SPECIAL EDUCATION RECORDS: Special education records for each child with an exceptionality are maintained by the school district 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."*

A school must destroy information that is no longer needed at the request of the parents. However, a permanent record of the following information may be maintained without time limitation:

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

**Sec. 300.624. Destruction of information**

- (a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.
- (b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

## G. AGE OF MAJORITY

In Kansas, 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 request amendment of records, and to file a complaint, etc. (See Chapter 1, Parent Rights In Special Education, for additional information on age of majority.)

**Sec. 300.625. Children's rights**

- (a) The SEA shall provide policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.
- (b) Under the regulations for the Family Educational Rights and Privacy Act of 1974 (34 C.F.R. 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.
- (c) If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with Sec. 300.520, the rights regarding educational records in Secs. 300.613 through 300.624 must also be transferred to the student. However, the public agency must provide any notice required under section 615 of the Act to the student and the parents.

## H. TEST PROTOCOLS

Some individualized testing involves the use of test protocols. These documents usually include the test questions or stimuli and the student's answers or responses. They may also include the correct answers, norm tables (scoring tables), scoring sheets, and examiner's notes. When a test protocol contains personally identifiable information directly related to a particular student, that protocol is an education record and a parent has a right to inspect and review it. In most cases, however, a parent would not have a right to a copy of a test protocol.

Requests for test protocols occur in varying contexts. Sometimes, parents ask to inspect or photocopy protocols maintained by schools or their personnel. Occasionally, schools 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.

When a student with an exceptionality 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 US Department of Education has 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.

Clearly, concerns exist about violating the test publisher's copyright protections. Schools are advised that Federal regulation 34 C.F.R. 300.613(b) would allow parents to inspect and review the records. However, if parents want to copy such records, the school may want to consult with its attorney. However, 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 school may be required to provide a copy to the parent (Letter to Thomas, 211 IDELR 420 (FPCO 1986)).

Sec. 300.613

(b) The right to inspect and review education records under this section includes--

- (2) 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 the records...

## I. DISCIPLINE RECORDS

Schools 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 C.F.R. 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 schools send records of students to other schools, they are also required to include the discipline records. (Note: K.S.A. 72-5386 defines school records to include ALL personally identifiable records, files and data.)
- If school employees are required to make a report to a law enforcement agency, pursuant to the Kansas School Safety and Security Act (K.S.A. 72-89603, et.seq.), they may be charged with failure to report if they do not comply.
- If school employees report a crime, the school may not impose sanctions on them.
- If school employees report a crime in good faith, they have immunity from civil liability.

**Sec. 300.535(b)**

(1) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

**Sec. 300.229. Disciplinary information**

(a) The State may require that a public agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

(b) The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

(c) If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current individualized education program and any statement of current or previous disciplinary action that has been taken against the child.

**K.S.A. 72-89b04**

(a) Willful and knowing failure of a school employee to make a report required by subsection (b)(1) of K.S.A. 1998 Supp. 72-89b03, and amendments thereto, is a class B nonperson misdemeanor. Preventing or interfering with the intent to prevent, the making of a report required by subsection (b)(1) of K.S.A. 1998 Supp. 72-89b03, and amendments thereto is a class B nonperson misdemeanor.

(b) Willful and knowing failure of any employee designated by a board of education to transmit reports made by school employees to the appropriate state or local law enforcement agency as required by subsection (b)(1) of K.S.A. 1998 Supp 72-89b03, and amendments thereto, is a class B nonperson misdemeanor.

- (c) No board of education shall terminate the employment of, or prevent or impair the profession of, or impose any other sanction on any school employee because the employee made an oral or written report relating to any criminal act that the employee knows has been committed or reasonably believes will be committed at school, on school property, or at a school supervised activity.
- (d) Any board of education, and any member or employee thereof, participating without malice in the making of an oral or written report to a law enforcement agency relating to any criminal act that is known to have been committed or reasonably is believed will be committed at school, on school property, or at a school supervised activity shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceedings resulting from the report.

## J. CHILD IN NEED OF CARE

As part of the Child in Need of Care case, the following agencies and people may freely exchange information:

- Department of Social and Rehabilitation Services;
- Commissioner of Juvenile Justice;
- Law enforcement agency receiving the report;
- Members of a Court-appointed multidisciplinary team;
- Entity mandated by Federal or State law to investigate child in need of care cases;
- Military enclave or Indian tribal organization authorized to investigate such cases;
- County or district attorney;
- Court services officer who has taken a child into custody;
- Guardian ad litem appointed for a child alleged to be in need of care;
- An intake and assessment worker; and
- Any community corrections program that has the child under Court-ordered supervision.

Note that this list does NOT include educational agencies or school personnel.

However, educational institutions, to the extent necessary to enable them to provide the safest possible environment for their students and employees, must have access to information received by the Department of Social and Rehabilitation Services. This access to records is limited to information reasonably necessary to carry out their lawful responsibilities to maintain their personal safety and that of others in their care; or to diagnose, treat, care for, or protect a child alleged to be in need of care. Accordingly, educational agencies may "receive" records, *but may not provide educational records to these agencies except as provided by FERPA*. (K.S.A. 38-2212(c))

### K.S.A. 38-1507

- (a) Except as otherwise provided, in order to protect the privacy of children who are the subject of a child in need of care record or report, all records and reports concerning children in need of care, including the juvenile intake and assessment report, received by the department of social and rehabilitation services, a law enforcement agency or any juvenile intake and assessment worker shall be kept confidential except:
- (1) To those persons or entities with a need for information that is directly related to achieving the purposes of this code, or
  - (2) Upon an order of a court of competent jurisdiction pursuant to a determination by the court that disclosure of the reports and records is in the best interests of the child or are necessary for the proceedings before the court, or both, and are otherwise admissible in evidence. Such access shall be limited to in camera inspection unless the court otherwise issues an order specifying the terms of disclosure.
- (b) The provisions of subsection (a) shall not prevent disclosure of information to an educational institution or to individual educators about a pupil specified in subsection (a) of K.S.A. 1998 Supp. 72-89b03 and amendments thereto.
- (c) When a report is received by the department of social and rehabilitation services, a law enforcement agency or any juvenile intake and assessment worker which indicates a child may be in need of care, the following persons and entities shall have a free exchange of information between and among them:
- (1) The department of social and rehabilitation services;
  - (2) The commissioner of juvenile justice;
  - (3) The law enforcement agency receiving such report;
  - (4) Members of a court appointed multidisciplinary team;
  - (5) An entity mandated by federal law or an agency of any state authorized to receive and investigate reports of a child known or suspected to be in need of care;
  - (6) A military enclave or Indian tribal organization authorized to receive and investigate reports of a child known or suspected to be in need of care;
  - (7) A county or district attorney;
  - (8) A court services officer who has taken a child into custody pursuant to K.S.A. 38-1527, and amendments thereto;
  - (9) A guardian ad litem appointed for a child alleged to be in need of care;
  - (10) An intake and assessment worker; and
  - (11) Any community corrections program which has the child under court ordered supervision.

- (d) The following persons or entities shall have access to information, records or reports received by the department of social and rehabilitation services, a law enforcement agency or any juvenile intake and assessment worker. Access shall be limited to information reasonably necessary to carry out their lawful responsibilities to maintain their personal safety and the personal safety of individuals in their care or to diagnose, treat, care for or protect a child alleged to be in need of care.
- (1) A child named in the report or records.
  - (2) A parent or other person responsible for the welfare of a child, or such person's legal representative.
  - (3) A court appointed special advocate for a child, citizen review board or other advocate which reports to the court.
  - (4) A person licensed to practice the healing arts or mental health profession in order to diagnose, care for, treat or supervise:
    - (A) A child whom such service provider reasonably suspects may be in need of care;
    - (B) A member of the child's family; or
    - (C) A person who allegedly abused or neglected the child.
  - (5) A person or entity licensed or registered by the secretary of health and environment or approved by the secretary of social and rehabilitation services to care for, treat or supervise a child in need of care. In order to assist a child placed for care by the secretary of social and rehabilitation services in a foster home or child care facility, the secretary shall provide relevant information to the foster parents or child care facility prior to placement and as such information becomes available to the secretary.
  - (6) A coroner or medical examiner when such person is determining the cause of death of a child.
  - (7) The state child death review board established under K.S.A. 22a-243, and amendments thereto.
  - (8) A prospective adoptive parent prior to placing a child in their care.
  - (9) The department of health and environment pursuant to K.S.A. 59-512, and amendments thereto, for the purpose of carrying out responsibilities relating to licensure or registration of child care providers as required by chapter 65 of article 5 of the Kansas Statutes Annotated, and amendments thereto.
  - (10) The state protection and advocacy agency as provided by subsection (a)(10) of K.S.A. 65-5603 or subsection (a)(2)(A) and (B) of K.S.A. 74-5515, and amendments thereto.
  - (11) Any educational institution to the extent necessary to enable the educational institution to provide the safest possible environment for its pupils and employees.
  - (12) Any educator to the extent necessary to enable the educator to protect the personal safety of the educator and the educator's pupils.
- (e) Information from a record or report of a child in need of care shall be available to members of the standing house or senate committee on judiciary, house committee on appropriations, senate committee on ways and means, legislative post audit committee and joint committee on children and families, carrying out such members' or committee's official function in accordance with K.S.A. 75-4319 and amendments thereto, in a closed or executive meeting. Except in limited conditions established by 2/3 of the committee shall not be further disclosed. Unauthorized disclosure may subject such member to discipline or censure from the house of representatives or senate.
- (f) Nothing in this section shall be interpreted to prohibit the secretary of social and rehabilitation services from summarizing the outcome of department actions regarding a child alleged to be a child in need of care to a person having made such report.
- (g) Disclosure of information from reports or records of a child in need of care to the public shall be limited to confirmation of factual details with respect to how the case was handled that do not violate the privacy of the child, if living, or the child's siblings, parents or guardians. Further, confidential information may be released to the public only with the expressed written permission of the individuals involved or their representatives or upon order of the court having jurisdiction upon a finding by the court that public disclosure of information in the records or reports is necessary for the resolution of an issue before the court.
- (h) Nothing in this section shall be interpreted to prohibit a court of competent jurisdiction from making an order disclosing the findings or information pursuant to a report of alleged or suspected child abuse or neglect which has resulted in a child fatality or near fatality if the court determines such disclosure is necessary to a legitimate state purpose. In making such order, the court shall give due consideration to the privacy of the child, if living, or the child's siblings, parents or guardians.
- (i) Information authorized to be disclosed in subsections (d) through (g) shall not contain information which identifies a reporter of a child in need of care.
- (j) Records or reports authorized to be disclosed in this section shall not be further disclosed, except that the provisions of this subsection shall not prevent disclosure of information to an educational institution or to individual educators about a pupil specified in subsection (a) of K.S.A. 1998 Supp. 72-89b03 and amendments thereto.
- (k) Anyone who participates in providing or receiving information without malice under the provisions of this section shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceedings resulting from providing or receiving information.
- (l) No individual, association, partnership, corporation or other entity shall willfully or knowingly disclose, permit or encourage disclosure of the contents of records or reports concerning a child in need of care received by the department of social and rehabilitation services, a law enforcement agency or a juvenile intake and assessment worker except as provided by the code. Violation of this subsection is a class B misdemeanor.

## QUESTIONS AND ANSWERS ABOUT CONFIDENTIALITY

### 1. What must a school do to provide parents reasonable access to their child's records?

Records should be in a location that: (a) parents can find; (b) is maintained during normal business hours; and (c) is not physically inaccessible (downstairs or upstairs, with no elevator available). Upon request, someone who can interpret or explain 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, a school 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, for example, a parent does not live within a reasonable driving distance from the school, the school may need to provide a copy of the requested records. If copies are provided schools 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 school must provide the records without charge.

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

FERPA and IDEA have included definitions of "education records." These definitions, while expansive, in most cases do not include the staff's working files and anecdotal records. However, there are some important requirements. FERPA regulation 34 C.F.R. 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. If a district cannot determine which Kansas school a student transferred from, may the State's Management Information System (MIS) be accessed to determine this information?

Yes. If the sending school district has used a FERPA notification form, stating that the Management Information System (MIS) data manager may inform the special education director of the receiving district of the student's previous district of attendance. The receiving district may then contact the sending district to request student records without parent consent. This exception to FERPA confidentiality requirements is in FERPA regulation 34 C.F.R. 99.31(a)(2).

### 4. 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 exceptionality, etc.). In addition, schools 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 school must obtain parental consent to access Medicaid for any change in a service or amount of a service.

### 5. What is the school's obligation to provide special education when the student cannot be enrolled because s/he does not have documentation of immunizations?

K.S.A. 72-5209 requires documentation of immunization before admitting students enrolling for the first time in a Kansas school. This may include a student transferring from an out-of-state school, or a child enrolling, for the first time in Kansas, in a kindergarten or in a preschool or a day care program operated by a school. K.S.A. 72-5211a permits school districts to adopt policies, in conformance with K.S.A. 72-5209, to exclude from school any student, enrolling in Kansas for the first time, who has not presented documentation of immunization. The school district is not required to provide any educational services, including special education services, until the documentation is received.

The school district should advise the student and parents that FAPE is available when the documentation for compliance with State health laws is received. K.S.A. 72-5211a specifies that the compulsory school

attendance law does not apply to any student excluded from school for failure to document immunization records. Thus, such students should not be reported as truant. However, State law requires schools to include this information, when transferring education records to a new school.

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

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

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

According to the US Department of Education, under FERPA 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 school may want to consult with their attorney. However, schools 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 C.F.R. 300.613(b)(2)).

**8. May a parent consent to disclosure of information in education records with a signature in electronic form?**

Yes. Written consent may be given in an electronic form that: (a) identifies and authenticates a particular person as the source of the electronic consent; and (b) indicates such person's approval of the information contained in the electronic consent. (34 C.F.R. 99.30(d))

