



Parental Rights under the Family Educational Rights and Privacy Act

Taylor Jenkins

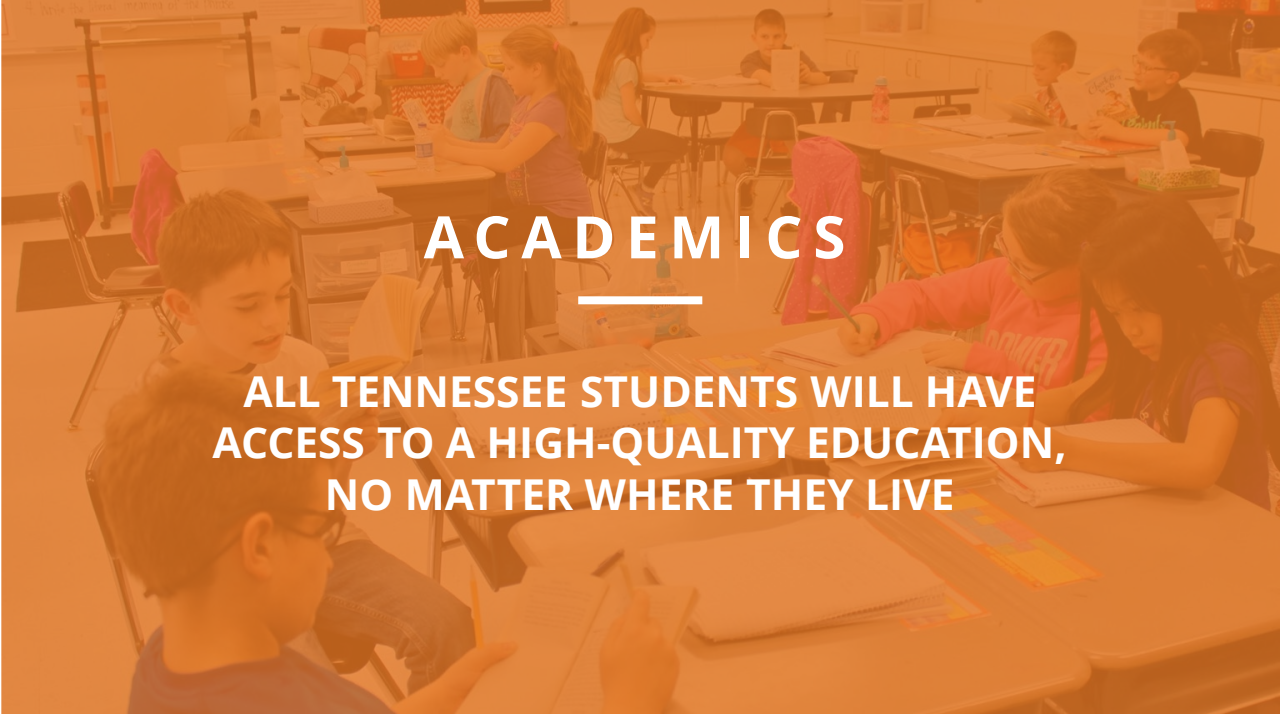
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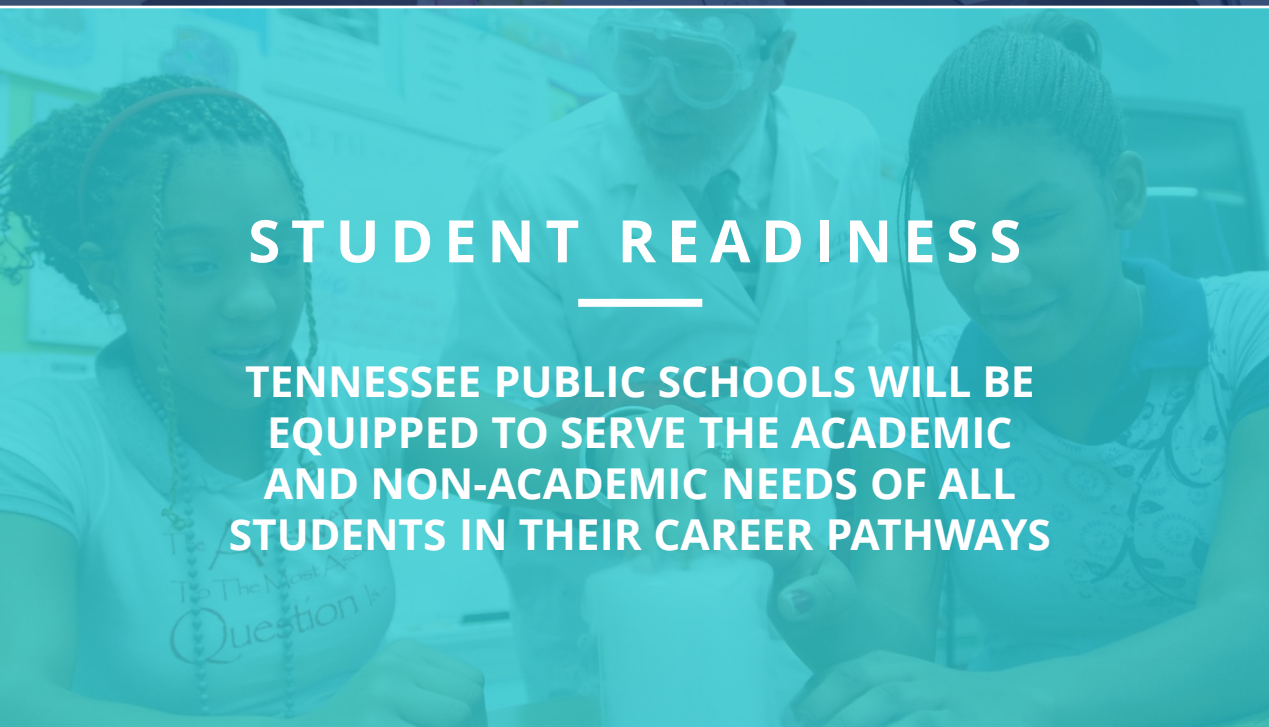
BEST FOR
ALL

We will set all students on a path to success.



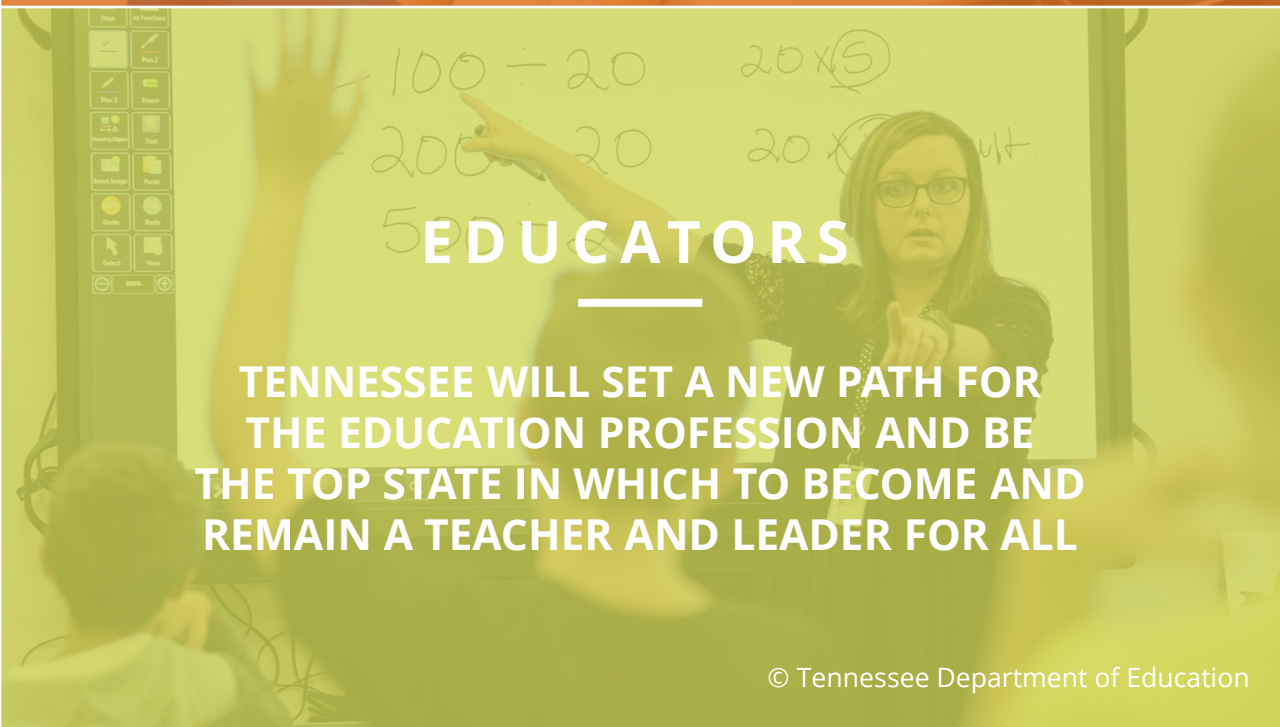
ACADEMICS

ALL TENNESSEE STUDENTS WILL HAVE ACCESS TO A HIGH-QUALITY EDUCATION, NO MATTER WHERE THEY LIVE



STUDENT READINESS

TENNESSEE PUBLIC SCHOOLS WILL BE EQUIPPED TO SERVE THE ACADEMIC AND NON-ACADEMIC NEEDS OF ALL STUDENTS IN THEIR CAREER PATHWAYS



EDUCATORS

TENNESSEE WILL SET A NEW PATH FOR THE EDUCATION PROFESSION AND BE THE TOP STATE IN WHICH TO BECOME AND REMAIN A TEACHER AND LEADER FOR ALL



Agenda

- Right to Amend Education Records
- Right to Inspect and Review Education Records
- Right to Non-Disclosure of Personally Identifiable Information in Education Records



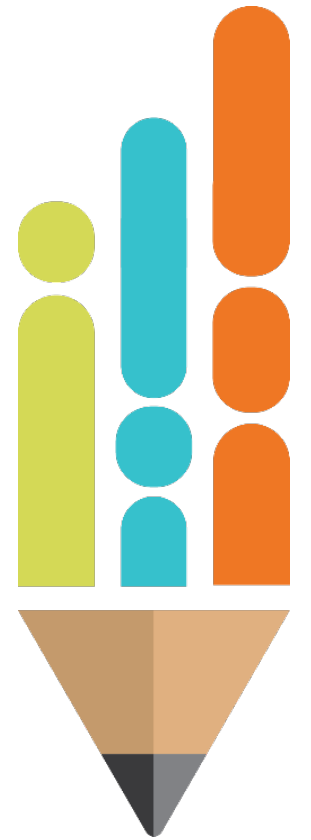
Right to Amend Education Records

Requests to Amend

- A student or a student's parents may ask the student's LEA to amend an education record relating to the student that contains information that is **inaccurate, misleading, or in violation of the student's rights of privacy**. See 34 C.F.R. § 99.20(a).
- What is **a violation of the student's rights of privacy**? Consider topics like family history, sexual preference or orientation, and transgender status that are extremely personal and minimally useful to educational programming.

Policy and Procedure Considerations

- Must the request to amend be made in writing, or can the request be made orally?
 - What if the parent has difficulties with language or communication?
- If the request to amend must be made in writing, is there a model form to assist the requestor?
- What information should be included in the request to amend?
 - The record to be amended?
 - The basis for the request to amend?
 - Contact information for the requestor?
- Where should the request to amend be submitted?



Requests to Amend “Substantive Decisions”

- A student’s parents may **not** ask the student’s LEA to amend **substantive decisions made by school officials** contained in a student’s education record. For example, the right to amend cannot be used to challenge:
 - A student’s grades. See Family Policy Compliance Office, [Letter to Anonymous](#), (July 30, 2007).
 - A student’s disciplinary records. See Family Policy Compliance Office, [Letter to Anonymous](#), (Mar. 2, 2016).
 - A student’s attendance records. See Family Policy Compliance Office, *Letter to Moody*, (2015).
 - Statements made in a psychological report. See Student Privacy Policy Office, *Letter to Anonymous*, (2021).
- A student’s parents may ask the LEA to amend substantive decisions **if the information was incorrectly entered** (e.g., grades, discipline or attendance incorrectly entered).

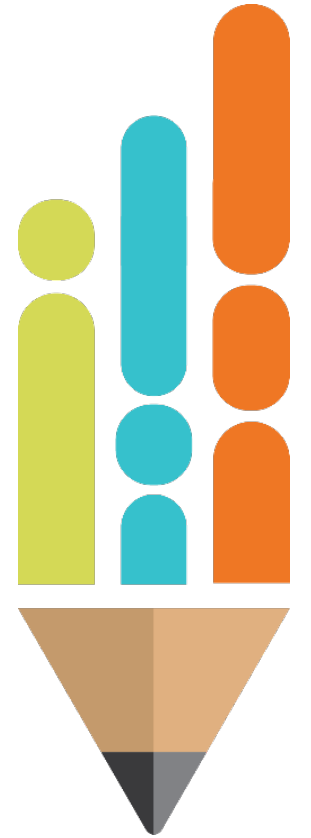
LEA Response to Requests to Amend

- Within a reasonable amount of time after receiving a request to amend, the LEA must respond by either:
 1. Granting the request and amending the record; or
 2. Denying the request and **informing the requestor of their right to a hearing.**

See 34 C.F.R. § 99.20(b), (c).

Policy and Procedure Considerations

- Who should be notified when a request to amend is submitted?
- Who is responsible for deciding whether to grant or deny the request to amend?
- Who is responsible for drafting and signing the response letter? Do you have a form response letter?
- Do you have a public-facing or internal timeline for what constitutes a “reasonable” amount of time to respond?

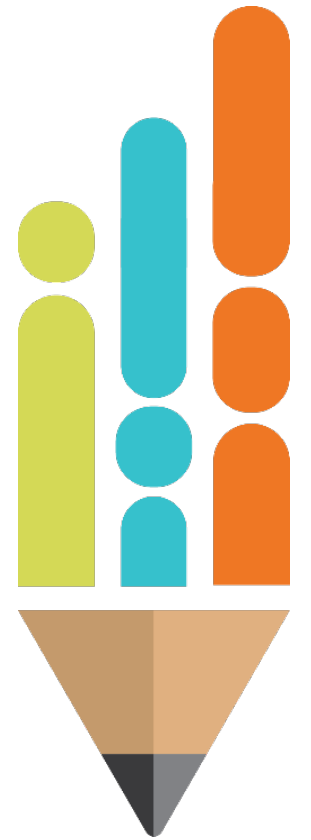


Requests for a Hearing

- If the student's parents request a hearing, the LEA must hold the hearing within a reasonable time after it has received the request for the hearing. *See* 34 C.F.R. § 99.22(a).
- The LEA must provide the parents **notice of the date, time, and place of the hearing** reasonably in advance of the hearing. *See* 34 C.F.R. § 99.22(b).
- It can be useful to schedule a **pre-hearing conference** with the student's parents to explain the hearing process, answer any questions that they may have, and explain that they may be represented or assisted by one or more individuals at the hearing, including an attorney.

Policy and Procedure Considerations

- Do you have a public-facing or internal timeline for the maximum number of days between the request being made and the hearing being held?
- Will you require the parties to submit any documents to the hearing officer prior to the hearing?

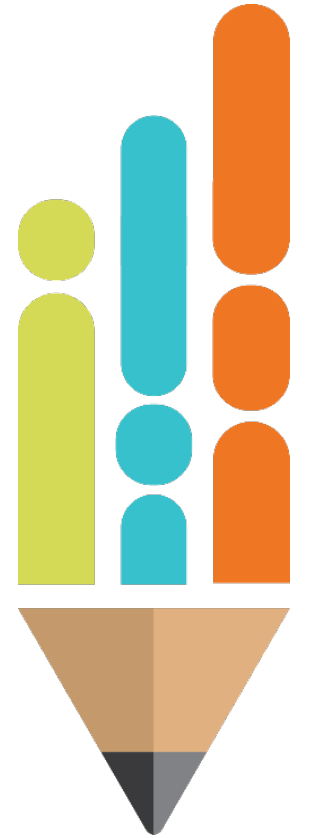


The Hearing

- The hearing may be conducted by any individual, including an LEA employee, as long as the individual **does not have a direct interest in the hearing's outcome.** 34 C.F.R. § 99.22(c).
- The LEA must give the student's parents a full and fair opportunity to present relevant evidence. 34 C.F.R. § 99.22(d).

Policy and Procedure Considerations

- Do you have a designated hearing officer?
 - Has the designated hearing officer been trained?
- Will the hearing be in-person or virtually?
- What will the order of presentation look like?
 - Will the student's parents or the LEA present first?
 - If the student's parents present first, will they have an opportunity to rebut the LEA's presentation?
- Will you have time limits for each party's presentation?
- Will the parties be allowed to call or cross-examine witnesses?
- Will the hearing officer be allowed to ask questions of the parties or their witnesses?
- Will you have a court reporter to transcribe the hearing?



The Hearing Decision

- Within a reasonable amount of time after the hearing, the LEA must issue a written decision and notify the student's parents of the result. 34 C.F.R. § 99.22(e).
- The written decision should include a summary of the evidence and the reasons for the decision. *See* 34 C.F.R. § 99.22(f).

The Hearing Decision

- If the LEA determines that the information **is** inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:
 - Amend the education record; and
 - Inform the student’s parents of the amendment in writing.
- If the LEA determines that the information **is not** inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:
 - Inform the student’s parents of the right to place a statement in the record commenting on the contested information in the record or stating why they disagree with the decision of the LEA.

Hypothetical

A school issues a report card showing that a student received a "B" in math. The student's father says he is in possession of all the student's assignments and, based on his calculation, believes that the student's grade was improperly recorded. The student's math teacher says the student's father is missing an assignment that the student performed poorly that dropped the student from an "A" to a "B".

The student's father requests the grade be amended. The school denies the request, but offers the student's father the right to request a hearing.

The student's father requests a hearing. The student's father presents his evidence, but the hearing officer issues a decision in favor of the school. The school keeps a statement made by the student's father appended to the report card.



Hypothetical

Months later, the student's teacher finds the missing assignment, sees that the student received an "A" on it, and calculates that the student should have received an "A" on the report card. The student's teacher informs the student's father of her mistake. He again requests the school amend the record. The school says no because they have already ruled on the request.

If the student's father files a complaint with the Student Privacy Policy Office, should the school be concerned?



Hypothetical

No. FERPA guarantees a student's family the right to a process, not necessarily a correct result. The school followed the process of responding to the initial request, informing the student's father of the right to a hearing, conducting a hearing, and issuing a determination. The school met its obligations under FERPA.



Right to Inspect and Review Education Records

Requests to Inspect and Review

- A student or student's parents have the **right to inspect and review their student's education records upon request.** *See* 34 C.F.R. § 99.10(a).
- The right to inspect and review requires LEAs to **respond to reasonable requests for explanations and interpretations** of education records. *See* 34 C.F.R. § 99.10(c).
- An "education record" is any record that is:
 - Directly related to the student; and
 - Maintained by an educational agency or a party acting for the educational agency.*See* 34 C.F.R. § 99.3.

Hypothetical

An LEA evaluates a student for intellectual giftedness. In accordance with the Tennessee Evaluation & Eligibility Standards, the LEA administers the student the Tennessee Teacher Observation Checklist (TnTOC) and the Tennessee Parent Information Form (TnPIF).

The LEA determines the student does not meet the eligibility requirements for intellectual giftedness. The upset parent requests to inspect and review the TnTOC and TnPIF for her student. Must the LEA produce those evaluation forms?



Hypothetical

Appendix G: TN Teacher Observation Checklist (TnTOC)

Student _____ School _____ Grade _____ Date _____

The TN Teacher Observation Checklist (TnTOC) is an important component of this student's individual screening and/or assessment. Please make careful consideration of each behavior characteristic while completing this checklist. Record on the lines provided below examples of behavioral traits of intellectual giftedness (whether considered socially "positive" or "negative") that you have observed in this student when compared to others of similar age, experience, and environment.

Please check those items which are frequently characteristic of this child. Note that it is unlikely that any child will have all of these attributes.

| | | | |
|----|--|-----|---|
| 1. | <input type="checkbox"/> Generates abstract ideas or asks complex questions | 22. | <input type="checkbox"/> Is impatient—hurries to complete a task |
| 2. | <input type="checkbox"/> Challenges rules, assignments, requests, and may ask provocative questions | 23. | <input type="checkbox"/> Exhibits long-term retention of school or non-school-related information |
| 3. | <input type="checkbox"/> Is curious—wants to know "why, how, etc."; asks thoughtful, searching questions | 24. | <input type="checkbox"/> Is motivated to high achievement in a low-performing school environment |
| 4. | <input type="checkbox"/> Understands puns, political cartoons, etc., beyond their peers | 25. | <input type="checkbox"/> Understands relationships among seemingly unrelated objects, ideas, or facts |
| 5. | <input type="checkbox"/> Shows desire for knowledge | 26. | <input type="checkbox"/> Attributes success and failure to fate, luck, or chance |
| 6. | <input type="checkbox"/> Often fails to complete schoolwork | 27. | <input type="checkbox"/> Likes structure, order, and consistency |
| 7. | <input type="checkbox"/> Enjoys school | 28. | <input type="checkbox"/> Facility with words/oral language exceeds quality of written work |



Hypothetical

Yes. Once the TnTOC and TnPIF evaluation forms are completed for the student, the evaluation forms are directly related to the student and are maintained by the LEA. The evaluation forms must be produced in response to a request to inspect and review. The LEA, however, may require the parent to review the evaluation forms on site to prevent the parent from “gaming” the evaluation, unless doing so would effectively prohibit the parent from inspecting and reviewing the evaluation forms.



OSEP Letters on Test Protocols

- **Test protocols that contain PII are education records under FERPA.** See U.S. Dep't of Educ., [Letter to Price](#), (Oct. 13, 2010); U.S. Dep't of Educ., [Letter to Silver](#), (Aug. 7, 1998).

Combined Protocol and Answer Sheet

This office has previously advised educational agencies and institutions that test instruments or question booklets that do not identify a student or that do not contain personally identifiable information are not considered "education records" under FERPA. See also 34 CFR § 99.3, "Personally identifiable information." In contrast, completed test instruments or question booklets containing information that identify a particular student, whether or not the actual name of the student appears on the booklet, constitute "education records" subject to the FERPA requirements. Therefore, in cases where an answer sheet is directly related to the student and is separate from the question booklet not directly related to a student, only the answer sheet would be considered an education record under FERPA. In cases where a question booklet includes both the questions and the student's responses, the question booklet is an education record subject to FERPA.

Separate Protocol and Answer Sheet

Although under FERPA a school district is not required to provide a parent with an opportunity to inspect and review information that is not personally identifiable to his or her child, such as test instruments and question booklets that are not directly related to the student, § 99.10(c) of the FERPA regulations provides that a school is required "to respond to reasonable requests for explanations and interpretations of the records." Accordingly, a school would be required to respond to a reasonable request for an explanation or interpretation of a student's answer sheet. Although, in this scenario, the school would not be required by FERPA to show the question booklet to a parent, providing an explanation or interpretation of the student's record may, in certain instances, include reviewing the question booklet with the parent.

Because answer sheets are usually directly related to a student, they generally fall within the definition of education records to which a parent has the right to inspect and review. Therefore, the parent has the right to have access to her child's answer sheet and an explanation or interpretation of that answer sheet which, in some cases, could require access to the question booklet. However, because FERPA requires a parent be given access and not copies, except when circumstances effectively prevent a parent from inspecting and reviewing the records, the school district is not required to provide the parent a copy of the answer sheet or the question booklet.

Sole Possession Exception

- “Sole possession” records are records that are:
 - Made by instructional or administrative personnel;
 - Kept in the sole possession of the maker of the record; and
 - Not accessible or revealed to any other person except a temporary substitute.
- Sole possession records are not considered education records and do not have to be produced in response to a request to inspect and review.

Requestors

- If the student's parents are divorced, **both the custodial parent and the non-custodial parent** may inspect and review the student's education records, unless a court order states otherwise.
 - **Tip:** Ask for a parenting agreement signed by the court. If none exists, treat the parents equally regardless of who is the custodial parent.
- If the student is over 18-years-old, **the student** may inspect and review the student's education records, unless a court order states otherwise.
 - **Tip:** Ask the student's parent or guardian if they have a power of attorney or conservatorship over the student. If so, the right to inspect reverts back to the parent or guardian.
- Under the IDEA, **a representative of the parent** may inspect and review the student's education records.
 - **Tip:** Ask for a signed release from the parent authorizing the representative to inspect and review the records.

Information about Multiple Students

- If an education record contains information about more than one student, the LEA must generally take one of the following actions before allowing a student's parents the right to request and inspect:
 - Redact personally identifiable information about the other students;
 - Obtain written consent from the parents of the other students to disclose the personally identifiable information about their student; or
 - Only allow the requestor the right to request and inspect the portion of the record related to their student.

But see U.S. Dep't of Educ., [Letter to Wachter](#), (Dec. 7, 2017) (exception exists when “the information about the other student cannot be segregated and redacted without destroying its meaning”).

Timeline for Records Requests

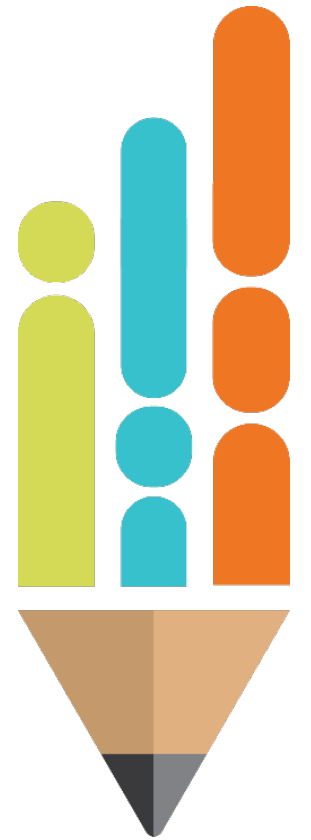
- LEAs must grant a request to inspect and review education records **without unnecessary delay and in no case more than 45 calendar days** after the request.
- LEAs must expedite requests in certain situations:
 - Relevant education records must be produced upon request **before any IEP team meeting.**
 - Relevant education records must be produced upon request **before a due process resolution session or final hearing.**
 - Relevant education records must be produced upon request **before a manifestation determination review.**

Copies and Fees for Records Requests

- Neither IDEA nor FERPA require LEAs to produce copies of education records to a student's parent or representative, **unless circumstances effectively prevent parents from exercising the right** to inspect and review without being provided copies.
 - Parents of students in virtual schools may require copies to exercise the right.
 - Parents with certain occupations (e.g., armed forces) may required copies to exercise the right.
- Both IDEA and FERPA permit LEAs to charge for copies of records “if the fee does not prevent the parents from exercising the right to inspect and review records.” *See* 34 C.F.R. § 300.617(a).
 - **Tip:** Include the copy fee and waiver process in your district policy.
- Neither IDEA nor FERPA permit LEAs to charge for searching for or retrieving a student's records. *See* 34 C.F.R. § 300.617(b).

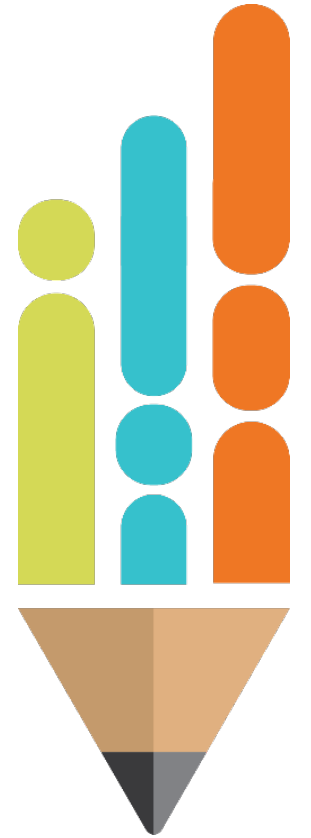
Policy and Procedure Considerations

1. Develop a document retention policy.
 - A document retention policy clearly states how long your school is expected to maintain certain documents.
2. Develop a policy or process for responding to requests to inspect and review education records.
 - Who decides what is “directly related” to a student?
 - Who decides what is “maintained” by the school?
 - Who decides how to grant the student’s parent access to the records?
 - Ensure that teachers or service providers are not responding to requests without your awareness.



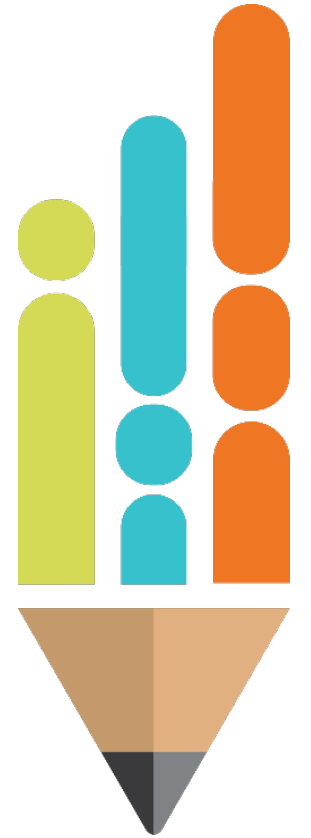
Policy and Procedure Considerations

3. Be aware of important meeting or hearing dates.
 - Ensure that you have enough time to produce relevant records upon request prior to a hearing. You may need to postpone IEP team meetings or MDR meetings to ensure the student’s parent has sufficient time to receive and review relevant records.
4. Keep a list or index of what documents a parent is granted access to and what documents a parent is not granted access to.
 - It can help to have documentation of when you provided access and how you provided access.
 - If you produce a copy of the records, it can help to paginate or Bates number the documents.



Policy and Procedure Considerations

5. Assume every document with a student's name on it can be requested by the student's parent.
 - Be very careful about what you put in writing.
6. If there is confusion about what the student's parent is requesting, stay in communication with the parent and continue to make a good-faith effort to clarify the request and to produce documents in a timely manner.



Right to Non-Disclosure

Right to Non-Disclosure

- FERPA generally prohibits the disclosure of personally identifiable information (PII) from a student's education records, unless:
 - The student or student's parents have provided prior written consent to disclose such information; or
 - An exception applies.

See 34 C.F.R. §§ 99.30; 99.31.

- Remember: FERPA **never requires LEAs to disclose PII** from a student's education records, unless requested by the student or the student's parents! *See* 34 C.F.R. § 99.31(d).
 - FERPA requires LEAs to use "reasonable methods" to identify and authenticate the identity of parties to whom PII is disclosed.

Personal Knowledge or Observations

- FERPA does not prohibit LEA employees or contractors from disclosing personally identifiable information about a student that is obtained by personal knowledge or observations, BUT...
- Remember that the **Tennessee Teacher Code of Ethics prohibits educators from disclosing “information about students obtained in the course of professional service, unless disclosure serves a compelling professional purpose or is required by law.”** See Tenn. Code Ann. § 49-5-1003(b)(8).

Prior Written Consent

- A student's parents may provide written consent authorizing an LEA to disclose PII from a student's education records. **The consent must:**
 - Be signed and dated;
 - Specify the records that may be disclosed;
 - State the purpose of the disclosure; and
 - Identify the party or class or parties to whom the disclosure may be made.*See 34 C.F.R. § 99.30(a), (b).*
- A student's parents may give electronic consent as long as the electronic form identifies and authenticates a particular person as the source of the electronic consent. *See 34 C.F.R. § 99.30(d).*

Exceptions Authorizing Disclosure

- FERPA permits LEAs to disclose PII from a student's education records without prior written consent in certain circumstances. *See* 34 C.F.R. § 99.31. For example, the LEA may disclose PII:
 - To another LEA or postsecondary institution where the student seeks or intends to enroll. *See* 34 C.F.R. § 99.31(a)(2).
 - To USDOE or TDOE if the disclosure is in connection with an audit or evaluation of a Federal or State supported educational program. *See* 34 C.F.R. § 99.31(a)(3).
 - In connection with student financial aid for which the student has applied or received. *See* 34 C.F.R. § 99.31(a)(4).
 - To organizations conducting studies on behalf of the LEA. *See* 34 C.F.R. § 99.31(a)(6).
 - To accrediting organizations to carry out their accrediting functions. *See* 34 C.F.R. § 99.31(a)(7).

The Student's Parents

- If the student is under 18-years-old, LEAs may disclose PII from a student's education records to the student's parents. See 34 C.F.R. § 99.31(a)(12).
- If the student is over 18-years-old, LEAs may disclose PII from a student's education records to the student's parents **if the student is listed a dependent on the parents' tax records**. See 34 C.F.R. § 99.31(a)(8).
- Who is a "parent"? A person who is acting as such in the absence of a student's natural parent and who is present in the student's life on a day-to-day basis. See Student Privacy Policy Office, [Frequently Asked Questions](#), (last accessed Aug. 2023).

Other School Officials with Legitimate Educational Interests

- LEAs may disclose PII from a student's education records **to other school officials** within the LEA who have **legitimate educational interests**. See 34 C.F.R. § 99.31(a)(1)(A).
- A contractor, consultant, volunteer, or other third party may be considered a "school official" if the individual (1) performs a service or function for which the LEA would otherwise use employees, and (2) is under the direct control of the LEA with respect to the use and maintenance of education records. See 34 C.F.R. § 99.31(a)(1)(B).

Other School Officials with Legitimate Educational Interests

- LEAs may determine which individuals have a “legitimate educational interest,” but **must inform parents of the criteria** under which it makes that determination in the FERPA annual notification. *See* 34 C.F.R. § 99.7(a)(3)(A).
- LEAs must use reasonable methods to ensure that school officials **obtain access to only those education records in which they have legitimate educational interests.** For example, LEAs can:
 - Limit physical or electronic access.
 - Require school officials to sign agreements.

As Required by Judicial Order or Lawfully Issued Subpoena

- LEAs may disclose PII from a student's education records as required by a judicial order or a lawfully issued subpoena. See 34 C.F.R. § 99.31(a)(9).
 - **Tip:** Consult your Board attorney whenever you receive a court order or subpoena!
- Prior to disclosure, LEAs must make a **reasonable effort to notify the student's parents of the order or subpoena** so that the parents have the opportunity to seek a protective order. See 34 C.F.R. § 99.31(a)(9)(ii).
 - The notice requirement does not apply in litigation between an LEA and a student's family. See 34 C.F.R. § 99.31(a)(9)(iii).
 - The notice requirement does not apply in a court proceeding involving child abuse, neglect, or dependency matters and the order or subpoena stems from that proceeding. See 20 U.S.C. § 1232g(b)(2)(B).

In Connection with Health or Safety Emergencies

- LEAs may disclose PII from a student's education records to **appropriate parties** in connection with an emergency if knowledge of the information is **necessary to protect the health and safety of the student or other individuals**. See 34 C.F.R. §§ 99.31(a)(10); 99.36(a).
 - “Appropriate parties” are those parties whose knowledge of such information is necessary to protect the health or safety of the student or other persons. The category generally includes individuals such as law enforcement officials, public health officials, trained medical personnel, and the student's parents.
- LEA should consider the “totality of the circumstances” and determine whether there is an **“articulable and significant threat.”** See 34 C.F.R. § 99.36(c).
 - “The determination must not be based on a generalized or distant threat of a possible or eventual emergency for which the likelihood of occurrence is unknown.” Student Privacy Policy Office, [Questions and Answers on the Applicability of FERPA to Disclosures Related to COVID-19](#), (Mar. 12, 2020).

In Connection with Health or Safety Emergencies

- Within a reasonable period of time after disclosure is made, the LEA **must record** (1) the articulable and significant threat that formed the basis for the disclosure and (2) the parties to whom the information was disclosed in the student's education records. *See* C.F.R. § 99.32(a)(5).

Directory Information

- LEAs may disclose PII from a student's education records to **when such information has been designated as directory information.**
See 34 C.F.R. §§ 99.31(a)(11); 99.37(a).
- "Directory information" is information that is generally not considered harmful or an invasion of privacy if released.
 - Directory information includes the student's name, physical and electronic mail addresses, telephone number, date of birth, grade level, photograph, or participation in activities and sports.
 - Directory information does *not* include the student's social security number, student identification number, sex, disability status, or grade point average.
See 34 C.F.R. § 99.3.

Directory Information

- To disclose directory information, LEAs must inform the student's parents of:
 - The types of PII that the LEA has designated as directory information;
 - The right to refuse to let the LEA designate any or all types of information about the student as directory information; and
 - The period of time within which a student's parents have to notify the LEA in writing of their refusal to designate information as directory information.

See 34 C.F.R. § 99.37(a).
- LEAs may inform the student's parents of the above information through its FERPA annual notice.



Thank You!

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