

>> FERPA and Educational Records. The mission of the Pennsylvania Training and Technical Assistance Network is to support the and initiatives of the Bureau of Special Education and to build the capacity of local educational agencies to serve students who receive special education services.

Our goal for each child is to ensure Individualized Education Program teams begin with the general education setting with the use of Supplementary Aids and Services before considering a more restrictive environment.

This is our disclaimer: The contents of this professional development is not a substitute for legal counsel. The information we present to you today and that you hear your colleague say is not a substitute for legal counsel. You should rely heavily on the guidance you receive from your legal counsel.

How do IDEA B and FERPA work together? They both cover confidentiality rights and requirements and the US Department of Education, Federal Government Statutes that review the sharing of data. IDEA Part B is the Individuals with Disabilities Education ACT 2004 and FERPA is the Family Educational Rights and Privacy Act.

Our goals for today are to talk about IDEA and FERPA and look over how they have a lot of things in common. How do you read them together when facing a new issue or question?

>> The education for All Handicapped Children's Act was enacted in November 1975. President Gerald Ford signed the legislation now known as IDEA 1990 into law. The statute focused singular attention on children with disabilities and required all schools and districts receiving federal dollars to provide such students with a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. In 1990, the United States Congress re-authorized EHA and changed the title to IDEA, known as public law 94142. The Act was again re-authorized in 1997 and again, re-authorized as IDEIA in 2004.

Most recent changes to mention include regulations published in the Federal Register, January 18, 2017 where states will establish a standard methodology to determine whether significant disproportionality based on race and ethnicity is occurring in the state and in its local education agencies. Also, the Federal Register published on July 11, 2017, Rosa's Law which amended the IDEA by substituting intellectual disabilities for mental retardation in Part B Regulations 300.8, titled, Child with a Disability, 300.309 titled, Determining the existence of a specific learning disability and 300.311, specific documentation for the eligibility determination.

>> In regards to FERPA, it's been amended about 11 times and most recently was amended in 2013 with the Uninterrupted Scholars Act which we'll talk about later in this webinar.

So the world has changed. When EHA, now known as IDEA Part B was passed in 1975, Gerald Ford was president. One Flew Over the Cuckoo's Nest one the Big Five at the Oscars as for Best Picture, Best Director, Best Actor, Best Actress, and Best Writing. Angelina Jolie and Bradley Cooper were born. Popular holiday gifts were pet rocks and mood rings and JAWS was the top grossing film.

When FERPA was passed in 1974, Richard Nixon had resigned and Gerald R. Ford became president. Hank Aaron hit his seven hundred and fifteenth home run to beat Babe Ruth's record. People magazine

was first published. Kate Moss, Alanis Morissette, Leonardo DiCaprio, and Ryan Seacrest were born and Blazing Saddles was the top grossing film.

So where can you find IDEA Part B and FERPA?

>> You can find IDEA Part B in Title 20 of the United States Code, Section 1401 and those that follow. IDEA is separated into four parts. A, B, C, and D. For purposes of this webinar we're going to talk only about Part B.

Part B is broken into different subparts, A through H. Subpart F, titled Monitoring Enforcement, Confidentiality, and Program Information, is where you will find information pertaining to confidentiality. Specifically, 34 CFR 300.610 is titled Confidentiality. The pertinent sections of IDEA, for this webinar, are from 300.610 to 300.627.

>> You can find FERPA in 34 CFR, Part 99 and it's really nice as it breaks out in question and answer format and is very user friendly. Regulations must be consistent with FERPA but may not be the same as FERPA.

So what is personally identifiable information?

>> Personally identifiable information in IDEA Part B specifically is from 34 CFR 300.32 which defines PII. It means, information that contains the name of the child, the child's parent or other family member, the address of the child, a personal identifier such as the child's Social Security number or student number, or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

>> You will notice there are some similar phrases between the IDEA definition and the definition used under FERPA to identify PII but the FERPA definition overall contains more details and explanation.

So here are some examples of personally, identifiable information, name, mother's maiden name, address, date of birth, place of birth, Social Security number and card, names of parent or parents or other family members. These are all direct identifiers of PII.

What else is personally identifiable information? Under FERPA 99.3, info that alone or in combination is 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. Info requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

What else is personally identifiable information under IDEA?

>> IDEA sent an OSEP letter to Anderson, November 13, 2006 explaining that in determining those personal characteristics or other information that would make it possible to identify the child with reasonable certainty or make the students identify easily traceable, must be made on an individualized basis and not on a general policy of disclosure. A public agency also needs to consider the contents of a document to determine which personal characteristics or other information would make it possible to identify the child with reasonable certainty or make the students identity easily traceable if disclosed to the school's community or community at large.

Some factors to consider here include the size of a district, school and grade, and the prevalence of knowledge of the child's personal characteristics which could be disability, initials, or parent's advocacy work.

>> So IDEA is similar to FERPA in this area to include PII information, the name of the child, the family members, the address, Social Security number, and other characteristics similar to IDEA but different from FERPA.

So what are the different rules when we look at IDEA Part B? The who, what, and when of records. What records are covered under IDEA Part B and FERPA and there are rules that are different for both statutes and we're going to go over those.

>> Records that are covered under IDEA Part B include the type of records covered under the definition of Educational Records in FERPA. Those are records that are collected, maintained, or used. This is found in 300.611 B of IDEA.

>> On the right side of this slide is the FERPA definition, 99.3 that states those records that are directly related to the student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term 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 of the maker.

Records of the law enforcement unit of an educational agency are not included and records related to an individual who is employed by an educational agency that are maintained in the normal course of business, records on a student that is 18 or older, and records created by an agency or institution after an individual is no longer a student in attendance, and lastly, grades on peer graded papers before they are collected and recorded.

And under FERPA, educational agency or institution is where the student attends, such as the school district or post-secondary institution.

So who must comply when we look at IDEA Part and FERPA?

>> Under IDEA the participating agency must comply. Simply put, under 300.611, any agency or institution that collects, maintains, or uses personally identifiable information or from which information is obtained under Part B.

>> So, then who must comply under FERPA? An educational agency or institution and similar to IDEA, any public or private agency or institution that provides educational services and, or instruction to students or is authorized to direct and control public elementary or second or post-secondary educational institutions and to which funds have been made available under any program administered by the secretary.

When do the confidentiality provisions apply?

>> Under IDEA Part B, specifically, 300.610, entitled Confidentiality, the secretary takes appropriate action under 444 of the General Education Provisions Act, also known as GEPA, to protect the

confidentiality of any personally identifiable data, information, records collected or maintained by the secretary, state educational agencies and local education agencies under Part B of the Act.

>> So when do confidentiality provisions apply for FERPA? When the student is in attendance at an educational agency or institution, and under 99.3 in FERPA you can find the definition of the student, and the student would have had to have been in attendance or is in attendance at the institution.

So whose records are covered when we look at IDEA Part B and FERPA?

>> Under IDEA, the records covered are those children with a disability who are eligible for services under one of the 13 disability categories as referenced in 300.8. These are the records that are collected, maintained, or used by a participating agency.

>> So whose records are covered under FERPA? Student, which is any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records. All students mean, elementary to college. And in-attendance is regardless of age.

So what are those rights and responsibilities? Confidentiality, reviewing and amending records, retaining records, and dispute resolution. All are very similar, however, there are still differences.

So what is confidentiality and the Consent decision? FERPA is different than IDEA when we talk about this.

>> Yeah, under IDEA, confidentiality, specifically talking about consent, you can find it 300.9. Consent simply means the parent has been fully informed of all information relevant to the activity for which consent is sought, is in the native language or another mode of communication, the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought and of the parent, and can be revoked at any time. If a parent revokes consent, that consent is not retroactive. An example of this would be it does not negate any action after consent and before revocation. If a parent revokes consent in writing after a child is initially provided special education, the public agency is not required to amend the educational record to remove any reference of the child receiving special education. So under IDEA, parental consent must be written. It must be voluntary, and it must be informed. This is specifically unique to IDEA.

>> So what is confidentiality when we look at FERPA? It must be signed, dated, and written from the parent before the school can disclose personally identifiable information from the student's education records. However, we do have some exceptions.

>> What are the exceptions to consent? Can I share info without consent? Exceptions to consent under IDEA Part B specifically under 306.22, 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 the section unless the information contained in educational records and the disclosure is authorized without parental consent under 34 CFR Part 99.

>> Under FERPA, Part A, the disclosure could be to other school officials, including teachers within the agency or institution whom the agency or institution has determined to have legitimate educational interest or B, a contractor consultant, volunteer, or other party to whom an agency or institution has

outsourced institutional services or functions, may be considered a school official under this paragraph provided that the outside party performs an institutional service or function for which the agency or institution would otherwise use employees.

Except as provided in paragraphs B2 and B3 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 under this part. Paragraph two states that 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).

Remember there is no age of majority in Pennsylvania. Parent consent is needed through the age of 21. Consent is not required before personally identifiable information is released to officials of a participating agency.

Under Exceptions to Consent in FERPA, the exceptions include audit and evaluation, Uninterrupted Scholars Act, compliance with judicial orders or subpoenas, and health and safety. These are all located under 99.31.

So Exceptions to Consent under FERPA, the first one we're going to look is Audit and Evaluation. Federal, State, and local officials listed under Section 99.31 (A)(3) or their authorized representative, may have access to educational records only in connection with an audit or evaluation of federal or state supported education programs or for the enforcement of or compliance with federal legal requirements which relate to those programs.

These parties may have access to personally identifiable information but only must be protected in a manner that does not disclose personally identifiable information to just anyone. And, then the parties need to ensure that those records are destroyed when no longer needed for the purpose listed above.

The second area under FERPA that's an Exception to Consent, is the Uninterrupted Scholars Act. This permits disclosure of personally identifiable information from education records of children in foster care to an agency case worker or other representative of a state or local child welfare agency who has the right to access a student's case plan under state or tribal law.

Disclosure is permitted when the child welfare agency is legally responsible for the care and protection of the student. This most recent change to FERPA was in January 14, 2013. This was something that President Obama signed into law and this again, was to ensure the continuity of a child's education while in foster care placement.

Another area that's an Exception to Consent under FERPA is to comply with a judicial order or subpoena. The school may disclose personally identifiable information from education records necessary to comply with a judicial order or lawfully issued subpoena. The school must make a reasonable effort to notify the parent or eligible student of the order or subpoena before complying with the order to allow the parent or eligible student an opportunity to seek protective action.

The fourth Exception to Consent under FERPA is under Health and Safety Emergencies. An exception is allowable when disclosure is necessary to protect the health or safety of the student or others. If there is an articulable and significant threat to the health or safety of a student or other individuals, if

appropriate parties, typically meaning local, state or federal law enforcement, trained medical personnel, public health officials and parents, and must be related to an actual impending or imminent emergency to the student.

So what are the rights regarding access to records under IDEA Part B and FERPA?

>> Under IDEA Part B, a parent or interested party can inspect and review any education record that's collected, maintained, or used by the agency in three areas without unnecessary delay before any meeting regarding an IEP, any due process hearing or resolution session, and this all must be done no more than 45 days after the request has been made.

Copies of the records under IDEA by the participating agency, they can charge a fee for copies unless imposing that fee will keep the parent from exercising his or her rights to inspect and review the records. They may not charge a fee to search for or retrieve the educational records of a student.

>> So when can records be reviewed under FERPA? Similar to IDEA, inspection and review of education records must happen within 45 days of receiving a request. And again, this can be changed if there would be a distance that would cause a hardship to review.

What about copies of the records under FERPA? So an educational agency or institution may charge a fee for copies unless imposing a fee effectively prevents a parent or eligible student from exercising his or her rights to inspect and review education records. They may not charge a fee to search for or to retrieve the education records of that student. And just as a side note, they can only charge a similar cost to what local copier services would charge.

So what if the records don't seem quite correct under IDEA Part and FERPA?

>> Under IDEA a parent who believes that the information in the record is inaccurate, misleading, or violates the privacy or other rights of the child, can request that the record be amended. Parents cannot seek to amend substantive decisions. Those would be such as, determination of IDEA eligibility or goals in the IEP, IFSP, student grades, et. cetera. So parents cannot seek to amend the students grades. FERPA and IDEA are the same on this.

>> And again, as John just noted, FERPA and IDEA are the same in this area so this slide is the same as the previous.

So what about the record of access when we talk about IDEA Part B and FERPA? They are a little different on this one.

>> When you talk about record of access under IDEA there are certain record keeping requirements for participating agencies. Those who open up the records of students must keep a record of this. Specifically, including the name of the person or party, the day access was given, and the purpose for which the party is authorized to use the records.

>> So what about the record of access under FERPA? Under FERPA, it contains record keeping requirements for both schools and state educational agencies. The records must be maintained as long as the record is maintained. It must include parties who requested or received information and include legitimate interest the parties had in receiving the information. Exceptions to this include parents,

school officials, and those to whom the parent provided consent and more. And again, you can find this under 99.32 of FERPA.

So how long do you have to keep the record? Let's look at IDEA Part B says about that.

>> IDEA in Pennsylvania, a retention of records memo was issued in 2009 based on our six-year cyclical monitoring process, records are made to maintained for six years. Recipients of federal funds must retain records for three years after the completion of the activity or which the funds are used. This is separate from the six years of the cyclical monitoring.

>> So how long do I have to keep the record for FERPA? An educational agency or institution or state education agency or it's component, shall not destroy any education records if there is an outstanding request to inspect and review the records. Again, under the memo titled Retention of Records from 2009 put out by the Bureau of Special Education, Pennsylvania Department of Education, the Family Educational Rights and Privacy Act, FERPA, requires maintenance of records found at 34 CFR Part 99. While FERPA has no specific timeline regarding retention of special educational records, the financial and programmatic audit requirements of the General Education Provisions Act, otherwise known as GEPA, requires that all school districts, charter schools receiving federal funds to maintain records about how those funds are used. Except as otherwise provided, records must be retained for three years from the starting date. If any litigation claim, negotiations audit, or other action involving the records has been started before the expiration of the three-year period, the records must be retained until completion of the action and resolution of all the issue which arise from it, or, until the end of the regular three-year period, whichever is later.

So what if we can't agree? Let's look at what IDEA Part B and FERPA say in regards to this.

>> If parties can't agree under IDEA there are three regulations with the state complaint procedure, 301.51, 301.52, and 301.53, filing a complaint. Also, with state complaint procedures is the opportunity for mediation consistent with 300.506. Apparent also or parties also can propose due process consistent with 300.507, filing a due process complaint.

>> Under FERPA if there's disagreement, a complaint may be filed with the Family Policy Compliance office and the Family Policy Compliance office will help the district come into compliance with FERPA.

So in review of what we just have gone over on this webinar, the Pennsylvania Department Education, Bureau of Special Education, requires that educational records for special education students be retained for six years. The Department has general supervisory responsibilities regarding the oversight and implementation of special education programs. The monitoring of special education programs is one of the supervisory activities that the Department mandated to conduct under Federal Regulations. Each school district and, or charter school is monitored at least once per six-year cycle. Hence, the reason that Pennsylvania had the six-year retention of records for cyclical monitoring purposes. Recipients of federal funds must retain records for three years after the completion of the activity for which the funds are used.

Under 22 PA Code, Chapter 12, Parts 31, 32, and 33, are the Pennsylvania guidelines for the collection, maintenance, and dissemination of public records.

Exhibit A under 1233, establishes a records retention timeline for three categories of student records. Your school district and, or charter school should also have a board approved written policy under 34 CFR, 300.610 for confidentiality.

Additionally, under our Pennsylvania State Regulations, Chapter 14.121, Child Find, each school district shall provide annual public notification, published and, or announced in newspapers, electronic media, or other media to notify parents throughout the school district of the Child Find identification activities and of the procedures followed to ensure confidentiality of information pertaining to students with disabilities or eligible young children in accordance with Chapter 14.

Category A data is retained for at least a hundred years. This includes the permanent record information for the student.

Category B data is reviewed at periodic intervals and this for the movement from elementary, middle, to high school and standardized test scores, health information, family background information, and verified reports of serious or recurrent behavior patterns.

Additionally, a resource for you know is under 34 CFR 300.623, Safe Guards. Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

So where can you go from here? IDEA and FERPA share much in common in the goal to protect personally identifiable information. When you face a question under IDEA, read IDEA first and, then FERPA.

It's really important to know for the Individuals with Disabilities Education Act the records that are collected, used, and maintained.

Here you see an additional list of resources pertaining to IDEA and FERPA.

For technical assistance on IDEA, you may reach out to the Office of Special Education Programs and their information and website is listed here.

For the Family Policy Compliance Office and technical assistance, here is their information and their website and also, an email address.

As you probably noted throughout this webinar, it was adapted from the US Department of Education's presentation in December of 2014 with permission and these were the presenters from the US Department of Education.

>> This concludes our presentation on FERPA and IDEA, Confidentiality. Should you have additional questions, you can contact John Gombocz, BSC Policy Advisor, or Roni Russell, Educational Consultant for PaTTAN.