

# Confidentiality of Student Records Under FERPA and IDEA

By: Elena M. Gallegos



WALSH GALLEGOS  
TREVINO KYLE & ROBINSON P.C.

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## Introduction

- ❑ What do Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA) have to say about student records? Experienced School Attorney Elena M. Gallegos will discuss:
  - ❑ What constitutes an education record?
  - ❑ Who can access?
  - ❑ What happens when there is a confidentiality breach?
  - ❑ How long do student records have to be maintained?
  - ❑ What process must be followed prior to destruction?
  - ❑ And more!

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# What Constitutes an Education Record?

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## What Does FERPA Have to Say?

- “The term [education record] means those records that are:
  - (1) Directly related to a student; and
  - (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.” 34 C.F.R. § 99.3(a).

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## What Does FERPA Have to Say?

- ❑ “The term [education record] does not include:
  - (1) 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.
  - (2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8. ...
  - (5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student. ...
  - (6) Grades on peer-graded papers before they are collected and recorded by a teacher.” 34 C.F.R. § 99.3(b).

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## What Does IDEA Have to Say?

- ❑ Expressly aligns with FERPA.
- ❑ “Education records means the type of records covered under the definition of ‘education records’ in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)).” 34 C.F.R. § 300.611(b).

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## What Does “Disclosure” Mean?

- ❑ Disclosure means “to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.” 34 C.F.R. § 99.3.

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## What Does “Personally Identifiable” Mean?

- ❑ “Personally Identifiable Information” – “The term includes but is not limited to –
  - (a) The student’s name;
  - (b) The name of the student’s parent or other family members;
  - (c) The address of the student or student’s family;
  - (d) A personal identifier, such as the student’s social security number, student number, or biometric record;
  - (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;...”

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## What Does “Personally Identifiable” Mean?

- ❑ “Personally Identifiable Information” – “The term includes but is not limited to – ...
  - (f) The Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
  - (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.”

34 C.F.R. § 99.3.

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## How Does IDEA Compare?

- ❑ “Personally identifiable means information that contains—
  - (a) The name of the child, the child’s parent, or other family member
  - (b) The address of the child;
  - (c) A personal identifier, such as the child’s social security number or student number; or
  - (d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.”

34 C.F.R. § 300.32.

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## Can You “De-Identify” a Record?

- ❑ FERPA

- ❑ “De-identified records and information. [A district], or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the [district] or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.”

34 C.F.R. § 99.31(b)(1).

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## 1. Parent or Eligible Student

- ❑ “Except as limited under § 99.12 [records on more than one student, certain limitations at postsecondary level], a parent or eligible student must be given the opportunity to inspect and review the student's education records...” 34 C.F.R. § 99.10(a).
- ❑ The District “shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.” 34 C.F.R. § 99.10(b).
- ❑ The District “shall respond to reasonable requests for explanations and interpretations of the records.” 34 C.F.R. § 99.10(c).

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## Parent Right to Access Under IDEA: Key Features

- ❑ “The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.” 34 C.F.R. § 300.613(a).
- ❑ The right also includes: “The right to have a representative of the parent inspect and review the records.” 34 C.F.R. § 300.613(b)(3).

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## How Does FERPA Define “Parent” and “Eligible Student”?

- ❑ “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian...” 34 C.F.R. § 99.3.
- ❑ “Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.” 34 C.F.R. § 99.3.

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## 2. With Consent

- ❑ “The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.” 34 C.F.R. § 99.30(a).
- ❑ Under IDEA, this includes:
  - ❑ “[B]efore personally identifiable information is released to officials of participating agencies providing or paying for transition services in accordance with § 300.321(b)(3).” 34 C.F.R. § 300.622(b)(2).
  - ❑ “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.” 34 C.F.R. § 300.622(b)(3).

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### **3. To School Officials with a Legitimate Educational Interest**

- ❑ “[A district] may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions ... The disclosure is to other school officials, including teachers, within the [District] whom the [District] has determined to have legitimate educational interests.” 34 C.F.R. § 99.31(a)(1)(i)(A).

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### **What FERPA Has to Say . . .**

- ❑ “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—
  - (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
  - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
  - (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.” 34 C.F.R. § 99.31(a)(1)(i)(B).

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## More on What FERPA Has to Say . . .

- ❑ “The [annual FERPA] notice must include all of the following ... If the [district] has a policy of disclosing education records under § 99.31(a)(1) [to school officials], a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.”

34 C.F.R. § 99.7(a)(3)(iii).

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## More on What FERPA Has to Say . . .

- ❑ “[A district] must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. [A district] that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.”

34 C.F.R. § 99.31(a)(1)(ii).

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## 4. Directory Information

- ❑ “[A district] may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions ... The disclosure is information the [District] has designated as ‘directory information,’ under the conditions described in § 99.37.”

34 C.F.R. § 99.31(a)(11).

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## What FERPA Has To Say . . .

- ❑ “Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” 34 C.F.R. § 99.3.
- ❑ “Directory information does not include a student’s—
  - ❑ (1) Social security number; or
  - ❑ (2) Student identification (ID) number, except as provided in paragraph (c) of this definition.” 34 C.F.R. § 99.3(b).

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## What Are Some Examples of Directory Information?

- ❑ "Directory information includes, but is not limited to:
  - ❑ The student's name; address; telephone listing;
  - ❑ Electronic mail address;
  - ❑ Photograph;
  - ❑ Date and place of birth;
  - ❑ Major field of study;
  - ❑ Grade level;

(Continued on next slide)

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## What Are Some Examples of Directory Information? (Continued)

- ❑ "Directory information includes, but is not limited to:
  - ❑ Enrollment status (e.g., undergraduate or graduate, full-time or part-time);
  - ❑ Dates of attendance;
  - ❑ Participation in officially recognized activities and sports;
  - ❑ Weight and height of members of athletic teams;
  - ❑ Degrees, honors, and awards received; and
  - ❑ The most recent [District] attended."

34 C.F.R. § 99.3(a).

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## What Conditions Apply to Disclosing “Directory Information”?

- ❑ Notice to Parents as part of annual FERPA notice including right to refuse and deadline for refusing in writing. See 34 C.F.R. § 99.37(a).

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## Directory Information: Practical Takeaways

- ❑ Be aware of what your District has designated as directory information.
- ❑ Make sure annual notice is provided.
- ❑ Make sure the annual notice informs parents:
  - ❑ Of the items the Board has designated as “directory information;”
  - ❑ The parent’s right to refuse to let the District disclose any or all of those types of information about their child; and
  - ❑ The deadline for the parent to inform the District that they wish to opt out of directory information disclosure.
- ❑ Have a system for keeping track of opt-outs.

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## 5. Health or Safety Emergency

- ❑ “An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 34 C.F.R. § 99.36(a).

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## What FERPA Has To Say . . .

- ❑ “Nothing in this Act or this part shall prevent an educational agency or institution from—
  - (1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;
  - (2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or
  - (3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.” 34 C.F.R. § 99.36(b).

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## More of What FERPA Has To Say . . .

- ❑ “In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.” 34 C.F.R. § 99.36(c).

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## 6. Subpoena or Court Order

- ❑ “[A district] may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions ... The disclosure is to comply with a judicial order or lawfully issued subpoena.” 34 C.F.R. § 99.31(a)(9)(i).
- ❑ “The [district] may disclose information under paragraph (a)(9)(i) of this section only if the [District] makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with [a notice exception].” 34 C.F.R. § 99.3(a)(9)(ii).

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## 7. Transfer Students

- ❑ Consent is not required to disclose education records when the disclosure is to “officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student’s enrollment or transfer.” 34 C.F.R. § 99.31(a)(2).
- ❑ But see limitations and conditions as set forth in 34 C.F.R. § 99.34(a).

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## Limitations and Conditions

- ❑ “One of the exceptions to the prior written consent provision permits a school to disclose education records to officials of another school where the student seeks or intends to enroll. A school that discloses education records under this provision must make a reasonable attempt to notify the parent or eligible student of the disclosure, unless the disclosure is initiated by the parent or eligible student, or the school’s annual notification of rights under FERPA includes a notice that it forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll.” *Letter to Anonymous*, 112 LRP 47381 (FPCO 2012).

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## What Does IDEA Have To Say?

- ❑ “To facilitate the transition for a child described in paragraphs (e) and (f) of this section—
  - (1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 C.F.R. § 99.31(a)(2); and
  - (2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.” 34 C.F.R. § 300.323(g).

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## Can a Parent Prevent a School District From Making Such a Disclosure?

- ❑ “[A] school may release a portion or all of a student's education records, under the “seeks or intends” to enroll exception in FERPA, at its discretion. However, the parent does not, under FERPA, have the right to prevent a school which a student previously attended from transferring the student's education records or from communicating information about a student to the student's new school.” *Letter to Anonymous*, 112 LRP 47381 (FPCO 2012).

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## Must the Student Have Already Enrolled in the New District?

*Letter to Anonymous, 107 LRP 20019 (FPCO 2007):*

- ❑ A District "is permitted to seek information from the Student's previous schools as part of its admission process."
- ❑ Moreover, "the previous schools are permitted to provide education records to the District since [the parent] sought to enroll the Student in the District."

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## What Does FERPA Have To Say?

- ❑ "If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student." 34 C.F.R. § 99.12(a).

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## What About the Rights of the Victim in a Harassment Case?

- ❑ In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state:
  - ❑ Nothing in GEPA "shall be construed to affect the applicability of Title VI of the Civil Rights Act of 1964, Title IX of Education Amendments of 1972, Title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d).

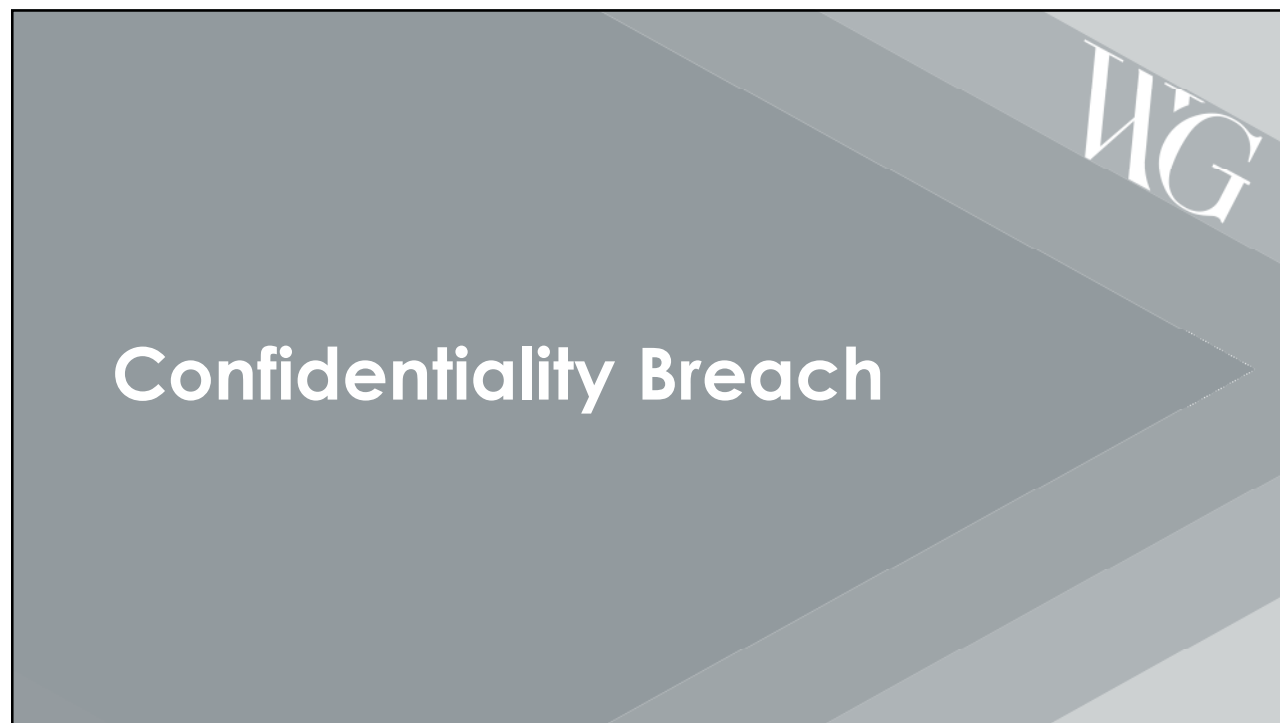
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## **What About Videos? Letter Re: *Magnolia Independent School District*, 107 LRP 685 (FPCO 2006)**

FPCO Analysis:

- ❑ Under FERPA, “the standard is whether the information is ‘directly related to’ a student, not whether a student is simply ‘personally identifiable.’”
- ❑ “For example, this office does not consider a videotape of routine activities by students riding a school bus to be ‘directly related to’ any particular student and, therefore, not an ‘education record’ under FERPA, even though those students may be ‘personally identifiable.’”
- ❑ “If, however, a videotape of a school bus ride records a student involved in an assault on another student, for example, then that part of the videotape would be considered ‘directly related to’ and, therefore, the ‘education record’ of those two students.”

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## ***Letter to Tobias, 115 LRP 33135 (FPCO 2015)***

- ❑ The Facts:
  - ❑ Counselor sent an e-mail to the parents of Senior students with a spreadsheet containing personally identifiable information of every graduating Senior attached to the e-mail.
  - ❑ The Superintendent wrote a letter to the FPCO asking for guidance regarding steps to be taken when there is an inadvertent disclosure.

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## ***Letter to Tobias, 115 LRP 33135 (FPCO 2015)***

- ❑ The Outcome:
  - ❑ FPCO provided guidance to the District regarding actions to be taken.
  - ❑ FPCO further informed the District that if a complaint is filed, the FPCO will investigate the complaint, and “take into consideration what [the District] has taken in response to a data breach or other unauthorized access to, release, or other disclosure of education records.”
  - ❑ FPCO cautioned that federal funds can be revoked for non-compliance.

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## ***Letter to Tobias, 115 LRP 33135 (FPCO 2015)***

- ❑ Takeaways from the FPCO:
  - ❑ When there is theft of files or computer equipment, hacking or other intrusion, software or hardware malfunction, inadvertent release of data to internet sites, or other unauthorized release or disclosure of education records, consider one or more of the following steps:
  - ❑ Determine exactly what information was compromised.
  - ❑ If circumstances warrant, report the incident to law enforcement authorities.

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## ***Letter to Tobias, 115 LRP 33135 (FPCO 2015)***

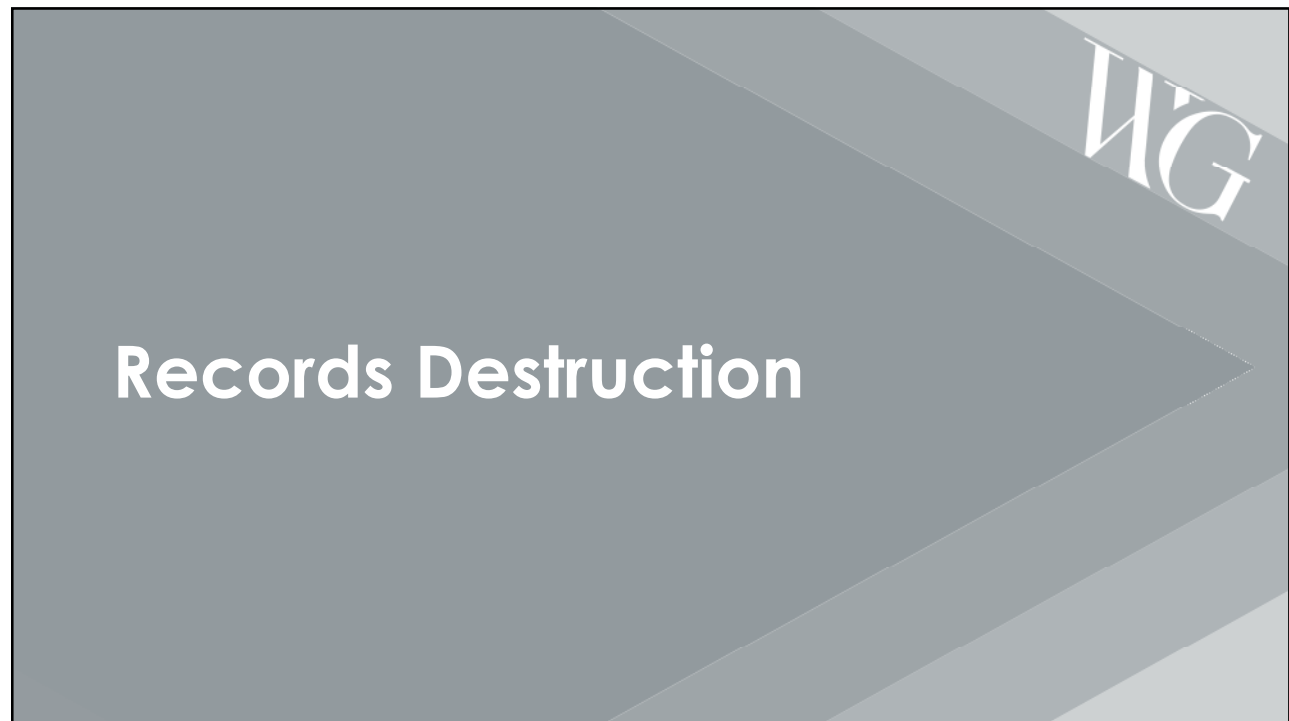
- ❑ Takeaways from the FPCO (continued):
  - ❑ Identify all affected records and students.
  - ❑ Take steps immediately to retrieve data and prevent further disclosures.
  - ❑ Determine how the incident occurred, including which school officials had control and responsibility.

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## ***Letter to Tobias, 115 LRP 33135 (FPCO 2015)***

- ❑ Takeaways from the FPCO (continued):
  - ❑ Determine whether institutional policies and procedures were breached.
  - ❑ Determine whether the incident occurred because of a lack of monitoring and oversight.
  - ❑ Conduct a risk assessment and identify appropriate physical, technological, and administrative measures.

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## FERPA

- ❑ “The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.” 34 C.F.R. § 99.10(e).

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## IDEA

- ❑ “The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.” 34 C.F.R. § 300.624(a).
- ❑ “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.” 34 C.F.R. § 300.624(a).

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## Do We Tell Parents at the Time of Destruction?

- ❑ "As discussed in the Analysis and Comments accompanying the 1999 IDEA Part B regulations, the notice required in 34 CFR § 300.624(a) would normally be provided to the parent and student when the student graduates (typically the earlier of when the student receives a regular high school diploma or at age 21) or otherwise leaves the public agency. See: Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, Final Rule, 64 Fed. Reg. 12406, 12642 (March 12, 1999). Therefore, we do not believe it is necessary to also provide this notice at the point in time when the district meets its record retention requirement and intends to destroy the special education records." *OSEP Letter to Zacchini* (February 27, 2017).

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## When Are They Considered No Longer Needed?

- ❑ "IDEA records must be retained consistent with the record retention requirements in 2 CFR § 200.33[4], and when actually applied, this record retention time period is at least five and a half years. The provision in 2 CFR § 200.33[4] requires 'Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report.'" *OSEP Letter to Zacchini* (February 27, 2017), footnote 1.

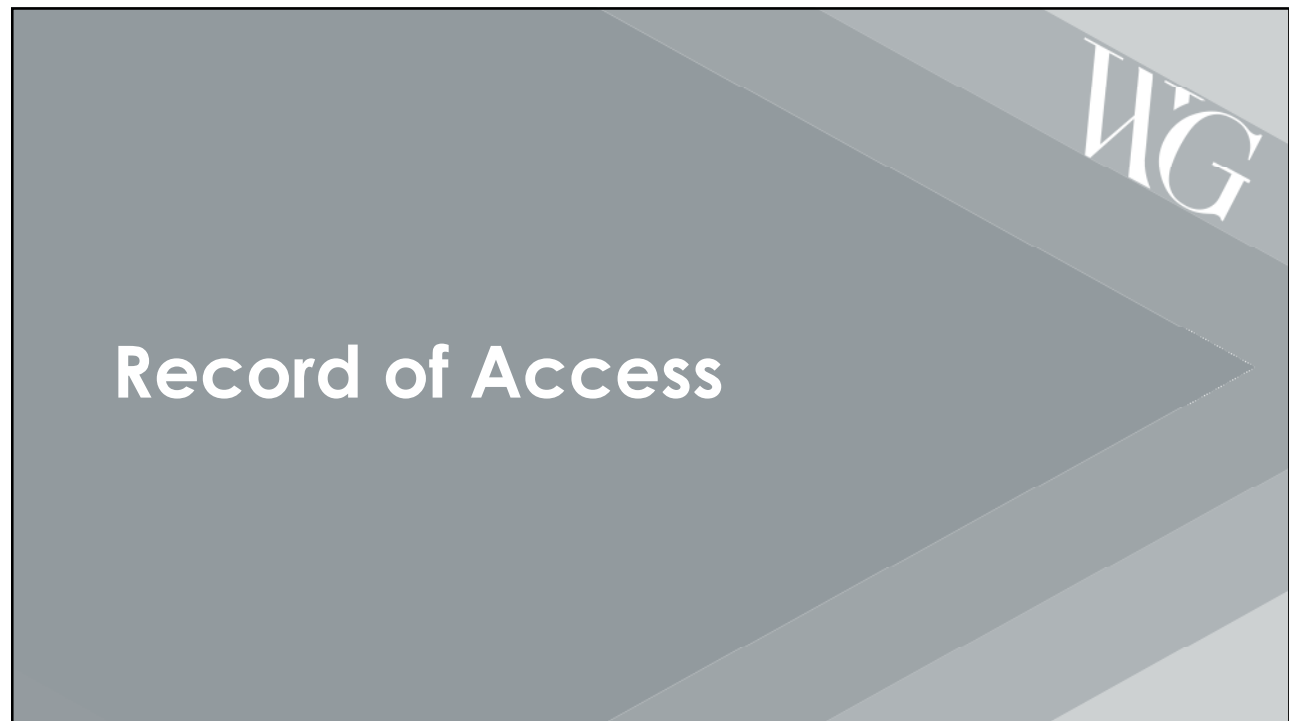
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## When Are They Considered No Longer Needed?

- ❑ “This three-year period runs from when the final expenditure report is submitted (and it is due generally 90 days from the end of the performance period, which is typically when Federal fiscal year (FFY) funds are no longer available for obligation). Under 34 CFR § 76.709, if a State does not obligate all of its IDEA grant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate those funds during a carryover period of one additional year.”
- ❑ “Given that a State generally submits its final expenditure report two and a half years after it receives its IDEA grant, the record retention period can extend to five and a half years from the date an IDEA record was created and the minimal record retention period is thus five and a half years. A number of States have adopted a six-year record retention timeline for IDEA records given that State and Federal fiscal years do not always align and such a timeline is consistent with these requirements.”

OSEP Letter to *Zacchini* (February 27, 2017), footnote 1.

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## What Recordkeeping Is Required?

- ❑ “An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).” 34 C.F.R. § 99.32(a)(1).

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## More on Recordkeeping When Disclosing Under the Health or Safety Emergency Exception...

- ❑ “An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:
  - (i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and
  - (ii) The parties to whom the agency or institution disclosed the information.”

34 C.F.R. § 99.32(a)(5).

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## When is Recordkeeping Not Required Under FERPA?

- ❑ Recordkeeping requirements do not apply “if the request was from, or the disclosure was to:
  - (1) The parent or eligible student;
  - (2) A school official under § 99.31(a)(1);
  - (3) A party with written consent from the parent or eligible student;
  - (4) A party seeking directory information; or
  - (5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C) [certain types of subpoenas and court orders].”

34 C.F.R. § 99.32(d).

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## What Does IDEA Have To Say About Record of Access?

- ❑ “Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.” 34 C.F.R. § 300.614.

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## What Does FERPA Have To Say?

“(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the [District] to amend the record.

(b) The [District] shall decide whether to amend the record as requested within a reasonable time after the [District] receives the request.

(c) If the [District] decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.”

34 C.F.R. § 99.20.

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## More on What FERPA Has To Say . . .

- ❑ The purpose of the hearing is to provide an opportunity “to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.” 34 C.F.R. § 99.21(a).

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**Elena M. Gallegos**  
egallegos@wabsa.com



**WALSH GALLEGOS**  
TREVIÑO KYLE & ROBINSON P.C.

**Albuquerque**  
500 Marquette NW  
Suite 1310  
Albuquerque, NM 87102  
(505) 243-6864

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WALSH GALLEGOS  
TREVINO KYLE & ROBINSON P.C.

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