

Adopted: July 20, 2009

Reviewed: December 14, 2022

515.10 SPECIAL EDUCATION RECORDS RETENTION AND DESTRUCTION POLICY

Any regulations regarding educational record retention applying to all students apply to special education students. For purposes of consistency however, and in recognition of the very different nature of the records public school districts generate in the normal course of educating their special education students, the District makes the following clarifications to its data retention schedule in regards to special education records:

1. The district will retain the student's name, address, and phone number, standardized and achievement test results, grades, attendance, and grade level completed without time limitation. However, in this circumstance, the term "standardized and achievement tests" means tests provided to both regular and special education students to gauge their overall academic performance and progress. The term "standardized and achievement tests" does not include protocols for tests conducted in connection with special education evaluations.
2. Protocols used in completing special education evaluations will be destroyed three years after administration, interpretation, and summarization, and after parent permission. (*See Attachment Permission to Shred Protocols.*)
3. Pursuant to both Minnesota and federal law, records in the possession of instructional personnel which are in the sole possession of the person who created them and are not accessible or revealed to any other individual except a substitute teacher, and are destroyed at the end of the school year, shall not be deemed to be "educational records". Duplicate copies of permanent file information (e.g. most recent Individualized Education Plan and Evaluation Summary) may be kept in a teacher/specialist working file.
4. With the above exceptions, the school district will retain all special education records until six years after the student has turned 21 years of age. At that time, the contents will be destroyed.
(Possible additional language for individual district consideration, yet not required by law:
....with the exception of the following, which will be maintained without time limitation:
the final Individualized Education Plan with accompanying Prior Written Notice and
Parental Consent
the final Special Education Evaluation Report.)

General notice of the District's Special Education Records Retention and Destruction Policy may be given via any of a variety of methods such as District website or District Handbook. Parents and eligible students will be notified about this practice at the time the student is

- (a) dismissed from special education services
- (b) moves
- (c) graduates with a diploma from the school district or
- (d) ages out of school per Minnesota and federal law in effect at the time.

This will constitute notice and no further notice will be given at the end of the six years. Parents and eligible students will be asked to sign an acknowledgment of the district's policy to destroy the records after six years and that the "Notice" has been given. (*See Attachment 2- Notice of {Special Education Records Retention and Destruction Policy}.*) A copy of this notice will be retained by the school with the permanent special education records.

Records may not be destroyed if there is an outstanding request to inspect the records by the parent or eligible student. Records must be destroyed at the request of the parents if they are no longer needed for educational purposes.

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| Chatfield Public Schools Special Education Program | Permission to Shred Protocols |
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Learner's **Full** Name: _____ Today's Date: _____

School: _____ Grade: _____ Current Evaluation Date: _____

As part of your child's **previous** special education evaluation, you received results of the following standardized tests:

These results were summarized for you in the Evaluation Report dated _____. We ask your permission to shred the actual test protocol(s) and scoring sheet(s) which were used to gather the evaluation data.

Please sign and return this form.

Note to parent(s): If you have any questions, please call me:

_____ Name _____ Position _____ Telephone # _____

| Parent Action | |
|---|---------------|
| Parents(s): Check one of the options below, sign, date, and return the original form. | |
| <input type="checkbox"/> I give permission to the school district to proceed as proposed. | |
| <input type="checkbox"/> I need further information. Please contact me to explain. | |
| <input type="checkbox"/> I do not give permission for the school district to proceed as proposed. Place the documents in my child's official special education records. | |
| _____ Parent's Signature (Student if age 18 or older) | _____ Date |

Date received by District: _____

Copies: Due Process File
 EP Manager
 Parent
 IFSP Service Coordinator, when applicable

**This notice is offered as per the District's Special Education Records Retention and Destruction Policy. "...Protocols used in completing special education evaluations will be destroyed three years after administration, interpretation, and summarization, and after parent permission."*

*Attachment 2***515.10 NOTICE OF SPECIAL EDUCATION RECORDS RETENTION AND DESTRUCTION POLICY**

Student Name _____ Birth Date _____

In accordance with the policy adopted by the Chatfield Public School District and approved by the Minnesota Records Disposition Panel, notice is hereby being given as the length of time that your special education file will be maintained.

The record will be retained until six years after the student's 21st birthday in accordance with the District's retention schedule. At that time, the contents will be destroyed with the exception of the following, which will be maintained without time limitation: a copy of this notice, the final Individualized Education Plan with accompanying Prior Written Notice and Parental Consent, the final Special Education Evaluation Report, student's name, address, phone number, standardized and achievement test results, grades, attendance, and grade level completed.

By signing this notice, you are acknowledging the retention policy. No further notice will be given.

Student (*when appropriate*)_____
Parent (*or legally appointed guardian*)_____
Date_____
Date_____
Witness_____
Date

Please see

(location)

for other records (test protocols) that exist for:

(student's name)

(student's date of birth)

(date these other records were filed)

From Amy L. Roberts, Director, Division of Compliance and Assistance, Minnesota Department of Education; 5/24/2004:

According to the Family Educational Rights and Privacy Act (FERPA), the term "educational records" is broadly defined as data directly related to a student that is maintained by an educational agency or institution or by a party acting for the agency or institution. 34 C.F.R. 99.3. For purposes of special education, access to these records is governed by 34 C.F.R. 300.562, which incorporates FERPA, and states:

- (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 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 provides 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.

Therefore, a district must permit parents of a student with a disability to inspect and review educational records about their child. A district must respond to such a request within ten business days and must comply with the request before an IEP team meeting or due process hearing is held and within 45 calendar days.

Test Protocols as Educational Data

The second step in the determination is whether the test protocols contain educational data and to what extent before releasing them to the parents. The Family Policy Compliance Office (FPCO), the federal office responsible for implementation of FERPA, determined in *Letter to Thomas* that test protocols, as educational data, may be accessible to the parents under the following conditions:

1. If the test questions and answers are both personally identifiable to the student (that is, if the answers appear on the same sheet as the questions, and are identified by the student's name), the parents have a right to inspect both the questions and answers.
2. If the questions are separate from the answers, and only the answers are personally identifiable to the student, the parent has the right of access to the answers only. However, since 34 C.F.R. 99.10 also requires an agency to respond to a reasonable request for explanation or interpretation of the record, the agency would have to inform the parent of the questions, if so requested, in order to explain the answers to the questions.

See Letter to Thomas, 211 IDELR 240 (FPCO 1986).

"Accordingly, if a school were to maintain a copy of a student's test answer sheet (an "education record"), the parent would have a right under Part B [of IDEA] and FERPA to request an explanation and interpretation of the record. The explanation and interpretation by the school district could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the responses in some other adequate manner that would inform the parent." 34 C.F.R. 300.562 (discussion).

Providing Copies of Test Protocols and Educational Data

The district is not unequivocally obliged to distribute copies of test protocols containing educational data to the parents unless failure to do so would effectively prevent the parents from exercising their right to inspect and review. 34 C.F.R. 300.562 (b) (2). In other words, if parents are physically unable to inspect and review the educational data about their child, the district must provide copies of the data to them. The U.S. Department of Education has interpreted this to mean that if a parent shall receive copies of the records when he or she lives too far from the school district to see the records in person. *Letter to Anonymous*, 213 IDELR 188 (OSERS 1989) and *Letter to Kincaid*, 213 IDELR 271 (OSERS 1989). The parent also might be prevented from exercising the right to inspect and review for other reasons, such as a disability, lack of transportation, etc. Representatives from the district may use their own judgment regarding whether a parent is effectively denied access, but should take the above examples into consideration when making this determination.

Federal Copyright Implications

If a district is concerned about the implications of federal copyright laws, it should take into consideration the fair use doctrine:

Sec. 107.-Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

In *Letter to Thomas*, the FPCO determined that "an educational agency or institution makes fair use of copyrighted material when the agency or institution provides a copy of test questions and a student's answers to those questions to the parents of the students." 211 IDELR 420 (FPCO 1986). However, to reduce the risk of test security violations, the FPCO also counseled: "[Districts] may wish to mark the documents with appropriate language informing the party to whom it is released that the test instrument is copyrighted." Even though this approach will not alleviate all test security concerns, a district must balance those concerns with a parent's right, guaranteed by federal law, to inspect and review his or her child's educational data.

Right of a Parent Representative

The IDEA regulations diverge from FERPA by allowing a parent representative access to inspect and review special education data on behalf of the parent; however, nothing in FERPA, IDEA or its implementing regulations allow a parent representative to obtain copies of the child's educational data directly from the district, even if the parent has consent. See 34 C.F.R. 300.562 (b) (3) and 34 C.F.R. 99.10 (d).

Nothing in that EHA-B (EHA-B, or the Education of the Handicapped Act, is the predecessor of the Individuals with Disabilities Act-IDEA.) provision gives a parent representative the right to obtain a copy of an education record of a student, even if failure to provide the copy would effectively prevent the representative from inspecting and reviewing the record. Therefore, while a school district is not required to give copies of education records to a parent representative, a parent could obtain copies of records, if he or she has a right to them, in turn, to a representative.

Letter to Longest, 213 IDELR 173 (OSEP 1988).