

Students

Student Records ¹

School student records are confidential. Information from them shall not be released other than as provided by law.² A school student record is any writing or other recorded information concerning a student and by which a student may be identified individually that is maintained by a school or at its

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¹ State law requires school boards to adopt policy and procedures implementing the Illinois School Student Records Act (ISSRA) and specifying the content of school student records. ~~23 Ill.Admin.Code §§375.100 and 226.740~~. Both State and federal law address school student records. See the federal Family Educational Rights and Privacy Act (FERPA, 20 U.S.C. §1232g, implemented by federal rules at 34 C.F.R. Part 99) and ~~the Ill. School Student Records Act (ISSRA, (105 ILCS 10/, amended by P.A. 100-532, implemented by ISBE rules at 23 Ill.Admin.Code Part 375)~~. In addition, the U.S. Dept. of Education's Privacy Technical Assistance Center (PTAC), a *one-stop* resource for education stakeholders to learn about data privacy, confidentiality, and security practices related to student-level longitudinal data systems, has information available at: ptac.ed.gov/. PTAC published a guide for school officials titled *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*, ~~available at:~~ tech.ed.gov/wp-content/uploads/2014/09/Student-Privacy-and-Online-Educational-Services-February-2014.pdf. **School officials interested in cloud computing contracts should contact the board attorney.**

Confusion persists regarding the interplay between the FERPA and the Health Insurance Portability and Accountability Act of 1996 (HIPAA, Pub. L. 104-191). The Privacy Rule implementing HIPAA, issued by the U.S. Dept. of Health and Human Services, addresses the disclosure of individuals' health information by *covered entities*. 45 C.F.R. Parts 160 and 164, Subparts A and E. Generally speaking, a school district becomes a *covered entity*, and must comply with applicable sections in the Privacy Rule, if it provides health care and transmits health information in electronic form in connection with transactions. However, *educational records* as defined by FERPA are excluded from HIPAA's definition of *protected health information*. 45 C.F.R. §160.103. In most cases this exception relieves school districts of complying with burdensome privacy notices and authorization forms. The board attorney should be consulted on all HIPAA-related questions.

² A plethora of statutory and decisional law protects student records. Aside from the laws identified in f/n 1, other laws protecting student records include:

1. Schools may not provide a student's *personal information* to a business organization or financial institution that issues credit or debit cards. ~~(105 ILCS 5/10-20.38)~~.
2. Schools may not sell personal information concerning a child under the age of 16, with a few exceptions, unless a parent has consented. ~~(Children's Privacy Protection and Parental Empowerment Act, 325 ILCS 17/)~~.
3. The release of confidential information given by a student to a therapist, e.g., school counselor or psychologist, is governed by the Mental Health and Developmental Disabilities Confidentiality Act. ~~(740 ILCS 110/)~~.
4. Schools must keep a sex offender registration form received from law enforcement separately from school student records maintained on behalf of the juvenile sex offender. ~~(730 ILCS 152/121)~~.
5. Schools may not provide a parent/guardian who is not allocated *parenting time* (formerly *visitation*) access to his or her child's school records, unless a court finds that it is in the child's best interests to provide those records to the parent. ~~(The Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/602.11, amended by P.A. 99-90)~~.
6. Schools may not provide a parent/guardian access to his or her child's school records if the parent is prohibited by an order of protection from inspecting or obtaining such records pursuant to the Domestic Violence Act of 1986 or the Code of Criminal Procedure of 1963. ~~(The Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/602.11, amended by P.A. 99-763, eff. 1-1-17)~~.

~~6.7. The protection of student data collected by educational technology companies is governed by the Student Online Personal Protection Act, 105 ILCS 85/, added by P.A. 100-315.~~

Note: Nos. 5 and 6 may conflict with FERPA in that they restrict a parent/guardian's right to access his or her child's school records more than is expressly permitted by FERPA. 20 U.S.C. 1232g(a)(1)(A), (B); 34 C.F.R. 99.10(a). **Consult the board attorney for guidance.**

Allowing students to grade each other's papers does not violate FERPA; such student work is not a *school record* until it is recorded by the teacher. Owasso I.S.D. No. I-011 v. Falvo, 422 S.Ct. 934, 534 U.S. 426 (2002). School student records are *per se* prohibited from disclosure; a district is under no obligation to redact them. Chicago Tribune Co. v. Chicago Bd. of Educ., 773 N.E.2d 674 (Ill.App.1, 2002), 332 Ill.App.3d 60 (1st Dist. 2002).

direction by a school employee, regardless of how or where the information is stored, except as provided in State or federal law as summarized below: ³

1. Records kept in a staff member's sole possession.
2. Records maintained by law enforcement officers working in the school.
3. Video and other electronic recordings (including without limitation, electronic recordings made on school buses⁴) that are created in part for law enforcement, security, or safety reasons or purposes. The content of these recordings may become part of a school student record to the extent school officials create, use, and maintain this content, or it becomes available to them by law enforcement officials, for disciplinary or special education purposes regarding a particular student.
4. Any information, either written or oral, received from law enforcement officials concerning a student less than the age of 17 years who has been arrested or taken into custody. ⁵

State and federal law grants students and parents/guardians certain rights, including the right to inspect, copy⁶, and challenge school student records. The information contained in school student records shall be kept current, accurate, clear, and relevant. All information maintained concerning a student receiving special education services shall be directly related to the provision of services to that child.⁷ The District may release directory information as permitted by law, but a parent/guardian

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³ 20 U.S.C. §1232g(a)(4); 34 C.F.R. §99.3; 105 ILCS 10/2(d); 705 ILCS 405/1-7 and 5-905; 23 Ill.Admin.Code §375.10. Rather than listing the exceptions in the policy, a school board may choose to end the sentence after the proviso "except as provided in State or federal law."

⁴ For an explanation, see footnotes in 7:220, *Bus Conduct*.

⁵ Many lawyers believe that once these records are received by a school, they are protected as *education records* under the federal Family Educational Rights and Privacy Act, 20 U.S.C. §1232g. Consult the board attorney for advice.

⁶ 105 ILCS 10/5(a).

105 ILCS 10/5(c), amended by P.A. 100-532, requires that a parent's or student's request to inspect and copy records be granted no later than 10 business days (previously 15 school days) after the date of receipt of such a request by the official records custodian.

105 ILCS 10/5(c-5), added by P.A. 100-532, outlines how a school district may extend the timeline for response by not more than five business days from the original due date if one or more of these six reasons applies:

1. The requested records are stored in whole or in part at other locations than the office having charge of the requested records;
2. The request required the collection of a substantial number of specified records;
3. The request is couched in categorical terms and requires an extensive search for the records responsive to it;
4. The requested records have not been located in the course of routine search and additional efforts are being made to locate them;
5. The request for records cannot be complied with by the school district within the time limits prescribed by subsection (c) without unduly burdening or interfering with the operations of the school district; or
6. There is a need for consultation, which shall be conducted with all practicable speed, with another public body or school district among two or more components of a public body or school district having a substantial interest in the determination or in the subject matter of the request.

The person making the request and the school district may also agree in writing to extend the timeline for compliance for a period to be determined by the parties. Id.

⁷ 23 Ill.Admin.Code §226.740(a).

shall have the right to object to the release of information regarding his or her child.⁸ However, the District will comply with an *ex parte* court order requiring it to permit the U.S. Attorney General or designee to have access to a student's school records without notice to, or the consent of, the student's parent/guardian.⁹ Upon request, the District discloses school student records without consent to officials of another school district in which a student has enrolled or intends to enroll, as well as to any person as specifically required by State or federal law.

The Superintendent shall fully implement this policy and designate an *official records custodian* for each school who shall maintain and protect the confidentiality of school student records, inform staff members of this policy, and inform students and their parents/guardians of their rights regarding school student records. ¹⁰

Student Biometric Information Collection ¹¹

The Superintendent or designee may recommend a student biometric information collection system solely for the purposes of identification and fraud prevention.¹² Such recommendation shall be consistent with budget requirements and in compliance with State law. Biometric information means

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⁸ This sentence is required if the board allows schools to release student directory information. ~~20 U.S.C. § 1232g; 23 Ill.Admin.Code §375.80; 34 C.F.R. §99.37.~~ There is at least one instance in Illinois in which parents were upset that their school district released students' names and addresses pursuant to a Freedom of Information Act (FOIA) request. FOIA contains an exemption for home addresses. Many lawyers, however, say that a district must release student information pursuant to a FOIA request when each of the following has occurred: the FOIA request seeks information that is included in the district's definition of student directory information, the district notified parents that it releases directory information, and the parents did not opt out of allowing directory information to be released concerning their child. An opinion from the Ill. Public Access Counselor supports that a district may not rely on the FOIA exemption for home addresses. ~~(PAO 12-3).~~

The **PRESS** policy does not identify the components of *directory information*, leaving that task to implementing material. Boards may want to discuss this quagmire with the superintendent knowing that there are good reasons to release directory information. ~~(e.g., to allow the district to publish information about specific students).~~ and good reasons to not release directory information. ~~(e.g., to avoid releasing names and addresses pursuant to a FOIA request).~~

23 Ill.Admin.Code 375.80(a)(1) includes *gender* as information which may be designated as directory information; however including *gender* within directory information may violate the federal Family Educational Rights and Privacy Act (FERPA). FERPA regulations provide that 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" and it "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; 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 educational agency or institution attended." 34 C.F.R. 99.3. Though FERPA regulations do not explicitly preclude the designation of *gender* as directory information, U.S. Department of Education (ED) guidance has consistently advised schools not to disclose a student's sex as directory information because it would be considered harmful or an invasion of privacy. See *Letter to Institutions of Postsecondary Education*, ED Family Policy Compliance Office (September 2009); ~~*Dear Colleague Letter on Transgender Students*, ED and U.S. Department of Justice (May 13, 2013-16).~~ Consult the board attorney about the practical implementation of this issue. Some attorneys, for example, believe photos of the "Girls Volleyball Team" may contradict ED guidance.

⁹ 20 U.S.C. §1232(g)(j), as added by the Sec. 507 of the U.S.A. Patriot Act of 2001.

¹⁰ Each school must have an *official records custodian*. ~~(105 ILCS 10/4(a)).~~ Districts must notify students and parents/guardians of their rights concerning school student records. ~~(105 ILCS 10/3; 23 Ill.Admin.Code §375.30; 34 C.F.R. §99.7).~~ Comprehensive faculty and student handbooks can provide required notices, along with other important information, to recipients. Handbooks can be developed by the building principal, but should be reviewed and approved by the superintendent and board. See exhibit 7:340-AP1, E1, *Notice to Parents/Guardians and Students of Their Rights Concerning a Student's School Records*, and administrative procedure 7:340-AP1, *School Student Records*.

¹¹ This program is optional; however, districts either wishing to implement such a program or districts that have already engaged in the collection of student biometric information must have a policy consistent with the requirements of 105 ILCS 5/10-20.40 et seq. This section restates the School Code's requirements for a student biometric information policy.

¹² For districts already collecting biometric information, the following is an alternative:

The Superintendent or designee shall maintain a biometric screening program that is consistent with budget requirements and in compliance with State law.

any information that is collected through an identification process for individuals based on their unique behavioral or physiological characteristics, including fingerprint, hand geometry, voice, or facial recognition or iris or retinal scans.

Before collecting student biometric information, the District shall obtain written permission from the person having legal custody/parental responsibility¹³ or the student (if over the age of 18).¹⁴ Upon a student's 18th birthday, the District shall obtain written permission from the student to collect student biometric information.¹⁵ Failure to provide written consent to collect biometric information shall not be the basis for refusal of any services otherwise available to a student.

All collected biometric information shall be stored and transmitted in a manner that protects it from disclosure. Sale, lease, or other disclosure of biometric information to another person or entity is strictly prohibited. ¹⁶

The District will discontinue use of a student's biometric information and destroy all collected biometric information within 30 days after: (1) the student graduates or withdraws from the School District, or (2) the District receives a written request to discontinue use of biometric information from the person having legal custody/parental responsibility of the student or the student (if over the age of 18).¹⁷ Requests to discontinue using a student's biometric information shall be forwarded to the Superintendent or designee.

The Superintendent or designee shall develop procedures to implement this policy consistent with State and federal law. ¹⁸

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¹³ Several statutes define legal custody and when a court may grant it; the term requires statutory construction/interpretation and school boards should discuss this issue with their attorney prior to adopting a policy on collection of student biometric information.

105 ILCS 5/10-20.40(b)(1) states the definition of legal custody is the same as the definition of legal custody for purposes of residency, payment of tuition, hearings, and criminal penalties at 105 ILCS 5/10-20.12b(2)(i)-(v).

The Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/, amended by P.A. 99-90, changed the terms *custody* and *visitation* to *parental responsibility* and *parenting time*, respectively. P.A. 99-90 also requires a *parenting plan* that allocates: (1) significant decision-making responsibilities; and (2) each parent's right to access his or her child's school records. The new law does not amend ISSRA or the School Code. **Consult the board attorney about whether the Illinois Marriage and Dissolution of Marriage Act's provisions change a noncustodial parent's ability to access a student's records.**

¹⁴ Based upon 105 ILCS 5/10-20.40, written permission is not required annually; it is valid until a request for discontinuation of the use of biometric information is received or until the student reaches the age of 18. See 7:340-AP1, E5, *Biometric Information Collection Authorization*.

¹⁵ Districts must reissue 7:340-AP1, E5, *Biometric Information Collection Authorization* to students turning 18 years of age during the school year. This is because all rights and privileges accorded to a parent under ~~ISSRA~~**the III-School Student Records Act** become exclusively those of the student upon his or her 18th birthday, graduation from secondary school, marriage, or entry into military service, whichever comes first. 105 ILCS 10/2(g).

¹⁶ State law contains two exceptions: (1) the individual who has legal custody/parental responsibility of the student or the student (if over the age of 18) consents to the disclosure, and (2) the disclosure is required by court order. 105 ILCS 10-20.40(b)(5); 750 ILCS 5/602.11, amended by P.A. 99-90.

¹⁷ 105 ILCS 5/10-20.40(d). No notification to or approval from the district's local records commission, pursuant to the Local Records Act, is required to destroy student biometric information. See f/n 12 for a discussion about the terms *custody* and *parental responsibility*.

¹⁸ Whether the student biometric information is an education record under FERPA, 20 U.S.C. §1232g, or falls under an exception to an education record under FERPA is an issue about which school boards should consult their board attorney. Protected Health Information under the U.S. Department of Health and Human Service's interpretations of the HIPAA excludes education records covered by FERPA, and thus HIPAA requirements are not expected to be triggered by districts collecting student biometric information. However, before implementing policies and procedures to collect student biometric information, a board should discuss these issues with the board attorney.

- LEGAL REF.: Chicago Tribune Co. v. Chicago Bd. of Ed., 332 Ill.App.3d 60 (1st Dist. 2002).
Owasso I.S.D. No. I-011 v. Falvo, 534 U.S. 426 (2002).
 Family Educational Rights and Privacy Act, 20 U.S.C. §1232g; implemented by 34
 C.F.R. Part 99.
 Children's Privacy Protection and Parental Empowerment Act, 325 ILCS 17/.
 105 ILCS 5/10-20.21b, 5/20.37, 5/20.40, and 5/14-1.01 et seq., ~~and 10/.~~
105 ILCS 10/, Illinois School Student Records Act.
 50 ILCS 205/7.
 750 ILCS 5/602.11.
 23 Ill.Admin.Code Parts 226 and 375.
- CROSS REF.: 5:100 (Staff Development Program), 5:130 (Responsibilities Concerning Internal
 Information), 7:15 (Student and Family Privacy Rights), 7:220 (Bus Conduct)
- ADMIN PROC.: 7:15-E (Notification to Parents of Family Privacy Rights), 7:340-AP1 (School
 Student Records), 7:340-AP1, E1 (Notice to Parents/Guardians and Students of
 Their Rights Concerning a Student's School Records), 7:340-AP1, E3 (Letter to
 Parents and Eligible Students Concerning Military Recruiters and Postsecondary
 Institutions Receiving Student Directory Information), 7:340-AP1, E4
(Frequently Asked Questions Regarding Military Recruiter Access to Students
and Student Information, 7:340-AP1, E5 (Biometric Information Collection
Authorization). 7:340-AP2 (Storage and Destruction of School Student Records),
 7:340-AP2, E1 (Schedule for Destruction of School Student Records)