

Q&A: Clarification of Educational Record Definitions and Procedures As It Relates to Review Test Protocols Used in the Evaluation of a Student with a Disability

The Minnesota Department of Education (MDE), Division of Compliance and Monitoring has developed this document to provide technical assistance to school districts and parents that have raised questions about the procedures by which a parent may inspect and review and request copies of test protocols that are part of a child with a disability's evaluation or reevaluation. The intention of this document is to provide helpful, general information to the public. It does not constitute legal advice nor is it a substitute for consulting with a licensed attorney. The information below should not be relied upon as a comprehensive or definitive response to your specific legal situation. This document may not include a complete rendition of applicable state and federal law.

Question 1: How is the term “educational record” defined?

Answer: According to the Family Education Rights and Privacy ACT (FERPA), the term “education records” is defined as data directly related to a student that is maintained by an educational agency or institution or by a party acting on behalf of the local education agency or institution.

Authority: 34 C.F.R. § 99.3; Minn. Stat. § 13.32, Subd. 1.

Question 2: What is a test protocol?

Answer: A test protocol is the test instrument used to assess a student. The term commonly refers to written instructions on how a test must be administered as well as the test questions. A test protocol is an original creation of independent authors and/or organizations and may be protected by federal copyright law. Federal copyright law grants exclusive rights to the owner of a copyright to reproduce copies of the copyrighted material. Test protocols would include written test instruments used in evaluating a student for possible special education eligibility.

Authority: 17 U.S.C. § 106(1).

Question 3: When would a test protocol contain educational data?

Answer: Test protocols would only be considered educational data if a student's responses are recorded on the test protocol document and data in the document links it to that student, such as a name or student identification number. For example, a student's answer sheet, whether it is a separate document or is written into a test booklet, is considered an educational record. In contrast, a test protocol or question booklet that is separate from

the student's answers and is not personally identifiable to a particular student would not be considered an educational record.

Authority: School District U-46. 45 IDELR 74, 106 LRP 8777 (11/22/2005 III SEA); Letter to Mathews, 9 FAB 4, 105 LRP 58483, Family Policy Compliance Office, September 13, 2005; Letter to Anonymous, 14 FAB 32, 111 LRP 18281, Family Policy Compliance Office, August 16, 2010; Letter re: Scott City School District, 10 FAB 39, 107 LRP 47713, (FPCO 2007); Letter re: Moriah Central Sch. Dist., 8 FAB 14, 105 LRP 11195 (FPCO 2004).

Question 4: Does a parent have the right to view a student's educational record?

Answer: Yes. A local educational agency is required to allow parents to inspect and review a student's educational records that are collected, maintained, or used by that local educational agency. This would include responding to reasonable requests for explanations and interpretations of a student's written answers during a special education assessment which are not accompanied by the test protocol question booklet. It would also include inspecting and reviewing test protocols that meet the definition of an educational record.

Authority: 34 C.F.R. § 300.562(a); 34 C.F.R. § 99.10; 34 C.F.R § 300.562(b); Minn. Stat. § 13.02, Subd. 8; Minn. Stat. §§ 13.32, Subd. 3(c)(e); and 13.32, Subd. 10; Letter to Anonymous, 213 IDELR, 213 LRP 9087 (OSERS 1989); Letter to Thomas, 211 IDELR 240 (FPCO 1986).

Question 5: How can a local education agency comply with both FERPA and federal copyright laws?

Answer: It is not an infringement of federal copyright law to make copies of a copyrighted work if the purpose for copying the material is considered a fair use, as defined in Chapter 17, Section 107 of the United States Code. To determine if the reproduction is a fair use, factors to consider include the purpose of the use and the effect the reproduction will have on the document's potential market or value. In 2005, a federal court held that a test protocol containing educational data on a particular student could be subject to review and inspection and copied for parents consistent with state and federal law. This would be considered a fair use of copyrighted material, as the risk of a negative impact on the integrity of the testing instrument is minimal.

To further protect test protocol, a school district could mark or stamp the test protocol as copyrighted material and inform parents that further sharing of the test instrument could potentially be an infringement of the federal copyright law.

Authority: See 17 U.S.C. § 107; Newport-Mesa Unified School District v. State of California Department of Education, 371 F. Supp. 2d 1170 (US DC California, May 24, 2005); Sch. Dist. U-46, 45 IDELR 74, 9 FAB 16, 106 LRP 8777 (III. SEA 2005).

Question 6: What does it mean to inspect and review education records?

Answer: A. The parent has the right to receive a response from the local education agency when a reasonable request is made for explanations and interpretations of the student's education records.

B. If a parent is effectively prevented from exercising their right to inspect and review the educational records, the local education agency must provide copies of the requested education records.

C. The parent has the right to have a representative inspect and review the student's records.

Authority: 34 C.F.R. § 300.562(b); Letter re: Scott City Sch. Dist., 10, FAB 39, 107 LRP 47713 (FPCO 2007).

Question 7: What situations would effectively prevent a parent from exercising his or her right to inspect and review the educational records?

Answer: One example is if the parent lives too far away from the local education agency to see the records in person (beyond commuting distance). Other examples could include a parent's disability or lack of transportation that would effectively prevent the parent from exercising their right to inspect and review the student's records. This determination is fact specific, and the local education agency would need to make its own determination.

Authority: 34 C.F.R. § 300.562(b)(2); Letter to Anonymous, 213 IDELR 188 (OSERS 1989); Letter to Kincaid, 213 IDELR 271 (OSERS 1989); Letter re: Scott City School District, 10 FAB 39, 107 LRP 47713, (FPCO 2007); 34 C.F.R. § 99.11.

Question 8: Does a noncustodial parent have the right to review and inspect his or her child's education records?

Answer: A noncustodial parent has the right to review and inspect his or her child's education records unless the district has been provided with evidence of a court order that specifically prohibits that parent's access to the educational records.

Authority: 34 C.F.R. § 300.562(c); 34 C.F.R. § 300.30(b)(1); 34 C.F.R. § 99.4; Minn. Stat. § 518.68; Lake Villa (IL) Sch. Dist. #41, 46 IDELR 292, 10 FAB 20, 106 LRP 60864 (OCR Midwestern Division 2006).

Question 9: Once a parent makes a request to inspect and review records, when must the local education agency respond to the request?

Answer: A local education agency must comply with the request within 10 business days of the request.

Authority: Minn. Stat. § 13.04, Subd. 3.

Question 10: If a parent is entitled to have a parent representative inspect and review the education records, can the representative obtain copies of the student's educational records?

Answer: No. IDEA provides for the inspection and review on behalf of a parent, if necessary; however, there is no corresponding right for the representative to obtain copies of the documents. The one exception under the Minnesota Government Data Practices Act (Data Practices Act) is if a parent has given written prior consent for one adult representative to attend a school conference. In that specific circumstance, the adult representative has the right to both attend the school conference and obtain copies of the student's relevant educational data.

Authority: 34 C.F.R. § 300.562(b)(3); 34 C.F.R § 99.10(d); Letter to Longest, 213 IDELR 173 (OSEP 1988); Minn. Stat. § 13.32, Subd. 10a.

Question 11: If a parent has the right to inspect and review education records, including a test protocol that meets the definition of educational data, does the parent also have the right to request copies of those records?

Answer: Yes. Minnesota law provides additional rights beyond those in FERPA regarding access to educational records. Under Minnesota law, a parent has the right to request to inspect their child's educational record and may request copies of the educational records of their child with a disability. One exception set forth in the Data Practices Act is personnel, licensing, or academic examination. This would include state assessments administered for graduation purposes. This exception is not applicable to test protocols used to determine a student's eligibility for special education, as they are not considered an academic examination

Authority: Minn. Stat. § 13.32, Subd. 10; Minn. Stat. § 13.34.

Question 12: Does the Data Practices Act contain any other provision related to the review and inspection and reproduction of educational data related to a student with a disability?

Answer: Yes. The Data Practices Act does not limit the frequency in which a parent can inspect the educational records of their child with a disability. An agency or institution cannot charge a

fee to a parent or guardian to retrieve the child's educational record. The agency or institution can charge a fee that reflects the costs of reproducing the records except when to do so would impair the ability of the child's parent or guardian, or the child who has reached the age of majority, to exercise their right to inspect and review those records.

Authority: Minn. Stat. §13.32, Subd. 10; Minn. Stat. § 13.04, Subd. 3.

Question 13: Who has authority to enforce the FERPA and IDEA regulations?

- Answer:
- A. Special education complaints can be filed with the Minnesota Department of Education (MDE) for violations of special education law, which would include title 34, section 300.562, of the Code of Federal Regulations . Further information can be found on the MDE website:
www.education.state.mn.us/MDE/SchSup/SpecEdComp/ComplMonitor/Comp/index.html; 651-582-8689; email: mde.compliance-monitoring@state.mn.us.
 - B. Complaints regarding the enforcement of the Family Education Rights and Privacy Act (FERPA) can be filed with the Family and Compliance Office at the US Department of Education. www2.ed.gov/policy/gen/guid/fpco/index.html; 800-872-5327.
 - C. The Information Policy and Analysis Division of the Minnesota Department of Administration issues advisory opinions related to Chapter 13 compliance issues. www.ipad.state.mn.us/docs/opreqdp.html; 651-296-6733/800-657-3721/fax: 651-205-4219; email: info.ipad@state.mn.us.
 - D. The Minnesota Office of Administrative Hearings handles expedited data practices complaints. www.oah.state.mn.us/X-MGDPA/index.html.