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|  | |  |  | | --- | --- | | Title: | RECORDS | | Purpose: | To assist Birth to Three Programs in addressing families’ privacy and confidentiality through IDEA and FERPA provisions | |
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**Overview**

In accordance with the [IDEA](http://birth23.org/aboutb23/lawsnRegs.html) and the [Family Educational Rights and Privacy Act](http://birth23.org/aboutb23/lawsnRegs.html) (FERPA 20 U.S.C. § 1232g; 34 C.F.R. Part 99; 34 C.F.R. §303.460), the confidentiality of early intervention records must be safeguarded.  Any and all personally identifiable information regarding children and families receiving services from Birth to Three programs is protected from unauthorized disclosure by [FERPA](http://records-ferpa.pdf/).  Personally identifiable information protected by [FERPA](http://records-ferpa.pdf/) is specifically *exempted* from the definition of "protected health information" that is subject to the provisions of the Health Insurance Portability and Accountability Act (HIPAA) privacy standards (Source: 45 C.F.R. § 164.501).

**Definition of Records**

The IDEA Part C regulations define “early intervention records” as all records regarding a child that are required to be collected, maintained, or used under IDEA Part C, 34 CFR § 303.403(b). "Record" means any information recorded in any way, including, but not limited to, hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche. (Source: 20 U.S.C. 1232g)

Personally Identifiable Information or PII is protected under the IDEA confidentiality provisions.

The IDEA Part C regulations in 34 CFR §303.29 references the FERPA definition for PII and refers to “student” as “child” and “school” as Early Intervention Service Provider.” Thus under IDEA Part C, PII is defined as information that includes, but is not limited to:

* The child’s name;
* The name of the child’s parents or other family members;
* The address of the child or child’s family;
* A personal identifier, such as the child’s social security number, program identification number, or biometric record;
* Other indirect identifiers, such as the child’s date of birth, place of birth, and mother’s maiden name; other information that, alone or in combination is linked or linkable to a specific child that would allow a reasonable person in the program or school community, who does not have personal knowledge of the relevant circumstances, to identify the child with reasonable certainty; or
* Information requested by a person who the educational agency reasonably believes knows the identity of the child to whom the education record relates (Source: 34 CFR § 99.3).

**Electronic Communication and the Child’s Birth to Three Record**

All communication between team members about a family or direct communication with families is part of a child’s record. This includes text messages, emails, and communication via sites such as Facebook. A program can either print the electronic communication and add it to the record or identify a way to archive the information where it can be retrieved.

**Electronic Communication between Parents and Providers**

Discussion of the preferred manner of communication between provider and parents should be discussed and agreed upon during the initial visits with the family. Some families may choose not to use electronic communication, or limit its use due to financial or equipment constraints. It is recommended that documentation of this discussion be in the child’s record.

The discussion of the use of social network sites should also occur during the initial visits with the family. Families should be informed that while their child is receiving services through Birth to Three the provider will be unable to communicate with them via personal social network sites. Families should be encouraged to follow all Birth to Three social media.

Caution should always be taken whenever using any form of electronic communication for the following reasons: use of personal email, cell phone numbers or personal social network sites can be accessed by others not working with the family; if a complaint leads to an investigation all electronic communication records (including personal email accounts) could be requested through the Freedom of Information Act. Finally, the use of electronic communication may make maintaining professional boundaries more difficult by allowing both families and providers access to personal cell phones, emails and texts at all hours of the day and night.

## [**Exempted**](https://studentprivacy.ed.gov/faq/what-records-are-exempted-ferpa) **from Definition of Records**

Exempted from the definition of education records are those records which are kept in the sole possession of the maker of the records and are not accessible or revealed to any other person except a temporary substitute for the maker of the records. Once the contents or information recorded in sole possession records is disclosed to any party other than a temporary substitute for the maker of the records, those records become education records subject to FERPA. Generally sole possession records are of the nature to serve as a “memory jogger” for the creator of the record. For example, if a therapist has taken notes regarding telephone or face to face conversations, such notes could be sole possession records depending on the nature and content of the notes. (Source: studentprivacy.ed.gov/ferpa)

Test protocols would be exempted from a child’s record if the child’s name was encoded on the test protocol in such a way that the examiner was the only person who could de-code it.

**Name Changes while in Birth to Three**

A legal name must be used when providing documentation in a child’s record. There may be instances where a child’s name is changed while enrolled in Birth to Three. If this occurs, service coordinators shall request a copy of a legal document such as a court order as proof from the parent and include it in the child’s record. Service coordinators are encouraged to support parents in alerting their insurance or Department of Social Services regarding the change so that new medical cards may be issued.

**Documentation of Requests to Access Records**

Each program will maintain documentation of requests for and disclosure of PII, from the early intervention record in each child’s record for all persons using the Early Intervention Record Access Log, Form 3-4. Exception to this log is by parents and authorized representatives and employees of the participating agency. (Source: (§303.406) (§ 99.31(a)(9)(ii)(A)-(C). § 99.32(d)). Parents who request to see their child’s record should be included on the log which may take the form of an email when requesting copies over age 3. The record of requests will be maintained as long as the child’s record is maintained and the parent may inspect it.

Programs must use reasonable methods to identify and authenticate the identity of parents, students, officials, and other parties before disclosing or permitting access to PII (Source: 34 CFR §99.31[c]). These requirements help to ensure that educational agencies and institutions protect the privacy of education records and do not violate FERPA by disclosing education records to the wrong party.

Under Parts C of the IDEA, programs may use electronic or digital signatures, provided they take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process (Source: OSEP Policy Letter dated March 21, 2014). FERPA specifies that “signed and dated written consent” may include a record and signature in electronic form that 1) identifies and authenticates a particular person as the source of the electronic consent; and 2) indicates such person's approval of the information contained in the electronic consent. (Source: 34 CFR § 99.30(d)).

**Parents Access to Records**

At their request, parents are to be notified who, by title, will have access to their child’s record. Programs must permit parents to inspect and review any early intervention records relating to their child without unnecessary delay and before an IFSP meeting or any hearing and in no case more than 10 days after the parents have made the request.   
(§303.401) Parents’ rights to access are restricted to the records of their own child. Information about children who are not part of the family should never appear in an early intervention record.

Either parents shall have full rights under FERPA, unless the program has been provided with evidence that there is a court order or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. (Authority: 20 U.S.C. 1232g)

The program must provide at no cost to the parent, a copy of each evaluation, assessment of the child, family assessment, and IFSP as soon as possible after each IFSP meeting. Parents may be charged a fee to obtain a copy of their child’s early intervention record if the fee does not effectively prevent the parents from exercising their rights. The fee cannot exceed the cost of the copies.

Regardless of the information being provided and how it is accessed (e.g., in person or electronically) from a child’s record, the same degree of certainty in the requester’s identity is required. Whether access to education records is by computer or telephone, programs must have procedures in place to be able to establish the same level of identity authentication assurance regardless of whether the data are accessed via electronic systems, mail, fax, telephone, or in person (Source: studentprivacy.ed Path: Identify Authentication Best Practices).

While FERPA does not specifically prohibit personally identifiable information from a child’s education records over the telephone, it does require that the programs use reasonable methods to identify and authenticate the identity of parents and any other parties to whom the program discloses personally identifiable information from education records (Source:34 CFR § 99.31(c)).

**DCF Access to Records**

If a child is under the guardianship (in foster care placement) of the Department of Children and Families, the child’s DCF worker may have access to the child’s early intervention record without the consent of the child’s parent or surrogate parent. If the child is not under DCF guardianship, however, then only the surrogate parent or parent, may consent to releasing information from the early intervention record to DCF. (Source: studentprivacy.ed Path: Frequently Asked Questions). Programs are encouraged to disclose information from education records to DCF to effectively implement a child’s case plan and to ensure the child’s education needs are met.

In the instances where DCF is conducting an active investigation of abuse or neglect and a request is made in writing on DCF letterhead, DCF investigators will be granted access to any information in the early intervention record. There is no need for consent or for a subpoena. (Source: 20 U.S.C. § 1232g(b)(1)(L), FERPA)).

**When Consent is NOT Needed for Access PII**

Parental consent is not required to release PII to:

1. A program’s employees and contractors such as teachers, therapists, supervisors, administrators, secretaries, or paraprofessionals who have been determined to have legitimate interests. Legitimate interest is performing a task related to his or her job description or a service to the child or family.

2. LEAs or school systems where the child resides, in accordance with §303.209(b)(1)(i) and (b)(1)(ii), the following personally identifiable information under the Act:(i) A child's name,(ii) A child's date of birth.,(iii) Parent contact information (including parents' names, addresses, and telephone numbers).This information is needed to enable the lead agency, as well as LEAs and SEAs under part B of the Act, to identify all children potentially eligible for services under §303.211 and part B of the Act. (Authority: 20 U.S.C. 1412(a)(8), 1412(a)(9), 1417(c), 1435(a)(5), 1437(a)(9), 1439(a)(2), 1439(a)(4), 1439(a)(6), 1442

3. Participating agencies as defined in IDEA as an agency including the lead agency and EIS providers and any individual or entity that provides any part C services (including service coordination, evaluations and assessments, and other part C services), but does not include primary referral sources, or public agencies (such as the State Medicaid, CHIP program, or Bureau of Education Services for the Blind (BESB) or private entities (such as private insurance companies) that act solely as funding sources for part C services. (Sec. 303.403)

4. Authorized representatives of: United States Department of Education, Connecticut Office of Early Childhood and Department of Social Services, or Health Care Financing Administration (HCFA) in connection with the audit, evaluation, or enforcement of state and federally supported programs. These representatives are not permitted to collect (take away) PII unless specifically authorized to do so by state or federal law.

5. Accrediting organizations in order to carry out their accrediting functions.

6. Appropriate persons, if the knowledge of such information is necessary to protect the health or safety of a child in case of neglect or abuse. The factors to be taken into account in determining whether personally identifiable information from the early intervention record of a child may be disclosed under this section shall include the following:

a. the seriousness of the threat to the health or safety of the child or other individuals

b. the need for the information to meet the emergency

c. whether the parties to whom the information is disclosed are in a position to deal with the emergency

d. the extent to which time is essential in dealing with the emergency

When a program makes a disclosure under the health or safety exception, it must record in the child’s education records the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed.  (Authority: *§* 99.32(a)(5).

7. To comply with a judicial order or lawfully issued subpoena. (§ 99.31(a)(9)(i) and (ii))

8. If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j)). A program may disclose to the court the education records of the student that are relevant for the educational agency or institution to proceed with or defend against the legal action.  34 CFR § 99.31(a)(9)(iii).

9. If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself. (Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j))

10. 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. (Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

**Amendment of Records**

Parents have the right to request that information collected on their child or family, which they believe inaccurate, misleading or in violation of their child’s rights or privacy be amended. Programs are not required to make the change but must consider the requested change. Requests will be acted upon by the program within thirty (30) days.

If the program decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal, and advise the parent of the right to have a hearing by an independent third party. The program will notify the Birth to Three Family Liaison. If the program agrees to the request the document is revised. If denied, the parent or eligible student has the right to include a statement in the record stating why he or she believes that the information contained in the education record is incorrect, misleading, or violates his or her right of privacy, why he or she disagrees with the hearing decision, or both. (Source: 2.ed.gov Path: Questions and Answers about Education Records).

A hearing is held within a reasonable period of time after the Birth to Three Family Liaison receives the request. The parent is given notice of the date, place, and time in advance of the hearing. The hearing will be conducted by an impartial hearing officer who will make a recommendation to the Commissioner of the Office of Early Childhood. The parent is afforded a full and fair opportunity to present evidence relevant to the issues raised, and is assisted or represented by individuals of his or her choice at his or her own expense, including an attorney. The hearing officer makes his decision in writing within thirty (30) days after the conclusion of the hearing.

If, as a result of the hearing, it is determined that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the infant, toddler or family, the program shall amend the information accordingly and so inform the parent in writing.

If, as a result of due process, it is determined that the records do not need amending, the parents may enclose a statement indicating that they disagree with the contested information. Their statement will then become a formal part of the child’s record and be kept as such for the life of the record. Copies of the statement will be released, whenever copies of the contested part of the record are released (always with parental permission).

Parents also have the right to file a complaint with the U.S. Dept. of Education concerning alleged failures of compliance with FERPA.

No record or part of a record may be altered in any way after anyone requests to inspect, review or copy a record. (Authority: 20 U.S.C. 1232g(a)(1)(A) and (B))

**Retention and Destruction of Records**

Programs must maintain all required documentation in its original form or a secured electronic format for six years. Documentation includes but is not limited to services provided and provider qualifications. All documentation is subject to review by the lead agency and appropriate agencies for audit purposes. When a child transfers to or receives a service from another program such as an autism or hearing assessment, sending program keeps the original record and sends a copy of the file to the receiving program. When documentation has been translated for the family, a copy in English must be maintained in the record.

Each program protects the confidentiality of PII at the collection, storage, disclosure, and destruction stage. One official at each program should assume this responsibility which includes:

1. making certain the confidentiality of the records is safeguarded and preserved;

2. denying or granting access to records;

3. reviewing all records to delete information that is not accurate, no longer valid or pertinent, or may be an infringement of the rights of the child or family;

4. maintaining in each record a current log of persons requesting access to that record;

5. annually notify parents of their rights regarding their child’s record using the “Parents Rights Under the IDEA Part C” booklet.

Under §303.416(a) of the IDEA a participating agency needs to inform parents when “personally identifiable information collected, maintained, or used under this part is no longer needed to provide services to the child under Part C of IDEA, the General Education Provisions Act (GEPA) provisions in 20 U.S.C. 1232f, and Education Department General Administrative Regulations(EDGAR), 34 CFR Parts 76 and 80.”. The parent notice should be provided when a family exits from Part C using Form 5-1 *Notification of Retention and Destruction of Records* (See Exit procedure effective date) along with Parent’s Rights Brochure. Informing parents may mean mailing notification if Form 5-1 was not provided to them.

Programs should remind parents that these records may be needed by the child or parent for school, medical records, social security benefits or other reasons.

Under section 303.403 of the IDEA Part C regulations, “destruction means to physically destroy the record or ensure that personal identifiers are removed from a record so that the record is no longer personally identifiable.” However, a permanent record of certain information or PII about the student (or child) can be maintained under IDEA without limitation. The information in the Birth to Three data system is maintained indefinitely.

A program may not destroy any education records if there is an outstanding request to inspect or review them. (Authority: 20 U.S.C. 1232g(a)(1)(A) and (B))

**Data Destruction Guidance**

No matter which method of destruction you choose, consider following these general best practices for data destruction:

1. When drafting written agreements with third parties, include provisions that specify that all PII that was provided to the third party must be destroyed when no longer needed for the specific purpose for which it was provided, including any copies of the PII that may reside in system backups, temporary files, or other storage media.
2. Ensure accountability for destruction of PII by using certification forms which are signed by the individual responsible for performing the destruction and contain detailed information about the destruction.
3. Remember that PII may also be present in non-electronic media. Organizations should manage non-electronic records in a similar fashion to their electronic data. When data are no longer required, destroy non-electronic media using secure means to render it safe for disposal or recycling. Commonly used methods include cross-cut shredders, pulverizes, and incinerators.
4. Depending on the sensitivity of the data being shared, be specific in the written agreement as to the type of destruction to be carried out.
5. When destroying electronic data, use appropriate data deletion methods to ensure the data cannot be recovered. Please note that simple deletion of the data is not effective. Often, when a data file is deleted, only the reference to that file is removed from the media. The actual file data remain on the disk and are available for recovery until overwritten. Talk to your IT professional to ensure proper deletion of records consistent with technology best practice standards.
6. Avoid using file deletion, disk formatting, and “one way” encryption to dispose of sensitive data—these methods are not effective because they leave the majority of the data intact and vulnerable to being retrieved by a determined person with the right tools.
7. Destroy CDs, DVDs, and any magneto-optical disks by pulverizing, cross-cut shredding, or burning.
8. Address in a timely manner sanitization of storage media which might have failed and need to be replaced under warranty or service contract. Many data breaches result from storage media containing sensitive information being returned to the manufacturer for service or replacement.
9. Create formal, documented processes for data destruction within your organization and require that partner organizations do the same.

*(Source: US Dept. of Education Best Practices for Data Destruction)*

**Data Breach**

In the case of a data breach of physical or electronic records, specific steps must be taken as required and outlined in the program’s current Birth to Three purchase of services contract.

Programs may refer to the Privacy Technical Assistance Center’s Data Security Checklist for assistance in developing and maintaining a successful data security program. *(Source: studentprivacy.ed.gov Data Security Checklist)*

**Highly Confidential Records**

Highly confidential records contain information that if disclosed would likely constitute an invasion of personal privacy.

**To Obtain Highly Confidential Information**

In order to obtain highly confidential information, the written consent by the parent or guardian, specific to the information, is needed. The general release of information for individual records is not sufficient in this case. See Authorization for Programs to Obtain Confidential Information, Form 3-15.

Authorized records containing highly confidential information shall be maintained separately from the early intervention records, unless the parent specifies that each person who has access to the early intervention record has access to this confidential information. Upon a child’s exit from Birth to Three services, confidential records kept separate from the child’s early intervention record will be destroyed with parental notification or the contents returned to the parent.

**To Release Highly Confidential Information**

In order to release highly confidential information, written consent by the parent or guardian is needed. The consent must indicate that highly confidential information will be shared and must indicate to whom. The highly confidential information shall be released only to those providers who have a need to know.

If a child with a condition is to participate in a community group setting, the family must be advised to consult with the physician who is documented to know the child's status to determine the risk to that child. Written permission by the parent or guardian is needed before the highly confidential information can be shared with the director of a community agency.

**Unauthorized Information**

If verbal or written information regarding highly confidential information is received by any provider without the proper releases on file, it shall remain confidential.

Once a provider has knowledge of highly confidential information, regardless of its source, providers may not disclose or be compelled to disclose the information. Unauthorized written information shall be returned to the source.

Whenever a party, other than the parent or legal guardian, discloses highly confidential information without written permission, providers should interrupt the disclosure. Remind the party of the related Statutes and that willful violation of the statute that protects highly confidential information may subject a person to damages to compensate the injured party.

**Sharing Information from a Record**

All information received by a provider using the authorization to obtain information will become part of a child’s early intervention record and will be kept confidential in accordance with the Individuals with Disabilities Education Act and the Family Educational Rights and Privacy Act ([FERPA](http://birth23.org/aboutb23/lawsnRegs.html)). With a signed Authorization to Release Information Form 3-3, any information within the child’s early intervention record may be released. Form 3-3 is a one-time release of the information listed. The “date” listed is meant to cover the time between when the form is signed and when you expect the information to be released. It gives the parent a timeframe during which they may change their mind about releasing the information and can revoke their consent by filling out the bottom of the form. A typical date might be a week after the parent has signed.

When a child exits the Birth to Three System to attend a program under the jurisdiction of their LEA, the minimum information shared from their early intervention record with parental permission is the current IFSP and most recent evaluation of progress. With parental permission, any information from point of referral on may be shared. Upon a child’s exit from Birth to Three services, confidential records kept separate from the child’s early intervention record will be destroyed with parental notification or the contents returned to the parent.

At the request of the parent and upon a signed Authorization to Release Information Form 3-3, any specified information may be shared with other community agencies or service providers. *Note: the parent(s) must have had an opportunity to review the document(s) being released before signing Form 3-3 or* [*Form 3-15*](file:///C:\~my%20real%20documents\NewB23\Providers\CurrentProcedures\Forms\3-15-ObtainConfInfo.doc)*.* (Source: Understanding the Confidentiality Requirements Applicable to IDEA Early Childhood Programs Frequently Asked Questions Oct. 2016”)

**Email Guidance**

The following guidelines are offered as suggestions for staff that choose to use emails to communicate with families:

* Joint personal emails and unprofessional sounding personal email addresses should never be used by providers.
* Careful attention should be paid to the address the email is being sent to in order to avoid sending the email to an unintended recipient.
* Read the email carefully before you send it checking that all personal information about the family is de-identified and the intent of the message is clear.
* Keep messages short and concise and encourage families to do the same.
* The signature at the end of the email should include your full name, email address, work address, phone number and job description (i.e. Occupational therapist, BCBA)
* Never use all capital letters. This is the online equivalent of shouting.
* Avoid using URGENT and IMPORTANT
* The use of a confidentiality disclaimer at the bottom of emails sent to or about families is encouraged. The following is an example of a confidentiality warning.

*Confidentiality Warning: This e-mail contains information intended only for the use of the individual or entity named above. If the reader of this e-mail is not the intended recipient or the employee or agent responsible for delivering it to the intended recipient, any dissemination, publication or copying of this e-mail is strictly prohibited. The sender does not accept any responsibility for any loss, disruption or damage to your data or computer system that may occur while using data contained in, or transmitted with, this e-mail. If you have received this e-mail in error, please immediately notify us by return e-mail. Thank you.*

**Text Message Guidance**

The following guidelines are offered as suggestions for staff that choose to use text messages to communicate with families:

* Always ask permission from a family before you begin texting them. Some phone plans may not cover texting or may charge for each text sent. Or the family may prefer voice messages left on their phone.
* Use text messages sparingly, for example, to update families on a change in appointment time.
* Always end your text with your first and last name. Do not assume the family has your name as a contact in their phone or will recognize your telephone number.
* Make sure all information in the text is de-identified and does not contain any personal information about the family.
* Keep the text strictly professional. Do not use texting shorthand assuming the family will understand. Do not use slang or all capital letters.
* Do not respond to a telephone call with a text message.
* Do not send text messages late in the evening or early in the morning.
* Careful attention should be paid to the telephone number the text is being sent to in order to avoid sending the text to an unintended recipient.
* Do not check your text messages or answer text messages while you are with a family. It is just as rude as talking on the telephone.
* Do not rely on text messaging with families as your sole form of communication.
* As with emails, text messages are considered part of the record and must be included in the file. If your phone does not allow you to email a text message where it can be printed out or archived where it can be retrieved, do not communicate with families via text.

Emails and texts are increasingly used as a means of communication between staff and families. If the information contained in either of those is pertinent to the child’s services, then the information is considered to be part of the record.

The use of electronic communication should be discussed with parents and a communication plan agreed upon. This plan could be included in the IFSP. The preferred method for discussions and sharing sensitive information is in person or synchronous audio-visual.