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I. COMPARISON OF IDEA AND SECTION 504

A. IDEA

IDEA is an education act that provides federal funding for special education and related services. The purpose of the law is to provide financial aid to the states in an effort to ensure a free and appropriate public education for students with disabilities. The local education agency (school board) is required to provide an individual education program that is developed pursuant to the procedures of IDEA.

Only students who meet the eligibility requirements for a specified IDEA disability are eligible for services under the IDEA. Examples of eligible disabilities specified in the law are learning disabilities, mental handicap (educable, trainable and profound), other health impaired, vision impaired, visual impairment, physical impairment and autism.

B. 504

Section 504 (The Rehabilitation Act of 1973) is a civil rights law that provides no federal funding. The purpose is to protect the rights of individuals with disabilities in programs and activities that receive federal assistance. (All school districts in Florida are subject to 504). Section 504 requires a written accommodation plan, and a student is eligible if he or she has, or is regarded as having, a physical or mental impairment which substantially limits a major life activity. The seven major life activities are walking, seeing, hearing, speaking, breathing, learning and working. Examples of possible 504 disabilities that may not arise to the level of IDEA eligibility include, but are not limited to, ADHD, arthritis, asthma, allergies, cancer, communicable diseases such as HIV or TB, and other permanent or temporary disabling conditions.

One court compared 504 and IDEA by noting that Section 504 is a “bludgeon to the IDEA’s stiletto, protecting a broader swath of the population without describing a precise manner of compliance.” *Weber v. Cranston Public School Committee*, 245 F. Supp. 2d 401, 406 (D. R.I. 2003). A well known education law professor, Perry Zirkel, said it this way: “IDEA is like Crater Lake, and Section 504 is like the Okefenokee Swamp.”

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II. CHART COMPARING IDEA AND 504

IDEA	§ 504
(Funding Statute)	(Civil Rights Act)
<ul style="list-style-type: none"> • provides approx. 15-20% of excess costs of special education. • “Full funding” under the IDEA, which Congress has never appropriated, is 40% of the excess costs. 	<ul style="list-style-type: none"> • tied to federal funding but provides none • •
(Length)	(Length)
<p>Long statute (approx. 30 pages in subchapter I). <i>20 U.S.C. §§ 1400-1419.</i></p> <p>Longer regulations (approx. 45 pp + comments. <i>34 C.F.R. Part 300.</i>)</p>	<p>Short statute (less than 2 pages for definitions and prohibition). <i>29 U.S.C. § 705(20) - defines individual with a disability.</i></p> <p>Medium-length regulations (approx. 9 pp. + comments). <i>34 C.F.R. Part 104.</i></p>
(Administering Agency for K-12 Schools)	(Administering Agency for K-12 Schools)
OSEP - Office for Special Education Programs	OCR - Office for Civil Rights

<p style="text-align: center;">(Eligibility)</p> <p>Two (2) part definition of disability. 34 C.F.R. § 300.7.</p> <ul style="list-style-type: none"> • child evaluated as having a specified disability • by reason of such needs special education and related services. <ul style="list-style-type: none"> • 11 categories in federal law <ul style="list-style-type: none"> • 	<p style="text-align: center;">(Eligibility)</p> <p>Definition of disability: 34 C.F.R. § 104.3(j)</p> <ul style="list-style-type: none"> • Any recognized impairment (mental or physical) which substantially limits a major life activity. • • See, e.g., <i>N.L. v. Knox County Sch.</i>, 315 F.3d 688 (6th Cir. 2003); see also <i>Perry Zirkel, Conducting Legally Defensible Eligibility Determinations under Section 504 and the ADA</i>, 174 Ed.Law Rep. [1] (2003). •
<p style="text-align: center;">(Degree of Disability)</p> <p>Frame of reference for measuring adverse effect: unspecific - <i>Rowley</i> standard.</p> <p>An exception is the severe-discrepancy standard for SLD, wherein the child's "ability" is the frame of reference. 34 C.F.R. § 300.541.</p> <p>Mitigating measures (e.g., medication): irrelevant.</p> <p>Child find obligation - specific. See, e.g., 34 C.F.R. §§ 300.125, 300.451, and 300.527(b).</p>	<p style="text-align: center;">(Degree of Disability)</p> <p>Frame of reference for measuring substantial limitation: average student in general population.</p> <p>Mitigating measures (e.g., medication): measurements with the medical treatment or correction. See, e.g., <i>Costello v. Mitchell Pub. Sch. Dist.</i> 79, 266 F.3d 916 [157 Ed.Law Rep. [520]] (8th Cir. 2001).</p> <p>Child find - less specific, arguably weaker. See, e.g., <i>W.B. v. Matula</i>, 67 F.3d 484 (3d Cir. 1995); <i>O.F. v. Chester Upland Sch. Dist.</i>, 246 F. Supp. 2d 409 (E.D.Pa. 2002).</p> <p style="text-align: center;">See also, 34 C.F.R. §104.32.</p>
<p style="text-align: center;">(IEE)</p> <p style="text-align: center;">34 C.F.R. § 300.502</p>	<p style="text-align: center;">(IEE)</p> <p style="text-align: center;">No Provision</p>

<p>(Substantive Std.)</p> <p>IEP is reasonably calculated to provide educational benefit, in the least restrictive environment. <i>Berger v. Medina City School Dist.</i>, 348 F. 3d 513 (6th Cir. 2003); <i>G.ex rel. Ssgt. RG v. Fort Bragg Dependent Schools</i>, 324 F. 3d 240 (4th Cir. 2003).</p>	<p>(Substantive Std.)</p> <p>Commensurate opportunity or reasonable accommodation. <i>Molly L. v. Lower Merion Sch. Dist.</i>, 194 F. Supp.2d 422, 428 (E.D.Pa.2002)(engrafting Third Circuit's IDEA meaningful benefit standard on to Second Circuit's § 504 reasonable accommodation standard), citing <i>J.D. v. Pawlet Sch. Dist.</i>, 244 F.3d 60 [147 Ed.Law Rep. [39]] (2d Cir. 2000).</p> <ul style="list-style-type: none"> • for private schools - "minor adjustments". 34 C.F.R. § 104.39
<ul style="list-style-type: none"> • (Written Plan) <ul style="list-style-type: none"> • Specifically prescribed IEP. 34 C.F.R. § 300.347. • including ITP (transition plan) with at least annual review 	<p>(Written Plan)</p> <p>No formally required document (but a plan has practical use for proof)</p> <ul style="list-style-type: none"> • no ITP requirement • no specified review requirement but presumably there is a reasonableness standard (review as needed). • 34 C.F.R. 104.36 (Compliance with IDEA is "one means of meeting" the procedural safeguard requirements).
<p>(Private Schools)</p> <p>Obligation to provide services to students in private schools: limited, see, 34 C.F.R. §§ 300.452 – 300.457</p>	<p>(Private Schools)</p> <p>No obligation to provide to students in private school. <i>Letter to Veir</i>, 20 IDELR 864 (OCR 1993).</p>
<p>(Home School)</p> <p>Limited. <i>Hooks v. Clark Co. Sch. Dist.</i>, 228 F.3d 1036 (9th Cir. 2000), cert. denied. 121 S. Ct. 1602 (2001); 64 Fed. Reg. 12, 601 (March 12, 1999).</p>	<p>(Home School)</p> <p>No obligation.</p>
<p>(Procedural Safeguards)</p> <p>34 C.F.R. § 300.504 – IEE; consent; notice; records; due process; placement; mediation; judicial review.</p>	<p>(Procedural Safeguards)</p> <p>34 C.F.R. § 104.36. Precise procedures are left to the school district – many use IDEA procedures.</p>

<p style="text-align: center;">(Team)</p> <p>IEP Team – Detailed criteria and specific roles, including parents, evaluation and IEP teams. <i>34 C.F.R. § 300.344</i>. For evaluation and reevaluation, the IDEA requires the IEP team members “and other qualified professionals, as appropriate.” <i>Id. § 300.534(a)</i>. The difference may be significant. <i>See, e.g., Elida Local Sch. Dist. Bd. Of Edu., 252 F. Supp.2d 476 (N.D. Oh. 2003)</i>.</p> <ul style="list-style-type: none"> • Parents • At least 1 reg. ed. Teacher (if child is or may be in regular education) • 1 special ed. Teacher or provider <ul style="list-style-type: none"> • LEA Rep. • Interpreter of evaluations • “other individuals” • the child (if appropriate) 	<p style="text-align: center;">(Team)</p> <p>504 Team; <i>34 C.F.R. § 104.35</i> – “Recipient” determines sources of information. Ensure the decision is made by a group of persons “knowledgeable about the child, the meaning of the evaluation data, and the placement options.”</p>
<p style="text-align: center;">(Consent)</p> <p>Consent for initial evaluation, and with limitations, for reevaluation. <i>Id. § 300.505</i>.</p> <p>Reevaluation at least every 3 years</p> <ul style="list-style-type: none"> • plus upon parent or teacher request of “if conditions warrant” <i>34 C.F.R. § 300.536(b)</i>. 	<p style="text-align: center;">(Consent)</p> <p>Consent for initial evaluation but only notice for reevaluation. <i>See, e.g., Letter to Durham, 27 IDELR 380 (OCR 1997); OCR Senior Staff Memorandum, 19 IDELR 892 (1992)</i>.</p> <p>Periodic reevaluation. <i>See, e.g. Garden City (NY) Union Free Sch. Dist., EHLR 353:327 (OCR 1989)</i>.</p> <ul style="list-style-type: none"> • plus on “a significant change in placement”. <i>See, e.g., OCR Staff Memorandum, EHLR 307:05 (OCR 1988). Compare Id., with 34 C.F.R. § 300.519.</i>
<p style="text-align: center;">(Stay Put)</p> <p>Clear and strong – with exceptions for drugs/weapons/violence. <i>34 C.F.R. § 300.514</i></p>	<p style="text-align: center;">(Stay Put)</p> <p>Not express – OCR says it is implicit. <i>Letter to Zirkel, 22 IDELR 667 (OCR 1995)</i>.</p>

<p>(Discipline)</p> <p>45 day unilateral transfer – drugs/weapons/violence.</p> <p>Expulsion – FAPE must be provided. 34 C.F.R. §§ 300.121(d) and 300.524 (a)</p>	<p>(Discipline)</p> <p>No authority.</p> <p>Expulsion – No FAPE obligation.</p>
<p>(Complaints/Compliance Reviews)</p> <p>State Ed. Agency (SEA)</p> <ul style="list-style-type: none"> • ultimate sanction – loss of IDEA funding. • precedents are rarely published. 	<p>(Complaints/Compliance Reviews)</p> <p>OCR</p> <ul style="list-style-type: none"> • ultimate sanction – loss of all federal funding. • precedents of OCR are published.
<p>(Disputes)</p> <ul style="list-style-type: none"> • Issues: Identification, evaluation, placement and FAPE. • detailed requirements for hearings. 34 C.F.R. §§ 300.505 - 300.511. • published precedents: common. • LEA must have a Special Ed Director. • Exhaustion required before court. • Statute of limitations – <i>Zipperer v. Sch. Bd of Seminole County</i>, (11th Circuit). 	<p>(Disputes)</p> <p>Issues are the same as IDEA</p> <ul style="list-style-type: none"> • skeletal requirement for hearings. 34 C.F.R. § 104.36: “an impartial hearing with an opportunity for participation by (parents and counsel).” • published “precedents”: rare • Recipient must have a “coordinator”. • Exhaustion not generally required before court in a pure § 504 case. • SOL probably the same in Florida as set forth in <i>Zipperer</i>.
<p>(Attorneys’ Fees)</p> <p>Prevailing student – may be reduced for unreasonable conduct. No multiplier, even if contingent.</p> <p>Possibly for SEA complaints. Compare <i>Luct v. Molalla Sch. Dist.</i>, 225 F.3d 1023 (9th Cir. 2000); with <i>Vultaggio v. Bd. Of Educ.</i>, 216 F. Supp. 2d 96 (E.D.N.Y. 2002).</p>	<p>(Attorneys’ Fees)</p> <p>Prevailing student – treated like general civil rights fee award under 42 U.S.C. 1988, or Title VII.</p> <p>No fees for OCR complaints.</p>

<p>(Money Damages)</p> <p>Generally, no.</p>	<p>(Money Damages)</p> <p>Yes – but must prove discriminatory intent.</p> <p>Punitives are not recoverable. <i>Barnes v. Gorman</i>, 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed. 2d 230 (2002).</p>
<p>(11TH Amendment Immunity)</p> <p>No.</p>	<p>(11TH Amendment Immunity)</p> <p>Yes – but only in a minority of jurisdictions. See, e.g., <i>A.W. v. Jersey City Pub.Sch.</i>, 2003 WL 21962952 (3d Cir. 2003); <i>Bd. of Educ. v. Kelly E.</i>, 207F.3d 931 [143 Ed.Law Rep. [70]] (7th Cir. 2000); <i>Gadsby v. Grasmick</i>, 109F.3d 940 [117 Ed.Law Rep. [581]] (4th Cir. 1997). For a comprehensive overview, see <i>Perry Zirkel</i>, <i>The Eleventh Amendment and Student Suits under the IDEA, § 504, and the ADA</i>, —Ed.Law Rep. [—] (2003)</p>

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III. STUDENT RECORDS AND CONFIDENTIALITY REQUIREMENTS

A. INTRODUCTION

IDEA Regulations. 34 C.F.R. §§ 300.560 - 300.576.

Parental consent required for release of personally identifiable information for a child under age 18. For the special situation of consent for a student with a disability between 18 and 21 years of age, see, *Mrs. C v. Wheaton*, 915 F.2d 69 (2nd Cir. 1990).

Definition of personally identifiable information in 34 C.F.R. § 99.4 (including student name, address and other information that would make the students identity easily traceable). Exceptions to the general rule of confidentiality are in § 99.31 (for

example, release of information to other school officials, including teachers, within the district as determined by the school district who had a legitimate educational interest).

B. FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT, 20 U.S.C. § 1232G.

1. Purpose. Purpose of FERPA is access to children's educational records for parents and guardians and the protection of those records from unauthorized persons. See, 120 Congressional Record, § 39,863 (Daily Edition Dec. 13, 1979) (Statement of Sponsoring Senator Buckley).

2. Discipline and Treatment Amendments. FERPA amended by §§ 951 and 952 of the Higher Education Amendments of 1998. Congress increased ability of post-secondary institutions to disclose discipline proceedings when the student conduct equates to certain specified violent or sex crimes and to disclose drug and alcohol problems to the parents under certain circumstances. See, Public Law No. 105-244, §§ 951(2) and 952 (1998).

Effective October 28, 2002, information regarding registered sex offenders is accessible to higher education institutions at which the offenders are enrolled or employed. The institutions are likewise permitted to disclose the information without violating FERPA. Public Law 106-386, § 1601(c)(d) (2000).

3. Scope. FERPA's coverage is broad. Public and private educational agencies, including K12 and post-secondary are covered if they receive any federal education funds (including federally-guaranteed student loans). 34 C.F.R. § 99.1(c)(2).

4. Records: Any recorded information in any medium that is directly related to a particular student and maintained on behalf of the educational institution (including maintained by an independent contractor). 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

Any medium qualifies as a record, including video tape/film/microfiche/computer file. 34 C.F.R. § 99.3.

Videotape of special ed student made without parents' consent is a record covered by FERPA, but its admission in due process hearing did not violate FERPA. *MR v. LincolnWood Board of Education*, 843 F. Supp. 1236 (N.D. Ill., 1994) *aff'd*, 56 F.3d 67 (7th Cir. 1995).

Records need not be kept in an official cumulative folder or maintained by central administration. FERPA covers records maintained in a nurse's office or in the principal's file.

Records received from contractors and outside parties such as a psychiatric evaluation of a student, or juvenile court records are records for purposes of FERPA. See, *Belanger v. Nashua N.H. School District*, 856 F. Supp. 40 (D.N.H. 1994) (Juvenile

court records kept in school attorney's file were FERPA records because they were maintained by the educational agency and used for education purposes).

Letter from parent to teacher is covered by FERPA and should not be released to the public when the parent becomes a school board candidate. *Warner v. St. Bernard Parish School Board*, 99 F. Supp. 2d, 748 (E.D. La. 2000). (The letter in this case concerned the parents' belief that the teacher's discussion of the Holocaust during the WWII era was propaganda and that her son should not be exposed to certain curricula materials that included the Holocaust).

C. DISCIPLINE RECORDS.

Modern view is that discipline records are covered by FERPA. In *U.S. v. The Miami University*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000), the court held discipline records are covered, and permanently enjoined the college from releasing. The regulations permit limited disclosure of the final results of certain types of disciplinary proceedings. (Thus indicating prohibition of disclosure except as expressly permitted). *Id.* at 1151.

D. CLASSROOM RECORDS.

Although the Tenth Circuit in *Falvo v. Owasso Independent School District*, 228 F.3d 1200 (10th Cir. 2000) found that the common practice of announcing grades and student identifying information in class were actions in violations of FERPA, the U.S. Supreme Court reversed that decision. The effect of the Supreme Court decision is that FERPA does not prohibit peer graded tests and papers in the classroom, nor does FERPA prohibit students grading each other's work in class or otherwise assisting the teacher in the classroom.

E. DOCUMENTS EXCLUDED AS EDUCATIONAL RECORDS.

1. Sole possession notes. Definition of sole possession notes is not addressed in the statute, but is covered in the regulations. 65 Fed. Reg. 41853 (34 C.F.R. § 99.3). Sole possession notes include notes taken by a counselor or a teacher who observes the student, as long as the notes are not shared with anyone except someone who temporarily takes over the class or substitutes for the person who made the note.

2. Treatment records of adult students.

3. Records of law enforcement units.

4. Employee records.

5. Alumni records.

6. Excluded documents. See, 20 U.S.C. §§ 1232g(a)(4)(B); 34 C.F.R. § 99.3; 34 C.F.R. § 99.10(f); 34 C.F.R. § 99.8.

F. TEST PROTOCOLS CONTAINING PERSONAL INFORMATION.

Concern is the integrity of the test as well as professional ethics standards. An OSEP letter indicates that test protocols need not be released under FERPA. See, Letter to MacDonald, 20 IDELR 1159 (OSEP 1993). However, a more recent letter from another regulatory body holds that if test protocols contain personally identifiable information, they are FERPA and must be released to a parent as part of the interpretation and explanation of records. See, *Fonda-Fultonville Central School District*, 31 IDELR, ¶ 149 (FPCO 1998). An Illinois court has similarly held in *Don K v. Board of Education*, 504 N.E.2d 797 (Ill. App. 1987) (requiring the release of Rorschach test data). To resolve the controversy and consistent with ethics, some school districts release protocols to a qualified and regulated professional of the parents' choosing (such as an independent evaluator in a special ed dispute) and require confidentiality and compliance from the professional.

G. CHALLENGES TO RECORDS.

Parents and adult students can challenge records they believe are inaccurate, misleading or an invasion of privacy.

If the school refuses to amend, notice to the parent of the right to an internal hearing (where the hearing officer may be a school district employee not directly interested in the outcome).

The school must respond within a reasonable time. The hearing must be held within a reasonable time of the request.

If parent prevails the school must amend and inform the parent in writing. If parent loses, the decision is final and there is no provision for an appeal. However, parent may place statement in the records explaining what the parent disagrees with. That statement is part of the records.

Generally, regarding challenge to records, see, 20 U.S.C. § 1232g(a)(2) and 34 C.F.R. § 99.20-99.22.

Notice to the parent prior to the hearing/full and fair opportunity to present evidence and to be represented by an attorney or another person at the expense of the parent. Hearing must result in a written decision based solely on the evidence at the hearing (including summary of the evidence and reasons for the decision).

H. ACCESS.

Parents have a right to access records within a reasonable time (no later than 45 days after the request). 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10. Records may not be destroyed while a request for access is pending. Consider the effect of Chapter 119 and Florida Public Records Act-All records created, kept, maintained or received by public schools and their employees are public records and may not be destroyed in any event except as scheduled with the permission of the state through the records retention office of the particular school district.

Compare the ability of the school to charge for copies of the records as between 34 C.F.R. §§ 99.10 and 99.11 with § 119.07, *Florida Statutes*. Extraordinary administrative or supervisory costs, or retrieval costs that are extraordinary may be charged as reasonable under Florida law. Federal law generally prohibits any fee for labor to search for and retrieve records. (Different scope of access between Florida law and FERPA).

9. Grades under FERPA.

Hearings are not generally available for purpose of challenging grades in a court proceeding. *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990) and *Lewin v. Medical College of Hampton Roads*, 931 F. Supp. 443 (E.D. Va. 1996). However, these court decisions do not prohibit an educational institution from granting an internal FERPA hearing to challenge the accuracy of the recording or calculation of grades.

I. CONSENT AND RELEASE.

Written, dated parental consent for the release of records is required. When the records are released pursuant to written consent, parents are entitled to a copy of such upon request. 34 C.F.R. § 99.30.

Exceptions to the parental consent requirement.

3. Disclosure to school officials. School district shall set out a written standard for legitimate educational reason for accessing records. 34 C.F.R. § 99.31(a)(1). School attorney may access student records under the exception for disclosure to school officials. *Aufox v. Board of Education*, 588 N.E. 2d 316 (Ill. 1992).
3. Disclosure to other schools. (Where student is enrolled or seeks to enroll) - reasonable attempt to provide advance notice unless parent initiates or consents to the disclosure. Schools may give written notice to parents in annual FERPA notice that student records are forwarded in this manner without any specific notification. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. § 99.34.
3. Directory information. (But not including class rosters, class schedules - apparently in response to concerns about privacy and

security). 65 Fed. Reg. 41,855. (Photographs that do not disclose a student's special education status do not violate FERPA - but if the photograph designates special ed status it would be a FERPA violation. Letter to San Augustine Independent School District (FPCO 7/21/99).

3. Student Email addresses and photographs. May be included as directory information pursuant to 2000 regulation amendments. 65 Fed. Reg. 41,852 (2000).
3. Disclosure to state and local officials.
- 4.
5. State Law. If the disclosure is allowed by state statute (*see, Florida Statute § 1002.22*)
3. AG. Disclosure to United States Attorney General for law enforcement purposes.
3. Subpoena. Disclosures in response to a subpoena issued by a court or agency (note that the Florida Statute only permits disclosure pursuant to a subpoena issued by a court).
3. Litigation. Disclosure in litigation involving the student.

J. ENFORCEMENT OF FERPA

1. No private right of action. *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989) *cert. denied*, 494 U.S. 1080 (1990).
2. FPCO. Complaint may be filed with Family Policy Compliance Office. No hearing - only an investigation by FPCO.
3. Remedy. FPCO may direct certain remedial actions in order to remedy violations such as removal of records. If there is a pattern of violations or an extreme violation, FPCO may initiate administrative proceedings to withdraw federal funds from a school or school district. 20 U.S.C. § 1232g(b)(2) and (f); 34 C.F.R. §§ 99.62-99.67. Research fails to identify a single case where FPCO attempted to withdraw federal funds because of FERPA violations.
4. Damages. Section 1983 lawsuit for damages. *Fay v. South Colonie Central School District*, 802 F.2d 21, 33-34 (2nd Cir. 1986).

K. SPECIAL REQUIREMENTS WITH REGARD TO SPECIAL EDUCATION STUDENTS UNDER IDEA.

1. Time for Disclosure. FERPA mandates access to records within a reasonable time up to 45 days. However, IDEA requires access “without unnecessary delay” and before any IEP meeting or special education hearing in order that parents may prepare for the meetings or hearings. Additionally, there is a five (5) day disclosure rule that all records a school district intends to use at a due process hearing must be disclosed five (5) days before the hearing - the parent has the same obligation of disclosure prior to the hearing.

2. Time for Maintenance. FERPA does not mandate any specific period of time during which records must be maintained (although records cannot be destroyed when a request for access to records is pending). Under IDEA it is necessary to maintain the records for at least three (3) years after the completion of the federally-funded activity. 20 U.S.C. § 1232f; 34 C.F.R. §§ 76.730 and 76.731. (Under Florida law, records must be retained pursuant to the records retention program established pursuant to Chapter 119, *Florida Statutes*, if longer than the three (3) year period of time under IDEA).

Parents must be informed when special education records are “no longer needed to provide educational services to the child.” 34 C.F.R. § 300.573(a). Schools are encouraged to notify parents that special ed records may be helpful for other purposes such as social security benefits.

3. Training. IDEA requires training and instruction regarding records confidentiality rules for “all persons collecting or using personally identifiable (special education student information.” 34 C.F.R. § 300.572(c).

4. Private Companies. FERPA applies to non-educational agencies as well as educational agencies if the vendor or agency has any responsibility for delivering specialized instruction or related services to a special ed student. 34 C.F.R. § 30.560(c).

5. Additional IDEA issues specific to student records:

a. Copy of the IEP must be given to the parents without charge. 34 C.F.R. § 300.345(f).

a. SEA may require disciplinary information to be transmitted with the student record to the same extent as with non-disabled students. 34 C.F.R. § 300.576.

a. Criminal referrals may be made without violation of FERPA. 20 U.S.C. § 1415(k)(9)(A).

a. Federal substance abuse laws may conflict with FERPA requirements. See, 42 U.S.C. § 290-ee; 42 C.F.R. § 2.14. If the older minor can seek substance abuse treatment and keep it confidential, even from parents, that conflicts with FERPA

requirements of parental access to educational records of minors. School-based personnel or contractors providing substance abuse services to special education students may generate records that are subject to FERPA. The same issue relates to outpatient mental health treatment provided without parental consent. See, 42 U.S.C. § 290-ee; 42 C.F.R. § 2.14.

- a. Tension between school districts operating in the Sunshine and Confidentiality rights.
 - i. OCR denied complaint based on FERPA violation and retaliation related to dispute regarding school district's release of personally identifiable information. School district released the information about a due process hearing to the local newspaper. *Broken Arrow Oklahoma Public Schools*, EHLR 352:168 (OCR 1985). See also, New York City School District, EHLR 507:414 (New York State Education Agency 1985).
 - i. Action for damages permitted when school officials give names of the parents in a due process hearing to a reporter for the local newspaper. Action under Section 1983 was allowed. *Sean R. v. Board of Education*, 795 F. Supp. 467 (D.Conn. 1993). The court held that Section 1983 provided a basis for a liability in money damages for violation of the confidentiality provisions in IDEA. 794 F. Supp. at 469-70.
 - i. FERPA provides basis for Section 1983 action in damages when school fails to disclose educational records to the plaintiff, the non-custodial parent. *Fay v. South Colonie Central School District*, 802 F.2d 21 (2nd Cir. 1986).
 - i. Another example of an action for damages being permitted for disclosure of personally identifiable information is *Doe v. Alfred*, 23 IDELR 623 (S.D. W.Va. 1995). School district suspended LD student for physical altercation with teacher. An action for damages against the school district was permitted where school officials released information regarding the incident to the local news media.
 - i. In some instances, the courts will let a jury decide whether information released to the public is personally identifiable and therefore a violation of FERPA that could give rise to a monetary award under Section 1983.

See, Doe v. Knox County Board of Education, 918 F. Supp. 181 (E.D. Ky. 1996). Agenda item in school board package merely reported that services were being purchased for a “12 year old female student with severe emotional and behavioral problems resulting primarily from a medical condition, hermaphroditism.” The court held that it was a jury issue whether such information was personally identifiable to the student or her parents. The decision also surveys the prior cases regarding whether a violation of FERPA may support an action for damages under Section 1983.

i. A different result regarding this circumstance, when school districts are required to publish information related to purchases and expenditures, is the decision in *Maynard v. Great Hoyt School District*, 876 F. Supp. 1104 (D. S.D. 1995). In *Maynard* the School District was required to document the cost for the residential out-of-state placement of an autistic child in its public meeting notices. This was a state law requirement when expenditures were paid. The cost to the small school district was so high, including not only tuition, room and board in a Connecticut school, but also travel expenses for periodic visits, that the school board was required to raise property taxes significantly for district residents. News coverage detailed these costs and identified the child by name and photograph. The family received harassing phone calls and other actions were committed against them and they perceived these attempts to force them to move out of the school district. The U.S. Department of Education found a FERPA violation but did not terminate federal funding to the school district. (S.D. Case No. 0418, 20 IDELR 105 (FPCO-Family Policy Compliance Office-1993). Family then sued the school board members, the reporter and one of the leading taxpayers complaining about the expenditures, in federal court. The court granted the defendants’ motion to dismiss for the following reasons:

(1) The reporter and taxpayer were dismissed because 1983 actions may be maintained only against the government representatives such as school officials.

(1) The remaining school official defendants were protected under qualified immunity. They acted pursuant to the state law requirement. The court

noted FPCO's decision, cited above. FPCO found that FERPA does not prohibit the application of sunshine laws such as the one involved in this South Dakota case. However, FPCO ruled that if the school board discloses personally identifiable information from education records without prior consent, there will be a FERPA violation that jeopardizes the receipt of federal funds.

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IV. DOAH DUE PROCESS

- A. 45 Day Rule.
 - 1. Expert preparation.
 - 1. Witness preparation.
- B. Issues for Consideration.
 - 1. Identification, evaluation, placement or FAPE.
 - 1. Keep the focus on permissible issues and the permissible timeframe for the litigation.
- C. Use of DOAH technology and procedures to deal with issues that might occur prior to hearing.
 - 1. Access to the school or school district employees.
 - 1. Issues related to due process hearing demand form used by the petitioner.
 - 1. Summary adjudication.
- D. There is no discovery! *See, S.T. v. School Board of Seminole County*, 783 So.2d 1231 (Fla. 5th DCA 2001) (at least until DOE amends the special ed due process rules in Chapter 6A-6 - which they haven't done since IDEA was amended in 1997!).
 - 1. Preparation of the case absent formal discovery.
 - 1. Cross examination of an opposing expert without the benefit of formal discovery.
- E. Procedures.

1. Final order by DOAH.
 1. Consideration of state court or federal court forum for judicial review.
 1. Stay put during pendency of judicial review.
 1. Scope of review - Review *de novo* subject to supplementation of the record. See, *School Board of Collier County v. KC*, 285 F.3d 977 (11th Cir. 2002).
 1. Tie-in between federal court and state court - current case, *Simon v. The Celebration Company* (and the School Board of Osceola County), 5th DCA Case No. 5DO2-2262 (Opinion filed December 5, 2003). (Consideration of 28 U.S.C. § 1367).
- F. Effective advocacy before DOAH.
1. Developing record.
 2. Persuasive arguments in the proposed final order.
- G. Attorneys' fees.
1. DOE prescribed form for initiating due process.
 1. Reasonableness of conduct during the course of the proceedings.
 1. *Zipperer v. School Board of Seminole County*, 111 F.3d 847 (11th Cir. 1997) - statute of limitations for action to enforce entitlement to fees.
 1. Limitations in IDEA on awards of fees.
 - a. IEP meetings.
 - a. Statutory restrictions.
 - a. Modification to the catalyst theory of settlements of IDEA disputes - *Buchannon Board and Care Home v. West Virginia Department of Health*, 532 U.S. 598 (2001).
- H. Standing.
1. Transfer of rights at age 18.

2. Interplay between IDEA and Florida Guardianship Law.
3. Discussion of OCSB/WR case.

- a. School Board involved in state guardianship proceeding.

- b. Incompetent's right to special hearing in state guardianship proceeding before commitment in a facility against his will.