

## Records Retention: What, How Long, and How?

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Among all the general school administration questions that NAIS gets every year, the most common relates to retaining records. Records can take up an incredible amount of physical space, triggering questions about whether schools must really keep all of those old admissions, student, personnel, and other dated files. The increasing use of electronic communications and storage systems has only accelerated these concerns, as technology can play to the worst of a school's instincts in that it allows schools to "save everything" without the use of much physical space.

This publication is designed to help schools approach their records keeping issues, from almost every aspect of school operations and administration. Some retention questions are easier to approach than others and the retention of certain types of documents may fall under federal or state law, or the law may be silent on the issue.

### Why Record Retention Matters

The maintenance and tracking of documents created by schools has always been important. Proper document retention is necessary in the event of a lawsuit, helps a school capture intellectual property in terms of courses and curriculum, and makes it easy for a school to know with reasonable certainty that it has all the documents it needs for any purpose. A well-

configured retention and organization system can also dramatically help a school regain physical or technological storage space. In addition, if a school decides to “go green” with its files, the impact on reducing the school’s carbon footprint can be substantial. While many schools and other businesses are more concerned about regulatory compliance in their retention systems, they should also be driven by business purpose and usefulness.

## Threat of Litigation and the Rise of E-Discovery

Technology makes records retention easier by allowing schools to store vast amounts of information—which also makes it harder since there can be so many more records to sort through. There are specific legal procedural rules that govern these records. Schools that have written destruction and retention policies can take advantage of safe harbors within the rules if a document inadvertently gets destroyed.

These federal rules went into effect in December 2006, with updates as recent as December 2015. The rules provide precise language, procedures, and guidance for the parties as they enter litigation in federal courts and begin the process by which both sides agree to share information about the case, also known as discovery. The process of sorting through electronic communications and poorly organized documents can be extremely time consuming and the potential cost to recover improperly deleted data is astronomical.

These rules impact parties involved in litigation. Early in the litigation, each party must disclose to the other the types and locations of documents that the party feels are and are not reasonably accessible as well as any potential preservation issues. This does not mean that the documents will remain inaccessible, just that the party will not initially retrieve these documents. Documents are not reasonably accessible if accessing them creates undue burden or cost. The concept of reasonable accessibility is not defined in the rules itself, but it has begun to develop through case law. For example, information may be considered inaccessible if it has been fragmented or damaged or is from a legacy IT system incompatible with current

technology.<sup>1</sup> However, a court may still order such information produced if good cause is shown for its necessity.

These discovery rules do not create absolute retention requirements. Schools must follow state and federal statutes and regulations that have specific requirements in this area. The general rule of thumb that has developed through case law and other law is that once an individual or entity is reasonably aware of the likelihood of litigation or investigation, the destruction of all potentially relating documents should stop.<sup>2</sup> As a practical matter, it is sometimes difficult to discern what documents will relate to the investigation or litigation, so schools should work with an attorney before continuing a destruction process that might impact information related to potential litigation. The updated rules do affirm that compliance with the rules “require(s) a commonsense determination of the issues based on a benchmark—reasonableness.”<sup>3</sup> Schools should work with legal counsel to determine when destruction must cease and err on the side of retaining documents longer if there is any question.

Most importantly, the rules do provide a safe harbor for inadvertent document losses that occur during the routine and good faith operations of a destruction policy. In looking at such a loss, the court is likely to consider what the parties have done to avoid the inadvertent destruction as well as how much the inadvertent loss was reliant upon a system already put in place and the related programming and systems.<sup>4</sup> The 2015 rule updates also clarified that the most serious sanctions—dismissal of the case, default judgment, or a jury instruction that allows the inference that the destroyed information was harmful to the destroying party—are limited to situations where one side intended to deprive the other side of the electronically stored information. This safe harbor is not helpful in all incidents, but there is enough guidance

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<sup>1</sup> Thomas Y. Allman, The “Two-Tiered” Approach to EDiscovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?, 14 RICH J.L. & TECH. 7, 12–13, available at <http://law.richmond.edu/jolt/v14i3/article7.pdf>.

<sup>2</sup> John E. Motylinski, E-Discovery Realpolitik: Why Rule 37(e) Must Embrace Sanctions, 2015 U. Ill. L. Rev. 1605,1616 (2015), available at <https://illinoislawreview.org/wp-content/ilr-content/articles/2015/4/Motylinski.pdf>.

<sup>3</sup> Philip J. Favro, The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments, 21 RICH. J.L. & TECH. 8,8–9 (2015), available at <http://jolt.richmond.edu/v21i3/article8.pdf>.

<sup>4</sup> *Id.* at 12.

here to strongly encourage all businesses to revisit their retention policies and ensure their electronic documents policies are coherent, implemented, and consistently followed.

## Federal Record Retention Requirements

Many key federal laws relevant to independent schools also have requirements to keep records for certain periods of time. Several of the most likely kinds of federal actions against schools are noted below. It is important to remember that there may also be additional record retention requirements on the same issues under state law.

### ***Americans with Disabilities Act (ADA)***

*Employment Records = One Year*

*Employment Discrimination Filing = Until Matter Is Resolved*

*Public Accommodations Records= No Set Time*

The ADA is a broad and comprehensive piece of legislation that aims to prohibit discrimination against individuals with disabilities and ensure participation in employment and educational opportunities. There are two sections of the ADA relevant to independent schools: Title I deals with employment matters and Title III applies to students and other matters of public accommodation. For further information on the ADA, please refer to this NAIS [publication](#).

When it comes to recordkeeping, it is important for schools to know they may have certain obligations to maintain records for a period of time. Additionally, maintaining such records can help protect schools and allow appropriate response in the case of litigation.

When it comes to Title I claims, schools must maintain application forms and other records relating to hiring, requests for reasonable accommodations, promotion, demotion, transfer, layoff/termination, pay and terms of compensation, and selection for training or apprenticeship for at least one year after making the record or taking an action, whichever is later.

Additionally, if an employee files a charge of discrimination or an action is otherwise brought by

the Equal Employment Opportunity Commission (EEOC), all related personnel records must be maintained until the matter reaches final resolution.<sup>5</sup>

The ADA does not explicitly require schools to maintain records relating to accommodating students' disabilities (Title III claims) for a specific period. However, the amount of time within which an individual must bring this type of claim under the ADA is usually the statute of limitations for personal injury claims under state law. These statutes can vary from two to six years depending on the state and schools should keep such records for at least that period or however long they keep similar student records, whichever is longer.

### ***Fair Labor Standards Act (FLSA)***

*Payroll = At Least Three Years*

*Records for Wage Computations = Two Years*

The FLSA sets a variety of labor requirements, including standards regarding overtime pay. Employers are required to keep certain types of records for nonexempt (i.e., eligible for overtime) employees, including basic employee data, workweek schedule, hours worked per week, pay rate, total overtime earnings for a workweek, and more. Schools must keep payroll records for at least three years. Records from which wage computations are based—such as time cards, wage rate tables, etc.—must be kept for two years.<sup>6</sup>

### ***Family Medical Leave Act (FMLA)***

*Records Related to FMLA Leave = Three Years*

The FMLA provides certain employees with up to 12 weeks of unpaid, job-protected leave. FMLA applies to employees who are at workplaces with at least 50 employees within 75 miles,

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<sup>5</sup> U.S. EEOC, Record Keeping Requirements, <https://www.eeoc.gov/employers/recordkeeping.cfm> (last visited June 15, 2018).

<sup>6</sup> Dep't of Labor, Wage and Hour Div. Fact Sheet #21: Recordkeeping Requirements Under the Fair Labor Standards Act (FLSA), <https://www.dol.gov/whd/regs/compliance/whdfs21.htm> (last updated July 2008).

have been at a workplace for at least 12 months, and have worked 1,250 hours in the 12 months prior to taking leave. Leave may be taken for reasons including the birth and care of a new child, time needed for adopting or fostering a child, caring for an immediate family member with a serious health condition, or a serious health condition of the employee. Schools must keep records related to FMLA leave for three years.<sup>7</sup>

### ***I-9 Forms***

*Forms = Three Years After Hiring or One Year After End of Relationship, Whichever Is Later*

Employers are required to submit the I-9 form for each employee to verify identity and authorization to work in the United States. Schools must retain these forms for three years after an employee is hired or one year after the employment relationship ends, whichever is later.<sup>8</sup>

### ***Employee Retirement Income Security Act (ERISA)***

ERISA sets standards for various types of retirement and insurance plans offered by employers. Employers must keep reporting and disclosure records such as forms filed with government agencies, plan descriptions, and participant benefit statements for six years. The requirements surrounding records with information that go to determining benefits for particular employees is a bit hazier. The law says that an employer should “maintain records with respect to each of its employees sufficient to determine the benefits due or which may become due to such employees,” however, a specific timeframe is not stated. Therefore, schools should err on the side of maintenance for these records.<sup>9</sup>

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<sup>7</sup> Dep’t of Labor, Health Benefits, Retirement Standards, and Workers Compensation: Family and Medical Leave, <https://www.hr.msu.edu/timoffleave/supportstaff/FMLARecord.htm> (last updated Dec. 2016).

<sup>8</sup> U.S. Citizenship and Immigration Serv., Retaining Form I-9, <https://www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-form-i-9> (last updated July 17, 2017).

<sup>9</sup> Kruggel Lawton CPA, What To Do With Old Employee Benefit Plan Records (Sept. 9, 2017), <http://www.klcpas.com/storing-ebp-records/>.

## **Tax**

### *Employment Tax Records = Four Years*

The IRS recommends employers retain records of employment taxes for at least four years. These records should include amounts and dates of wages, basic employee information (names, addresses, social security numbers, and occupations), dates of employment, and tax withholding allowance forms (such as the W-4).<sup>10</sup>

## **State Record Retention Requirements**

While federal law addresses document retention requirements in the areas shown above, states may also have requirements that cover the same category of documents. Essentially, states cannot lessen a federal requirement, but they may extend it. Also, states may have regulations where the federal government has none. For example, federal law does not require a school to keep a transcript for any length of time. However, many states require that schools keep student transcripts forever.

### *General Student Records*

Student records are governed by state law, making a comprehensive answer to how long to keep records difficult. Different types of information kept on each student, including health and other records, complicates the issue further. Because of this, many schools will assess the various statutes in play and create a system where the school keeps all the records for the longest period required to avoid regular sorting of the records.

Many states do have record maintenance laws and regulations that address a wide variety of student records that a school may keep. Depending on the state (and type of record), these

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<sup>10</sup> I.R.S., Employment Tax Recordkeeping, <https://www.irs.gov/businesses/small-businesses-self-employed/employment-tax-recordkeeping> (last updated Mar. 21, 2018).

laws may only apply to public schools. However, independent schools should look to these requirements for guidance as they may cover the wide and detailed array of records a school is likely to have in its possession.<sup>11</sup> For example, while some states look at the different types of records, others divide student records into categories, such as a permanent record and a temporary record. The permanent record may include basic identifying information, academic transcripts, and attendance records. Long-term suspensions, expulsions, and health records may also be included. Often, the permanent record must be kept indefinitely, although some states do set a retention time, such as 60 to 100 years.

The temporary record includes most other student information and schools may be required to keep such records for a period of three to six years. Information that may fall into a temporary record includes other family background information, information regarding extracurricular activities, teacher anecdotal records, disciplinary information, psychological evaluations, health information, and more. This issue varies from state to state and schools should work with a professional familiar with the state's document retention laws in their jurisdiction for specific guidance. Frequently, state departments of education and agencies dedicated to record maintenance have helpful resources.

### *Student Immunization Records*

One area where independent schools may be included in specific state record retention requirements is student immunization records. State laws often require an immunization record, or exceptions to the requirements, be presented before a child can attend school. Some states consider that immunization record to be part of the student's permanent record and that information must be retained as such.<sup>12</sup>

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<sup>11</sup> See Wisconsin Dep't of Pub. Instruction, Wisconsin Records Retention Schedule for School Districts, <http://publicrecordsboard.wi.gov/docview.asp?docid=15892&locid=165> (last updated June 2015); North Carolina Administration, Private School FAQs, <https://ncadmin.nc.gov/citizens/private-school/private-school-faqs#records/transcripts,-student> (last visited June 15, 2018).

<sup>12</sup> See Arizona Dep't of Health Serv. Arizona Immunization Handbook, <http://azdhs.gov/documents/preparedness/epidemiology-disease-control/immunization/school-childcare/school-childcare-immunization-guide.pdf> (last updated July 2017); Mont. Code Ann. §20-5-403 (2015).

## Statutes of Limitations on Actions

Of course, another important side of record keeping is having the information you need when you need it. Often, schools need information only if someone is looking for it. Generally, this is when either the student would like a copy, or the school would like a copy because it needs to look back at its records. For the latter, a school may want this information because it is being sued for whatever actions it took at the time of an incident. Schools may generally only be sued for actions that are within the statute of limitations. This is a statute that specifically delineates how long after an event occurs that someone may be sued. States limit these periods by statute so that eventually the threat of a suit will end. The statute of limitations may vary for different types of claims, such as claims of bodily injury, property damage, unwritten contracts, and written contracts. [This link](#) provides an overview of state statutes of limitations for different kinds of actions. Because various statutes of limitations exist in each state, this chart is not intended to provide a complete overview of statutory limitations and may not reflect subsequent changes in the law. Schools must work with legal counsel to ensure that the proper statutes of limitation are considered when designing a records retention program.

### *Expanding the Statute of Limitations*

On top of these statutes of limitation, schools must also look at other potential laws that might affect a claim against the school. Many states have extended the statute of limitations for students under the age of 18. These laws are often referred to as “infancy tolling” statutes. These statutes delay the statute of limitations from starting to run until the student reaches majority age. Often these statutes provide for suit until the minor reaches majority age plus the state statute of limitations. For example, a student falls down a flight of stairs because the janitor left a bucket of water and a broom in the middle of the third step. The student graduates two years later at the age of 18. The student files a lawsuit against the school two years after that. In New York, the personal injury statute of limitations is three years. However, with the infancy tolling statute the student need not bring a lawsuit until three years after they turn majority age. Each school should check with its attorney to determine the status of such a law in its state.

### *Student Claims: Sexual Abuse Records*

A special subcategory in the infancy tolling statute area involves any kind of sexual abuse claim. Almost every state in the country has some tolling provision for these kinds of claims. [This website](#) contains information regarding state civil statutes of limitations in cases of child sexual abuse and the circumstances upon which the statute of limitations is extended. The records relating to these issues should be fully complete and held in the utmost confidence for however long is required. Schools should be aware that civil and criminal statutes in this area have been shifting rapidly, so they should follow how their state laws may be changing in this area.

## Document Destruction

The most exciting thing about document retention is the destruction of the documents that no longer need to be kept. Although a prolonged process, freeing up storage rooms full of generations of admissions files can give back a lot of space to a school. However, schools need to establish a defined document destruction routine so the destruction takes place the same way, at the same time, every time. Confidential documents need to be shredded or burned, either by appropriate school personnel or an outside company that specializes in such work.

Each time large groups of documents are on the docket to be destroyed, a point person who is aware of all document destruction should be notified. This is particularly important considering the new document destruction law enacted through the Sarbanes-Oxley Act. Section 1519 of this act makes it a crime to knowingly destroy a document with the intent to obstruct or influence “the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States... or in relation to or contemplation of any such matter or case.” This is an extremely broad statute that can trigger a variety of concerns relating to what may seem an innocuous document destruction issue. Generally, the point person to whom future document destructions are reported should be in a position to know if there are any potential issues on the horizon. For example, if the school is aware of a potential EEOC complaint and some personnel-related documents are up for destruction, the point

person can stop the destruction completely or sort through the documents to ensure that relevant ones are not destroyed. If a question comes up, a court will want to know exactly what measures were used to retain the appropriate records.

### *Electronic Records*

When it comes to electronic documents, the general rule of thumb is however long something would be kept in paper is how long it should be kept electronically. This means that an email relating to an employment issue should be retained for however long a similar paper document on the same issue should be retained. The easiest way to do this may be either printing the email and putting it in the paper file or creating a document out of the email and putting that document in the appropriate electronic file. Often email systems have a backup process that ensures communications are not truly deleted for some time. In most cases the sent emails are most easily recalled. However, these systems do not back up these communications indefinitely and a conscious decision should be made about how long the documents are retrievable. Schools must then train all staff involved in electronic communications either to store the information electronically or produce paper copies of particularly sensitive or necessary communications. While daunting, most schools will find the emails being sent are largely administrative in nature and do not need to be retained for any reason or for any specific length of time. An end of the school year purge is often appropriate. Overall, planning is paramount. The process must be well considered within the context of the larger strategy and approach, automated, and followed by the users.

Many schools question if an electronic copy of a record is sufficient for retention. In most states it is. This means that many school records can be moved to an electronic system. However, schools should bear in mind that records may need to be kept in a format that cannot be altered to ensure the records are accurately maintained.

## Creating or Updating a Records Retention System

There are many things to consider when creating or updating a records retention system. Below are steps and items to guide your process:

- Create Your Document Team
  - This team will almost certainly include your technology director, business officer, head of school, a faculty supervisor (dean of faculty, assistant head, etc.), and any other keeper of large bodies of records in your school (director of development, school nurse, etc.).
  - This team should review the overall retention plan and their appropriate areas, as well as how the school might use technology effectively in these areas.
- Check with Your School's Attorney Regarding:
  - Statute of limitations for various records in your state;
  - Student records requirements for your state; and
  - A general overview of your eventual document retention and destruction plan.
- Check with Your School's Accountant / Auditor
  - These individuals are priceless when it comes to input on document retention. They may have helpful input on both the front- and backend of your planning.
- Determine Your Goals
  - Do you aim to regain space and move to an electronic system?
  - Each school needs to make its own determination of what that will look like and require in terms of both technological needs and the requisite steps to get the entire staff on board.
  - Do you just want to cut down on the amount of records you keep?
  - Whichever direction the school is moving, your team must determine the goal, have a plan for moving toward that goal, and ensure a reasonably smooth process along the way.
- Make a List of the Documents Routinely Created
  - What types of documents does each office / department create?
  - Are they electronic or paper?
  - How long are they currently kept?

- How long are electronic documents (both actual e-files and email) maintained, and how long is it practical to do so in various formats?
- How long are they actually needed?
- Name a Point Person / Office for Document Destruction Notification
  - Create a process that flows through this person or office always so they know what is being destroyed and when.
  - Identify the individual in charge of the electronic archiving and destruction of documents so they can easily stop the process as needed.
- Train Staff
  - Implementing new policies and systems does not happen overnight, and document retention is not the most scintillating topic, so this may take more time. Getting everyone on board early will help the process.
  - When training your staff, the following points may be helpful:
    1. Be clear about the documents you expect teachers to keep.
      - a. How long should routine communications with students, parents, and/or guardians be kept?
      - b. How should emails be kept and what kinds should be kept?
      - c. Should they be copied into a separate folder? Sometimes this is easiest as it allows for teachers to continue to delete emails and keep their inboxes relatively clean.
    2. Be clear about the documents you expect supervisors to keep.
 

Electronic communications can help with creating a paper trail—both positive and negative—in the world of employment law.
    3. Be clear about the files that should be kept regarding “official communications.” Frequently, standard communications are not tracked as well when the communications move to the electronic venue.
    4. Be clear about what kinds of incidents warrant keeping all communications relating to the incident. This is an area where a

school's attorney can be most helpful as they will often handle the matter. In general, these issues are triggered early, but the casualness of electronic communications encourages continuation of written communications that should probably be had in a vocal conversation.

The typical areas where these topics arise are:

- a. Student discipline or academic concerns;
  - b. Student complaints, particularly those related to handbook or legally protected activities;
  - c. Student injuries / health-related events;
  - d. Parental issues;
  - e. Employment concerns;
  - f. Employment injuries / health-related events; and
  - g. Employee complaints, concerns.
- Routinely review the time tables and practices in effect.
    - Schools should review both their retention schedules and processes every few years to ensure that nothing substantial has changed that would impact the way records are handled. Send regular reminders to ensure everyone involved is using the system as designed.

## Sample Record Retention Schedule

Many schools seek the ultimate in records retention guidelines on all the other documents that arise as well. Unfortunately, one standard is unlikely to fill in all the potential holes in this area. However, the following table—which is based on NAIS's records retention system—should get you started. NAIS's records retention system was developed based on guidance issued by the IRS and other agencies as well as laws and regulations implemented by the District of Columbia. Some of these time periods are longer than those required by law since individual decisions were made as to the usefulness of maintaining these files longer than required. Additionally, some documents commonly found in schools are not included in this list, but many schools find

these pieces of information should be kept either permanently or for six or seven years (usually the upper end of the statute of limitations).

| <b>Records Retention Schedule</b>   |                  |   |                             |
|---|------------------|---|-----------------------------|
| <b>Record</b>   | <b>Retention</b> | <b>Record</b>   | <b>Retention</b>            |
| Accident reports/claims (settled cases)   | 7 Years          | Financial Statements (interim/internal)   | Permanently                 |
| Accounts receivable and payable - ledgers and schedules   | 7 Years          | General journal or ledger   | Permanently                 |
| Annual reports  | Permanently      | Government reports  | 6 Years                     |
| Articles of incorporation   | Permanently      | Income tax returns and cancelled checks (federal, state, and local)   | Permanently                 |
| Auditors' reports/work papers   | Permanently      | Insurance policies (expired)  | Permanently                 |
| Authorization and appropriations for expenditures   | 3 Years          | Insurance policies (current) - accident reports, claims, etc.   | Permanently                 |
| Bank reconciliations / statements   | 7 Years          | Inventory list  | Permanently                 |
| Bank deposit slips  | 3 Years          | Invoices (to customers, from vendors)   | 7 Years                     |
| Budgets   | 3 Years          | Journals  | Permanently                 |
| Cash disbursement journals  | Permanently      | Leases  | 10 Years                    |
| Cash receipts journal   | Permanently      | Manuscripts   | 2 Years                     |
| Chart of accounts   | Permanently      | Medical records   | 30 Years                    |
| Checks (cancelled), general   | 7 Years          | Membership records  | 3 Years                     |
| Checks (cancelled) for important payments (i.e., taxes, purchases of property, special contracts, etc.). Checks should be filed with the papers pertaining to the underlying transaction. | Permanently      | Minutes (board and committees with board authority)   | Permanently                 |
|   |                  | Minutes (committees without board authority)  | 5 Years                     |
| Claims and Litigation files   | 10 Years         | Occupational inquiry and illness Records  | 5 Years                     |
| Constitution and by-laws  | Permanently      | Patents, copyrights, licenses, agreements, bills of sale, permits, etc.   | 3 Years or Life of Document |
| Continuing education documents  | 2 Years          | Payroll records and summaries (including payment to pensioners)   | 7 Years                     |
| Contracts (general)   | 10 Years         | Payroll tax returns   | 4 Years                     |
| Contracts (government)  | 7 Years          | Pension/ profit-sharing plans   | Permanently                 |
| Contracts (sales), UCC  | 7 Years          | Personnel records (terminated)  | 7 Years                     |
| Contracts and leases still in effect  | Permanently      | Petty cash vouchers   | 3 Years                     |
| Copyright, patent, and trademark registrations  | Permanently      | Property records, including costs, depreciation reserves, yearend trail balances, depreciation schedules, blueprints, and plans | Permanently                 |

|   |             |   |             |
|---|-------------|---|-------------|
| Correspondence (general)  | 3 Years     | Publications  | Permanently |
| Correspondence (legal and important matters)  | Permanently | Purchases, including title abstracts, opinions, insurance policies, sales agreements, mortgages, and deeds        | 20 Years    |
| Correspondence (routine with customers and/or vendors)  | 3 Years     | Purchase orders - purchasing dept. copy   | 7 years     |
| Deeds, mortgages, and bills of sale   | Permanently | Retirement and pension records  | Permanently |
| Depreciation schedules  | Permanently | Rosters   | Permanently |
| Duplicate deposit slips   | 3 Years     | Sales and used tax returns  | 10 Years    |
| Employee expense reports  | 3 Years     | Sales records   | 7 Years     |
| Employee payroll records (W-2, W-4, annual earnings, etc.)                                    | 6 Years     | Subsidiary ledgers  | 7 Years     |
| Employee pension records, including service, eligibility, personal information, pensions paid | 6 Years     | Tax returns and worksheets, revenue agents, and other documents relating to determination of income tax liability | Permanently |
| Employment applications   | 4 Years     | Time books/cards  | 7 Years     |
| Employee contracts  | 10 Years    | Trademark registrations and copyrights  | Permanently |
| Expense analyses/expense distribution schedule  | 7 Years     | Training manuals  | Permanently |
| Financial statements (annual)   | Permanently | Voucher register and schedules  | 7 Years     |
|   |             | Withholding tax statements  | 7 Years     |

## Education Records FAQs

Many schools have the same questions when it comes to record retention and deletion. Here are some FAQs to help you navigate the tough issues.

*What do I do with all the education records once the students have graduated?*

Many schools are faced with rooms upon rooms—if not entire buildings—filled with student records. Some schools discover these files are filled with everything from phone messages to transcripts to copies of old English papers. Generally, a school is only required to save transcripts and attendance records of former students, although there may be reason to keep more of the file for a set period of time after the student leaves. These requirements are set by state law. Most states do not define what a transcript must contain. Schools are probably best served by considering transcripts as what will serve the student best when they need the

information. This usually includes grades, honor roll information, and other distinctions the student may have achieved. Permanently retaining information beyond these basic pieces of information in terms of the base education record is up to the school, even if there are short-term requirements.

Schools should bear in mind the different kinds of lawsuits that may be brought against a school. For this reason, many schools save the entire education record for the length of the state statute of limitations and then pare down file to the basics after that time. For example, if your state has an infancy tolling statute that allows a student to bring a lawsuit for up to three years after they turn 18, you will want your document destruction process to maintain those files until that class has collectively reached 21 years old. If there is something in a student's file that would require longer retention (a sexual abuse allegation or something similar), the school may want to retain the pertinent documents for a longer period. Consult with an attorney to setting these requirements as attorneys can shed light on what kinds of documents may be helpful.

*I have a room filled with old applicant records of every kind. They date back to 1963. Can I destroy them?*

Admissions files present a conundrum at schools. Often the process rests at the heart of the matter, so look at some variations on the theme.

*Student applies, gets in, and accepts his place at the school.*

In these situations, many schools want to know what to keep in the admissions office, what to pass on to the regular file, and what to destroy. Most of this is up to the school, but there are a variety of options.

- School gives teachers of the new student a chance to review the application and then destroy all but the pertinent, current information. The documents destroyed include the recommendations, essays, etc.

- School does not let the teachers view the file and only passes on the pertinent information on the theory that the student deserves an entirely fresh start at the school. The rest of the information is destroyed.
- School keeps the entire file and maintains all the information in the student's official file.
- School keeps everything in the admissions office until someone comes digging.

*Student applies, gets in, and goes someplace else.*

*OR*

*Student applies, does not get in, and goes someplace else.*

In these situations schools may keep the entire file, destroy the entire file, destroy parts of the file, or keep pertinent information in the database in the event the student reapplies.

*Which among these is the right approach?*

Most state laws do not absolutely require that a school retain the entire admissions file for all candidates. From a school perspective, it depends on the school's culture and how much storage space may be available. From a legal perspective, the school needs to consider where legal issues may arise. Generally, these are from students denied admission. When this happens, there are usually two basic pressure points: Was there any discrimination of any kind or did the teacher recommendations received by the school impact the student's candidacy? Schools that decide to immediately destroy the application records must have some way of illustrating that their process is nondiscriminatory. Examples include having admissions policies in place addressing the consideration of various characteristics; having a summary profile of each class of applicants as well as the admitted applicants and the attending class; and other similar steps. If a school decides to destroy admissions files before the end of the statute of limitations for such claims, it should work with legal counsel to determine what sorts of documents to have in place to help the school in the event of such a litigation threat.

On the reference front, many schools prefer not to be in a position to have to turn over teacher recommendations. For this reason, most schools have a parent waiver line on the reference form itself. However, in the event of a subpoena, these forms still must be provided.

*What about discipline hearing records and results?*

Schools make a variety of policy decisions relating to disciplinary records in terms of disclosure to other schools. However, a more complicated question often arises about what to do with the records of the process itself. Many schools have separate discipline files relating to the event, the process, and the outcome. As a practical matter, once the statute of limitations ends, what should you do with the records? Most schools will keep these documents indefinitely in some capacity or another (e.g., maintaining an anonymous summation of the incident for reference purposes). This is helpful in that it provides the school with a history of its own precedent in handling disciplinary issues. Whether the school keeps the entire record permanently, including the names of all involved, or creates a summary or redacted version of the same is largely up to the school.

*I just got a subpoena for all information relating to a student's file. The student graduated five years ago and I don't know what this is for. What should I send?*

Most subpoenas are written very broadly: "All documents, memoranda, or other materials in hard copy or electronic format that mention the individual in question in any capacity." Unless there is a specific privilege that would enable the school to keep the document from being subpoenaed (e.g., a psychiatrist's notes from an interview with the student), the school must turn them over. Some schools make the mistake of thinking the subpoena can only apply to the student's "official" file. This is not the case. Regardless of where the information is kept (a teacher's desk, the admission office, the dean's office, a third party, etc.), all the relevant documents must be provided unless there is a legitimate legal reason for not providing them.

For example, if the school is sued for negligently failing to intercede in a bullying or harassment scenario, even if the school does not have a record of the electronic communications that are a

part of the action, the party bringing the action may subpoena anyone who might have the records. In such an action, the cell phone company providing service may be subpoenaed for copies of text messages, host sites where messages were posted may be subpoenaed, and any number of other third-party locations. Further, schools should make students and staff aware that they personally may receive a subpoena for any documents or data they have in their possession, including old school files and personal notes. Any school that receives a subpoena should contact legal counsel before responding.

*What if there is a pencil note on one of the documents, could I just erase it? It's my note.*

No. Any destruction or alteration of any of the documents in question is against the law.

*Can the cookies and other evidence of computer use be subpoenaed?*

Yes. Any data trails in a computer or other electronic device may be subpoenaed.

*Do we have an obligation to save all instant message exchanges?*

Instant message exchanges should be addressed in the school's retention policy if the school does handle this data. Again, the content of the data becomes part of the larger retention question. However, the school generally has no absolute obligation to keep all instant messages for any set period.

*Does NAIS have any model records retention policies?*

Yes, Ravenscroft School (NC) generously gave permission for NAIS to post its records retention document. This document is on the NAIS website and may be found by typing in either "Ravenscroft" or "records retention" in the search engine.

## Conclusion

Schools are record intensive places. With increasing work collecting data on student progress, profiles, and other information, those records won't diminish any time soon. Retention policies

and practices, as well as the training that goes with them, can help a school bring reasonable order to the information it maintains.

*N.B. This article is provided for general educational purposes only. Schools should work with legal counsel when drafting records retention guidelines and approaching fact-specific scenarios.*