



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INNOVATION AND IMPROVEMENT

Dr. Kay Baker
Superintendent
Salem-Keizer School District 24J
2450 Lancaster Drive NE
PO Box 12024
Salem, Oregon 97309

DEC 28 2005

Complaint No. 1251
Family Educational Rights
and Privacy Act

Dear Dr. Baker:

This is to inform Salem-Keizer School District 24J (District) of our findings in the referenced complaint. [REDACTED] (Parent) filed a complaint alleging that the District violated her right under the Family Educational Rights and Privacy Act (FERPA) to inspect and review the education records of her daughter, [REDACTED] (Student), and failed to notify her of her right under FERPA to seek amendment of those records on the grounds that they did not include certain correspondence. As noted in our August 17, 2004, letter, the Parent elected to file a complaint with this Office under FERPA rather than use the State complaint procedures for alleged violations of Part B of the Individuals with Disabilities Education Improvement Act (IDEA) on the grounds that the Oregon Department of Education (ODE) interprets the Part B confidentiality of information regulations in a manner that violates FERPA.

Allegation #1

The Parent alleged that on April 13 and 14, 2004, she asked [REDACTED] principal of [REDACTED] School [REDACTED] Elementary School, for a copy of the Student's

special education records which are kept in the personal files of the teachers. This includes educational records which document speech and language pathology services, specifically what activities did my daughter do each day, how did she respond, what did the clinician document as to my daughter's response, further areas to work on, what she has mastered, and all observations made during her SLP [Speech/Language Pathology] sessions.

Additionally any such records which exist for her reading resource are also requested.

The Parent indicated that she needed these records prior to an IEP (Individualized Education Program) meeting scheduled for the next day, April 15, so that she could contribute equally to the development of goals and objectives for the IEP. According to the Parent's April 22, 2004, letter to S [redacted] W [redacted], dispute resolution coordinator and records facilitator, the District refused to allow the Parent to view the records at the April 15, 2004, IEP meeting. The Parent's April 22, 2004, letter indicates that Ms. W [redacted] called the Parent on or about April 20 for clarification of the request, and the Parent explained that she wanted access to –

logs which indicate what "activities did my daughter do each day, how did she respond, what did the clinician document as to my daughter's response, further areas to work on, what she has mastered, and all observations made during her SLP sessions. Additionally any such records which exist for her reading resource are also requested."

The Parent explained further that Principal [redacted] did not have the requested records available at the April 15 IEP meeting and that when the Parent asked Principal [redacted] whether copies had ever been made, Principal [redacted] "did not answer me directly with a yes or no." The Parent then reiterated to Ms. W [redacted] her need to have these records for the next IEP meeting, scheduled for April 30, 2004.

The Parent wrote Ms. W [redacted] a second letter on April 22, 2004, asking for a "complete viewing of my daughter's file," including "her actual Test of Language Development [TOLD] and the manual to the test which gives the actual test question, to allow me to understand the responses which my daughter made." (Emphasis in original letter.) The Parent also asked for access to tests administered to her daughter the previous fall by Ms. M [redacted], School [redacted] LRC teacher, along with a copy of the complete test scores, including subcategories. The Parent indicated that she had asked Ms. M [redacted] for this information at their last IEP meeting on April 15, 2004.

The Parent provided evidence that R [redacted] G [redacted], director of student services for the District, responded to the Parent in letter dated April 22, 2004. Ms. G [redacted]'s letter states that she had received the Parent's April 14, 2004, letter requesting a records review and that the records would be assembled and made available to the Parent on April 28, 2004, at 10:30 a.m. for one hour, at Student Services offices in Salem, and that Ms. W [redacted] would be present to facilitate the review.

The Parent sent Ms. W [redacted] and Ms. G [redacted] a letter on April 28, 2004, indicating that she was not provided access to the Student's "speech logs" at the meeting that day, as requested, and that Ms. W [redacted] said the reason was that they had not come over from the school. The Parent alleged that later that day she spoke by telephone with Ms. G [redacted], who stated that under board policy "speech logs" are considered "sole possession documents" and, therefore, the District would not allow the Parent to review or obtain a copy of them. According to the Parent, Ms. G [redacted] also stated that the Parent would not be allowed access to the TOLD test manual because it is a copyrighted item and because the Parent would not be able to interpret it anyway. On May 3, 2004, the Parent sent Ms. G [redacted] a letter summarizing these events.

In regard to these allegations, our August 17, 2005, letter asked the District to identify any decisions by the State Superintendent of Public Instruction on which the District may have relied in refusing to provide access to these records as requested by the Parent.

Mr. [redacted] C [redacted] responded on behalf of the District by letter dated September 20, 2005. In that letter Mr. C [redacted] stated that the District responded to the Parent's April 22, 2004, request for access to the Student's education records six days later on "April 28, 2003" [sic]. (Mr. C [redacted] did not refer to the Parent's April 14, 2004, request for access to the same records.) Mr. C [redacted] stated that on April 28, the Parent reviewed "all of the educational records maintained by the school district relating to services provided to her daughter" except for "sole possession documents in the possession of a speech-language therapist which were used only as a personal memory aid and were not accessible or revealed to any person." Mr. C [redacted] argued that "[t]he speech clinician's notes are not educational records as defined by 34 CFR § 99.3, as they are mere memory aids to the completion by the speech clinician of the progress records for the IEP" and, further, that they are not "education records under the U.S. Supreme Court's decision in Owasso Independent School District v. Falvo because they are "preparatory to the speech clinician recording progress reports on the IEP or periodic progress reports."

In regard to the Parent's request for access to the Student's actual answers to the TOLD and the test manual itself, Mr. C [redacted] stated that the Parent was provided with the score and explanation at IEP meetings on December 16, 2003, and April 30, 2004. Further, according to Mr. C [redacted]'s letter, the Parent "was provided with the testing results, including the test of language development (TOLD) in the IEP documents. In the communication annual goal [sic], a present level of educational performance was stated in writing and discussed as part of the individual education program."

In support of the District's assertion that the December 16, 2003, and April 30, 2004, IEP documents responded adequately to the Parent's request for access to the Student's actual TOLD answers and the test manual itself, Mr. C [redacted] provided an excerpt from the December 16, 2003, draft IEP and the April 30, 2004, IEP, which describe certain tests that had been administered to the Student, including the clinical evaluation of language fundamentals-revised (CELF-R), administered by Private Evaluator [redacted] in October 2003; Salem-Keizer language assessments administered May 2003; Test of Language Development-Primary: Third Edition; and the WISC-III. The excerpt then suggests certain activities from which the Student could benefit, based on these test results. It also describes a clinician's evaluation procedures, indicating that the clinician "began with categorization tasks, starting with objects, then progressing to pictures. [The Student] had a high success rate with categorizing with objects and then pictures" Mr. C [redacted] included with the District's response "a copy of the IEP prepared and objected to by the parent at the April 30, 2004 IEP meeting, together with the attachment of the December 16, 2003, IEP," noting that "both have the student's TOLD results in the Communication annual goal present level of performance [sic]."

In regard to our request for any decisions by the State Superintendent of Public Instruction on which the District has relied for denying the Parent access to the clinician's daily speech logs and other records relating to the Student's daily progress, and denying access to the Student's actual TOLD results and test manual, Mr. C [redacted] cited only the following provision in Oregon Administrative Rule 581-021-0270:

Rights of Inspection and Review of Education Records

* * *

(4) If a parent or eligible student so requests, the educational agency or institution shall give the parent or eligible student a copy of the student's educational records pursuant to ORS 192-440, **except that no copy of test protocols, test questions and answers, and other documents described in ORS 192-501(4), shall be provided unless authorized by federal law.**

(Emphasis supplied.) The District did not cite any State authority for its decisions regarding the clinician's "sole possession" records.

Finding

The District has violated FERPA by refusing to allow the Parent to inspect and review 1) the Student's "speech logs" and other records documenting daily reading and speech/language pathology services provided by clinicians to the Student along with the clinicians' observations regarding the Student's daily progress; and 2) the Student's actual TOLD results and the TOLD manual that provides the actual test questions, as well as similar records regarding tests administered to the Student during the fall of 2003 by Ms. M [redacted], [redacted] School LRC teacher, all as requested by the Parent in letters dated April 14 and 22, 2004.

FERPA provides that an educational agency or institution must comply with a parent's request for access to education records within a reasonable period of time, but not more than 45 days after it has received the request. 34 CFR § 99.10(b). While an agency or institution is not required under FERPA to maintain any records on a student, destruction of education records is prohibited so long as there is an outstanding request to inspect and review the records. 34 CFR § 99.10(e).

The term "education records" is defined in FERPA as those records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 34 CFR § 99.3. Under FERPA, "record" is defined as "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 CFR § 99.3. The explanation of Congress itself when it created the definition of "education records" in December 1974 remains crucial to understanding the meaning of this term:

An individual should be able to know, review, and challenge all information – with certain limited exceptions – that an institution keeps on him, particularly

when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution.

Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21487, S21488 (daily ed. Dec. 13, 1974). That is, school officials may not unilaterally remove records from the protections of FERPA through administrative decisions about where certain records are maintained or how they are categorized.

Excluded from the definition of “education records” are:

Records that are kept in the sole possession of the maker, *are used only as a personal memory aid*, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

34 CFR § 99.3, “Education records” (b)(1)(emphasis added). The provision regarding use of a record “only as a personal memory aid” was added in the Final Rule issued on July 6, 2000 (65 Fed. Reg. 41852, 41855), where the Department explained that in the NPRM “we sought to clarify that ‘sole possession records’ *do not include evaluations of student conduct or performance.*” (Emphasis added.) Some of the proposed requirements in the NPRM were confusing to commenters and, therefore, not adopted in the Final Rule. Instead, the Department added the language about use of these records only as “memory aids” and explained:

The main purpose of this exception to the definition of “education records” is to allow school officials to keep personal notes private. For example, a teacher or counselor who observes a student and takes a note to remind himself or herself of the student’s behavior has created a sole possession record, so long as he or she does not share the note with anyone else.

Notes about students prepared by school officials (such as teachers, speech-language therapists, clinicians, etc.) are not considered “personal” under this provision merely because they are kept in the school official’s office or desk drawer, have not been shared with anyone, or are used to prepare “official” or “final” reports. Rather, in order to qualify for this exception, the notes or other record must be kept in the sole possession of the maker (except a temporary substitute) *and* be used only as a *personal memory aid*. That is, the exception for “sole possession records” is intended to protect “personal notes” used to jog a teacher’s memory about a particular matter or event, such as a note reminding the teacher to call a parent or that the student was disruptive during play time. It is not intended to exclude from the definition of “education records” detailed or comprehensive notes that record specific clinical, educational or other services provided to a student, or that record the school official’s direct observations or evaluations of student behavior, including the student’s success in attaining specified objectives. This is true whether or not the notes are used later to prepare an “official” or “final” progress report or IEP for the student. That is, a parent has a right under FERPA to inspect and review these kinds of

detailed or comprehensive notes about a student maintained by a school official and is not required to rely solely on summary conclusions contained only in final or official reports, including a student's IEP.

The Supreme Court's Falvo decision does not modify this outcome. By its own terms, that case is limited to the narrow holding that "peer grading" does not violate FERPA because "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book." The case did not concern records that have been created and maintained by school officials and are not subject to recordation in a "grade book."

The Parent has stated that in late May 2005 she spoke with S [redacted] H [redacted], a legal specialist with the Oregon Department of Education, regarding the definition of "sole possession records" under FERPA. According to the Parent, Ms. H [redacted] advised her that if a document has not been shared with anyone else a parent may not have access to it under FERPA. This interpretation is not consistent with FERPA requirements, as explained above, and may not be applied to education records maintained by the District under FERPA. Any contrary findings, conclusions or final orders by the State Superintendent of Public Instruction about "speech therapy logs" under the Part B confidentiality of information requirements may not be applied to education records under FERPA.

In regard to the Parent's request for access to the Student's actual TOLD answers and the test manual, as well as tests administered to the Student by Ms. M [redacted], this Office has advised previously that test instruments, question booklets, answer sheets, evaluations, surveys, inventories, and other materials that identify a student (by name or number) and that are maintained by an educational agency or institution (or by a party acting for the agency or institution) are "education records" under FERPA. See September 13, 2005, letter to Carroll Independent School District and October 2, 1997, letter to Mary Lou Philbin (copies attached). Therefore, the Parent has a right under FERPA to inspect and review the Student's actual TOLD answers (and other test responses), provided these records were maintained at the time of the Parent's requests. It was not sufficient under FERPA for the District to refer the Parent to an IEP or other document that reflects the Student's test results. We note that under FERPA the District has no obligation to provide the Parent with a copy of these records. See 34 CFR § 99.10(d).

As noted in previous letters from this Office referenced above, if an educational agency or institution maintains a student's test responses separately from the test instrument itself, a parent has a right under FERPA to inspect and review only the separate responses. However, § 99.10(c) of the FERPA regulations provides that an educational agency or institution must "respond to reasonable requests for explanations and interpretations of the records." This could include reviewing the question booklet or test manual with the parent. Again, nothing in FERPA requires an educational agency or institution to provide a parent with a *copy* of a test or test manual. This is consistent with the Oregon administrative rule cited by Mr. C [redacted] and quoted above ("no copy of test protocols, test questions and answers, and other documents described in ORS 192-501(4), shall be provided unless authorized by federal law.")

In order to close this part of the complaint, the District must provide this Office with written evidence that the Parent has been afforded an opportunity to inspect and review the records described above, and that appropriate school officials have been informed that a school official's

notes recording services provided to a student, observations or evaluations of student behavior, or documentation of a student's success in attaining specified objectives, as described above, do not fall within the "sole possession" exception and may not be destroyed so long as there is an outstanding request to inspect and review them. Please provide the requested assurance within four weeks of your receipt of this letter.

Allegation #2

On May 7, 2004, the Parent sent Principal another letter regarding her request for access to the Student's education records. This letter stated that on April 28, as the Parent was reviewing her daughter's "permanent education file," she noticed that none of the correspondence that has occurred between School A and School B schools about the Parent is included in the file. The Parent asked Principal to "gather those documents and place them in her [daughter's] file" as they are directly related to the District's provision of FAPE (Free Appropriate Public Education). The Parent included in her May 7 letter to Principal a list of 41 letters dated from September 25, 2003, through May 7, 2004. (The Parent also asked the District to include in the Student's file specified IEP meeting agenda and R-15 meeting notices.)

Mr. C responded to these allegations for the District in a letter to the Parent dated May 14, 2004, indicating that the Parent had "reviewed all of the educational records relating to [the Student] on April 28, 2004, following [her] request of April 14, 2004." (This letter listed 11 pieces of correspondence from the Parent concerning the Student dated from April 22, 2004, through May 12, 2004.) Mr. C 's May 14 letter noted that "education records" under FERPA are records that are directly related to a student and maintained by the District, such as transcripts of courses taken and grades, attendance records; tests relating specifically to achievement or measurement of ability, and health records. Mr. C explained further:

Your correspondence is not a record that is or will be maintained by the School District as an educational record. All records are either at School Elementary School, School Elementary School, or the Student Services Center, Salem-Keizer School District 224J.

The District's September 20, 2005, response to this complaint states that the District "does not maintain parental correspondence as an educational record." The response also included a copy of Ms. W 's November 8, 2004, letter to the Parent, which explained:

With respect to your request for "any hand-written, typed, or computer-generated (including email) notes authored by school district personnel which refer to myself or [the Student]" and "any letters of correspondence to or from the district, its staff, or any contracted agency which are personally identifiable regarding [the Student] and/or her [Parent]," please note that your correspondence is not a record that is or will be maintained by the School District as an educational record.

Ms. W [redacted] noted further that some or all of these records may be available to the Parent under the State's public records law, which allows the District to charge a fee for making records available.

Our August 17, 2004, letter to the District characterized the Parent's allegation as a failure by the District to notify the Parent of her right under FERPA to seek to amend the Student's education records and have an opportunity for a hearing to challenge the content of those records on the grounds that they are inaccurate, misleading, or in violation of the student's privacy rights without her own correspondence. Mr. C [redacted]'s September 20, 2004, letter denies that the District failed to provide the Parent with notice of her right under FERPA to seek amendment of education records and provided specific evidence that the Parent had received notice of this FERPA right, including copies of an August 31, 2003, newspaper notice and the school registration form signed by the Parent on September 12, 2003, October 13, 2003, and January 5, 2004. The registration form states:

Student Records

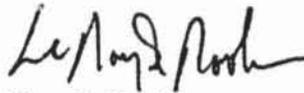
2. Should a parent, guardian, or eligible student request amendment of education records to ensure that the records are not inaccurate, misleading, or otherwise in violation of a student's privacy or other rights, a hearing may be scheduled within forty-five (45) days of receiving such request. The building principal will inform the requesting person of specific procedures. A copy of any portion of a student's education records is available to parents at the cost of reproduction.

Based on information provided by the District, we find no support for the allegation, as stated in our August 17, 2005, letter, that the District failed to notify the Parent of her right to seek to amend and to obtain a hearing to challenge the content of the Student's education records. The District was under no obligation to notify the Parent specifically that its refusal to maintain her correspondence as an education record provided grounds for her to seek to amend the Student's records under §§ 99.20-.22 of the FERPA regulations.

It is not clear from information provided by the parties whether the District refused to allow the Parent to inspect and review her own correspondence that it maintained at the time of her request, or whether the District did not maintain this correspondence at all. However, correspondence from a parent that is directly related to a student and that is maintained by the District (or by a party acting for the District) in any location is clearly an "education record" subject to all FERPA requirements, including a parent's right to inspect and review and to seek to amend the records. The term "education records" is not limited to items listed in the District's letters to the Parent (i.e., transcripts of courses taken and grades, attendance records; tests relating specifically to achievement or measurement of ability, and health records). Therefore, the Parent has a right under FERPA to obtain access to any of her correspondence directly related to the Student maintained by the District (or by a party acting for the District), as well as a right under FERPA to seek amendment of the Student's education records on the grounds that

failure to include her correspondence with the Student's official file results in inaccurate or misleading information. Any suggestions to the contrary by Mr. C [redacted] and Ms. W [redacted] are not supported in the law.

Sincerely,



LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosures

cc: Parent

Dr. Susan Castillo, Oregon State Superintendent of Public Instruction
Oregon Department of Education

Dr. Nancy J. Latini, Associate Superintendent
Office of Special Education, Oregon Department of Education

Troy Justesen, Director
Office of Special Education Programs, US Department of Education