



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INNOVATION AND IMPROVEMENT

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

DEC 29 2006

Complaint No. 1251
Family Educational Rights
and Privacy Act

Dear Dr. Husk:

The purpose of this letter is to inform you of our findings in the referenced complaint against Salem-Keizer School District 24J (District) under the Family Educational Rights and Privacy Act (FERPA). As explained below, we find that the District violated FERPA by 1) refusing to allow the complainant to inspect and review her daughter's education records; 2) requiring payment for access to certain education records, and 3) destroying some education records while there was an outstanding request to inspect and review them.

This Office notified your predecessor, Dr. Kay Baker, by letter dated August 17, 2005, that we were investigating a complaint filed by [REDACTED] (Parent) that the District violated FERPA by refusing to comply with the Parent's April 13-14, 2004, request to inspect and review records documenting speech and language pathology services ("speech logs") provided to her daughter, [REDACTED] (the Student); the Student's actual Test of Language Development (TOLD) responses along with the test manual; and tests administered to the Student the previous fall by Ms. M [REDACTED], [SCHOOL] LRC teacher, including a copy of the complete test scores with subcategories (allegation #1). The Parent also alleged that the District failed to notify her of her right under FERPA to seek to amend the Student's education records because they failed to contain letters the Parent had sent to the District about special education services provided to the Student (allegation #2). Our August 17, 2005, letter explained further that, according to the Parent, the District's denial of access to education records (allegation #1) was based on policies of the Oregon Department of Education. We therefore asked the District to identify any decisions by the State Superintendent of Public Instruction on which the District may have relied in refusing to comply with the Parent's request to inspect and review the Student's education records.

Attorney M [redacted] C [redacted] replied for the District by letter dated September 20, 2005, and denied both allegations. Mr. C [redacted] argued that the speech clinician's notes are not "education records" under FERPA but are "mere memory aids" used by the clinician to complete progress records for the Student's Individualized Education Program (IEP) under Part B of the Individuals with Disabilities Education Act (IDEA). Mr. C [redacted] did not identify State or local law or guidance on this issue in the District's September 20, 2005, response but attached a copy of District policy JR-1 on Student Education Records (dated 6/99), which provides –

Education records do not include:

1.01.02.01 Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

As discussed below, this provision in District policy JR-1 is essentially the same as that in State regulations codified at OAR 581-021-0220. In regard to the District's refusal to provide the Parent with access to the Student's TOLD results and testing manual, Mr. C [redacted] cited Oregon Administrative Rule 581-021-0270(4), which provides:

If a parent or an eligible student so requests, the educational agency or institution shall give the parent or eligible student a copy of the student's education 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(f) shall be provided unless authorized by federal law.

Mr. C [redacted] stated further that the District provided the Parent with the Student's TOLD score and explained the results at a December 16, 2004, IEP meeting and again at an April 30, 2004, IEP meeting. Mr. C [redacted] also quoted from and attached a copy of IEP Forms R16b dated December 16, 2003, and April 30, 2004, which describe the Student's TOLD results. Mr. C [redacted]'s September 20, 2005, letter does not address the Parent's request for access to tests administered to the Student by Ms. M [redacted] in the fall of 2003.

This Office notified Dr. Baker on December 28, 2005, that we found the District in violation of FERPA under allegation #1 because it refused to allow the Parent to inspect and review the clinician's "speech logs"; the Student's actual TOLD results; and similar records from tests administered to the Student during the fall of 2003 by Ms. M [redacted]. Our letter explained in detail that the exclusion of "sole possession" records from the definition of "education records" in FERPA does not apply to detailed or comprehensive notes that record specific clinical, educational or other services provided to a student, or that record direct observations or evaluations of student behavior, including a student's success in attaining specified objectives, whether or not these records have been shared with another individual. While Mr. C [redacted] had not identified any State law or policy applicable to the District's treatment of "sole possession" records, we noted that the Parent had reported to us that in May 2005 she had consulted with S [redacted] H [redacted], legal counsel for the Oregon Department of Education, who advised the Parent that if a document has not been shared with anyone else a parent may not have access to it under FERPA. We explained that this interpretation is not consistent with FERPA requirements and

may not be applied to “speech therapy logs” maintained by the District or service providers working for the District. We also explained that under FERPA the Parent has a right to inspect and review the Student’s actual test results and is not limited to reviewing that information in the Student’s IEP or other report, and that nothing in ORS 192-501(4) conflicts with this requirement because FERPA does not require the District to provide the Parent with a *copy* of those records in these circumstances. Further, while the Parent does not have a right under FERPA to inspect the test manual itself (because it is not directly related to the Student), FERPA does require the District to respond to reasonable requests for explanations and interpretations of test results and other education records, which could include reviewing the test manual with the Parent.

In regard to allegation #2, the District had provided us with a copy of signed registration and disclosure forms notifying the Parent of her right to seek amendment of education records and, therefore, we found that the District did not violate the FERPA notification requirement, as alleged. We explained that correspondence from the Parent directly related to the Student and maintained by the District, or by a party acting for the District, in any location constitutes the Student’s “education records” under FERPA and is subject to the Parent’s right to inspect and review the Student’s education records under FERPA. We explained further that the Parent also has a right under FERPA to seek amendment of the Student’s education records on the grounds that failure to include the Parent’s own correspondence with the Student’s official file results in inaccurate or misleading information. However, the District had no obligation to notify the Parent specifically that its refusal to maintain her correspondence with the Student’s official file provided grounds for her to seek to amend the Student’s records under the FERPA regulations.

Mr. C [redacted] responded for the District by letter dated February 9, 2006, in which the District refused to provide the assurances we requested in order to close this investigation and asked for reconsideration of our decision because it disagreed with our interpretation of the facts and relevant law. This letter described the speech clinician’s records (allegation #1) as “hash marks” on a piece of paper that the clinician interpreted and included in information that was reported to the Parent in progress reports and on the IEP. Mr. C [redacted] argued that this was merely a “memory aid” used by the clinician to prepare reports, was not shared with anyone else, and was destroyed by the clinician in March 2005. The District’s letter did not make any further arguments with regard to our finding that it failed to allow the Parent to inspect and review the Student’s actual TOLD results and similar records from tests administered to the Student during the fall of 2003 by Ms. M [redacted] in violation of FERPA requirements. In regard to allegation #2, Mr. C [redacted] repeated that the District does not maintain the Parent’s correspondence as an “educational record” and argued that our “legal error ... would make the School Districts of the United States a warehouse for every document that a parent writes or transmits to a school district relating to a child.”

On May 23, 2006, we advised the District that its February 9, 2006, letter did not offer any facts, analysis, or argument that would cause us to revise the findings in our December 28, 2005, letter. We also notified the District that we were amending the complaint to include new allegations by the Parent about the District’s refusal to allow her to inspect and review the Student’s education records and asked the District to respond to those new allegations. In particular, after issuing the

first complaint letter in this matter, the Parent advised us that she had submitted a subsequent request to the District for access to the following records on October 7, 2004:

1. All IEP (individualized education program) meeting notes;
2. All IEP's;
3. All test results, scores;
4. All test scores conducted by J [redacted] M [redacted] in November 2003;
5. All notes of J [redacted] M [redacted] that represent data used to document the Student's progress toward her IEP goals, including "probe data" collected on the Student;
6. Any handwritten, typed, or computer-generated (including email) notes authored by school district personnel that refer to the Student or the Parent;
7. All speech/language therapy session notes from speech/language pathologist C [redacted] W [redacted] that document the sessions conducted with the Student and the progress made by the Student, otherwise referred to as the "speech logs"; and
8. Any letters of correspondence to or from the District, its staff, or any contracted agency that are personally identifiable to the Student and/or the Parent.

We also notified the District that the Parent had provided this Office with a copy of the District's November 8, 2004, response from S [redacted] W [redacted], which states (emphases added):

You have already reviewed some of these files, **some files are not education records subject to disclosure**, and some must be assembled. You listed several items you wanted copied which we will provide; including IEPs and IEP meeting notes; and test results/scores that are not test protocols, questions, and answers as defined in District Policy JR 4.03.01. In addition, you requested test scores conducted by J [redacted] M [redacted] in October 2003, however, Ms. M [redacted] conducted no tests during October 2003. Two tests were conducted in November 2003, and these will be included.

You reviewed substantially all of [the Student's] educational records on April 28, 2004, and had begun a second file review on June 9, 2004, which was not completed. Educational records as defined in Family Educational Privacy Rights Act [sic], Oregon Administrative Rule 581-021-022, et seq., and District Policy JR include those records that are directly related to a student and maintained by the District such as:

1. Transcripts of courses taken and grades;
2. Records of attendance;
3. Tests relating specifically to achievement or measurement of ability; and
4. Health records.

Beyond that, educational records do not include certain records defined in Board Policy JR 1.01.02, which is attached.

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.** However, **your request for email files and computer files has been considered as a public record request** under ORS Chapter 192 and since the scope of your request is broad, **there may be email files and computer files or hard-copy files, in various locations throughout the [District].** Attached as Exhibit A is a listing of most, but not necessarily all types of electronic and written student information locations. These locations may or may not contain a reference or file concerning you or [the Student]. Some, but not all, of these locations may be subject to exemption from disclosure under Oregon’s Public Records law.

This letter from Ms. W [redacted] to the Parent, along with her follow-up letter dated November 18, 2004, advised the Parent that in accordance with Oregon’s public records law, the District would charge the Parent for the cost of making certain records available. Ms. W [redacted]’s November 18 letter states (emphases added):

...[District] policy JR 4.03 – Student Education Records, and ORS 192.501 speak to records such as tests [sic] protocols, test questions and answers that will not be disclosed. While OAR 581-021-0280 provides that the District may not charge a fee to search for or to retrieve education records, **your request is broader than education records.** There was no fee charged for the copy of education records sent to you on November 8, 2004. **The \$130.00 fee being requested is for a public records request for documents that are not education records.** Please remit the deposit of \$130.00, to begin the review for compilation of other information you requested. The district is estimating that this review and compilation will require approximately 20 hours at \$32.42 per hour for an estimated total cost of \$648.37.

Our May 23, 2006, letter explained to the District once again that the Parent has a right under FEPPRA to inspect and review the Student’s “education records,” which includes “speech logs,” test data, and the Parent’s correspondence that is directly related to the Student regardless of where it is maintained by the District or its service providers. We also explained that under § 99.11(b) of the FERPA regulations, the District may not charge a fee to search for or to retrieve the education records of a student. We noted that Ms. W [redacted]’s November 2004 letters indicate that the District follows a local or Statewide policy under which it denies parents access to certain records that are considered “education records” under FERPA and charges a fee under the State open records law to retrieve records that should be made available for inspection and review without charge under FERPA. We asked you to investigate these additional allegations and provide the following information:

1. Identify specifically all information and records that the District refused to allow the Parent to inspect and review under FERPA in response to her October 7, 2004, letter to Ms. W [redacted] and the reasons for the District's decision.
2. Identify specifically all information and records that the District agreed to provide the Parent under the State open records law.
3. Provide a copy of all local and State statutes, regulations, and policies under which the District refused to allow the Parent to inspect and review the information and records identified above.

The District's June 30, 2006, response states generally that following the Parent's February 7, 2004, and November 18, 2004, requests, the Parent was provided with access to all IEP meeting notes; all IEPs; all test results and scores; all test scores conducted by Ms. M [redacted] in November 2003; and all of Ms. M [redacted]'s notes that represent data used to document the Student's progress toward her IEP goal, including probe data collected on the Student in November 2004. The District asserts that it has provided the Parent with all educational records except for "those sole possession documents of the speech/language pathologist, which were destroyed in February 2005." The District's specific responses are discussed below.

Speech logs

The District explained that it did not provide the Parent with access to or copies of Ms. W [redacted]'s speech/language therapy session notes documenting the Student's progress ("speech logs") "because those documents were destroyed by the speech/language clinician in February 2005." According to the District's letter, the information represented in those speech logs was provided to the Parent in the April 2004 IEP meetings. Mr. C [redacted] argued that Ms. W [redacted]'s speech logs, which contained "hash marks" as identified in his previous letter, were destroyed before the complaint was filed in this matter, before this Office issued a finding with which the District disagrees, and before this Office responded to the District's request for reconsideration of its findings.

Finding: We affirm our original finding that the District violated FERPA by refusing to allow the Parent to inspect and review the Student's "speech logs," i.e., records documenting daily reading and speech/language pathology services provided to the Student and the clinician's observations regarding the Student's progress. As explained previously, those documents constitute a student's "education records" and may not be destroyed while there is an outstanding request to inspect and review them, even if they are later used to prepare an IEP or official report regarding the student. The District violated §§ 99.10(b) and 99.10(e) of the FERPA regulations when it refused to allow the Parent to inspect and review the clinician's speech logs and when the clinician destroyed those records in February 2005 while there was an outstanding request to inspect and review the records.

In September 2006, this Office, together with staff from the Department's Office of Special Education Programs (OSEP), communicated with Dr. Nancy Latini of the Oregon Office of Special Education and Ms. H [redacted], legal counsel for the State, in regard to this matter. Dr. Latini

and Ms. H [redacted] explained that the current version of OAR 581-021-0220(6)(b)(A), which is reflected in the District's policy, sets forth a version of the definition of "sole possession" records that does not include the provision regarding use of the records only as a personal memory aid that was added to the FERPA regulations in July 2000, as discussed in our December 28, 2005, letter. During our discussion, Dr. Latini and Ms. H [redacted] indicated their agreement with the position of this Office and OSEP, as set forth in our December 28, 2005, letter to the District, regarding the meaning of sole possession records as it applies to notes or other records documenting services provided to a student and detailed observations regarding the student's progress. Thereafter, this Office conducted training on the matter for special education providers at the State's October 2006 fall conference. Ms. H [redacted] also indicated to us that she had advised Mr. C [redacted] that the State Department of Education supported our position and that it would shortly issue guidance on the matter, along with proposed rules amending State regulations on sole possession records to be issued in December 2006.

Test records

The District reaffirmed that it had provided the Parent with access to the Student's actual TOLD results in April 2004 as part of the IEP review process as identified in the District's September 20, 2005, letter. Mr. C [redacted] explained that the District did not provide access to or a copy of the TOLD manual or questions and answers of the student on the TOLD test in April 2004 (when they were requested by the Parent) "due to the existing Oregon Department of Education Administrative Rule, 581-021-0270, which provides that no copy of test protocols, test questions and answers, shall be provided." He added that the District allowed the Parent access to the TOLD manual that contained the actual test questions on May 17, 2006, in response to this Office's December 28, 2005, letter, but the Parent has not been allowed to copy or receive copies of the test protocols and test answer booklets.

Finding: We reaffirm our previous finding that the District violated FERPA when it failed to allow the Parent to inspect and review the Student's actual TOLD results as requested in April 2004. As explained in detail our December 28, 2005, letter, 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 to our December 28, 2005, letter to the District). 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 is not sufficient under FERPA for the District to refer the Parent to an IEP or other document that reflects the Student's test results or scores. Further, as explained previously, this requirement does not conflict with the State administrative rule cited by the District because it does not require the District to provide the Parent with a *copy* of those records. See 34 CFR § 99.10(d).

It is not clear from the District's June 30, 2006, letter whether it allowed the Parent to inspect and review the Student's actual responses to tests conducted by Ms. M [redacted] in the fall of 2003 or just the test results and scores. The District is required under FERPA to make the

Student's actual test responses available for inspection and review by the Parent if it has not already done so.

Correspondence referring to the Parent

The District stated in its June 30, 2006, letter that it has not allowed the Parent to inspect and review "handwritten, typed or computer generated (including email) notes authored by school district personnel that refer to the parent" because it believes these are not education records entitled to FERPA protection. The District explained further that it "has agreed to search for and provide copies of public records, identified as copies of correspondence to or from the District, its staff, or any contracted agency that is identifiable to the parent, when a deposit of \$130.00 is received to cover the anticipated cost of the search and copies, pursuant to ORS 192.440(3)(c)."

Finding: The District violated § 99.10(a) of the FERPA regulations when it refused to allow the Parent to inspect and review handwritten, typed or computer generated notes, including email, authored by school district personnel that refer to the Parent and violated § 99.11(b) when it charged the Parent a fee under the State public records law to make these records available to the Parent.

An "education record" is defined in FERPA as records that are 1) directly related to a student; and 2) maintained by an educational agency or institution, or by a party acting for the agency or institution. 34 CFR § 99.3. Written records that contain personally identifiable information about a student or parent are considered directly related to the student. ("Personally identifiable information" is defined in § 99.3 to include the student's name and the name of the student's parent or other family member.) Accordingly, all handwritten, typed or computer generated notes, including email messages, written by school district personnel that identify the Parent or Student and are maintained by the District (or service providers acting for the District) constitute the Student's "education records" under FERPA. The District violated FERPA when it refused to make these records available for inspection and review at no charge to the Parent.

Correspondence from the Parent

The District stated that it does not maintain copies of correspondence to the District from the Parent that do not relate to the Parent's requests for records and that these documents were provided in to the Parent on April 28, 2004, June 9, 2004, November 18, 2004, and May 17, 2006. On August 8, 2006, the Parent provided this Office with a copy of the District's July 27, 2006, letter to the Parent from Mr. C [redacted] regarding documents he intended to offer into evidence in an administrative proceeding on behalf of the District. The documents include several letters the Parent had written to District officials.

Finding:

Correspondence from the Parent maintained by the District is an "education record" under FERPA because, as explained above, it is directly related to the Student. As we advised the District previously, the District is not required under FERPA to maintain the Parent's correspondence about the Student, including requests for access to the Student's education

records, and is not required to maintain them as part of the Student's "official educational record." If the District chooses to maintain these records at all, however, it must make them available for inspection and review by the Parent. Further, as noted in our previous letter finding the District in violation of FERPA, the Parent has a right under § 99.20 to seek to amend the Student's education records on the grounds that failure to include the Parent's correspondence renders those records inaccurate or misleading. After a hearing under by an impartial official under §§ 99.21-99.22, the District could conclude that the records are not misleading or inaccurate and decline to amend the records as requested but would have to allow the Parent to insert a statement commenting on the contested information or stating why the Parent disagrees with the decision, or both. 34 CFR § 99.21(b)(2).

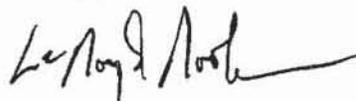
In accordance with § 99.66(c) of the regulations, in order to close this investigation the District is required to provide this Office with written documentation showing that --

- 1) The District has procedures in place to ensure that parents are afforded an opportunity to inspect and review the actual notes and other records prepared by teachers, therapists, clinicians, and other service providers documenting any test, therapy, or service provided to a student, as well as the service provider's observations and comments regarding a student's responses and progress, and to ensure that teachers, therapists, clinicians, and other service providers do not destroy these notes and other records so long as there is an outstanding request to the District to inspect and review them. The District must advise its service providers and other school officials that it is not sufficient under FERPA to refer parents to an IEP or other document that summarizes this information.
- 2) The District has procedures in place to ensure that parents are afforded an opportunity to inspect and review any test instruments, question booklets, answer sheets, evaluations, surveys, inventories, and other materials that identify a student (by name, number, or any other manner) that are maintained by the District or a party acting for the District, and to ensure that service providers and other school officials do not destroy these records so long as there is an outstanding request to inspect and review them. The District must advise its service providers and other school officials that it is not sufficient under FERPA to refer parents to an IEP or other document that reflects or summarizes a student's test results.
- 3) The District has procedures in place to ensure that parents are afforded an opportunity to inspect and review, at no cost to the parent, any handwritten, typed, or computer-generated notes, including email messages, authored by school district personnel and other service providers that personally identify a student or parent, and to ensure that service providers and other school officials do not destroy these records so long as there is an outstanding request to inspect and review them.
- 4) The District has procedures in place to ensure that parents are afforded an opportunity to inspect and review, at no cost to the parent, any correspondence from a parent maintained by the District or a party acting for the District, and to ensure that service providers and other school officials do not destroy these records so long as there is an outstanding request to inspect and review them.

- 5) The District has afforded the Parent an opportunity to inspect and review the Student's actual TOLD responses and actual responses on tests administered to the Student during the fall of 2003 by Ms. M [REDACTED] [SCHOOL] LRC teacher, as requested by the Parent in letters dated April 14, 22, and October 7, 2004.
- 6) The District has reviewed the TOLD question booklet or test manual with the Parent in accordance with § 99.10(c) of the FERPA regulations, which provides that an educational agency or institution must "respond to reasonable requests for explanations and interpretations of the records.
- 7) The District has afforded the Parent an opportunity to inspect and review, at no cost to the Parent, any handwritten, typed, or computer-generated notes, including email messages, authored by District personnel that refer to the Student or Parent.
- 8) The District has afforded the Parent an opportunity to inspect and review, at no cost to the Parent, any letters to or from the District, including any service providers and other school officials, that personally identify the Student or the Parent.

The District should provide this information within four weeks of its receipt of this letter. Your voluntary compliance will allow us to issue you a written decision closing this investigation in accordance with § 99.67(b).

Sincerely,



LeRoy S. Rooker
Director
Family Policy Compliance Office

✓ 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

[REDACTED], Esq.
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Dr. Alexa Posny, Director
Office of Special Education Programs, U.S. Department of Education