



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

FEB 15 2008

Complaint No. 1251
Family Educational Rights
and Privacy Act

Dear Dr. Husk:

This Office notified Salem-Keizer School District 24J (District) on December 25, 2005, that it violated the Family Educational Rights and Privacy Act (FERPA) by refusing to allow [redacted] (Parent) to inspect and review the education records of her daughter (Student). By letter dated February 9, 2006, the District asked for reconsideration of our decision. On May 23, 2006, we notified the District that it had not offered any facts, analysis, or argument that would cause us to revise our findings; we also asked the District to respond to new allegations that the District refused to allow the Parent to inspect and review certain education records. The District responded by letter dated June 30, 2006. On December 29, 2006, we notified you that the District violated FERPA when it 1) refused to allow the Parent to inspect and review her daughter's education records; 2) required payment for access to certain education records, and 3) destroyed certain education records while there was an outstanding request to inspect and review them. In order to obtain voluntary compliance and close out this investigation we asked the District 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 [redacted] 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 responded by letter dated February 2, 2007. This Office had no record of receiving the District's response and obtained a faxed version from the District on April 10, 2007.

Items 1-4. In response to items 1-4, the District attached a copy of your January 25, 2007, directive to "Leadership Team." This memo and attached "Talking Points" repeat much of the language in our directive, quoted above. However, these documents do not explain that District staff and outside service providers have been operating under an incorrect definition and understanding of the "sole possession" records exception to the definition of "education records"

in FERPA, which led to the FERPA violation in allegation #1 of the Parent's complaint. The District's repeated assertions to this Office about the clinician's "speech logs" in this complaint show that it has been relying on an incorrect understanding of the sole possession records exception. As such, we are concerned that failure to include a specific discussion of the sole possession records exception in your memo leaves District staff and outside service providers with an incomplete and likely incorrect understanding of the status of "speech logs" and other notes they generate when evaluating and providing services to special education students. In that regard, we note that the "Talking Points" contain the following statement: "It is important to recognize that we are not required to change our current record keeping practices. We are required to provide the document(s) that we maintain." On the contrary, the District is most definitely required to change its record keeping practices with regard to sole possession records and must provide this Office with evidence that it has done so in order for us to close this investigation.

We are also concerned that staff and outside service providers may continue to destroy education records they determine erroneously are sole possession records in violation of FERPA requirements, as they did in this case. On June 14, 2004, the Parent made a detailed, specific written request asking S [redacted] W [redacted], the District's records custodian, not to destroy any of C [redacted] W [redacted]'s speech/language logs and any observations made by Ms. M [redacted] that the District had characterized erroneously as sole possession records (along with all other education records maintained on the Student). The District's attorney notified this Office on June 30, 2006, that notwithstanding the Parent's specific request, these records were destroyed in February 2005 because the District believed they were not education records. Further, it appears from excerpts of transcripts provided by the Parent to this Office that Ms. W [redacted] testified during the Parent's due process hearing in August 2006 that District officials directed her to continue her existing practice and shred her session notes, which she did. In short, the District clearly maintained a policy in violation of FERPA requirements with regard to sole possession records; what is not clear is whether that policy has been changed.

The Parent has also provided us with informal transcript excerpts from her due process hearing in August – October 2006, indicating that the District continued to violate § 99.10 of the FERPA regulations even after receiving our letters of December 28, 2005, and May 23, 2006. Our letters explained that correspondence from a parent that is directly related to a student and that the District (or a party acting for the District) maintains 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. (Our December 29, 2006, letter confirmed that any handwritten, typed, or computer-generated notes, including emails, authorized by school district personnel that refer to the Parent are also "education records" under FERPA.) Nonetheless, it appears that in August 2006 Ms. W [redacted], the District's records custodian, testified upon examination by the District's legal counsel that these documents were "broader than just educational records," and then under subsequent questioning that the District did not provide the Parent with access to her own correspondence about the Student because under District policy it was not an education record. Further in that regard, we are particularly concerned that in August 2006 legal counsel M [redacted] C [redacted] appears to have stated erroneously that this Office has never responded to the District's request for reconsideration of our initial decision, even though our May 23, 2006, letter

states specifically in the first paragraph that the District had not offered “any facts, analysis, or argument that would cause us to revise our findings.”

It appears also that your memo to “Leadership Team” and talking points were distributed to unidentified staff on a one-time basis, and that the District has no procedures in place to ensure that staff and outside service providers who were not present at the January 25, 2007, meeting are made aware on an ongoing basis of these important changes in the District’s practices in regard to sole possession records, parent correspondence, and other records described above. We are concerned further that after more than one year the District continues to publish on its website and distribute to parents an incomplete and incorrect version of the sole possession records exception in its Student Education Records policy (JR-1), which does not contain the required language about use of these records “only as a personal memory aid.” See www.salkeiz.k12.or.us/DistrictCenter/PoliciesandRules/index.html. In these circumstances, we doubt that District staff, outside service providers, and parents understand parents’ rights under FERPA with regard to these records.

Required Action: The District must provide this Office with evidence showing that it no longer publishes incorrect statements regarding the sole possession records exception to the definition of education records; that the District has notified parents, staff and outside service providers that the District’s policy with regard to sole possession records, parent correspondence, and other records described above has changed; that the District has procedures in place to ensure that parents, staff, and outside service providers are notified of the correct definition of sole possession records; and that District has procedures in place to ensure that staff and outside service providers do not destroy education records that the District formerly excluded from the definition of education records in error while there is an outstanding request to inspect and review those records under FERPA.

Item 5. Your letter states that the District has afforded the Parent an opportunity to inspect and review actual TOLD responses and actual responses on tests administered to the student during the fall of 2003 by Ms. M [redacted] as well as the TOLD question booklet or test manual, and had staff available to respond to reasonable requests for explanations and interpretations of the records. You also attached a copy of Ms. W [redacted]’s affidavit in support of the District’s assertion that it has complied with items 5 and 6.

The Parent has provided us with a copy of a letter from L [redacted] F [redacted] of Student Services dated March 23, 2007, indicating that, “at [the Parent’s request,” the District destroyed the Student’s test booklet for the Kaufman Test of Educational Achievement (KTEA) that was administered to the Student in November 2003. The Parent denied that she ever asked the District to destroy this or any other test booklet and alleged that this test, which Ms. M [redacted] kept in her personal files, was the only documentation of the Student’s qualification for special education math services and was used to determine the Student’s individualized education program (IEP) and placement.

Required action: Please investigate the Parent’s allegations with regard to the KTEA administered to the Student in November 2003. In particular, please advise us when this test booklet was destroyed.

Item 6. The District has complied with this requirement.

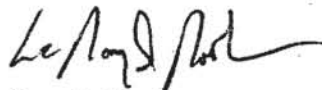
Items 7 and 8. The District stated that it has forwarded to the Parent notice of an opportunity to inspect and review, at no cost to the Parent, any handwritten, typed, or computer-generated notes, including email messages, authored by District personnel, that refer to the student or parent, that do not fall within the District's attorney-client privilege allowed under ORS 40.225, as well as any letters to or from the District, including any service providers and other school officials, that personally identify the student or the parent, which do not fall within the District's attorney-client privilege under ORS 40.225. The District's February 2, 2007, letter notifying the Parent of her opportunity to inspect and review this information states that the offer to review will remain open for 45 days beginning February 8, 2007.

Under § 99.10(b) of the FERPA regulations, an educational agency or institution must provide a parent with the opportunity to inspect and review education records within a reasonable period of time not exceeding 45 days after it has received the request. The District may not limit the Parent's right to inspect and review education records to a 45-day period. Further, if the Parent is unable to attend any of the District's proposed review dates, the District must propose alternative dates when the Parent is available to inspect and review the records. Alternatively, the District may provide the Parent with copies of the requested records as a means of satisfying the inspect and review requirement under FERPA.

Required action: The District must provide this Office with evidence that it has not limited the Parent's review of the requested education records to a 45-day period and that it has offered the Parent alternative dates for review of the records or provided copies of the records. This Office will address in a separate communication the requirements that the District must meet in order to assert an attorney-client privilege in derogation of a parent's Federal statutory right under FERPA to inspect and review education records.

Please provide the requested information within four weeks of your receipt of this letter. We appreciate your continued cooperation in the resolution of this complaint.

Sincerely,



LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Parent ✓

William Knudsen, Deputy-Assistant Secretary
Office of Special Education and Rehabilitative Services
U.S. Department of Education

Patty Guard, Acting Director
Office of Special Education Programs
U.S. Department of Education

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