



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

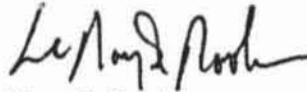
2. Should a parent, guardian, or eligible student request amendment of education records to ensure that the records are not inaccurate, misleading, or otherwise in violation of a student's privacy or other rights, a hearing may be scheduled within forty-five (45) days of receiving such request. The building 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



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

MAY 23 2006

Complaint No. 1251
Family Educational Rights
and Privacy Act

Dear Dr. Baker:

This Office informed Salem-Keizer School District 24J (District) of our findings in the referenced complaint by letter dated December 28, 2005. Attorney M [redacted] C [redacted], responding on behalf of the District by letter dated February 9, 2006, refused to provide the assurances we requested in order to close this investigation and asked for reconsideration because he disagrees with our interpretation of the facts and relevant law. Mr. C [redacted]'s letter does not offer any facts, analysis, or argument that would cause us to revise our findings.

As explained below, [redacted] (Parent) recently submitted to this Office additional allegations about the District refusal to allow her to inspect and review her child's (the Student's) education records in accordance with the Family Educational Rights and Privacy Act (FERPA). We are extending the time limit set forth in § 99.64(d) of the regulations and amending this complaint to include these new allegations because they raise issues that are the same or similar to those addressed in the current investigation. We will respond more fully to the District's February 9, 2006, letter upon completion of our investigation of these new allegations.

The subject of our August 17, 2005, letter was the Parent's April 13 and 14, 2004, request for access to records documenting speech and language pathology services provided to the Student, the Student's actual Test of Language Development (TOLD) results, and the TOLD manual that contains the actual test questions. The Parent advised us on May 9, 2006, that she submitted a subsequent request to the District for access to the Student's education records on October 7, 2004. The Parent's October 7, 2004, records request asked for access to the following:

1. All IEP (individualized education program) meeting notes;
2. All IEP's;
3. All test results, scores;

4. All test scores conducted by J□M□ in November 2003;
5. All notes of J□M□ 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□W□ 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.

The Parent provided this Office with a copy of the District's November 8, 2004, response from S□W□, 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□M□ in October 2003, however, Ms. M□ 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, and Ms. W[redacted]'s 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.

As explained in our previous letters, 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. See our December 28, 2005, letter at pages 4 – 7 and 8-9. Indeed, FERPA provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or denying, or which effectively prevents, the parents of students ... the right to inspect and review the education records of their children.

20 U.S.C. § 1232g(a)(1)(A); 34 CFR Part 99, Subpart B. Under § 99.10 of the FERPA regulations, a parent does not have a right to a copy of education records unless circumstances effectively prevent the parent from exercising the right to inspect and review the records, such as if the parent does not live within commuting distance. If the institution does provide a copy of education records, it may charge a reasonable copying fee unless the imposition of a fee effectively prevents a parent from exercising the right to inspect and review the records. 34 CFR § 99.11(a). An institution may not, however, charge a fee to search for or to retrieve the education records of a student. 34 CFR § 99.11(b).

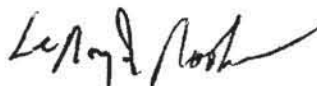
Ms. W[redacted]'s November 2004 letters indicate that the District follows a local or Statewide policy under which it denies parents access to certain records that are considered "education records" under FERPA and charges a fee under the State open records law to retrieve records that should

be made available for inspection and review without charge under FERPA. In order to complete our investigation of this matter, we ask that you respond to these 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 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.

Please provide your response within four weeks of your receipt of this letter and refer complaint number 1251 in your correspondence. Thank you for your continued cooperation in this matter.

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

Dr. Alexa Posny, Director
Office of Special Education Programs, US Department of Education



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], [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).

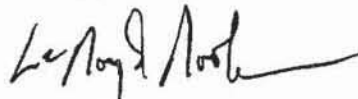
In accordance with § 99.66(c) of the regulations, in order to close this investigation the District is required to provide this Office with written documentation showing that --

- 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.
Oregon Department of Education

Dr. Alexa Posny, Director
Office of Special Education Programs, U.S. Department of Education



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.

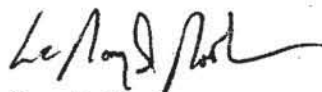
Items 7 and 8. The District stated that it has forwarded to the Parent notice of an opportunity to inspect and review, at no cost to the Parent, any handwritten, typed, or computer-generated notes, including email messages, authored by District personnel, that refer to the student or parent, that do 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