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## FERPA: Beware of reliance on the “sole possession” exception

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Over the years, we have found that administrators, teachers and providers such as speech pathologists often rely on the “sole possession” exception in the Family Educational Rights and Privacy Act (“FERPA”) to withhold documents requested by a student’s parents. In some cases, however, this exception is interpreted incorrectly and costly disputes (both in terms of dollars and school relationships with families) can result. This article discusses what the “sole possession” exception really entails and provides some practical suggestions to help school officials to navigate this tricky area.

FERPA gives parents the right to inspect and review the “education records” of their child, with certain exceptions.<sup>1</sup> “Education records” are broadly defined in the law to include “those records, files, documents, and other materials which – (i) contain information related directly to a student; and (ii) are maintained by the educational agency...or by a person acting for such agency...”<sup>2</sup> The regulations implementing FERPA specify that such records include “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”<sup>3</sup>

“Sole possession records” are excluded from the definition of “education records”, and are defined in FERPA as “records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the *sole possession* of the maker thereof and which are not accessible or revealed to any other person except a substitute.”<sup>4</sup> Again, the regulations provide more detail on the sole possession exception, stating that it includes “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.”<sup>5</sup>

Many school employees have interpreted the sole possession exception to mean that any notes or documents they create and keep to themselves do not have to be turned over if a parent asks to review their child’s education records. But the phrase “*used only as a personal memory aid*” is important and the Family Policy Compliance Office (“FPCO”), the agency charged with enforcing FERPA, narrowly interprets this exception.

In 2000, the FPCO proposed to change the definition of “sole possession,” but ended up not doing so. In discussing the exception at that time, however, FPCO stated that the reason why they were seeking a change was to clarify that sole possession records “do not include evaluations of student conduct or performance.” They went on to say, “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.”<sup>6</sup>

We called the FPCO for further clarification and they provided us with copies of two letters sent to a school district that constitute their current guidance on the sole possession exception. These letters show how narrowly the FPCO interprets the exception. This case involved an issue that arises frequently in schools – a parent had asked for (among other things) “speech logs” and other records documenting her child’s reading and speech/language pathologist services. The district took the position that these logs were sole possession documents used only as a memory aid in preparing progress reports for the student’s IEP and refused to let the parent review them. The FPCO disagreed with the district’s position, stating:

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.<sup>7</sup>

(emphasis in original)

In a follow-up letter to the district a year later, the FPCO found further FERPA violations after the speech pathologist destroyed the requested speech logs (even after the FPCO had found the district in violation of FERPA for not producing them). The district continued to argue that the speech logs were sole possession records containing “hash marks,” but did not prevail with this argument.<sup>8</sup> As a result of this case, the district was required to implement a series of cumbersome procedures to ensure future compliance with FERPA.

We should note, however, that an official in the FPCO informed us that U.S. Department of Education’s Office of Special Education and Rehabilitative Services has a more expansive view of the “sole possession” exception in regard to records of special education “counselors” than does the FPCO (a position that our practice group generally agrees with).

## **Lessons for school districts**

While one may argue with the FPCO’s interpretation of the scope of the sole possession exception, school employees should understand it and keep in mind that a court may pay some deference to the agency’s interpretation. Accordingly, we suggest that school employees:

- Write all notes about students carefully and assume that parents or others may see them someday;
- Alert an appropriate administrator to the existence of any notes on a student – wherever they are located – when there is a request to review education records, so that an assessment can be made as to whether they need to be provided to the parent for review;

- Never destroy records of any type about a student when there is an outstanding request to review them;
- Remember that e-mails about students are also education records;
- Remember that the Maine State Archives Rules require that many records pertaining to students need to be retained for specific time periods;<sup>9</sup> And
- When there is uncertainty about whether specific materials constitute education records, consult with legal counsel.

School administrators may want to consider providing training to staff on these important issues. ■

### *Endnotes*

1. 20 U.S.C. § 1232g; 34 C.F.R. § 99.3. The other exceptions besides the sole possession exception discussed in this article include, but are not limited to, law enforcement unit records, employee records and treatment records of students over the age of 18.
2. 20 U.S.C. § 1232g(a)(4)(A).
3. 34 C.F.R. § 99.3.
4. 20 U.S.C. § 1232g(a)(4)(B)(i) (emphasis added).
5. 34 C.F.R. § 99.3 (emphasis added).
6. F.R. Vol. 65, No. 13, p. 41856 (July 6, 2000).
7. Letter from LeRoy Hooker, Director, FPCO, dated December 28, 2005.
8. Letter from LeRoy Hooker, Director, FPCO, dated December 29, 2006.
9. Please let us know if you would like to receive a copy of Drummond Woodsum's version of the Archives' record retention guidelines for schools.