

# Family Education Rights and Privacy Act & School Counselor's Personal Notes

October 2013

## FERPA and Educational Records

Under the Family Education Rights and Privacy Act (FERPA) school districts must properly retain educational records to ensure confidentiality and to make the records available to students and parents for inspection or review upon request. "Educational records" are records, files, documents or other materials that (1) contain information directly related to the student and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. There are four categories of records that are excluded from classification as educational records. These categories are: law enforcement records, employee records, treatment records, and sole possession records.

## Sole Possession Notes Are Not Educational Records

"Sole possession records" are records of instructional, supervisory and administrative personnel that are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute. The test for determining if a document, record or other material is a sole possession record is if the document is (1) a memory aid, (2) not accessible by any other person in written form, or (3) a personal note. The sole possession exception is often considered with regard to personal, handwritten notes kept by a teacher, counselor or administrator. If such personal notes do not meet the above requirements, they are considered an educational record and the school district is required to maintain the records and make them accessible to parents and students upon request.

## School Counselor's Personal Notes May Still Be Considered Educational Records

Districts and counselors should be mindful that the "sole possession" exemption is very narrow and specific. Sole-possession notes will be considered part of the student's educational file if not handled properly. Hand-written notes kept in a separate file cabinet are not per se sole possession notes. For example, a record that was once a sole possession record can be converted into an educational record based on a change in location, use, or added content. Further, the Department of Education has previously interpreted sole possession notes not to include information that is documented as a result of counseling or testing of a student.

| FERPA Exempt Sole Possession Notes                                                                                                                                                                                                                                                                                                                                               | Not Exempt as Sole Possession Notes                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| <ul style="list-style-type: none"><li>• Private note created solely by the person possessing it</li><li>• Information for personal memory aid</li><li>• Exclusive control of creator</li><li>• Information is not shared with anyone, except a substitute</li><li>• Stored separate from school counseling files</li><li>• Includes observations and personal opinions</li></ul> | <ul style="list-style-type: none"><li>• Notes containing information about the substance of the interactions, particularly the content of the conversation</li><li>• Stored in student counseling file</li><li>• Private notes made by a counselor that records comments made by parents, students, or other school employees during a conversation</li><li>• Notes detailing an observation of a student when the observation is later shared with another district employee</li><li>• Notes that have been shown to another person</li><li>• Notes saved on the District server</li></ul> |

## School Counselor's Notes Recommendations

Districts should consult with counselors to establish if the counselor keeps sole possession notes, and if so, how long the notes are retained, how they are stored, and how the notes are disposed. If Districts request to view sole possession notes, doing so will convert the notes to educational records. If the District chooses not to view the notes, the notes should still be properly stored and disposed of, such as in a separate locking file cabinet or by confidential shredding.

Sole possession notes, while not educational records, are still subject to subpoena in most jurisdictions and are not protected as confidential under any counselor-student privilege. Therefore, even when following all proper procedure for sole possession notes, Districts should advise counselors to always notate professionally and under the assumption that the notes may be later reviewed in court.