

LETTER OPINION
98-L-51

April 24, 1998

Dr. Gary Gronberg
Assistant Superintendent
Adaptive Services
Department of Public Instruction
600 E Boulevard Ave
Bismarck, ND 58505

Dear Dr. Gronberg:

Thank you for your letter asking whether "teacher journals" prepared by special education teachers are "education records" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and therefore available for inspection by parents.

Your letter indicates that certain special education teachers in a North Dakota public school district, at the direction of their school principal, prepared and maintained certain records (journals) concerning their administration of special education and related services to a certain child. The parents of this child, pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., filed a complaint with the Department of Public Instruction (DPI) concerning an alleged failure by the school district to provide a free appropriate public education. As part of your investigation of that complaint, you learned of the existence of the journals and asked the school principal to provide them to you. The school principal, in response to your request, sent the journals to DPI for its use in responding to the parents' complaint. Thus, the journals have been revealed by their makers at least to the school principal and to staff members of DPI.

A school district's records are open to the public "[e]xcept as otherwise specifically provided by law." N.D.C.C. §§ 44-04-18, 15-29-10. The "except as otherwise specifically provided by law" language includes both state laws and federal laws. N.D.C.C. § 44-04-17.1(7). See also 1981 N.D. Op. Att'y Gen. 395. Under FERPA, educational institutions receiving federal funds must keep "education records" confidential or lose their entitlement to those

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federal funds. 20 U.S.C. § 1232g(b). FERPA is a specific exception to North Dakota's open records law. 1994 N.D. Op. Att'y Gen. 118.

FERPA does not preclude DPI from having access to "education records" in connection with the evaluation, audit, or enforcement of any federally or state supported education program. 20 U.S.C. § 1232g(b)(1)(C), (3), (5). See also M.R. v. Lincolnwood Bd. of Ed., 843 F.Supp. 1236, 1239 (N.D. Ill. 1994). However, DPI must protect any "education records" it receives and must return (for originals) or destroy (for copies) all personally identifiable data to the school district when DPI no longer needs the data for its evaluation, audit, or enforcement action. 20 U.S.C. § 1232g(b)(3). Therefore, it is my opinion that any "education records" provided to DPI under FERPA which permit the personal identification of students and their parents are not subject to the open records law.

Under FERPA, parents have "the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A). This right covers "education records" in the hands of any "educational agency or institution," which means "any public or private agency or institution which is the recipient of funds under any applicable education program." 20 U.S.C. § 1232g(a)(3). This includes both DPI and a North Dakota school district that receives federal funds. See 34 C.F.R. § 99.10 (1997).

The term "education records" means "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). If the reason for preparing the journals was to log information concerning administration of special education and related services to the student, as your letter indicates, then the records directly relate to that student. As a result, the journals would generally be considered "education records" under FERPA.

However, the definition of "education records" specifically excludes, among other things, "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." 20 U.S.C. § 1232g(a)(4)(B) (emphasis added). "Sole" means single, individual, separate, or comprising only one person. Black's Law Dictionary 1391 (6th ed. 1990).

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Your description of the preparation of the journals indicates they were not prepared by the teachers involved to aid their own personal memories for further education activities, but at the direction of school management to record events in the administration of special education. This basis for preparing the journals shows both an awareness of the journals' existence by persons other than the actual makers thereof and an apparent intent that the journals could be accessed by other persons in the future. You state the records in question were voluntarily released by the makers thereof to the school principal and to DPI. Because the journals have not been maintained in the sole possession of the makers but have been made accessible to or been revealed to persons other than a substitute for the makers of the records, it is my opinion that the journals fall under the general definition of "education records."

The journals are maintained by the school district. In addition, until DPI destroys or returns to the school district the journals or copies that it has received, the journals or copies are also "maintained" by DPI. Therefore, it is my opinion that the journals or copies must be open and available to the parents of the child who is the subject of those records at any educational agency or institution where the journals or copies are maintained. Any information in the journals relating to other children would have to be excised. 20 U.S.C. § 1232g(a)(1)(A). Loss of federal funds is a possibility if the school district or DPI do not provide the records to the parents upon request. 20 U.S.C. § 1232g.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/rel/vkk