



Legal/Ethical Considerations: School Counselor Notes, Student Privacy and FERPA

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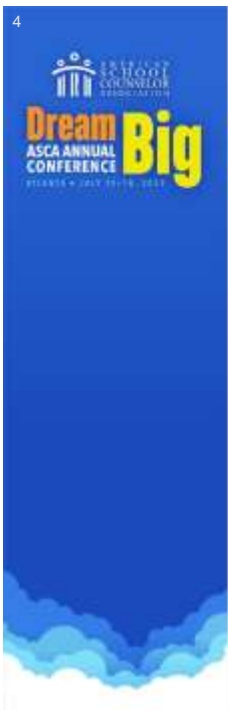
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Learning Objectives

After attending this session you will be able to:

1. Identify and discuss the definition of sole-possession records and provide examples
2. Explore legal and ethical considerations of counseling notes and documentation
3. Examine court cases and guidance from the Student Privacy Policy Office related to sole-possession records

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FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974

“The Family Educational Rights and Privacy Act (FERPA) is a federal law that affords parents the right to have *access to their children’s education records*, the right to seek to *have the records amended*, and the right to have some *control over the disclosure of personally identifiable information* from the education records. When a student turns 18 years old, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student (“eligible student”). ”

<https://studentprivacy.ed.gov/faq/what-ferpa>

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WHAT IS AN “EDUCATION RECORD?”

- Any record, with certain exceptions, ***maintained*** by an institution that is ***directly related to a student*** or students. This record can contain a student’s name(s) or ***information*** from which an individual ***student can be personally (individually) identified***.
- These records include: files, documents, student papers and materials in whatever medium (handwriting, print, tapes, disks, film, microfilm, microfiche) which contain information directly related to students and from which students can be personally (individually) identified.



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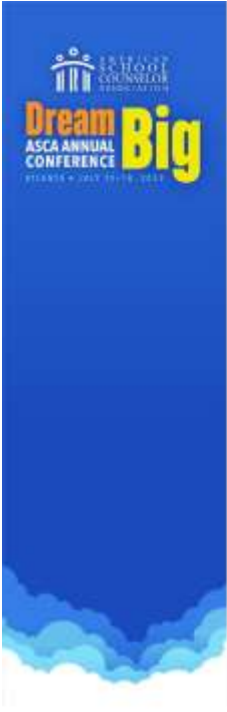


What is Not Considered an Education Record?

- “Sole Possession” notes
- Law enforcement unit records
- Records maintained exclusively for individuals in their capacity as employees
 - Records of individuals who are employed as a result of their status as students (work study) are education records.
- Medical & Treatment records
- Alumni records

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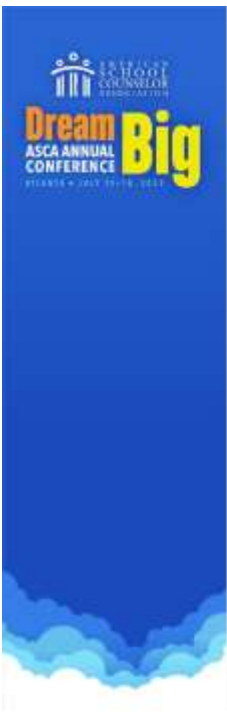


Sole-possession records

“Records used only as a personal memory aid 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 and provide only professional opinion or personal observations. Sole-possession records are exempted from the definition of educational records and FERPA protection” (ASCA Ethical Standards, 2022).



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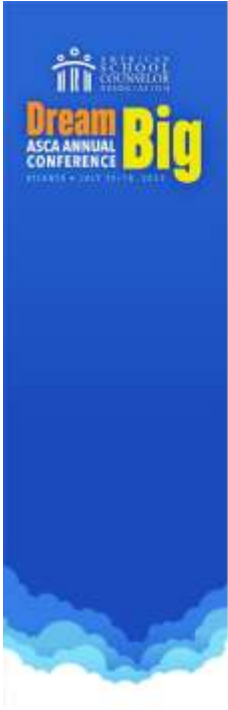
Legal Guidance Patterson, Buchanan, Fobes, & Leitch, Inc., P.S.

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



https://resources.finalsite.net/images/v1576003301/monroewa/cdwlslgh7bzajzkxhjej/Ferpa_and_Private_Notes.pdf

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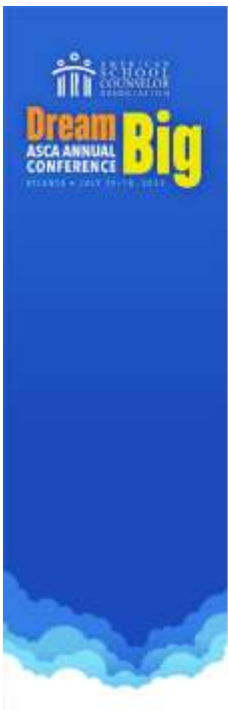
Legal & Ethical Considerations

A.13.c: It is difficult to adhere to FERPA's definition of sole-possession record

A.13.d: Sole possession records and case notes can be subpoenaed unless there is a state statute protecting privileged communication for student/school counselors.



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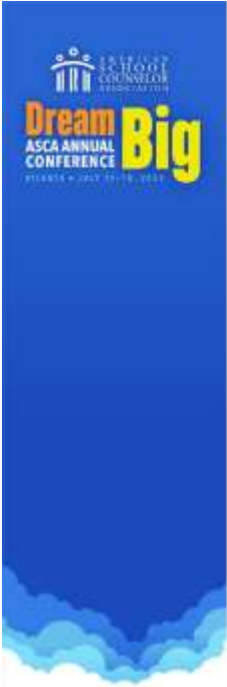


Legal & Ethical Considerations: A.13.f

- Adhere to ethical considerations in purging sole-possession records or casenotes (e.g., student transitions, graduation)
- Do NOT destroy sole-possession records that may be needed by court without prior approval by district legal counsel (e.g., child abuse, suicide, sexual harassment, violence)



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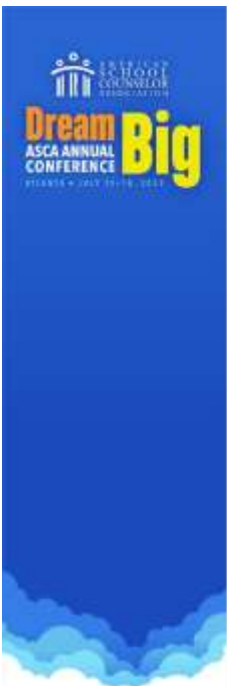


SOLE POSSESSION NOTES SCENARIO

At a school in the southeast, the Title IX coordinator was investigating a complaint filed by a student. The student alleged that she had been harassed by another student. In the investigation, the Title IX coordinator interviewed all students who may have observed the alleged incident. The Title IX coordinator interviewed each student individually and privately, and while interviewing, wrote notes of each student's observation and recollection. The Title IX coordinator did not ask each student to review the notes for accuracy and did not share the notes with anyone. The interview notes were maintained in the Title IX coordinator's office in a locked cabinet. No other person had access to the notes. The Title IX coordinator reviewed the notes to prepare a report but did not disclose the notes themselves to anyone. Several years later, the student who had made the accusation discovered that the notes existed and asked to see them since, under FERPA she said; a student has the right to examine education records. The Title IX coordinator was advised by legal counsel that the notes were "sole possession" records, and thus were not education records and not subject to review by the student. The student then filed a complaint with the Family Policy Compliance Office, claiming that her "right to access" under FERPA had been denied.

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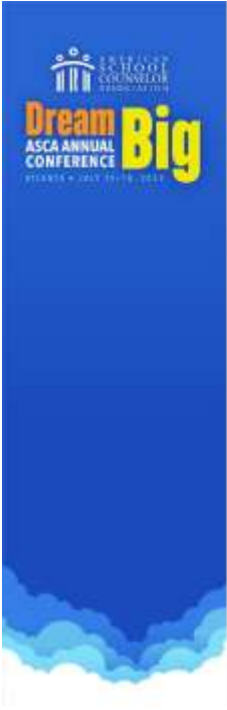
Complaint 1251, 2005

The Salem-Keizer School District in Oregon was found to have violated FERPA by refusing to allow a parent to inspect and review her daughter's speech logs and other records documenting services provided by clinicians including the clinicians' observations regarding the student's progress. The district argued these were sole-possession records.

The Family Policy Compliance Office (FPCO) explained that the provision regarding use of a record "only as a personal memory aid" was added in the Final Rule issued on July 6, 2000. The Department explained that "we sought to clarify that 'sole possession records' *do not include evaluations of student conduct or performance.*"

<https://www.wrightslaw.com/info/ferpa.ltr.baker.052306.pdf>

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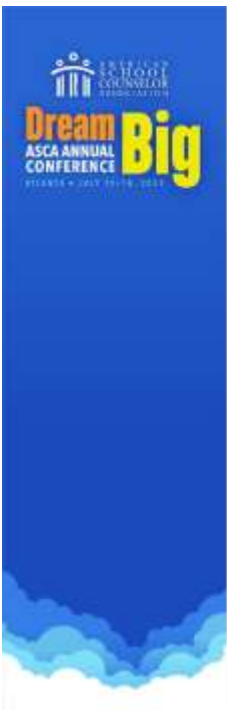


Complaint 1251, 2005

It was further explained that “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.”

<https://www.wrightslaw.com/info/ferpa.ltr.baker.052306.pdf>

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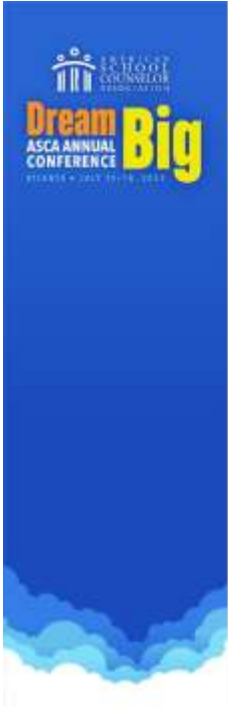


Complaint 1251, 2005

Notes about students prepared by school officials (such as teachers, speech-language therapists, clinicians, etc.) are not considered "personal" 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.

<https://www.wrightslaw.com/info/ferpa.ltr.baker.052306.pdf>

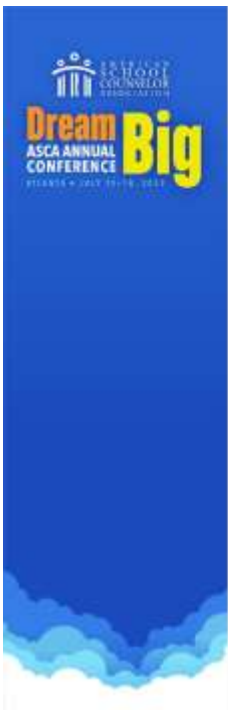
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Scenario

I have a parent reaching out to me requesting my notes for a custody battle. I am not sure how to respond to the parent. Ideally, I would like to stay out of custody situations. I don't have technical notes, just little notes that I do to keep track of the student. For example, the times we met and general ideas covered but nothing official or anything. I would love your guidance on how to proceed with parents. Do I need to release the notes? Should I write a separate letter summarizing what was covered?

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FERPA Information Sources

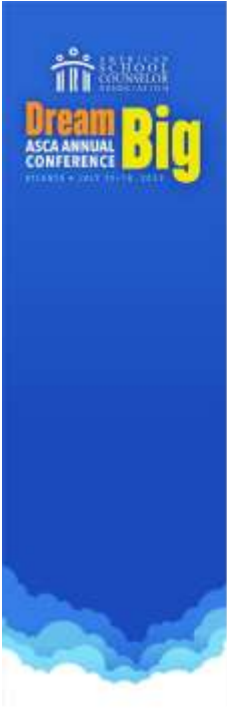
Family Policy Compliance Office
 U.S. Department of Education
 400 Maryland Ave., SW
 Washington, D.C. 20202-5920

1-855-249-3072 (phone)

<https://studentprivacy.aem-tx.com/contact>

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Key Take-Aways

- Sole possession records and case notes can be subpoenaed unless there is a state statute
- It is important to know the ethical standards regarding sole-possession records



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Resources

American School Counselor Association. (2022). *ASCA Ethical Standards*.

Stone, C. (2022). *School counseling principles: Ethics and law* (5th ed.).

The American School Counseling Association.



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