

# School Records and Case Notes

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Questions about ethics and law are frequent in our profession. It's unclear sometimes the difference between ethical and legal practice. I submit the following article by Carolyn Stone, ASCA Ethics Chair, regarding school records and counselor case notes.

## **Case Notes, Educational Records and Subpoenas**

You have been seeing Stephen off and on for the first three months of the school year. You have received a request from Stephen's mother for copies of your case notes. Are you legally required to provide her with your case notes? Family Education Rights and Privacy Act (FERPA) is federal legislation that governs educational records and impacts case notes in a school setting. FERPA dictates how all written information on a student will be handled for the protection of the student and their family. Before FERPA, parents did not have rights to records and abuses occurred. FERPA has enacted safeguards so that parents can access their children's educational records and have a voice in availability to others. Not all of the information collected and maintained by schools and school employees about students is subject to the access and disclosure requirements under the Family Education Rights and Privacy ACT (FERPA, 1973). One of the five categories exempt from the definition of educational records under FERPA is records made by teachers, supervisors, counselors, administrators and other school personnel 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.

FERPA means that school counselor's case notes are sole possession records and not education records (which parents are entitled to see) if the records meet very specific criteria: 1) a memory aid, 2) not accessible or shared in either verbal or written form, 3) a private note created solely by the individual possessing it, and 4) include only observations and professional opinions.

Parents have rights to educational records and therefore, if our case notes do not meet the above criteria, then we are legally required to respect the spirit and intent of FERPA and provide these case notes/educational records to the requesting parent. The general belief that unless shared and accessible your case notes remain sole possession records, applies to our mental health colleagues, but application is more complex for case notes for school counselors. FERPA requirements mean that school counselors must write case notes through a different lens, only recording observations and professional opinions if we desire to meet the spirit of sole possession records. Think about the last student who came to you for a personal/emotional issue. Try to write a case note that does not record details but rather just your professional opinion and your observations. Meeting the definition of sole possession records is very tough to do!

School counselors do not usually keep prolific notes, as this is not our reality. Often case notes record the date, the student's name, and a few details to jog our memory. However, when we write detailed case notes, for example, in a child abuse situation, a student who is self-mutilating, or suicidal students, we write with the understanding that our notes can be subpoenaed (in most states) and parents can access the case notes if they record other than observations and professional opinions. Therefore, we take great care to write professionally and once subpoenaed, we are careful not to purge or rewrite notes. We can correct misspellings

or other errors by crossing out the error so that it can still be read, correcting it, and initialing the correction.

It is hard to meet the criteria for sole possession records but this does not mean that we do not write case notes when it is important or appropriate for the welfare of our students. However, when we write case notes we must constantly remind ourselves that these notes can be read in a court of law and that parents can request them. Write down what you must remember about your student/client but not with assurance and comfort that it will never be read by others. Even when school counselors manage to meet the criteria of sole possession records, in most states these records can still be subpoenaed.

What should be our first step when we receive a subpoena for one of our student's records? From the legal counsel for your school district, the attorney who issued the subpoena, or the opposing attorney, seek advice and a motion to quash, a procedure that voids your obligation to respond to a subpoena. Generally speaking, we do not want our records or our testimony in court! Our loyalty is to our students and the confidentiality we owe them. If you are unsuccessful in getting the motion to quash, advocate for the privacy of your students in other ways such as asking the judge to excuse your testimony to take your notes into chambers to determine if the notes are really needed. Advocate, advocate, advocate to protect your case notes and to be excused from testifying.

You are probably thinking that there are times such as child abuse situations in which you will want to testify and share your records. Absolutely, but exercise caution before entering the legal arena on behalf of students. For example, we are often asked to endorse one parent over another in custody battles. Ask yourself, have I ever spent hours, days and maybe even years with someone and they turned out not to be the person I thought they were?. If you answered yes to this, could it be that we rarely have the entire picture as to which parent is a better fit for a student.

Could there be more to the story than we are able to learn from the student, teacher, and from our own interactions with the parents? Some of the most heart wrenching calls I have received as ASCA Ethics Chair are from parents involved in heated custody battles who felt wronged because his or her child's counselor sided with the other parent in the form of a letter or testimony. We will continue to enter the legal arena as our judgment dictates but a sobering dose of caution may help us reevaluate some of our involvement. We want to protect student's privacy to the extent possible. However, if all attempts fail to avoid relinquishing your records or your testimony, then cooperate fully.