

# For the Record...Retention

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# Which Laws Apply?

## ▪ **Business Records**

- State and Federal Rules of Evidence
- State and Federal Rules of Civil Procedure

## ▪ **Nebraska Public Records** (84-712 *et seq.*)

## ▪ **Student Records**

- FERPA
- NE student records statute

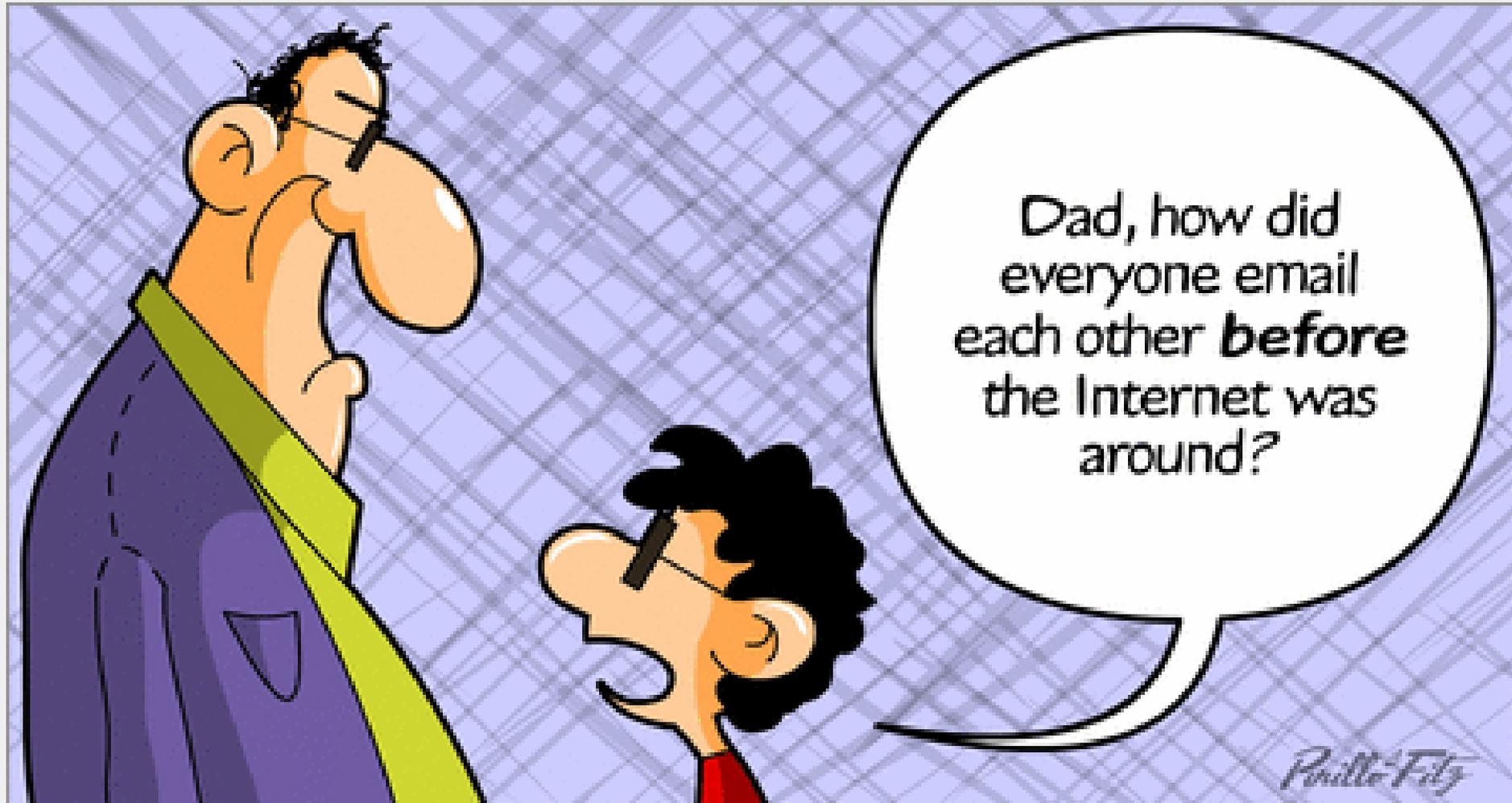
## ▪ **Special Education Records**

- Section 504
- IDEA
- Rule 51

## ▪ **Secretary of State Retention Schedules**

- 10: "Local School Districts"
- 13: "County Supt. Of Schools"
- 24: "Local Agencies"
- 95: "ESUs"

# Business Records



# Business Records

- Rule 26 – duty to disclose; general provisions governing discovery
- Rule 37 – failure to make or cooperate in discovery; sanctions
- Rule 37(e) – routine, good faith safe harbor
  - Requires “litigation hold” memoranda when there is “pending or reasonably anticipated litigation”

# Public Records



"At 10:00 you'll be deleting spam. At 10:15 you'll be forwarding jokes. At 10:35 you'll be playing online poker. At noon..."

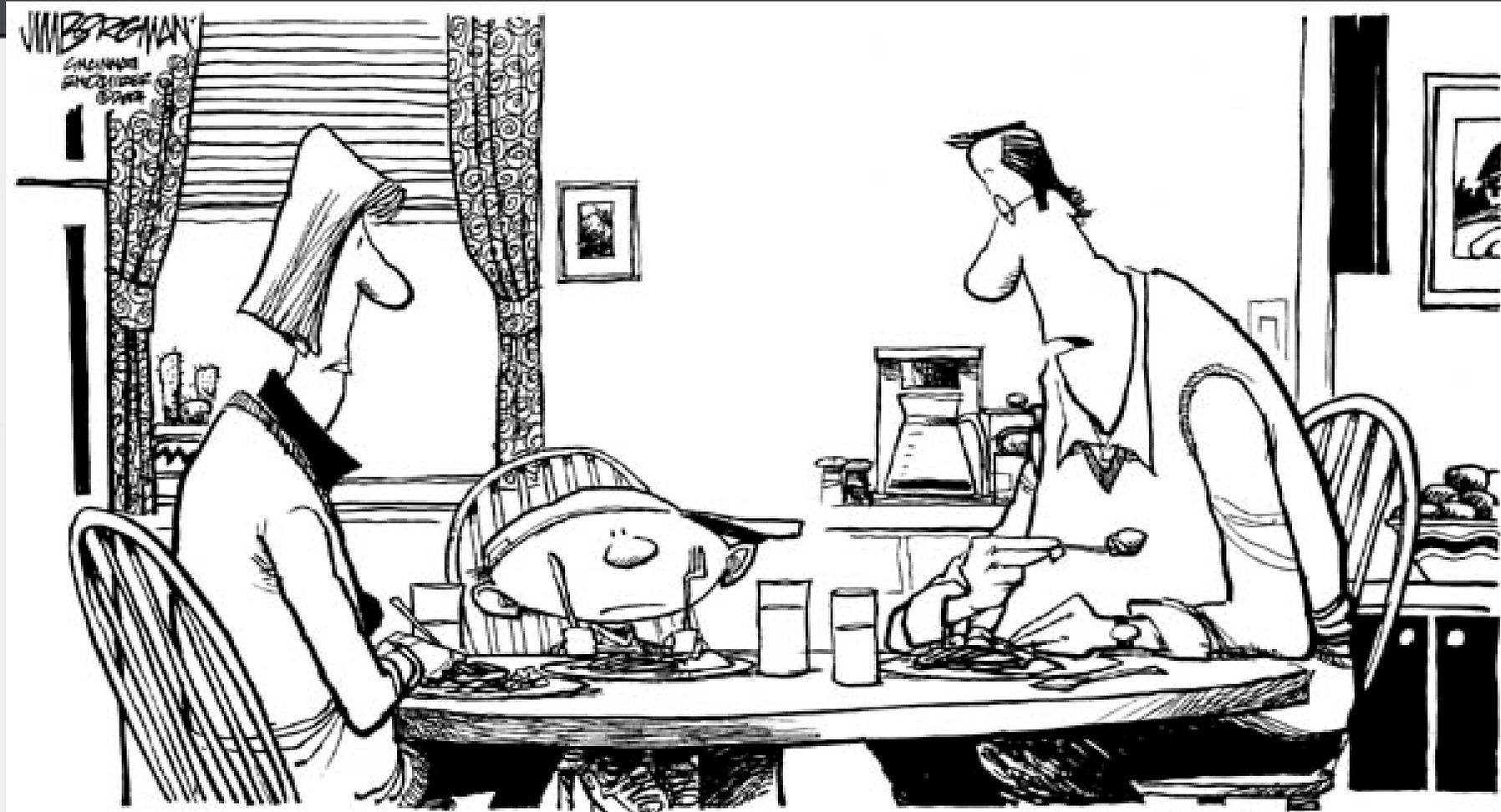
# Public Records

- 84-712.01: “public records shall include all records and documents, regardless of physical form, of or belonging to the [district].... Data which is a public record in its original form shall remain a public record when maintained in computer files.”
- AG: E-mails are public records “if they relate to official school business”
- Includes “home and private” e-mails
- Probably applies to social media messages
- Must follow SOS Record Retention Schedules

# Public Records

- SOS Schedules 10, 24, & 95 examples:
  - “Communications”: 5 years if “event-driven” or “fiscal-driven,” 8 years if “related to the mission of the agency,” (*i.e.* board goal setting)
  - Bids: 5 years if rejected, or 5 years post-completion
  - Calendars: 2 years
  - Claims: 5 years, or 10 years if no audit
  - Public Record Requests: 6 months after fulfilled
  - ESU Negotiation Records: 3 years

# Student and Education Records



"WELL, YES, WE COULD READ YOUR BLOG.... OR YOU COULD JUST  
TELL US ABOUT YOUR SCHOOL DAY."

# Student and Education Records

- FERPA: “education record” means materials which “contain information directly related to a student [and] maintained by an educational agency”
- Includes “print or computer media”
- 79-2,104: all records “maintained” regarding a student and shall separate academic and discipline records, with discipline files kept until 3 years continuous absence from school

*Owasso Ind. Sch. Dist. v. Falvo,*  
534 U.S. 426 (2002)

- Parent sued over peer grading
- Supreme Court: No FERPA violation
- Grades not “education records” until recorded in grade book.
- Peer-graded items were not “maintained” – students only handled items for a few moments.
- Student graders not “person acting for an educational institution”

# *S.A. v. Tulare County Office of Educ.,*

109 LRP 60382 (E.D. Cal. 2009)

- Parents asked for copies of all e-mail sent or received by the district concerning or personally identifying their autistic son
- District sent only e-mails which were printed and in file
- Parents claimed all e-mails that specifically identify the student are education records
- Cal. Dept. of Ed. upheld the district's interpretation
- Parents appealed, arguing that all e-mails are "maintained" in the district's electronic mail system and could be located with tech. search

# *S.A. v. Tulare County Office of Educ.,*

109 LRP 60382 (E.D. Cal. 2009)

- Court: Ruled for School
  - FERPA contemplates that education records be kept in one place
  - "An e-mail may be sent, received, read and deleted within moments"
  - Rejected idea that all e-mails on any computer that identify student are "maintained" by school

*Washoe County Sch. Dist.*  
*(Washoe I),*  
109 LRP 78026 (Nev. April 2, 2009)

- Parents requested “complete copy” of child's education records.
  - Parents noticed e-mails they had sent school were missing
  - School responded that e-mails, unless archived by staff, were deleted from its server within 60 days
  - Parents filed state department of ed complaint

*Washoe County Sch. Dist.*  
*(Washoe I),*  
109 LRP 78026 (Nev. April 2, 2009)

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- Department: violation of FERPA and IDEA
- FERPA
  - Defines "record" to mean any information recorded in any way, including computer media
  - Didn't include copies upon request, and didn't ask permission to destroy records
  - Shared definition of "record" means NDE determined that the records were "maintained"

*Washoe County Sch. Dist.*  
*(Washoe II),*  
114 LRP 25728 (Nev. May 23, 2014)

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- Parents of student with autism requested copies of documents related to “roller skating observation”
  - All documents were e-mails
  - School initially declined to provide documents
  - After IEP they printed, made copies, and provided
  - Parents filed state department of ed complaint

*Washoe County Sch. Dist.*  
*(Washoe II),*  
114 LRP 25728 (Nev. May 23, 2014)

- Department: NOT a violation of FERPA or IDEA
  - Quoted *Owasso* and *Tulare*
  - Held no violation
  - Re *Washoe I*: "Since a complaint report must reflect the statutory, regulatory, and judicial authority at the time of the alleged violation, the NDE does not view the conclusion of law in the prior complaint report to have a bearing on this determination"

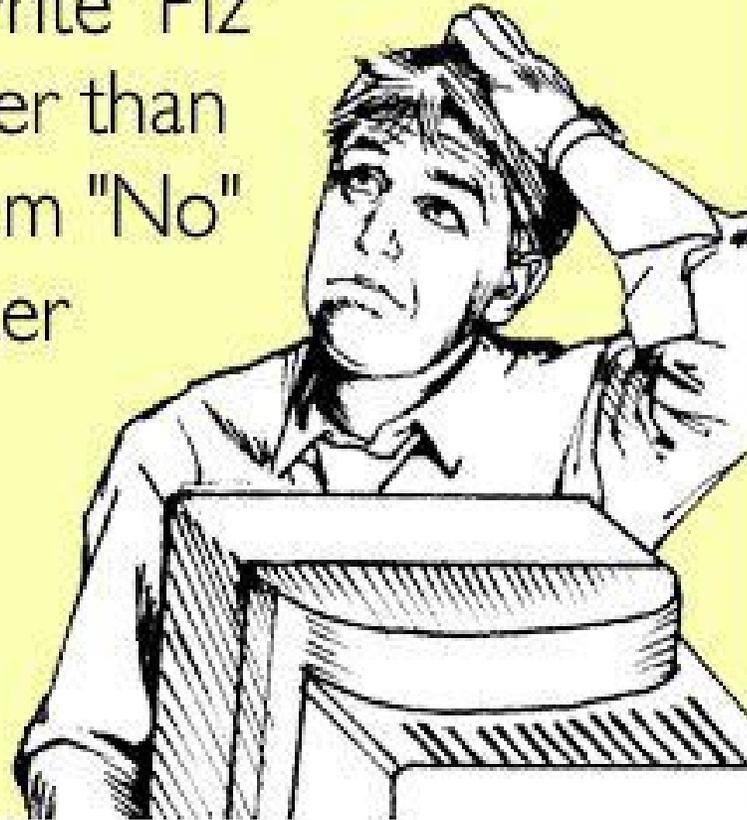
# Student and Education Records

- Secretary of State Schedule 10:
  - “Permanent”: retain permanently or microfilm and destroy at graduation or 3 years after no attendance
  - “Subsidiary”: microfilm and destroy at graduation or 3 years after no attendance
  - “Communications about students” = could be subsidiary, SPED, discipline, etc.
  - “Directory Info”: retain permanently or microfilm and destroy at graduation or 3 years after no attendance
- 10-6-10: unless otherwise prohibited, records can be microfilmed and destroyed

# Special Education Records

When people text me for something they write "Plz" because it's shorter than "Please", I text them "No" because it's shorter than "Yes".

someecards  
user card



# Special Education Records

- IDEA:
  - Requires notification of parents prior to deleting ed records which contain personally identifiable information “collected, maintained, or used”
  - “A permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.”

# Special Education Records

- IDEA:
  - School and parents may communicate via email if offered by school and agreed to by parents
  - Uses FERPA definition of “education records”
- SOS 10-1-6: must keep SPED records for shorter of 5 years after no longer needed to provided services, or 20 years
- Rule 51: Uses FERPA definition of “ed. records”
  - Tracks IDEA for deletion of records

# *Washoe I and II*

## ■ Washoe I

- IDEA requires districts to inform parents when personally identifiable information is no longer needed
- School was obligated to inform the parents that the information in the messages was no longer needed
- “Safe harbor” of Rule 37 not protection in IDEA context

*Washoe County Sch. Dist.*  
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# Hypotheticals

- One teacher e-mails another not to wear a red shirt for co-teaching the next day
  - Public record?
  - Schedule 10 or 24?

# Hypotheticals

- One teacher e-mails another not to wear a red shirt for co-teaching the next day, because SPED student triggers at the color red, hit another student 2 weeks ago, and IEP says teachers shouldn't wear red shirts
  - Litigation/business record?
  - Public record?
  - Student record?
  - IDEA?
  - Schedule 10: discipline and SPED?
- Delete after 3 years or save for graduation +5?

# Practical Pointers



*“You should check your email more often, Barnes. I fired you over 3 weeks ago.”*

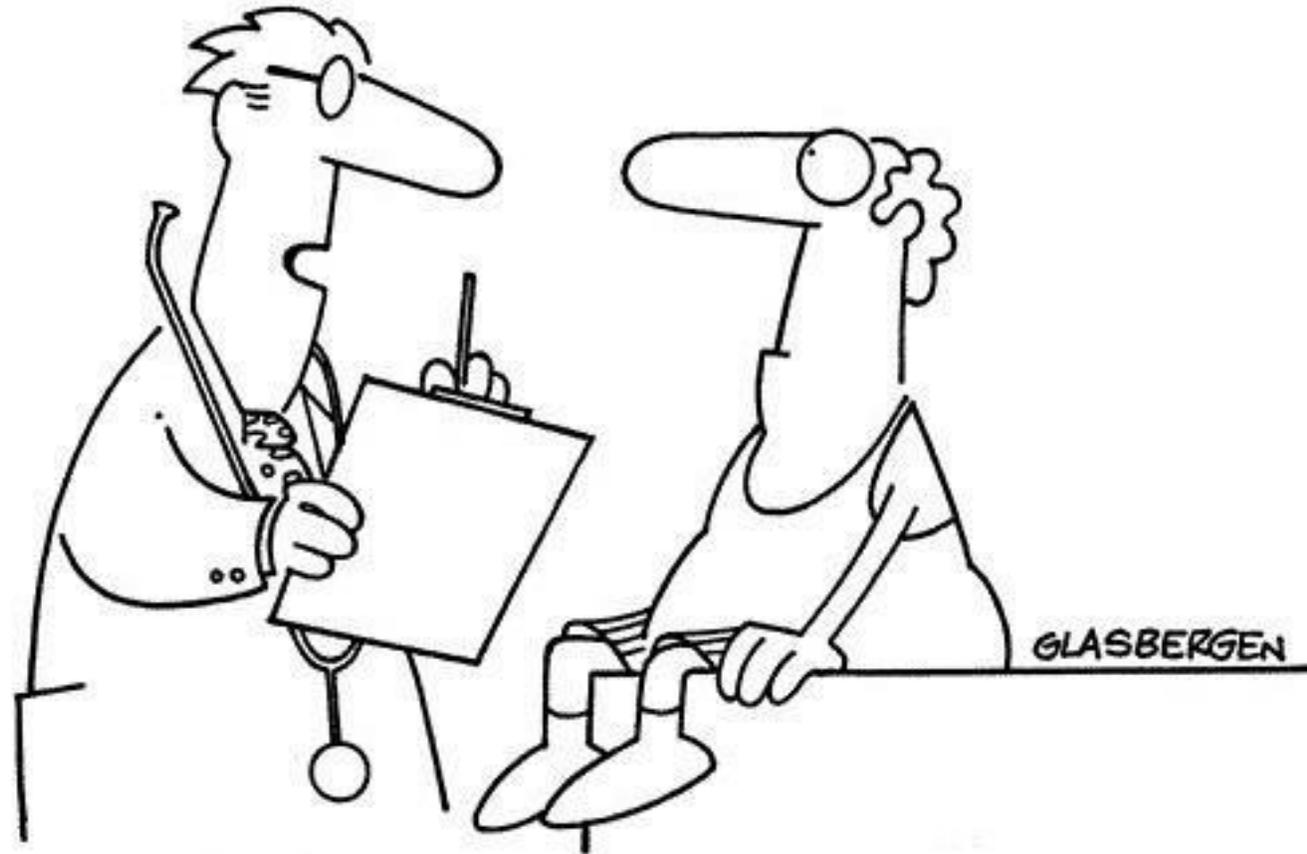
# Practical Pointers

- Provide training on and follow your record retention policies
  - All staff
  - Board members
- This is one policy where we don't mind regurgitating the law
- Form a policy which addresses social media use
- Put in a "if in doubt" provision applicable to all staff

# Practical Pointers

- Generally resolve conflicts with the most conservative approach
- When in doubt, digitize, but remain mindful of FERPA's "maintain" requirement
- Review your routine email deletion protocols, and if applicable consult your ESU
- Keep logs of deletions of any records

# Questions?



**“We can’t find anything wrong with you, so we’re going to treat you for Symptom Deficit Disorder.”**

# For the Record...Retention

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