

March 14, 2005

Robert H. Henry, Esq.
School and College Legal Services of California
5350 Skylane Boulevard
Santa Rosa, California 95403

Dear Mr. Henry:

This responds to your letter of December 26, 2004, in which you identified a potential conflict between California law and the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Your letter indicates that School and College Legal Services of California represents over 200 school and community college districts in the State. This Office administers FERPA and provides technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations codified at 34 CFR Part 99.

You provided a copy of a recent Opinion of the California Attorney General, 87 Op. Atty. Gen. 168 (No. 04-112) dated November 29, 2004, and suggested that public school districts in the State will not be able to comply with both the Attorney General's Opinion and the right of parents to access their children's student records under FERPA. Under § 99.61 of the FERPA regulations, an educational agency or institution is required to notify this Office within 45 days if it determines that it cannot comply with FERPA due to a conflict with State or local law.

The Opinion responds to two questions about State law regarding students' receipt of confidential medical services. The Attorney General determined that §§ 46010.1 and 48205 of the Education Code require school districts to notify both students and their parents that students may be excused from school for confidential medical appointments without parental consent. Based on this interpretation, the Opinion concludes that a school district may not 1) require a student to obtain written parental consent prior to releasing the student from school to receive confidential medical services; and 2) adopt a policy pursuant to which the district will notify a parent when a student leaves school to obtain confidential medical services.

In regard to the potential conflict between State law and FERPA, you pointed out by way of example that State regulations require schools to maintain records of excused student absences along with the method that was used to verify that the absences were excused. See 5 CCR §§ 420 and 421. Your letter states that "[t]he Attorney General's Opinion concludes that parents are not to be given access to such records."

FERPA provides that parents have a right to inspect and review their children's education records, which are defined as records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR Part 99, Subpart B, and § 99.3 ("Education records"). Once a student

reaches 18 years of age or attends a postsecondary institution, all FERPA rights transfer from parents to the student. 34 CFR §§ 99.3 (“Eligible student”) and 99.5. We assume for purposes of this discussion that the students in question are not “eligible students” and that the parents retain their right to inspect and review their children’s education records under FERPA.

State law provides that parents have an “absolute right to access to any and all pupil records related to their children which are maintained by school districts ... except as provided for in [Chapter 6.5. Pupil Records].” Cal Ed Code § 49069; see also Cal Ed Code § 51101(a)(10). While State law provides that parents have a right to “be notified on a timely basis if their child is absent from school without permission” (Cal Ed. Code § 51101(a)(4)), a student has a right to obtain “confidential medical care ... without the consent of his or her parent or guardian.” Cal Ed Code § 49091.12(b). The Attorney General’s Opinion concludes (at page six) that minors have a right under State law not only to seek sensitive medical treatment without parental consent but *to keep the existence of such medical services confidential, even from their parents*. The Opinion explains further (at page six):

Nor is our conclusion inconsistent with statutes giving parents access to certain information bearing on their children’s education, including access to their children’s school records. (Ed. Code, §§ 49061; 51101, subd. (a)(10).) [5 Nothing in this opinion is intended to curtail a parent’s right to be informed when his or her child has been absent from school without excuse. (Ed. Code, § 51101, subd. (a)(4).)]⁵ While providing parental access to this information, the Legislature has protected students’ rights to informational privacy, specifically regarding confidential medical services (e.g., Ed. Code, § 49091.12, subd. (b)) and disclosure of personal information to school counselors (Ed. Code, § 49602).

State regulations provide that a student’s absence for medical, dental or optometrical services is one of four absences that are considered “allowable as attendance” when verified in accordance with Article 1.1. Record of Verification of Absence Due to Illness and Other Causes. See 5 CCR § 420(c). (The others include absence due to illness; quarantine directed by a county or city health officer; and attending funeral services of a member of the student’s immediate family under specified conditions.) Thus, it appears that the Attorney General’s conclusion is based on an understanding that parents’ rights to obtain access to student records under State law covers records of *unexcused* absences under § 51101(4) of the Education Code, but it does not apply to records of *excused* absences, which includes a student’s absence for confidential medical services. In regard to the particular example you provided, we note further that while 5 CCR § 421. Method of Verification provides a list of persons and methods that qualify for verification an absence due to *illness or quarantine*, there appears to be no parallel provision applicable to other excused absences, including absences for medical services.

In any case, a record of a student’s absence for confidential medical services maintained by an educational agency or institution constitutes an “education record” under FERPA because it is directly related to a student. Further, there is no exception to the definition of “education records” or other basis in FERPA on which an educational agency or institution may deny parents their right to inspect and review their children’s records of these excused or allowed absences under FERPA. Therefore, a public school that receives federal education funds and

that maintains records of students' absences for confidential medical services may not comply with State law that requires it to deny parents their right under FERPA to inspect and review these records.

We will advise the State Superintendent of Public Instruction of this matter for appropriate follow-up and thank you for bringing it promptly to our attention.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office