Steven L. Beshear
Governor

Terry Holliday, Ph.D.
Commissioner of Education

EDUCATION AND WORKFORCE DEVELOPMENT CABINET
DEPARTMENT OF EDUCATION

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April 10, 2013

Deputy Chief Justice Mary C. Noble
5th Supreme Court District
Supreme Court of Kentucky
State Capitol, Room 235
700 Capitol Avenue
Frankfort, KY 40601

Sara Boswell Dent, J.D.
Family Court Liaison
Department of Family and Juvenile Services
Administrative Office of the Courts
100 Millcreek Park
Frankfort, KY 40601

Re: Disclosure of education records in education neglect cases

Dear Justice Noble and Ms. Dent:

I wanted to thank you for the recent inclusion of the Kentucky Department of Education (KDE) in the efforts to streamline and improve the Family Court forms and issues that currently exist in the provision of education records to court designated workers (CDW) for the investigation of educational neglect. As you may know, Associate Commissioner Susan Allred and attorney David Wickersham from my agency have also been participating in the last few months, with some of the same counterparts involved in the Family Court forms review, in efforts to improve the communication between the Cabinet for Health and Family Services and education providers and the transfer of education records for foster children in our state. Those efforts are ongoing and early progress in resolving issues for those students has been encouraging, to say the least.

The issue discussed in last week's meeting with Amy Peabody and David Wickersham, the provision of education records to a CDW for investigation of educational neglect, is one that our office has not previously reviewed thoroughly and I am happy to report that we believe these issues and confidentiality concerns can be resolved based on the following information.

First, though the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, does protect the confidentiality of student education records, the U.S. Department of Education's

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Family Policy Compliance Office (FPCO) has issued guidance clarifying that school personnel can provide a student's education records when required to report abuse or neglect of the student. In 2004, FPCO issued a letter to the University of New Mexico clearly allowing school officials to provide education records, as necessary, in reports of neglect or abuse required under state law:

> In regard to the reporting required under New Mexico's Abuse and Neglect Act, in 1997 this Office reviewed State laws in Maine and Texas that require schools to report known or suspected cases of child abuse or neglect to designated officials. While we first determined that the "health and safety emergency" exception in FERPA would not permit a blanket release of personally identifiable information from a student's education records in every case where a teacher "knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected," we also concluded that these state laws actually presented a conflict between FERPA and another, later-enacted Federal law that superseded FERPA and allowed these disclosures without consent.
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> In particular, the Federal Child Abuse Prevention, Adoption and Family Services Act of 1988 amended the Child Abuse Prevention and Treatment Act (CAPTA) by providing that a State must enact laws that require reporting of known and suspected instances of child abuse and neglect in order to receive grants for abuse prevention and treatment programs. See 42 U.S.C. § 5106a(b)(1)(A) and 45 CFR 1340.14(c). (States must also ensure that the disclosure and redisclosure of information concerning child abuse and neglect is made only to persons or entities determined by the State to have a need for the information. 42 U.S.C. § 5106a(b)(4)(A).) It is clear that in some instances the mandatory reporting may require the release of personally identifiable information from education records protected under FERPA. Congress enacted the basic privacy protections of FERPA in 1974. Following well-established standards of statutory construction, we were unable to interpret these two laws (CAPTA and FERPA) so that they did not conflict and concluded that Congress intended to supersede FERPA in this instance and allow reports of child abuse to take place, including disclosure of personally identifiable information from education records, without parental consent.
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> Under this analysis, University personnel may comply with the specific reporting requirements in New Mexico's Abuse and Neglect Act and regulations to the extent that these State requirements comply with CAPTA (including regulations promulgated pursuant to CAPTA) and conflict with specific provisions in FERPA. We would be pleased to answer any more detailed questions you may have in this regard about reporting requirements under this State law.

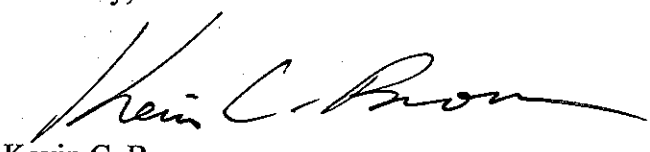
This letter can be found on the USED website at http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html?exp=8 and a copy is

enclosed with this correspondence for your convenience. This interpretation alone provides the necessary confirmation from the federal agency that its interpretation of its own regulations allow for the release of education records to CDWs when school officials are reporting abuse or neglect, including educational neglect.

Second, there is a general FERPA exception coupled with the authority of the CDWs listed in Kentucky statute KRS 605.030 which provides another avenue for the release of a student's education records to a CDW without parental consent. KRS 605.030 provides the CDWs with the authority to issue subpoenas. FERPA has a general exception to parental consent which allows a school official to release a student's education records when presented with a subpoena. A CDW could work with the local school district director of pupil personnel (DPP), the district employee vested with the duty to ensure compulsory attendance of students pursuant to KRS Chapter 159, regarding coordination of the educational neglect complaint, AOC Form JV-41, and any educational records needed for the CDW's investigation and referral of a case.

In an effort to ensure communication of the CDW's authority to receive these educational records to address and rectify educational neglect, Commissioner Holliday will be sending this information to local school district superintendents and KDE will also provide this information directly to DPPs throughout the state. I have also copied Teresa Combs with the Kentucky School Boards Association (KSBA) to insure the consistency of the policy services provided by that organization to local school districts. We encourage you to provide this information to your CDWs as well to complete the communication chain. Together, I believe we can resolve these prior issues and better serve our most vulnerable students and ensure greater outcomes for their futures.

Sincerely,



Kevin C. Brown
Associate Commissioner and General Counsel

Enclosure

cc: Terry Holliday, Ph.D., Commissioner, KDE
Susan Allred, Associate Commissioner, KDE
David Wickersham, Assistant General Counsel, KDE
Amy Peabody, Assistant General Counsel, KDE
Teresa Combs, Counsel, KSBA