



September 20, 2002

Ms. Debbie Harris  
Legal Advisor  
Lamar Consolidated Independent School District  
3911 Avenue I  
Rosenberg, Texas 77471

OR2002-5319

Dear Ms. Harris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171278.

The Lamar Consolidated Independent School District ("LCISD") received a request for information relating to the education and counseling of certain students. The requestor represents the parents of the named students. You state that all of the requested information is being prepared for release to the requestor except for the documents that you have submitted to this office. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.135 of the Government Code and sections 261.101 and 261.201 of the Family Code. We have considered the exceptions you claim and reviewed the submitted information.

In the instant case the submitted information consists of student education records which are subject to the Family Educational Rights and Privacy Act ("FERPA"). 20 U.S.C. § 1232g. FERPA protects a student's privacy interests in "education records," which are defined as those records which contain information that is directly related to a student and which are maintained by an educational agency or institution or by a party acting for such an agency or institution. *Id.* § 1232g(a)(4)(A). Under FERPA, an education agency or institution is generally required to provide parents of minor students access to the student's education records. *Id.* § 1232g(a)(1)(B). Thus, in this case, the requestor, as a representative of the parents of the students whose education records are requested, would generally have a right to the requested information under FERPA. Similarly, section 26.004 of the Education Code provides that "[a] parent is entitled to access to all written records of a school district concerning the parent's child, including ... counseling records[.]" Educ. Code § 26.004. Thus, the requestor would normally have a right to the requested information under section 26.004.

However, the submitted information is also subject to the federal Child Abuse Prevention and Treatment Act ("CAPTA") which provides that a state must meet certain eligibility requirements before it may receive federal grant funding for child abuse prevention and treatment programs. *See* 42 U.S.C. § 5106a(b)(1)(A). CAPTA requires states to provide for methods to preserve the confidentiality of information concerning child abuse and neglect. *Id.* § 5106a(b)(2)(A)(v). In accordance with CAPTA, section 261.201(a)(2) of the Family Code makes confidential "the files, reports, records, communications, and working papers used or developed in an investigation under [chapter 261] or in providing services as a result of an investigation." The Department of Protective and Regulatory Services ("DPRS") is an agency authorized to conduct an investigation under chapter 261. Fam. Code § 261.103. The submitted information labeled "Letter" ("Letter") is a letter from DPRS. Because the Letter represents a communication developed in an investigation under chapter 261, this information is confidential per 261.201(a)(2).<sup>1</sup> The submitted information labeled "Report" ("Report") is not a file, report, record, communication or working paper *used or developed in an investigation under chapter 261* because LCISD is not an agency authorized to conduct an investigation under chapter 261. *See id.* Because you provide no indication that the Report was used in a chapter 261 investigation, we conclude that section 261.201 does not apply to the Report.

Therefore, with regard to the Letter, the issue is the conflict of laws vis-à-vis a parent's right of access to the education record of his child when that record is a communication developed in an investigation under chapter 261. Under FERPA and section 26.004 of the Education Code, a parent has a right to his child's education records. Under chapter 261 of the Family Code, enacted in accordance with CAPTA, the information is confidential as a communication developed in an investigation.

The United States Department of Education's Family Policy Compliance Office ("compliance office") has addressed the conflict between FERPA and a Texas law enacted pursuant to CAPTA in a letter to counsel for the San Antonio Independent School District. The compliance office is responsible for interpreting and construing FERPA and we defer to its decision. We have attached a copy of the compliance office's letter ruling for your

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<sup>1</sup>We note that because the investigation has been referred to the Department of Protective and Regulatory Services ("DPRS"), the requestor, who is the parents' representative, is entitled to access to DPRS's records. Section 261.201(g) of the Family Code provides that DPRS, upon request and subject to its own rules:

shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect information concerning the reported abuse or neglect that would otherwise be confidential under this section if the department has edited the information to protect the confidentiality of the identity of the person who made the report and any other person whose life or safety may be endangered by the disclosure.

convenience. This letter dealt with FERPA and chapter 261 of the Family Code. The former requires an educational agency to release education records to parents of minor students, while the latter prohibits the disclosure of information concerning suspected child abuse. Thus, there exists a potential conflict between the two statutes. The compliance office found that the Texas statute was promulgated pursuant to CAPTA and that any statutory conflict would therefore be between the two federal statutes rather than the Texas statute and FERPA. As the two federal statutes were in irreconcilable conflict, the compliance office concluded that the later-enacted statute, CAPTA, governs. *See* Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Stacy Ferguson, Attorney, Schulman, Walheim & Heidelberg (Oct. 10, 1997); *see also* *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Thus, the compliance office concluded that the CAPTA-compliant Texas Family Code provision concerning reporting suspected incidents of abuse or neglect prevailed over FERPA. We agree with the compliance office's ruling that CAPTA prevails over FERPA.

We note that there also exists a potential conflict between section 26.004 of the Education Code and chapter 261 of the Family Code. However, because chapter 261 was enacted pursuant to CAPTA, we conclude that any statutory conflict would actually be between CAPTA and section 26.004, rather than between the two Texas statutes. Such conflicts are governed by the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law that conflicts with federal law is preempted and "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *M'Culloch v. Maryland*, 17 U.S. 316 (1819)). Therefore, we conclude that in the instant case CAPTA also prevails over section 26.004. Consequently, under Texas law enacted in accordance with CAPTA, the Letter is made confidential by section 261.201(a)(2) of the Family Code. Because section 552.101 of the Government Code excepts from disclosure information considered to be confidential by other statutes, we find that the Letter is excepted from required public disclosure as information made confidential by law.

Concerning the remaining submitted information, which consists of a counseling report, we address your assertion that the identity of the person who reported the suspected child abuse should be withheld. Section 261.101 of the Family Code provides that the identity of an individual making a report under chapter 261 is confidential. *See* Fam. Code § 261.101(d). To resolve the question of whether this section conflicts with FERPA, we turn to another letter from the compliance office dealing with the relationship of FERPA and a CAPTA-compliant state statute. In this letter the compliance office stated:

The identity of the individual reporting suspected child abuse is not information or data about the student and, therefore, not the type of information Congress sought to protect in enacting FERPA.

Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Steven J. Sibner, Attorney, Durant, Sabanosh, Nichols & Houston (Mar. 14, 1994). Because the compliance office concluded that this information is not subject to FERPA, there is no conflict between FERPA and section 261.101(d).

As for the potential conflict of section 261.101(d) of the Family Code and section 26.004 of the Education Code, we again turn to CAPTA. Because we concluded above that CAPTA prevails over section 26.004, we find that under Texas law enacted in accordance with CAPTA, the identity of the person who reported the suspected child abuse is made confidential. *See* Fam. Code § 261.101(d). Because section 552.101 of the Government Code excepts from disclosure information considered to be confidential by other statutes, we find that the identity of the person who reported the suspected child abuse is excepted from required public disclosure as information made confidential by law. Consequently, you must withhold this information from the Report. We have marked the submitted information accordingly. The remainder of the Report must be released to the requestor. Because section 261.101 is dispositive with regard to the identity of the reporter, we need not address your argument under section 552.135 of the Government Code.

In summary, the LCISD must withhold in its entirety the submitted information labeled "Letter." As for the submitted information labeled "Report," you must withhold the identity of the person who reported the suspected child abuse. The remainder of the Report must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, *no writ*).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jon Tate Self  
Assistant Attorney General  
Open Records Division

JTS/seg

Ref: ID# 171278

Enc. Marked documents

c: Mr. Gary W. Gates, Jr.  
Family Advocates  
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(w/o enclosures)