



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 12, 1996

Mr. David Greak
Superintendent of Schools
Cayuga Public Schools
P.O. Box 427
Cayuga, Texas 75832

OR96-1422

Dear Mr. Greak:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request ID# 40774.

The Cayuga Independent School District (the "district") received a request for a copy of a settlement agreement entered into by the district and the parents of a district student in a special education litigation matter. You have provided this office with a copy of this settlement agreement and ask whether the agreement is confidential pursuant to a confidentiality clause within the agreement.

The settlement agreement that you submitted contains a nondisclosure provision which provides that the settlement agreement shall be held confidential by the parties and not disclosed to others, except to those who have a legal right of access. Normally, a settlement agreement that is not made confidential by a court order will be open to the public. Open Records Decision No. 114 (1975); *see also* Open Records Decision Nos. 444 (1986) at 6 ("governmental bodies may not simply agree to keep information confidential"), 415 (1984) (settlement agreement made confidential by court order excepted from disclosure under predecessor to Gov't Code § 552.107(2)); *cf. Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 358 U.S. 931 (1977) ("we do not believe that information should be excepted from disclosure merely because the individual furnishing such information did so with the expectation that access to the information would be restricted"). Thus, the fact that the settlement agreement contains a confidentiality agreement does not make the information confidential. Absent a specific court order making the agreement confidential, settlement agreements are normally subject to public disclosure. Open Records Decision Nos. 444 (1986), 114 (1975).

In the case at hand, however, the parents of the student that entered into the settlement agreement with the district assert that the document is protected as an education record under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Section 1232g(b) provides in part as follows:

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section)¹ of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

[list of exceptions].

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally

identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

¹"Directory information" is defined as including

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A). Other examples of directory information include marital status and expected date of graduation, *see* Open Records Decision No. 96 (1975) at 1, student parking permit information, Open Records Decision No. 242 (1980) at 2, and student rosters for particular courses and names of students present at each class, Open Records Decision No. 244 (1980) at 2.

FERPA permits an educational agency or institution to release directory information in accordance with federal notice requirements, 20 U.S.C. § 1232g(a)(5)(B) (providing notice requirements that afford affected students right to object to release of directory information relating to them), without the sanction of loss of federal funds, *id.* § 1232g(b)(1). The Texas Open Records Act *requires* an educational agency or institution to give notice and an opportunity to object to the release of requested directory information as required by federal law and then to release the directory information if there is no objection. Open Records Decision Nos. 244 (1980) at 2, 242 (1980) at 2, 96 (1975) at 2.

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency. [Footnote added.]

See also 34 C.F.R. pt. 99 (Department of Education regulations under FERPA). For purposes of FERPA, "education records" generally include "records, files, documents, and other materials" that "contain information directly related to a student" and that "are maintained by an educational agency or institution or by a person acting for such agency or institution," 20 U.S.C. § 1232g(a)(4)(A).²

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by

²The FERPA definition of "education records" contains several exceptions:

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).

Based on the information that has been provided to this office, we are unable to determine whether all or any part of the requested settlement agreement is an "educational record" subject to the nondisclosure provisions of FERPA. *Cf.* Open Records Decision Nos. 554 (1990), 552 (1990) (attorney general unable to resolve questions of fact through opinion process). If the district determines that the settlement agreement or specific information contained within the settlement agreement is an "educational record" subject to FERPA, the district must withhold the agreement or portion of the agreement pursuant to FERPA and Open Records Decision No. 634 (1995).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/ch

Ref.: ID# 40774

Enclosures: Submitted documents

cc: Mr. Brian Williams
Palestine Herald Press
P.O. Box 379
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(w/o enclosures)