



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

February 10, 1975

Opinion No. 75- 56

Mr. Gene M. Olander
District Attorney
Shawnee County Courthouse
Topeka, Kansas 66603

Dear Mr. Olander:

This is a response to your request for our opinion regarding the possible conflict between PL-93-380, 20 USC 821 and K.S.A. 38-717 (1974 Supp.).

PL-93-380 is a recent amendment to the Elementary and Secondary Education Act of 1965. These amendments make several changes in law, including those related to the privacy of school records. Your inquiry concerns 20 USC 1232g(b) (1) & (2) which provide:

"(b) (1) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of permitting the release of personally identifiable records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

"(A) other school officials including teachers within the educational institution or local educational agency who have legitimate educational interests;

"(B) officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

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"(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 409 of this Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

"(D) in connection with a student's application for, or receipt of, financial aid.

"(2) No funds shall be made available under any applicable program to any State or local educational agency, any institution or higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b) (1) 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

"(B) 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.

You ask if these provisions conflict with K.S.A. 38-717 which provides:

"[E]very registered nurse, or school nurse, examining, attending or treating such a child [under the age of 18] in the absence of a physician or surgeon, and every teacher, school administrator or other employee of a school which such child is attending, or any law enforcement officer having reason to believe that such child has had serious injury or injuries inflicted upon him or her as a result of physical or mental abuse or neglect, shall report the matter promptly to the juvenile court of the county in which such examination or

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attendance is made, treatment is given, school is located or such abuse or neglect is extant or to the local office of the department of social and rehabilitation services. Such report may be made orally by telephone and shall be followed by a written report if requested. When medical examination or treatment with respect to a child is pursuant to the performance of services by a member of the staff of a hospital or similar institution, such staff member shall immediately notify the superintendent, manager, or other person in charge of the institution who shall make such a report in writing forthwith. Every such report when required to be written shall contain the names and addresses of the child and his or her parents or other persons responsible for his or her care, if known, the child's age, the nature and extent of the child's injuries (including any evidence of previous injuries), and any other information that the maker of the report believes might be helpful in establishing the cause of the injuries and the identity of the person or persons responsible therefor. [Emphasis supplied.]

PL 93-380 establishes guidelines or rules with which institutions must comply if they wish to receive federal funds. However, the law does not compel compliance. It allows a district the option of not complying with the legislation and not receiving federal funds. Thus, the federal government has not asserted exclusive control over the privacy of school records nor has it preempted the field. Rather the federal government has established conditions of disbursement of funds under its control. State governments, schools, institutions, etc., still retain the right to decide whether they wish to meet those conditions. Under these conditions no "real" conflict of laws exists. For example, the state may enact legislation in direct contravention of the requirements of PL-93-380. The Department of Health, Education, and Welfare will note this and not authorize the payment of any funds to that state. The state can still enforce its new law. Both governments may enforce their legislation simultaneously with no conflict. Massachusetts v. Mellon, 262 U.S. 47, 43 S. Ct. 597, 67 L. Ed. 1078, (1923).

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K.S.A. 38-717, on the other hand, creates a duty for certain Kansas citizens. The statute requires that certain citizens must report certain cases of child abuse. These citizens have no choice. If this required reporting causes a school to lose funds, then it is up to the state legislature to make a policy decision whether to abandon such mandatory reporting or to jeopardize the eligibility of Kansas school districts for federal funds.

Thus, even if PL 93-380 penalizes the kind of disclosure described in K.S.A. 38-717 with loss of federal funds, citizens (school nurses, teachers, etc.) must still report incidents covered by the provisions of the statute.

However, it is unlikely we will face this extreme dilemma. Although the proposed regulations implementing 93-380 have not been finally adopted, it appears that the report made to the juvenile court as required by K.S.A. -817 will not violate the provisions of the Act.

The provisions of PL 93-380 refer specifically to "records." The comment by the Secretary of the Department of Health, Education and Welfare to Section D states the pertinent part thus:

"It should be noted that the requirements in section 438(b) relate only to release of recorded data or information from recorded data that is personally identifiable. There are no restrictions on oral communications not based on information from education records, nor does section 438 forbid release of data that is not personally identifiable to a student or his or her family (for example, release of statistical information)."

It would appear from this commentary that suspicions aroused by interviews, behavior, visual observations, etc., and reported to the court would not be covered by the Act.

Also §99.30 (e) of the proposed regulations provides an exception to the rule of non disclosure by allowing an institution to allow release of records to a limited class of people defined thereby:

(e) [State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;]
[Nothing in] [this paragraph shall prevent a State from further limiting the number or type

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of State or local officials who will continue to
have access thereunder;]

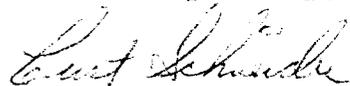
This section of the regulations appears most directly applicable to the question you raise. In talking with a local HEW representative he was unsure as to whether this section was meant to cover your situation. He did indicate that he would relay the question to Washington where a more definitive answer could be worked out and included in final regulations.

A question has been raised concerning the right of access to student's records particularly as regards the child abuse situation. It would appear that if a report of child abuse is placed or noted in the student's file or record, then the student or the student's parents are entitled to have access to it. However, there is no requirement that it be placed in the file or even become a part of the student's record. The proposed regulations do not clearly describe rights of access, and there are indications that there will be substantial changes in the final regulations. Therefore, I hesitate to speculate too freely on this area and must await publication of final regulations in March or April.

In summary, I would say the PL-93-380 in no way releases school teachers, nurses, counselors, or administrators from their duty to report all suspected cases of child abuse, even if this would jeopardize federal funding. However, it is my opinion that the PL-93-380 does allow the reporting of suspected child abuse and that such reports would not jeopardize an institution's eligibility for federal funds. Whether schools may restrict the access to records concerning child abuse appears doubtful but is still under consideration by the Department of Health, Education and Welfare, and therefore, I will delay my opinion on this question.

I hope this answers the questions you have raised and that if any further inquiries are necessary that you will feel free to call on the office for help.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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