NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to FERPA@ed.gov.

May 6, 2005

Mr. Jack O'Connell
State Superintendent of Public Instruction
California Department of Education
1430 N Street
Sacramento, California 95814

Dear Mr. O'Connell:

This is to notify you of an apparent conflict between California law and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the resulting violation of FERPA by local school districts in the State. This Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations codified 34 CFR Part 99.

Section 99.61 of the FERPA regulations provides that an educational agency or institution that determines that it cannot comply with FERPA due to a conflict with State or local law shall notify this Office within 45 days and include the text and citation of the conflicting law. In general, an actual conflict of laws arises if it is impossible for a party to comply with both federal and State law, or when a State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law. Taubman Realty Group Ltd. Partnership v. Norman Mineta, 198 F.Supp. 2d 744, 761 (E.D. Va. 2002), citing English v. General Electric. 496 U.S. 72(1990).

Robert H. Henry, Esq. of School and College Legal Services of California notified this Office of the apparent conflict between FERPA and California law in a letter dated December 26, 2004. Mr. Henry 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.

The Attorney General's 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, Mr. Henry pointed out that State regulations (codified at 5 CCR §§ 420 and 421) require schools to maintain records of excused student absences and 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)(l)(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)(I0). 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).

We note that 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 l.l. 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 include a student's absence for confidential medical services. Further, 5 CCR § 421 (Method of Verification) provides a list of

persons and methods that may be used to verify (and presumably create a record regarding) an absence due to *illness or quarantine*; however, there appears to be no parallel provision applicable to verifying other excused absences, including absences for medical services.

In any case, any 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. That is, a public school that receives federal education funds and that maintains records of students' absences for confidential medical services violates FERPA if it denies parents their right under FERPA to inspect and review those records.

State law conflicts with FERPA to the extent that §§ 46010.1 and 48205 of the California Education Code, as interpreted by the Attorney General in 87 Op. Atty. Gen. 168 (No. 04-112), effectively prevents parents from exercising their right to inspect and review education records relating to their child's absences for confidential medical services. Assuming for purposes of this determination that the Attorney General's opinion prevents school districts from allowing parents to have access to these records, the resulting system wide FERPA violation would also constitute a breach of the assurances in the consolidated application submitted by your agency to this Department to receive federal funds.

As noted most recently in United States v. Miami University, Ohio State University, 294 F.3d 797 (6th Cir. 2002), Congress provided in FERPA that "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" except as provided in FERPA. The court explained that legislation, like FERPA, enacted pursuant to the Constitutional spending power (art. I, § 8, cl. 1) "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 294 F.3d at 808, citing Pennhurst State School and Hospital. 451 U.S. 1, 17 (1981) (holding that Congress may fix the terms on which it disburses Federal money to the states, and likening the relationship to a contract where the receipt of Federal monies is conditioned upon a state's compliance with Federal laws). That is, "Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states." 294 F.3d at 808, *citing* Wheeler v. Barrera, 417 U.S. 402, 427 (1974), *modified on another ground*, 422 U.S. 1004 (1975). Accordingly, the State must ensure that all local school districts comply with FERPA regarding parents' rights to inspect and review any education records maintained by the district relating to their child's absence for confidential medical services.

There are a number of enforcement options available to the Department in achieving compliance with FERPA, including withholding further payments, issuing a cease and desist order, and recovering funds. See enclosed copy of 34 CFR § 99.67 and 20 U.S.C. § 1234c. The court of appeals in Miami University, *supra*, also concluded that the United States has the inherent power to sue to enforce conditions imposed under FERPA on the recipients of federal grants. 294 F.3d at 808. However, this Office is committed to working with your office and with local school districts to achieve voluntary compliance with FERPA as provided under § 99.66(c)(2) of the

regulations. As part of that effort, please report to me within 30 days of the date of this letter on the steps your agency has taken, or will take, to ensure that local school districts in California comply with FERPA requirements as described in this letter, or provide a statement explaining why you believe this action is unwarranted. Our address is:

Family Policy Compliance Office
Office of Innovation and Improvement
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-5901

We look forward to working with you to resolve this issue as expeditiously as possible. Should you have any questions, do not hesitate to contact me directly, or Frances Moran of my staff, at the address noted above. You may also reach us by telephone at (202) 260-3887.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Robert H. Henry, Esq.