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DEPARTMENT OF JUSTICE

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February 10, 2009

Mr. John Granzow
Go Kid Go Transport & Tours, LLC
5151 South Howell Avenue, Suite E
Milwaukee, WI 53207-6179

Dear Mr. Granzow:

In your January 12, 2009, letter to the Wisconsin Department of Justice you state that you asked 56 school districts in Milwaukee, Ozaukee, Racine, Washington, and Waukesha Counties to provide you with "directory data" of their students. Approximately 30 school districts replied either asking for clarification of your initial requests or declining to provide the data. Many of the letters denying your request were very similar, stating that the districts only disclose certain directory data to various public entities. You ask whether your initial request was proper and whether the letters denying your requests state valid reasons for the denials.

Section 118.125 of the Wisconsin Statutes defines various categories of pupil records and makes all of those records confidential except as specifically provided. Section 118.125(1)(b) defines directory data as "those pupil records which include the pupil'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, photographs, degrees and awards received and the name of the school most recently previously attended by the pupil." Section 118.125(2)(j) provides:

> Except as provided under subds. 2. and 3., directory data may be disclosed to any person, if the school has notified the parent, legal guardian or guardian ad litem of the categories of information which it has designated as directory data with respect to each pupil, has informed the parent, legal guardian or guardian ad litem of that pupil that he or she has 14 days to inform the school that all or any part of the directory data may not be released without the prior consent of the parent, legal guardian or guardian ad litem and has allowed 14 days for the parent, legal

> guardian or guardian ad litem of that pupil to inform the school that all or any part of the directory data may not be released without the prior consent of the parent, legal guardian or guardian ad litem.

In *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 342 N.W.2d 682 (1984) the court held that computer-generated lists of names and addresses of parents of pupils enrolled in a school district, which was used by the school district to mail information to parents, was not exempt from disclosure on the basis that is was a confidential "pupil record" within section 118.125.

It would appear that the information you requested from the school districts either meets the definition of directory data in section 118.125(1)(b) or is information included within the holding of *Hathaway*, that is, information that is not a pupil record under section 118.125. I would note that although you ask the age of the student, the directory data definition only includes the date and place of birth of the student. A school district could not be required to calculate the age of the student. Similarly, the name of the school most recently previously attended is included within the definition of directory data. Your request included a request for the grade level of the student. Again, the school district would not be required to provide that information since that specific information is not included within the definition of directory data. Therefore, except as noted, your request properly asks for information that was either directory data or not a pupil record and, therefore, absent any countervailing public interest, should have been disclosed.

Section 118.125(2)(j) does provide that directory data "may" be disclosed by the school district to any person. It is possible that the school district record custodians are interpreting "may" as granting the custodian the discretion to determine which of the authorized information will be released. In 78 Op Att'y Gen. 71 (1989) this office interpreted a very similar statute, section 146.50(12), now section 256.15(12). That statute makes ambulance service provider records confidential, but goes on to say that "not withstanding" the earlier provision of the statute "an ambulance service provider" "may make available, to any requester" certain specified types of information. This office concluded that the phrase "may make available" is used as a general exception to the confidentiality provision. The effect of the statute is that "notwithstanding the confidentially provision, the described information may be made available under the public records law." 78 Op. Att'y Gen. at 73. The office concluded that the Legislature did not use the word "shall" because the use of "shall" would have barred the custodian from withholding any information under the common law balancing test, which is otherwise available as a possible exception under the general public records law. *Id.* For similar reasons, and because the presumption that public records are available to the public, section 19.31, I would conclude that the word "may" in section 118.125(2)(j) does not confer personal discretion or discretionary authority on individual school district record custodians. Rather, the presumption is that the

records are available to the public and any custodian wishing to deny access, must, under the common law balancing test, overcome that presumption.

I note that at least one school district has concluded, under the common law balancing test, that because section 19.36(10)(e) makes the home address, home email address, home telephone number or social security number of an employee confidential, the Legislature has demonstrated a strong public interest in keeping other home addresses, phone numbers, and email addresses private. To the contrary, if the Legislature wanted to make the address, phone numbers, and email address of parents of pupils confidential, it could easily have done so in section 118.125 or the public records law. Furthermore, the Legislature has amended section 118.125 often after the court's holding in *Hathaway*. The Legislature, therefore, is presumed to know of the court's interpretation of section 118.125, and by not amending that statute, the Legislature is deemed to have acquiesced in the court's interpretation. See *Holmen Concrete Products v. Hardy Construction,* 2004 WI App 165, 276 Wis. 2d 126, 686 N.W.2d 705.

The opinions contained in this letter do not constitute a formal opinion of the Attorney General or the Department of justice under section 165.015(1). Thank you for your interest in compliance with Wisconsin's public records law.

Sincerely,

Alan Lee
Assistant Attorney General

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