



KENTUCKY GENERAL ASSEMBLY Office of Education Accountability

MEMORANDUM

TO: DR. RANDOLPH POE, SUPERINTENDENT
BOONE COUNTY SCHOOL DISTRICT

FROM: DAVID WICKERSHAM, DIRECTOR
OFFICE OF EDUCATION ACCOUNTABILITY

DATE: AUGUST 18, 2017

SUBJECT: SBDM FINAL REPORT

A handwritten signature in black ink, appearing to read "David Wickersham", positioned to the right of the "FROM:" field.

The Office of Education Accountability (OEA) has completed an investigation of allegations of wrongdoing in the Boone County School District. OEA is empowered to investigate complaints dealing with regulatory and statutory issues [KRS 7.410(2)(c)4, KRS 160.345(9)(b)]. In the course of an investigation, OEA is to have access to all public records [KRS 7.410(2)(d)]. Following the investigation, OEA is mandated to resolve the conflict, if possible, or to forward the matter to the Kentucky Board of Education [KRS 160.345(9)(b)].

On March 28-29, 2017, OEA staff visited the Boone County School District and interviewed Principal Stephanie Hagerty, Camp Ernst Middle School Council members, Principal James Brewer, Connor Middle School Council members, and others. The district and the schools provided requested documents to OEA staff. OEA has received a response from Superintendent Poe through the attorney for the district. All of the information contained in the response has been reviewed.

Based on that review and the information previously gathered by OEA, the following represents the **FINDINGS, CONCLUSIONS,** and **RESOLUTIONS** by OEA.

ALLEGATION: Superintendent Randy Poe usurped the authority of the Boone County Board of Education by permitting three middle school principals and the director of the alternative school to enter into contractual agreements with Summit Public Schools.

FINDINGS

According to information obtained from the Boone County School District, Connor Middle School, Camp Ernst Middle School, Ockerman Middle School, and The Boone Academy implemented Summit Basecamp Learning in the 2016-2017 school year. The district advised that the principals and administrators learned of Summit while attending a seminar at the University of Kentucky's Next Generation Leadership Academy.

Each school wishing to learn more about the Summit program submitted an application for participation. Summit approved the schools' participation during a visit and participation in a professional development activity regarding Summit. The district sent 82 teachers and administrators to California to learn about the program. The professional development focused on the entire Summit program, including project-based learning, personalized learning, and the mentoring components of Summit. The district advised that these trips were completely paid for by Summit.

The district further advised that Connor Middle School, Camp Ernst Middle School, Ockerman Middle School, and The Boone Academy were approved by Summit to implement its program in March 2016. The district advised that it expended no funds in bringing Summit to these schools. Summit required the execution of a participation agreement. OEA was advised by Superintendent Randy Poe that the Boone County Board of Education took no action related to the participation of these schools in Summit. The board did not enter into a participation agreement with Summit. Instead, each school principal implementing Summit was responsible for executing the participation agreement. Neither the principals nor the district obtained a copy of the participation agreements signed by a Summit Public Schools' representative.

On the Summit Learning website, OEA found a description and explanation of the Summit program.

In response to the SBDM Preliminary Report, the attorney for the district points out that OEA has cited from the website for Summit Public Schools instead of Summit Learning and states that OEA has mistakenly relied on the website "to gain their understanding of the platform in question."

OEA agrees that the information below is from the Summit Public Schools website. However, OEA disagrees that it has mistakenly relied on the website. Since Summit Public Schools is part and parcel of Summit Learning, the information below is applicable.

Summit Public Schools is a leading charter management and school partnership organization operating 11 Summit schools in California and Washington States, and supporting more than 130 schools across 27 states. Founded in 2003, Summit launched its first school with the belief that all students should be equipped with the skills and habits to lead the lives they want.

Our program includes access to the Summit Learning Platform, a comprehensive curriculum, in-person professional development and ongoing support.

The platform comes with a comprehensive curriculum developed by teachers in classrooms. The base curriculum is aligned with the Common Core, and each course includes meaningful projects, playlists of content and assessments, all of which can be customized. Teachers can adapt or create new playlists and projects to meet their students' needs.

Students work through playlists of Common Core and NGSS-aligned content at their own pace and take assessments on demand.*

**Next Generation Science Standard*

A review of the Summit Learning website confirms the information above. On the home page of the Summit Learning website, the first item listed under the Summit

Learning Platform is "Curriculum" and it describes the curriculum exactly as it is described on the Summit Public Schools website.

The platform comes with a comprehensive curriculum developed by teachers in classrooms. The base curriculum is aligned with the Common Core, and each course includes meaningful projects, playlists of content and assessments, all of which can be customized. Teachers can adapt or create new playlists and projects to meet their students' needs.

Additionally, the requirements for bringing Summit Learning to a school include an application process. The website directs extension requests to newschoolpartnerships@summitps.org. Schools interested in applying for Summit Learning send their requests to applications@summitps.org. Summitps.org is the website for Summit Public Schools.

Further proof of the relationship of Summit Learning to Summit Public Schools is found on the Summit Learning website under the "about us" tab. When this tab is opened, the first article encountered is "About Summit Public Schools." The information found in the next article, "About Summit Learning," states that "Summit Learning is the foundation of Summit Public Schools'...."

Finally, as noted above, the agreements signed by the school principals which "must be signed as written," according to the Summit Learning website, require the signature of a Summit Public Schools representative.

Interviewees were asked who determined that Summit was aligned with Kentucky State Standards. Most interviewees could not state with certainty who had determined the alignment. Some interviewees advised that the curriculum did not align with the standards in social studies, math, and science. It was reported to OEA that the district spent professional development funds to provide middle school teachers across the district a full day to spend working on the curriculum to ensure that it aligned with the standards. OEA learned during the investigation that this activity occurred in February 2017, six months after the Summit curriculum was implemented.

During the investigation, OEA staff interviewed several parents who expressed concerns about granting Summit access to all students' records. In order for Connor Middle School, Camp Ernst Middle School, Ockerman Middle School, and The Boone Academy to implement Summit, the parents of students assigned to the Summit classrooms were required to give written consent, permitting Summit to access information. The Summit "Parental Notice and Consent to Personalized Learning Service" contained the following language:

*We understand how important the privacy of your child's information is to you. Consequently, we have outlined how Summit will collect, use and share information in connection with the Services. We support the involvement of parents and guardians in their child's education, so we want to get your consent by signing and returning this form to the school before your child is given access to the Services. To provide the Services, Summit Public Schools and its service providers and partners (collectively, "Summit") will need to collect certain information from the school, you, and your child. For example, Summit may collect information that you provide or your child provides directly to Summit, such as contact information, coursework, testing, and grades. **Summit also may collect information automatically from browsers, computers, and devices (such as information from cookies, browser and device identifiers in order to remember your preferences.)***

*Summit has committed to use your child's information to provide, develop, and improve educational services. For example, Summit may use your child's information to conduct surveys and studies; develop new features, products, and services; and otherwise as requested by your school or consistent with your consent. In addition, Summit will not disclose your child's personal information except to parents or legal guardians, as authorized by the school; to teachers and other users at your child's school who have a reasonable need to know the information; as directed in writing by the school; with your permission; or as otherwise required or permitted by law. **Summit also may disclose information to third-party service providers and partners as directed or authorized by the school. For example, Summit uses Clever, Facebook, and Google to help develop and***

improve the personalized learning plan software or to provide related educational services on Summit's behalf. (Emphasis added).

CONCLUSIONS

Authority to Enter Agreement

In response to the SBDM Preliminary Report, the attorney for the district states that the agreement entered into by the school principals was not a contract.

The district asserts that the participation agreement, required by Summit to be executed, without revision, is not a contract. A written contract is one which is all in writing, so that all its terms and provisions can be ascertained from the instrument itself. The cases generally hold that a written instrument which sets forth the undertaking of the persons executing it or discloses the terms from which such an undertaking can be imported, and which shows the consideration for the undertaking, and which identifies the parties thereto, will be considered a contract in writing. Mills v. McGaffee, 254 S.W.2d 716 (1953).

As in Mills, no material provision is omitted from the participation agreement and there is no need to ask the parties what was intended. There was, as in Mills, every intention that the agreement should be the final contact between the parties. The Summit agreement recites that it is a legal agreement. It recites that it governs access to and use of the Summit websites [plural in original]. It recites that the signing school official has the full legal authority to bind the school to the agreement. It contains intellectual property provisions. It contains access restrictions. It contains privacy provisions. It contains termination provisions. It lists prohibited actions. It lists representations and warranties. It contains a disclaimer of warranties. It contains limitations of liability. It contains an indemnification clause. It contains language governing assignment of rights. It recites a choice of law provision, namely that the agreement is to be governed by California law. It includes a class action waiver and an arbitration clause. It is a contract.

Each of the schools that implemented Summit also entered separate contractual agreements with Summit Public Schools. Each of the agreements entered into by the schools of the district are exactly the same.

The agreement sets out the duties of Summit and of the school. The agreement requires that the school obtain a signed consent form from each student's parent before the student is allowed to access the Summit program. It also provides that Summit may add or eliminate features without notice to the school. Both parties acknowledge that they are bound by the requirements of FERPA.

The agreement in section 7.1 requires that the "parties represent and warrant that they have the *full right and power to enter into and perform this Agreement and that their performance under this Agreement will comply with all applicable laws and not conflict with any other obligation each may have to any other party.*"

In section 7.2, each of the schools signing the agreement:

"Represents and warrants that it has obtained all necessary rights, has provided all necessary notices, has obtained all necessary permissions or consents, and has authority under state and federal law to use the services and authorize Summit to access, receive, use, store, disclose, or otherwise process Student Data as permitted under this Agreement...."

KRS 160.160 establishes boards of education for school districts in Kentucky and delineates the power of these boards. Subsection (1) states, in pertinent part:

Each school district shall be under the management and control of a board of education.... Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued; make contracts; expend funds necessary for liability insurance premiums and for the defense of any civil action brought against an individual board member in his official or individual capacity, or both, on account of an act made in the scope and course of his performance of legal duties as a board member; purchase, receive, hold, and sell property; issue its bonds to build and construct improvements; and do all things necessary to accomplish the purposes for which it is created....

Additionally, KRS 160.290 sets out the general powers and duties of the boards of education. Subsection (1) states, in pertinent part:

Each board of education shall have general control and management of the public schools in its district and may establish schools and provide for courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with the administrative regulations of the Kentucky Board of Education.

KRS 160.370 designates the superintendent as the executive agent for the board. The superintendent may act at the direction of the board in the management of business affairs for the district. OEA found no statute or regulation delegating board authority to school principals. Only the board has authority to make contracts in a school district. Superintendent Randy Poe, in correspondence to OEA, advised that the Boone County Board of Education played no role in bringing Summit to Connor Middle School, Camp Ernst Middle School, Ockerman Middle School, and The Boone Academy. The Boone County Board of Education took no action to authorize or approve an agreement between Summit Public Schools and the district or any individual school in the district. The Boone County Board of Education also took no action to delegate authority to bind the district or any individual school in the district to the terms outlined in the Summit Basecamp Participation Agreement.

In response to the SBDM Preliminary Report, the district asserts that the Boone County Board of Education granted approval for the schools to adopt Summit through the "statutory budgeting process and allocation of funds to the site-based councils."

While KRS 160.345(4), arguably, provides an avenue through which the board might have made such a delegation, as noted above, there is no evidence that such action was taken. The longstanding rule in Kentucky is that a public body can speak only through its records. See, for example, OAG 08-002. As noted above, there is no evidence that the Boone County Board of Education took such action, and the district, prior to the response filed by its attorney, denied that any such action had taken place.

Therefore, the warranties made by the principals and director did not comply with the laws of Kentucky, and as such, OEA finds that Superintendent Poe usurped the authority of the Boone County Board of Education by allowing Connor Middle School, Camp Ernst Middle School, Ockerman Middle School, and The Boone Academy to enter into the agreements with Summit Public Schools. The general rule is that a board of education is not bound by a contract made for on its behalf by an agent who has no authority from the board to contract. See County Board of Education of Warren County v. Durham et al, 249 S.W. 1028 (1923).

The Family Educational Rights and Privacy Act

KRS 365.734(2) provides:

A cloud computing service provider shall not process student data for any purpose other than providing, improving, developing, or maintaining the integrity of its cloud computing services, unless the provider receives express permission from the student's parent. However, a cloud computing service provider may assist an educational institution to conduct educational research as permitted by the Family Educational Rights and Privacy Act of 1974, as amended, 20 U.S.C. sec. 1232g. A cloud computing service provider shall not in any case process student data to advertise or facilitate advertising or to create or correct an individual or household profile for any advertisement purpose, and shall not sell, disclose, or otherwise process student data for any commercial purpose.

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

- Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.
- Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.
- Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):
 - School officials with legitimate educational interest;
 - Other schools to which a student is transferring;
 - Specified officials for audit or evaluation purposes;
 - Appropriate parties in connection with financial aid to a student;
 - Organizations conducting certain studies for or on behalf of the school;
 - Accrediting organizations;
 - To comply with a judicial order or lawfully issued subpoena;
 - Appropriate officials in cases of health and safety emergencies; and
 - State and local authorities, within a juvenile justice system, pursuant to specific State law.

Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA

bulletin, student handbook, or newspaper article) is left to the discretion of each school.

In response to OEA's request, the district provided a copy of the Summit Basecamp Participation Agreement, bearing an effective date of March 4, 2016. The agreement is signed only by the principals and not by any representative of Summit. Attached to the agreement is the Parental Notice and Consent noted above. The first sentence states "[y]our child's teacher or school has signed up to use Summit Public Schools' personalized learning services, which we call the Services." As noted above, Kentucky law does not permit a teacher or principal to enter a contract that is binding upon the district. For these reasons, the Parental Consent and Notice did not accurately depict, for parents, the nature of the relationship between the participating schools and Summit.

The parental consent issue is further muddled. As OEA staff investigated this matter, it was discovered that Summit has subsequently taken the position that parents do not need to provide consent for their children to use the Summit Learning Platform. As noted by Summit, "[t]he Summit Learning Platform is a teaching and learning tool-the same as a student's textbook in any course or subject matter." Summit adds, "A school is using the Platform as part of its instructional approach; therefore, a school's leadership and teaching team ultimately makes the decision about whether Summit Learning and the Platform are a good fit for its students." Summit continues, "You used to require parental consent, why has your approach changed? We heard directly from our partner schools and districts that they have established processes for making instructional decisions-such as adopting a textbook series or curriculum-to meet the needs of their students. The Summit Learning Platform is a teaching and learning tool that includes a comprehensive 6th-12th grade curricula in English, math, science, Spanish, and social studies-as well as all the tools and learning resources students and teachers need for the school year. We want to respect each school's process. Therefore each schools leadership and teaching team will determine whether to use Summit Learning on behalf of their community." As noted above, the school leadership team, under Kentucky law, is the school-based decision making council.

It appears that Summit also previously asserted that parental consent is not necessary, because Summit employees and contractors are "school officials" under federal law. Under federal law, school official means any employee, including a

teacher, that the school or district has determined to have a legitimate education interest in the personally identifiable information from the education record of a student. School official, under this definition, may include third party contractors, consultants, volunteers, service providers, or other parties to whom the school or district has outsourced functions for which the school or district would otherwise use employees. The Summit Basecamp Participation seems to embrace the school official concept by explaining that "Partner School and Summit are independent contractors and not employees, partners, agents, or joint venturers." There is significant inconsistency between documents regarding whether Summit requires parental consent prior to student participation in Summit and whether parental consent is necessary because Summit employees are independent contractors and school officials under federal law.

Violations of FERPA are determined upon timely complaints lodged with the Family Policy Compliance Office of the U.S. Department of Education. OEA does not have the authority, under KRS 7.410, to remedy violations of federal law, nor does federal law provide a private cause of action to address violations.

In any event, KRS 160.700(5) states that "'[s]chool official' means personnel employed in instructive and administrative positions with a school board or educational institution." KRS 160.700(2) explains that "'[e]ducational institution' means any public school providing an elementary and secondary education." Summit is not a Kentucky public school and Summit employees are not school officials under Kentucky law.

It appears that, to satisfy Kentucky law, the release or disclosure of records, reports, or identifiable information on students to Summit requires parental or eligible student consent.

RESOLUTIONS

Superintendent Randy Poe shall obtain three hours of training from a Kentucky Department of Education approved trainer on the subject of "The Authority and Duties of the Local Board of Education." Proof of this training shall be provided to OEA by September 30, 2017.

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For determination of whether a FERPA violation has occurred under the specific facts of this matter, OEA will refer this matter to the Family Policy Compliance Office of the Department of Education.