

22-23

OAL Dkt. No. 05501-22

Agency Dkt. No. 145-6/22

New Jersey Commissioner of Education

Final Decision

Eric Fitzke-Grey,

Petitioner,

v.

Board of Education of the West Essex Regional
School District, Essex County,

Respondent.

The record of this matter, the December 14, 2022 Order of Administrative Law Judge (ALJ) John P. Scollo, the request for interlocutory review from respondent West Essex Regional School District Board of Education (Board), and petitioner's response thereto, have been reviewed and considered.

This matter arises out of the Board's determination that petitioner, a music teacher employed by the Board, had committed an act of harassment, intimidation, and bullying (HIB) against a student, H.O. In response to certain discovery requests, the Board indicated that it was unable to produce student records and correspondence relating to pupils without parental consent. Petitioner filed a motion seeking to compel discovery. The Board opposed the motion, contending that the motion should be denied because it was filed after the deadline set by the ALJ and petitioner had not complied with his own discovery obligations; the Board also reiterated that federal and State laws barred the production of the documents.

The ALJ concluded that petitioner's answers to the Board's interrogatories were responsive and did not bar petitioner from bringing a motion to compel discovery.¹ The ALJ concluded that none of the documents petitioner sought were student records under *N.J.A.C. 6A:32-2.1* and ordered the Board to turn over all documents demanded by petitioner.²

The Board requested interlocutory review of the ALJ's order. The Board argues that the ALJ incorrectly determined that the documents requested by petitioner are not student records and do not seek any student's private information. According to the Board, correspondence and notes between school staff and H.O.'s parents, H.O.'s Section 504 Disability Accommodation Plan (504 Plan), doctor's notes, and the identity of the four student witnesses in this matter do indeed constitute education records, and the Family Educational and Privacy Rights Act (FERPA) prohibits their disclosure without the written consent of the students' parents. The Board further contends that the ALJ incorrectly directed the Board to provide an employment verification form to petitioner, when that document was not requested in discovery and is unrelated to the pending case, and when there is no legal requirement that an employer must sign a form attesting that a former employee's service was deemed satisfactory. Finally, the Board reiterates its argument that petitioner should not have been permitted to move to compel discovery in light of his own discovery deficiencies.

In response, petitioner contends that the records at issue are not student records and that he is entitled to the entire investigatory file, including written reports, witness statements,

¹ The ALJ did not specifically address the Board's argument that the motion to compel was not timely filed. However, since the ALJ allowed the motion to proceed, the Commissioner presumes that the ALJ rejected this argument.

² Following the ALJ's Order, the Board produced documents and/or provided assurances that responsive documents have previously been provided regarding demands 8, 9, 14, 15, 16, 25, and 29. The Board also revised its response to demands 19 and 30, indicating that it does not maintain responsive records. Accordingly, those demands do not require further resolution in this forum.

summaries, and email and other communications. Petitioner also argues that he is unable to defend himself against accusations that he violated H.O.'s 504 Plan when he has not been provided with a copy of the plan. Petitioner notes that he was unable to apply for employment in a district in Pennsylvania due to the Board's failure to supply the employment verification form. Finally, petitioner argues that the ALJ correctly found that his discovery responses were adequate and that he was not barred from bringing a motion to compel discovery.

Initially, the Commissioner concludes that the ALJ's decision to allow the motion to compel discovery to proceed is a case management decision within the discretion of the ALJ, and the Commissioner finds no reason to disturb that decision on interlocutory review.

Regarding the employment verification form, the Commissioner can find no evidence that this document was the subject of any discovery request, and therefore it was improper for the ALJ to direct the Board to produce it as part of a motion to compel discovery.

Turning to the issue of student records, the Commissioner concludes that the ALJ erred in finding that the documents in question were not student records. FERPA is clear that an "education record" is a record that contains information directly related to a student and is maintained by an educational agency or institution. 20 U.S.C.S. § 1232g(a)(4). The implementing regulations for the corresponding State law, the New Jersey Pupil Records Act (PRA), similarly define a student record as "information related to an individual student gathered within or outside the school district and maintained within the school district." *N.J.A.C. 6A:32-2.1*.

The ALJ concluded that petitioner is not seeking "student records as that term is defined in *N.J.A.C. 6A:32-2.1*," and indicated that "[s]tudent records not subject to disclosure are those which are comprised of information that related directly to the student, such as his name, address, social security number, his grades, and other private information." The ALJ also stated, "Petitioner is not

seeking any student's private information." The ALJ appears to have conflated the definition of an "education record" with the definition of "personally identifiable information," which includes the student's name, address, social security number, and other indirect identifiers such as date or place of birth. 34 C.F.R. § 99.3; N.J.A.C. 6A:32-2.1. But FERPA and PRA protection extends beyond personally identifiable information: all student records – meaning all records containing information related to a student – are protected.

Reviewing the broad categories of records sought by petitioner, it is clear that the majority of them are, in fact, student records. Complaints, emails, letters, or memos circulated between H.O.'s parents and school officials about the facts of the HIB allegations or other issues pertaining to H.O.'s education certainly contain information related to H.O. Petitioner's request for documents from his Google Drive specifically indicates that he is seeking documents regarding accommodations made by petitioner in reference to H.O. H.O.'s 504 Plan is unquestionably a student record, as are emails or other documentation related to the plan. The identities of the four witnesses and their statements – assuming that those witnesses are students – also contain information about students and are therefore student records.

The Commissioner notes that although the instant matter involves a discovery request and not a request under the Open Public Records Act (OPRA), the regulation governing OPRA requests provides a useful framework for balancing the privacy interests of students with a request for access. Pursuant to N.J.A.C. 6A:32-7.5(g), a board of education responding to OPRA requests may release student records without consent as long as all personally identifiable information has been removed from the documents. The board of education is required to make a "reasonable decision that a student's identity cannot be determined whether through single or multiple releases, or when added to other reasonably available information." *Ibid.* However, there are some records that contain so much

student information, or such detailed student information, that redaction can never sufficiently protect the student's identity. This problem is compounded when the party seeking access knows the identity of the student at issue, as there is no possible way to protect the student's identity. Here, petitioner knows the identity of H.O. Accordingly, the Board cannot use redactions to turn over records that contain information relating to H.O. without the consent of H.O.'s parents. Nor can the Board provide the identities of the students who made witness statements without, by definition, disclosing their identities.³

However, pursuant to 34 C.F.R. § 99.31, prior consent is not required to disclose personally identifiable information when the disclosure is to comply with a judicial order. *See also* N.J.A.C. 6A:32-7.5(e)(15). Under FERPA, the educational agency must make a reasonable effort to notify the parent of the order in advance of compliance, so that the parent may seek protective action. 34 C.F.R. § 99.31. Under the PRA, the requirement is more specific: prior to disclosure of student records pursuant to a court order, the board of education must give the parent at least three days' notice of the name of the requesting agency and the specific records requested. N.J.A.C. 6A:32-7.6(a)(4).

In *L.R. v. Camden City Public Sch. Dist.*, 238 N.J. 547 (2019), the New Jersey Supreme Court identified the factors to be considered for a court order for the production of student records under N.J.A.C. 6A:32-7.5(e)(15). The Supreme Court suggested a framework that may include, but is not limited to:

- (1) the type of student record requested;
- (2) the information that the student record contains;
- (3) the potential for harm in any subsequent nonconsensual disclosure of

³ The Board suggests that the ALJ's Order to identify the students who made witness statements is contradicted by his caveat elsewhere in the Order that the names of the students shall be redacted from the witness statements. It appears from this portion of the Order that the ALJ was discussing redacting student names in the context of the hearing, such as for purposes of a transcript, rather than redactions to be completed prior to producing documents in discovery.

the student record; (4) the injury from disclosure to the relationship between the educational agency and the student and his or her parents or guardians; (5) the extent to which disclosure will impede the educational agency's functions by discouraging candid disclosure of information regarding students; (6) the effect disclosure may have upon persons who have provided such information; (7) the extent to which agency self-evaluation, program improvement, or other determinations will be chilled by disclosure; (8) the adequacy of safeguards to prevent unauthorized disclosure; (9) the degree of need for access to the student records; and (10) whether there is an express statutory or regulatory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. at 575.

The Supreme Court noted that not all of the factors will apply in every case, and additional factors may be relevant. *Ibid.*

The Commissioner finds that the most consequential factor in determining whether these records should be released is the degree of need for access to the records. The emails, notes, and other documents regarding the district's investigation of the HIB allegations contain information about the incidents between petitioner and H.O. that are the subject of this matter. Furthermore, as petitioner is alleged to have violated H.O.'s 504 Plan, the contents of that plan are critical to the ultimate determination. Petitioner is entitled to appeal the Board's decision finding that he committed HIB, pursuant to *N.J.S.A. 18A:37-15(b)(6)(e)*, and it is unclear to the Commissioner how petitioner would be able to challenge the district's investigation or the Board's decision without access to the records that were part of the investigation and which informed the decision. The Board cannot use the information contained in these documents against petitioner and simultaneously prevent him from reviewing them for possible use in his defense. While the Commissioner acknowledges that FERPA and the PRA tend to militate against access to student records, general principles of due process weigh in favor of access under these circumstances, as do general principles pertaining to discovery. *See, e.g., N.J.A.C. 1:1-10.1.*

The Commissioner acknowledges that the release of student records may be unpalatable to the parents of the students at issue, particularly to H.O.'s parents. As noted herein, the documents in question contain sensitive information about H.O. However, it appears that petitioner has already had access to many of the records and/or the information contained therein during the time that he was employed by the Board. Therefore, while the release will provide petitioner with the written records, it does not appear to the Commissioner that, following release, petitioner will know much or any additional information about H.O. beyond what he already knows. This fact, combined with petitioner's strong due process right to access the records to be used against him, leads the Commissioner to conclude that the records should be released to petitioner as part of discovery.

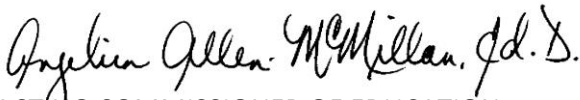
The Commissioner views student privacy as a matter of paramount concern. Accordingly, the student records shall be released only to counsel for petitioner. The records may not be distributed to any other parties. Petitioner may not use the records for any purpose other than pursuing the petition of appeal in this matter. To the extent that student records may be entered into evidence during the course of the hearing, those portions of the record shall be sealed and shall be available for review only by the ALJ and the Commissioner.⁴ To the extent that student witnesses may testify at the hearing, they shall be identified in any transcripts, and in any summary of their testimony in the Initial or Commissioner decisions, only by their initials or a pseudonym.

Accordingly, the Board shall provide all documents and information requested in petitioner's demands 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 17, 20, 21, 22, 23, 24, 26, and 28. The Board shall notify the parents of the students at issue of the impending disclosure within seven days of the

⁴ The Commissioner urges the parties to redact student names from all documents before they are used at hearing or entered into evidence, to limit the potential for further exposure.

date of mailing of this decision.⁵ Consistent with *N.J.A.C. 6A:32-32-7.6(a)(4)*, the Board shall release the records to petitioner three days after notice is given to the parents. The Order is reversed as to demand 18, as the ALJ found this demand to be unclear and it appears that the Order to produce these records was therefore in error. The Order is reversed as to the employment verification form.

IT IS SO ORDERED.


ANGELICA ALLEN McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2023

Date of Mailing: January 25, 2023

⁵ It does not appear that any of the records demanded by petitioner contain student information regarding students other than H.O. Should the Board determine that other students are identified in these records, it shall redact those students' information prior to disclosure.