9

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2012-4475

MICHAEL CHAMPA

vs.

TOWN OF WESTON PUBLIC SCHOOLS & others[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANTS' CROSS MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Michael Champa ("Champa"), has brought this action pursuant to G. L. c. 66, § 10, to compel disclosure of settlement agreements entered into between Weston Public Schools and the parents of students with disabilities regarding the placement of students in out-of-district private schools. Champa alleges that defendants Weston Public Schools ("WPS"), Cheryl Maloney, in her capacity as Weston's Superintendent of Schools, and Susan Strong, in her capacity as Weston's Director of Student Services (collectively "Weston") violated G. L. c. 66, § 10 by withholding the settlement agreements despite his public records request. He seeks a declaratory judgment and injunctive relief. This case came before the court on July 25, 2013 for a hearing on the parties' cross-motions for judgment on the pleadings. For the following reasons, the plaintiff's Motion for Judgment on the Pleadings is **ALLOWED**, and the defendants' Motion for Judgment on the Pleadings is **DENIED**.

[1] Cheryl Maloney, in her capacity as Weston's Superintendent of Schools, and Susan Strong, in her capacity as Director of Student Services for Weston Public Schools.

BACKGROUND

WPS is required to provide free appropriate public education to students with disabilities in accordance with Massachusetts law and the Individuals With Disabilities Education Act. Disputes may arise between WPS and parents of students concerning a student's entitlement to special education services or placement in a school that is out-of-district. When WPS has such a dispute with parents, it may enter into confidential agreements to settle the dispute. The settlements contain, at minimum, the student's name, the name of the out-of-district private school the child will attend and any financial arrangements for that the student's attendance there and may also contain information regarding what special education services the child will receive.

On January 17, 2012, Champa, a resident of the Town of Weston, sent a public records request in writing to the Interim Director of Student Services for the Weston Public Schools. Among his requests, Champa sought "[c]opies of all agreements entered into by the district with parents and guardians, as part of the [Individualized Education Program] process, in which the district limited its contribution to education funding or attached conditions for it for out of district placements for school years 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012." On January 30, 2012, Champa received a written response to this request which stated that the information was not a matter of public record and that "disclosure of the requested student records, in whole or in part, would constitute a violation of the Family Education Rights and Privacy Act (FERPA) and the Massachusetts Record Regulations." Champa filed an administrative appeal with the Supervisor of the Records, who issued a decision that the settlement agreements are student records which are exempt from disclosure. Champa then filed a complaint in this court to compel the disclosure of the settlements.

DISCUSSION

General Laws c. 66, § 10 grants the public the right to obtain copies of public records by submitting a request to the custodian of the records. Public records are broadly defined and include all documentary materials made or received by an officer or employee of any public entity of the Commonwealth, unless one of nine statutory exemptions is applicable. G. L. c. 4, § 7, cl. 26. See also Bougas v. Chief of Police of Lexington, 371 Mass. 59, 61 (1976) (documents are presumed to be public records when possessed by public entity). "[T]he dominant purpose of the law is to afford the public broad access to governmental records." Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 436 (1983). The statute favors disclosure by "presum[ing] that the record sought is public." Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 3 (2003), citing G. L. c. 66, § 10(c). If a custodian of a public record refuses or fails to comply with a request for a public record, the Superior Court has jurisdiction to order compliance with the statute. G. L. c. 66, § 10(b).[2]

The statutory exemptions to G. L. c. 66, § 10 are strictly construed. Attorney Gen. v. Assistant Comm'r of the Real Property Dep't of Boston, 380 Mass. 623, 625 (1980). The custodian of the records has the burden to prove with specificity that the requested document is exempt from the statute. District Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995). "[A] case-by-case review is required to determine whether an exemption applies." In re Subpoena Duces Tecum, 445 Mass. 645, 688 (2006). If a document containing exempt

[2] The statute also provides for an administrative remedy whereby the person who has been denied a request for a public record can petition the supervisor of the records for a determination of whether the record requested is public. See G. L. c. 66, § 10(b). However, the statute further provides that the administrative remedy shall not "limit the availability of judicial remedies otherwise available to any person requesting a public record." Id.; see also Reinstein, 378 Mass. at 287 n.13. Therefore, the defendants' argument that the court's analysis should proceed under the standard set forth in G. L. c. 30A, § 14(7) is misguided. The court's review of whether the agreements constitute public records is de novo. See id.; G. L. c. 66, § 10(c).

information also contains nonexempt portions, the right of access extends to those portions that fall within the purview of the public record. See Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 287-288 (1979).

Weston argues that the settlement agreements fall under either the statutory exemption in G. L. c. 4, § 7, cl. 26(a) or the privacy exemption of G. L. c. 4, § 7, cl. 26(c). Clause 26 (a) exempts material that is "specifically or by necessary implication exempted from disclosure by statute." G. L. c. 4, § 7, cl. 26(a). Weston argues that this exemption applies because the settlement agreements are student records, which are protected from disclosure under Massachusetts Law or the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Weston also contends that the agreements fall under Clause 26(c), which exempts "materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G. L. c. 4, § 7, cl. 26(c). Champa contends that the settlement agreements are not exempt from disclosure under either exemption, and therefore Weston should comply with his public records request. [3]

A. Student Records Exemption under Massachusetts Law

Massachusetts has enacted legislation and regulations protecting the confidentiality of student records. See G. L. c. 71, § 34D and 603 Code Mass. Regs. § 23.01 *et seq.* Pursuant to the regulations promulgated by the Department of Education, high school students and their parents have access to student records, but a third party may only access student records with written consent from the student or the parent. 603 Code Mass. Regs. § 23.07(2) & (4). Here, if the settlement agreements are properly considered student records, as Weston argues, then releasing them to Champa would constitute a violation of the regulation.

[3] Because Champa is seeking a permanent injunction, and not a preliminary injunction, contrary to the defendants' arguments, Champa is not required to demonstrate a substantial risk of irreparable harm and a reasonable likelihood of success on the merits in order to prevail.

The regulations define "student record" as:

> [T]he transcript and the temporary record, including all information . . . or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth. 603 Code Mass. Regs. § 23.02.

The transcript is further defined as "administrative records that constitute the minimum data necessary to reflect the student's educational progress and to operate the educational system" and is limited to information identifying the student and course titles, grades, course credit, grade level completed, and the year it was completed. Id. The temporary record consists of "all the information in the student record which is not contained in the transcript." Id. This information in the temporary record "shall be of importance to the educational process," and it may include standardized test results, class rank, extracurricular activities, and evaluations by teachers, counselors, and other school staff. Id.

Weston contends that the settlement agreements can properly be classified as "student records" because they contain information such as where a student will attend school, what services will be provided to the student, and the length of the school year, which is "of importance to the educational process." Champa argues that the settlements are not student records because they are made for the purpose of resolving legal disputes about funding special education services and are not for educators to use in measuring the progress of students.

Weston's argument is based on a broad interpretation of the definition of student records that is unsupported by the language in the regulations. The definitions provided in 603 Code Mass. Regs. § 23.02 limit the student records exemption to information contained only in the transcript and temporary record, both of which are defined relatively narrowly. The settlement agreements cannot properly be considered either transcripts or temporary records under the

express language of the regulations. Since the settlements do not contain course titles, grades, course credit, years of grade level completion, they do not fall within the definition of "transcript." See 603 Code Mass. Regs. § 23.02. They also cannot be considered part of the temporary record. The examples of information that is considered part of the temporary record, such as class rank and standardized test results, all relate to evaluations of a student's progress. See id. The settlement agreements at issue here are legal documents created to resolve disputes. Although they contain information regarding what school the student will attend, they do not contain information about a student's educational progress that the Department of Education seeks to protect in student records. Viewing the settlements in the context within which they were created, they do not fall under the definition of student records in the regulations. See Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 386 (2002) ("What is critical is the nature or character of the documents, not their label."). Weston points to no case that would extend the definition of student records to any document identifying a student and relating to his or her education. Indeed, Massachusetts's courts have rejected such a broad interpretation. See Commonwealth v. Buccella, 434 Mass. 473, 478-479 (2001) (court rejected defendant's broad interpretation of regulations which included homework and written assignments because it was not intended by the regulations); City of Boston Sch. Comm. v. Boston Teachers Union, Local 66, 22 Mass. L. Rep. 15, 2006 Mass. Super. LEXIS 634, *13-14 (Mass. Super. Nov. 30, 2006) (unredacted student witness statements did not fall within the definition of student records). Thus, Massachusetts law does not exempt these settlement agreements from disclosure pursuant to Clause 26(a) as a student record.

B. Family Education Rights and Privacy Act

FERPA provides for the withholding of federal funds from educational institutions that have "a policy or practice of permitting the release of education records . . . of students without written consent of their parents." 20 U.S.C. § 1232g. Education records are defined as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). Unlike the Massachusetts regulations, FERPA does not limit the items included as part of the student record. While some courts have broadly construed FERPA to cover any type of information relating to a student, other courts have held that information may identify a student without becoming part of the "education record[]." Compare Elanger v. Nashua, New Hampshire Sch. Dist., 856 F. Supp. 40, 48 (D.N.H. 1994) (Because juvenile records contain information which relates directly to a student, they are education records) with Boston Teachers Union, Local 66, 22 Mass. L. Rep. at *10-12 (student witness statements regarding a teacher's misconduct were not education records under FERPA) and Bauer v. Kincaid, 759 F. Supp. 575, 591 (W.D. Mo. 1991) ("incident reports containing personally identifiable information about students are not educational records because they do not relate to the type of records which FERPA expressly protects . . . records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files.").

This court concludes that the settlement agreements are not "education records" covered under FERPA. As discussed above, the settlement agreements are legal documents regarding how much money the school is going to supply to satisfy its obligation of providing public education to a student. The fact that they pertain to a particular student does not put them under

the protection of FERPA when they do not directly relate to a student's academic progress. Furthermore, FERPA is violated when a school has a "policy or practice of permitting the release of education records" without parental consent. 20 U.S.C. § 1232g (b)(1). Here, the release of the settlement agreements to the plaintiff in this one instance does not constitute a policy or practice and thus is not a violation of FERPA. See Buccella, 434 Mass. at 483 n.8 (a single instance of releasing a student's record without parental consent is not a violation of FERPA).

C. Privacy Exemption

Weston also argues that the settlement agreements fall under the privacy exemption for public records. G. L. c. 4, § 7, cl. 26(c) exempts "materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." As with the analysis under G. L. c. 4, § 7, cl. 26(a), the burden to prove an exemption under G. L. c. 4, § 7, cl. 26(c) is on the custodian of the records. G. L. c. 66, § 10(c). Analysis of the privacy exemption requires that the seriousness of any invasion of privacy be balanced against the public right to know. Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 156 (1979). "The public right to know should prevail unless disclosure would publicize 'intimate details' of 'a highly personal nature.'" Attorney Gen. v. Assistant Comm'r of the Real Property Dep't of Boston, 380 Mass. 623, 625, 626 (1980); Collector of Lynn, 377 Mass at 156 ("Where the public interest in obtaining information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield to the public interest."). Examples of such personal information include "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcohol consumption, family fights, and reputation." Georgiou v. Commissioner of the Dept. of Indus. Accidents, 67 Mass. App. Ct. 428, 433 (2006).

Weston argues that disclosing the settlements would amount to an unwarranted invasion of personal privacy because the agreements contain information which would permit the student to be individually identified and from which the nature and severity of his or her disability can be derived. Weston also argues that redacting the student's name is insufficient to protect confidentiality. Champa argues that the legal settlements do not contain any information that is protected by the privacy exemption. Furthermore, Champa contends that even if the information in the settlements was protected, the public interest in obtaining the financial information in the agreements outweighs any private interest in preventing disclosure.

Champa supplied the court with a sample settlement agreement. In an unredacted form, the settlement agreements name the child who is the subject of the agreement, the out-of-district placement, and may describe the services the child will receive. Clearly, such information implicates an important privacy interest for the parents, as well as the child. Therefore, the court concludes that the agreements in their entirety are not subject to disclosure. However, because information in the settlement agreements may be redacted so that identification of the child or his or her disability is not possible, a redacted version of the agreements is subject to disclosure under G. L. c. 66, § 10. See Reinstein, 378 Mass. at 293.

In his request for the settlement agreements, Champa specifically seeks disclosure of information that includes "the name and location of any private placement and the financial terms of such placements." Champa has also expressed a willingness to receive the agreements in a redacted form that removes potentially private information that would include specific diagnosis of a child and educational and medical history, because his real interest is in the financial terms of the agreement.

Weston contends that revealing the name of the placement would effectively reveal the disability at issue. Many of the possible placements, however, serve students with a range of disabilities. For example, the May Institute provides serves students with brain injuries, autism or behavioral problems. The Chamberlain School serves students with a wide range of learning disabilities. Weston, which bears the burden of showing the exemption applies, has not presented sufficient information on how revealing the school name, if the student's name and any mention of a specific disability are redacted, would necessarily reveal the identity of the student and their medical condition. Furthermore, the information that Champa seeks pertains to how much money the school is paying in tuition to these various placements. Therefore, this court concludes that if the settlement agreements are redacted to remove the student's name and any mention of a disability, but reveal the name of the out-of-district placement, the settlement agreements would not result in an invasion of personal privacy, under Clause 26(c). Consequently, the court orders disclosure of the settlement agreements in accordance with this decision. However, should any settlement agreements include personal information, not specifically addressed in this order Weston may apply to the court, via a motion for clarification, to obtain a specific ruling on the unanticipated information.

Moreover, the court notes that the public has an interest "in knowing if public servants are carrying out their duties in an efficient and law-abiding manner." Collector of Lynn, 377 Mass at 158. It is WPS's obligation to provide funding for special education services under Massachusetts and federal law. Disclosure of the settlement agreements naming the out-of-district placement protects the public interest in knowing whether WPS is meeting its legal obligation to provide funding for special education services, without invading the personal privacy of students and their families.

ORDER

For the reasons stated above, it is hereby **ORDERED** that the plaintiff's Motion for Judgment on the Pleadings is **ALLOWED**, and the defendants' Motion for Judgment on the Pleadings is **DENIED**.

Angel Kelley Brown
Justice of the Superior Court

DATED: August 23, 2013