

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

IN THE MATTER OF STUDENT JANE A.W. DOE

DECISION

Held: Parent is entitled to inspect
and review student's "education
records" as that term is defined
by federal and state law.

DATE: MARCH 31, 1997

Background

This case concerns a parent's exercise of her federal and state right to inspect and review the education records of her child.

On May 20, 1996, the mother of student Doe was given access to what the school district considered to be student Doe's education records. Following Petitioner's inspection of the records, a disagreement arose between the parties as to what constituted student Doe's "education records."

On August 23, 1996, we appointed a special visitor to address the ongoing dispute. The special visitor was directed to obtain a list of the types of education records the school district maintains for student Doe, and to gather those records in one location for Petitioner's inspection and review.

On November 6, 1996, the special visitor reported that the parties had

fundamental differences in the interpretation of the statutory right of parents to inspect and review the education records of their children . . . and several specific disagreements as to what constitutes 'education records' in this case. [Hearing Officer's Exhibit 9].

In accordance with the special visitor's recommendation, hearings were held to address the legal issues which had arisen during the dispute.¹ The hearings focused on the definition of "education records" and its application to materials which had not been made available for Petitioner's inspection.

Discussion

Under the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g; 34 C.F.R. 99) and the Rhode Island Educational

¹ Hearings were conducted on November 20, 1996, December 18, 1996, and January 10, 1997.

Records Bill of Rights (Rhode Island General Laws 16-71-1 et seq.) school districts are required to permit a parent to inspect and review the education records of the student. ² The term "education records" is defined in FERPA 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)].

FERPA excludes certain records from the term "education records," including

records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.
[20 U.S.C.1232g(a)(4)(B)(i)].

The regulations implementing FERPA define "record" as "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." (34 C.F.R. 99.3).

During the hearing, the school district entered into evidence a copy of the records it had previously made available to Petitioner.

2 As the parent of a special-education student, Petitioner is further entitled to inspect and review records pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1400 et seq.; 34 C.F.R. 300.562), and the Regulations of the Board of Regents for Elementary and Secondary Education Governing the Special Education of Students with Disabilities (Section Two, Part I, 4.1). FERPA and IDEA also grant parents the right to a list of the types and locations of education records maintained by a school district and the names of school officials who are responsible for the records. In addition, school districts are required to keep a record of parties (except parents and authorized school department employees) obtaining access to education records.

These records did not include personal notes related to Petitioner and student Doe made by numerous administrators, teachers, and service providers employed by the school district and kept in the respective maker's sole possession.

We find that the personal notes discussed above that are directly related to student Doe fall within the "sole possession" exemption set forth in 99 C.F.R. 99.3, and therefore are not "education records" which must be provided to Petitioner for her inspection and review. Personal notes which pertain exclusively to Petitioner, and are not directly related to student Doe, also fall outside the definition of "education records." While Petitioner has the right to request access to records maintained by the school district that relate to her, this right does not involve any law relating to education. It therefore follows that the enforcement of this right is not within our jurisdiction.

The record also shows that other documents kept by many of the same administrators, teachers, and service providers were not made available to Petitioner. To the extent that these documents were (1) not made by school district employees or agents, or (2) not kept in their sole possession, they are "education records" as long as they are directly related to student Doe. The first category of records includes correspondence from Petitioner, administrative complaints filed by Petitioner, correspondence from government agencies, newspaper articles, copies of student Doe's school work, workbooks, letters from tutors, and student Doe's writing samples. The second category of records includes correspondence to Petitioner, correspondence to government agencies, memoranda to administrators, notes from other teachers, drafts and copies of individualized

education plans, parent/teacher notification forms, meeting notification forms, and minutes and notes of multidisciplinary team (MDT) meetings relating to student Doe that have been distributed to MDT members.

A specific item in dispute in this matter concerns an administrator's telephone log sheets. According to testimony at the hearing, the telephone logs were created in one of two ways. First, the administrator's secretary would record on a log sheet the fact that Petitioner had called the administrator at a time when the latter was not available. The secretary would give the administrator the log sheet and the administrator would call Petitioner and make notes about the conversation on the log sheet. The second means by which telephone log sheets came into existence occurred when the administrator was available to take Petitioner's call, whereby the administrator would record the call on the log sheet and proceed to make notes about the conversation. The administrator testified that she has not shown the telephone logs to any other person except that "I have made my attorney aware and shared with him all of the phone logs that I have on [student Doe] in relationship to discussion of litigation, for that purpose only." [11/20/96 transcript, p. 64].

We find that the telephone log sheets as created by the administrator's secretary are "education records" because they are not kept in the sole possession of the maker, i.e., the secretary. We further find that to the extent the telephone log sheets were shown to the school district's attorney, they became "education records." In so finding, we rely on an April 19, 1994 letter from the director of the Family Policy Compliance Office at the United States Department

of Education to the Carson City, Nevada School District addressing the exclusion of medical records from the term "student records."

According to the letter, the "sole possession of the maker" exemption to the definition of "education record"

generally refers to informal notes or "memory joggers" made by a teacher or other school official on a student that are not accessible or revealed to anyone but a substitute for that official. Please note that this exemption is strictly construed; notes lose their exemption status and become education records if they are shown to any person, including the student.

Given this directive, and the inapplicability of the attorney-³ client privilege, we find that the telephone log sheets compiled by the administrator which were shown to the school district's attorney are "education records" which must be provided to Petitioner for her inspection and review.

Another area of dispute concerned communications between school district officials and attorneys for the school district. As stated by James A. Rapp in Education Law, a parent's access to student records

may be precluded by the attorney/client privilege, the work product rule or another rule of law. The attorney/client privilege protects against disclosure communications between an attorney and a client. [footnote citing to Federal Rules of Evidence 501]. Under the work product rule, "any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery" or disclosure. [footnote citing to Black's Law Dictionary 1606 (6th edition 1990)]. Section 10.03[4][m].

The attorney-client privilege was discussed at length in

3 The telephone log sheets are not a "communication" between an attorney and a client.

State v. von Bulow. According to the Rhode Island Supreme Court,

"[t]he attorney-client privilege protects from disclosure only the confidential communications between a client and his or her attorney." DeFusco v. Giorgio, R.I., 440 A.2d 727, 731 (1982). "The general rule is that communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure." Haymes v. Smith, 73 F.R.D. 572, 576 (W.D.N.Y.1976) (citing Colton v. United States, 306 F.2d 633 (2d Cir.1962), cert. denied, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963)).

The Court set forth the requisite elements that must be established in order to invoke the privilege:

"(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with his communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been claimed and (b) not waived by the client." [quoting United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978)].

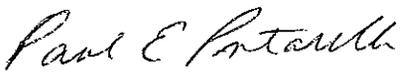
We find that the record establishes the above-mentioned elements with respect to communications made to and by attorneys for the school district. We find the attorney-client privilege also applies to the superintendent's legal correspondence to the district's insurance company and the city's risk management committee, and to the superintendent's legal-issues memoranda presented to attorneys or the School

4 475 A.2d 995 (R.I. 1984).

Committee in the presence of an attorney.⁵ We find that the work-product doctrine precludes access to documents prepared by school district attorneys in anticipation of litigation.⁶ We also find that minutes of executive sessions of the School Committee are not "education records" to the extent they are not directly related to student Doe and/or they concern pending or anticipated litigation involving Petitioner.⁷

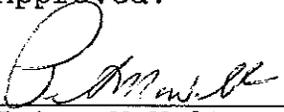
Conclusion

Cranston Public Schools shall permit Petitioner to inspect and review the "education records" of her daughter consistent with the findings herein.



Paul E. Pontarelli
Hearing Officer

Approved:



Peter McWalters
Commissioner of Education

Date: MARCH 31, 1997

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- 5 If these materials are not directly related to student Doe, they would not constitute "education records" for that reason as well.
- 6 Petitioner is entitled to inspect and review "pleadings" relating to administrative complaints she filed on behalf of student Doe, documents she submitted related thereto, and copies of transcripts of testimony at administrative hearings concerning student Doe.
- 7 See R.I.G.L. 42-46-5(a)(2).