

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

IN THE MATTER OF STUDENT JANE A.W. DOE

DECISION ON REMAND

Held: Decision of March 31, 1997
is affirmed.

FEBRUARY 26, 1998

Background

On March 31, 1997, we issued a decision in this case in which we directed the Cranston Public Schools to permit Petitioner to inspect and review certain materials which we found to be "education records" as that term is defined under the Family Educational Rights and Privacy Act (FERPA). Shortly thereafter, the Cranston School Committee appealed our decision to the Board of Regents.

In a decision dated September 2, 1997, but not received by the hearing officer until November 5, 1997, the Board of Regents remanded this proceeding for further consideration.¹ In so doing, the Board of Regents stated that

. . . we are somewhat unsure of how the Hearing Officer concluded that those records which the School Committee argues are not subject to inspection were classified as 'educational records.' We would also like to have the Commissioner's view regarding the extent to which the School Committee must go to locate copies of documents which have been distributed to multiple addresses.

Upon receiving the Board of Regents' decision, Petitioner requested that the Department of Education be joined as a party to this proceeding. A hearing was held on December 17, 1997, at which Petitioner advanced her motion to join the Department of Education, and the School Committee identified three types of materials it contends do not fall within the definition of

1 The hearing officer received a copy of the Board of Regents' decision from Petitioner, who had received the decision on October 31, 1997. The Cranston School Committee received the decision subsequent to October 31, 1997.

"education records."

Positions of the Parties

In support of her motion to join the Department, Petitioner argues that she did not receive procedural due process during the Board of Regents' consideration of the School Committee's appeal, and that her October 31, 1997 receipt of the Board of Regents' September 2, 1997 decision violated her statutory right to a decision within 45 days.

The School Committee took the position that the following materials are not "education records":

(1) Copies of documents -- The Committee contends that it met the spirit and intent of FERPA by providing parental access to original documents. According to the Committee, to require disclosure of and access to copies of a document kept by various employees and agents of the school district imposes an unwarranted administrative burden.

(2) Telephone logs -- The Committee asserts that a secretary is a "temporary substitute" for an administrator, and that telephone logs compiled by the secretary in the administrator's absence therefore fall within the "sole possession of the maker" exception to the definition of "education records." The Committee also contends that, consistent with attorney-client privilege, logs otherwise within the "sole possession of the maker" exception do not lose that status by being shown to the school district's attorney.

(3) Newspaper articles -- The Committee claims that a

newspaper article concerning a student which is kept in a school employee's file is not an "education record" because the newspaper is distributed publicly and the article is therefore otherwise available to the parent.

Discussion

Petitioner's motion to join the Department of Education as a party is based on alleged irregularities in the Board of Regents' procedural handling of the School Committee's appeal. Under R.I.G.L. 16-39-3 and 16-60-4(9)(viii), it is the Board of Regents which decides appeals from Commissioner's decisions. The Commissioner has no authority to review decisions of the Board of Regents. Because Petitioner's motion asks the Commissioner to review actions taken by the Board of Regents in its appellate capacity, it must be denied.

Turning to the contentions of the School Committee, we reiterate two key requirements of FERPA and special education law that were noted in our earlier decision: (1) school districts must permit parents to inspect and review all of their child's "education records,"² and (2) school districts must provide a list of all types and locations of "education records"³ maintained or collected if requested by the parent.

2 FERPA: 20 USCA Sec. 1232(a), 34 CFR Sec. 99.10; Individuals with Disabilities Education Act (IDEA): 20 USCA 1480(4), 34 CFR Sec. 300.562; Regulations of the Board of Regents Governing the Special Education of Students with Disabilities: Section Two, Part I, 4.1.

3 IDEA: 34 CFR 300.565; Board of Regents Regulations: Section Two, Part I, 4.4.

"Education records" are defined by FERPA as any recorded information that is maintained or collected by a school district and is directly related to a student. The definition of "education records" is subject to several statutory exceptions. It therefore follows that a document kept in the possession of a school employee and directly related to a student is an "education record" unless it falls within an exception set forth in FERPA.

Copies of a document and copies of a newspaper article are recorded information. They are not covered by any exception to the definition of "education records." Accordingly, if the copy is maintained by an employee or agent of the school district and is directly related to a student, such a copy is an "education record" which the parent has a right to inspect and review. Furthermore, if the parent requests, the school district must include the copy in a list of the types and locations of "education records" maintained by the district.

Our task under the Rhode Island Educational Records Bill of Rights Act (R.I.G.L. 16-71) and federal and state special education regulations, all of which incorporate the FERPA definition of "education records," is to apply, not rewrite, that definition. We have no authority to create additional exceptions to the definition of "education records." We are guided in our task by the two key requirements we noted at the outset of our discussion. It is evident from those requirements that parents have a right to know which school employees and agents have

"education records" in their possession, what types of records are being kept, and where those records are located. It is not enough for a school district to allow the inspection of an "official" or "master" file containing the originals, but not copies, of documents directly related to a special-education student. Nor is it permissible to refer parents to the local newspaper for a copy of an article that is in the possession of a school employee. Parents of special-education students are entitled to know which school officials are keeping copies of these "education records" and where they are located. By exercising this right, parents can learn the identity of all school personnel who have some involvement or interest in the education of their children. It also will enable parents to specifically inquire as to whether any of these school officials have other materials in their possession which may constitute "education records." The information thus obtained will assist parents in their efforts to be knowledgeable and effective participants in all aspects of their children's education.

We therefore find no valid basis, in law or in fact, to apply the definition of "education records" so as to exempt copies of documents or copies of newspaper articles. As for the effort school districts must expend in providing access to copies of documents, the United States Department of Education and the Board of Regents have answered that question by adopting regulations which do not place any limit on the district's obligation to disclose all locations of a student's "education records." We are bound by those regulations. We note that in situations where a document contains a

copy list, this task is rather simple. The district need only ask those employees and agents on the copy list whether they have kept the document. If the document has been kept, the parent must be given access to it as an "education record." If the document has not been retained, there is no "education record." In situations where "blind" copies of an "education record" have been distributed, either by the maker or a recipient of the document, the parent's right to know which school officials have retained such copies clearly outweighs any "administrative burden" that the district must incur in identifying these individuals. We would expect that a notice of general distribution similar to other notices given to teachers and staff on a districtwide basis could be used to determine which individuals have received and kept "blind" copies of an "education record."

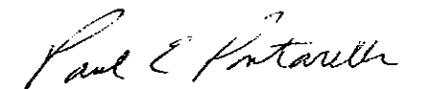
The issue of telephone logs and its bearing on the attorney-client privilege was specifically addressed in our earlier decision. According to the United States Department of Education Family Policy Compliance Office letter we cited, the "sole possession of the maker" exception to the definition of "education records" is lost if the maker shows the document to "any person." The attorney-client privilege is far from an obscure notion, and the Family Policy Compliance Office could easily have preserved the exception in cases where the document was shown only to the school attorney. The Office did not do so, however.

As for our finding that the "sole possession of the maker" exception was lost when the telephone logs compiled by the secretary

in the administrator's absence were later given to the administrator, the School Committee's argument that the secretary is a "temporary substitute" for the administrator is misplaced. Because the secretary is the maker of the telephone logs in question, we would have to find that the administrator, i.e., the person to whom the secretary's logs were shown, is the "temporary substitute" for the secretary. Absent a job description which requires the administrator to perform the full scope of her secretary's work in the latter's absence, we do not believe that the administrator's performance of a particular duty of the secretary's on an ad hoc basis is sufficient to qualify for this strictly-construed exception.

Conclusion

For the reasons set forth above, the decision previously issued in this matter on March 31, 1997 is affirmed.



Paul E. Pontarelli
Hearing Officer

Approved:



Peter McWalters
Commissioner of Education

Date: FEBRUARY 26, 1998