

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSISONER OF
EDUCATION

.....

Jane Doe

v.

East Greenwich School Committee

.....

DECISION

Held: The petitioner has established that she is entitled to the School Committee's protection of her confidentiality rights under federal and state law. The East Greenwich School Committee is directed and required to take appropriate measures to prevent further breaches of the petitioner's confidentiality rights.

DATE: September 24, 2007

Travel of the Case:

An interim protective order was issued in this appeal on December 22, 2006. Since that time a hearing on the merits was held on January 18, 2007 and memoranda were filed by the parties. The last memo was filed on March 9, 2007 at which time the record in this case was closed.

ISSUES

- Is the Petitioner “aggrieved” by any action of the East Greenwich School Committee thus conferring jurisdiction over this dispute on the Commissioner of Education?
- Is the Petitioner entitled to an order from the Commissioner to the East Greenwich School Committee directing it to refrain from engaging in and permitting public discussion of her IDEA-based litigation at public meetings of the School Committee and to take such other steps as may be necessary and appropriate to prevent further public dissemination of confidential information?

Findings of Relevant Facts:

- A copy of the Decision on Request for Issuance of an Interim Protective Order is attached as Attachment A and the findings of fact contained in that decision are incorporated herein.
- The public statements of the former chair of the East Greenwich School Committee with respect to litigation pending between the Petitioner and the School Committee went beyond the fact that litigation was pending and included a discussion of the implications he perceived such litigation had on Jane Doe’s ability to continue to function as a member of the East Greenwich School Committee. The former chair’s public statements provided an estimate of the cost to East Greenwich of a decision in favor of the Petitioner and her family and predicted the cost of any “landmark” adverse precedent to taxpayers throughout the state. Petitioner’s Ex.7.
- In addition to the public disclosures and comment contained in the former chair’s press release issued in early September of 2006 and published in the newspapers at that time, there had been a prior news article in the Providence Journal on August 10, 2006 reporting that the Petitioner had litigation pending in the Superior Court at the time she was elected to the School Committee in 2004, and that she was still “secretly waging a legal battle” against the school district at that time. Petitioner’s Ex.3.¹

¹ The August 10, 2006 Providence Journal article is not part of the record in this case, however, but is referred to in other exhibits. We infer that the litigation mentioned in that article is related to the same IDEA-related litigation, disclosures of which sparked this controversy.

- The Petitioner has made repeated requests² for written confirmation from the School Committee that the above-referenced litigation will not be discussed in open session and that the School Committee members will be advised and directed to refrain from publicly discussing the above-referenced litigation. The Petitioner has also requested that the School Committee investigate the source of the aforementioned August 10, 2006 news article to determine whether any school employee and/or member of the School Committee violated confidentiality obligations imposed by IDEA in releasing information to the press. Petitioner’s Ex. 13.
- In lieu of taking the steps described above, the Petitioner has more recently requested that the School Committee adopt resolutions which would (a) preclude discussions of the litigation at public sessions of School Committee meetings, (b) restrict disclosures and discussions by School Committee members to those permitted under IDEA, and (c) commit the School Committee to take appropriate steps to “discipline” any employee or School Committee member who is found by the Committee to have violated confidentiality requirements imposed by law. Petitioner’s Ex.16.
- The East Greenwich School Committee has indicated to the Petitioner that it did not issue any press release with respect to the litigation and affirmed that the Committee has not engaged in any public discussions with respect to her claim. The School Committee, through its counsel, has affirmed that its policy is to maintain the confidentiality of persons making claims against it under the IDEA. Petitioner’s Ex. 5 and 8.
- The East Greenwich School Committee has not issued the written confirmation requested by the Petitioner and when presented with the proposed resolutions forwarded by the Petitioner’s counsel at its January 9, 2007 meeting, found such resolutions unacceptable. Petitioner’s Ex.17.

Positions of the Parties

Jane Doe

In pleadings filed with the Commissioner, Ms. Doe requests the issuance of an order which would ensure her confidentiality rights under the Individuals With Disabilities Education Act, 20 USC 1400 et seq. (IDEA), the Family Educational Rights and Privacy Act of 1974, 20 USC 1232 (g) (FERPA) and the Educational Records Bill of Rights Act, R.I.G.L. 16-71-1 et seq. Specifically, she requests that the Commissioner direct³ the East Greenwich School Committee to take certain steps to assure that her privacy rights and those of her family will be protected and that prior violations of these rights will be investigated.

² See the prior findings of fact in the December 22, 2006 interim order decision.

³ Although the language “enjoin and restrain” is used throughout the pleadings, the Commissioner has no power to issue injunctions. Through the process of appeal to the Commissioner, however, final administrative decisions of the Commissioner are enforceable in the Superior Court pursuant to R.I.G.L. 16-39-3.1.

She submits that violations of her confidentiality rights have occurred on past occasions, including through public statements and discussions by the former chair of the School Committee. An inference is created that the East Greenwich School Committee sanctions public discussion of the Petitioner's pending IDEA litigation, because it has taken no action to investigate the source of the initial disclosure or to distance itself from its former chair's public discussion of the litigation. In response to repeated requests for written confirmation that discussion of the litigation will not take place at public meetings and that School Committee members will refrain from public discussions in general, no confirmations have been forthcoming. The resolutions drafted by the Petitioner's counsel and submitted to the School Committee for adoption on January 9, 2007 were deemed unacceptable by the members of the Committee. This only strengthens the inference that the Committee does not view such discussions as a violation of her confidentiality rights.

The prospect of further public discussions of IDEA-based litigation involving the Petitioner and the School Committee is not unlikely. The issue of whether such litigation creates a conflict of interest which prevents the Petitioner from continuing to serve as a member of the School Committee is an ongoing one. The Petitioner points out that in its legal argument⁴ the School Committee contends that public discussion of the *fact*⁵ of the litigation in the context of a conflict of interest discussion is permitted at public meetings. The Committee also asserts in its legal argument that restrictions on such discussion constitutes an impermissible restraint on the rights of free speech enjoyed by members of the School Committee and the public. These positions and arguments demonstrate, counsel submits, the clear intent of the School Committee to entertain and engage in future public discussions of this confidential matter. Clearly, the School Committee is of the opinion that it is their right and obligation to discuss this litigation publicly in the context of determining a conflict of interest which would disqualify the Petitioner from continuing to serve as a School Committee member. Further harm and violations of the Petitioner's rights are imminent, absent an order of the Commissioner of Education.

The Petitioner thus requests the issuance of the order requested in her pleadings and such other relief as the Commissioner may deem appropriate.

East Greenwich School Committee

As a threshold issue the School Committee submits that the Commissioner lacks jurisdiction to adjudicate this controversy because there has been no action by the School Committee which aggrieves the Petitioner. The East Greenwich School Committee has made no decision which has determined a right adverse to the Ms. Doe or her child and, under the case law which has interpreted the provisions of R.I.G.L. 16-39-2⁶ she is not "aggrieved by a decision" of the Committee. The invocation of the authority granted to the Commissioner under R.I.G.L. 16-39-2 is restricted to "persons who had some right that had been litigated and determined adversely to them by the committee when acting in

⁴ Specifically at page 7 of the Memorandum filed in support of the School Committee's Motion to Dismiss

⁵ Without specific details

⁶ Under which statute the Petitioner has invoked the Commissioner's jurisdiction. See Appeal and Request for Injunctive Relief dated December 8, 2006.

excess of its authority or otherwise illegally”. Demers v. Collins, 98 R.I. 312,316 (1964). In the Demers case, the statute on which the petitioner’s appeal was premised, R.I.G.L. 16-38-6, prohibited the sale of items on school property to students or teachers, except for the sale of school lunches. The court found that the statute conferred no individual right upon the appellant, who sold and serviced musical instruments in the town of West Warwick and who had complained to the Coventry School Committee that schools in the town were being used for the sale and rental of musical instruments in violation of the statute.

In the case before the Commissioner, there has been no decision of the School Committee which affects the Petitioner and certainly no decision that has resulted in the violation of her rights. The fact that the School Committee did not provide the Petitioner with a written confirmation that the “John Doe Litigation” would not be discussed in an open meeting does not constitute a decision from which an appeal can be taken to the Commissioner. The Petitioner has no right to the written confirmation which she has repeatedly requested of the School Committee members. Similarly with respect to the resolutions submitted by the Petitioner’s counsel for the School Committee’s consideration at its January 9, 2007 meeting, there was no legal right of the Petitioner to the passage of such resolutions. These requests are attempts to create a cause of action where none exists. The Petitioner’s intent in making such requests and in submitting unilaterally-drafted resolutions is to extend the Commissioner’s jurisdiction to a situation in which he lacks authority to intervene.

The purported violation of the Petitioner’s confidentiality rights remains unconnected to the present membership of the East Greenwich School Committee. If, for the sake of argument, the public statements of the former chair with respect to the John Doe litigation and its implications did constitute a violation⁷ of the Petitioner’s rights, there is no evidence that the East Greenwich School Committee authorized, sanctioned, condoned or commissioned his statements. It is indisputable that a School Committee can take action only through the formal passage of motions and resolutions in conformity with proper procedures. There is, again, no evidence of formal action by the School Committee and there is no basis on which to attribute any actions or statements of the former chair to the East Greenwich School Committee. The inferences which the Petitioner argues must be taken from the School Committee’s refusal to provide written confirmation and adopt resolutions submitted to it by Petitioner’s counsel are unwarranted. There is no legal obligation of the School Committee to take such action. If such written assurances were provided to one parent, the School Committee would be required to provide similar assurances to all parents in the district. The members of the East Greenwich School Committee have taken an oath to uphold the law, including those provisions of the law which require confidentiality with respect to IDEA litigation. The record does not demonstrate that a violation of the Petitioner’s rights in this regard is imminent, as she has argued. The members of the School Committee are cognizant of their obligation not to discuss the details and particular facts of the John Doe litigation in a public setting.

⁷ And our understanding of the position of the School Committee is that no violation occurred by virtue of the former chair’s public statements in that he never disclosed facts sufficiently specific concerning the nature of the litigation to constitute an invasion of privacy. See East Greenwich School Committee’s Memorandum of Law in Support of its Motion to Dismiss Appellant’s Appeal and Request for Injunctive Relief at pages 5-6.

The School Committee also argues that the relief sought by the Petitioner in this appeal would constitute an impermissible prior restraint on free speech. Members of the School Committee and the public at large have a constitutionally-protected right to speak on matters of concern to them. The relief requested by the Petitioner would essentially constitute a “gag” order. If the Commissioner issues an order prohibiting discussions of the “John Doe litigation” at public meetings of the Committee this will prevent Committee members and the public in general from addressing the conflict of interest issue which looms “like an ominous storm cloud in the background of this controversy.” A violation of the First Amendment would surely result if the Commissioner grants such an order.

There is little likelihood that the a public discussion of a conflict of interest created by the Petitioner’s involvement with IDEA litigation on behalf of her child would violate her privacy rights argues the School Committee. The *fact that the John Doe litigation exists* is essentially public knowledge, such that public discussions of its implications for the Petitioner’s competence to serve as a member of the East Greenwich School Committee would not breach her rights to confidentiality. The School Committee submits that the Petitioner’s concern for her privacy would be more persuasive if it were not widely known in the community of East Greenwich that she has a pending suit against the School Department⁸. In fact, upon information and belief⁹ Jane Doe herself made such information known to members of the public who then approached individual members of the School Committee to express their concerns. She has essentially waived her right to keep the existence of her IDEA suit a private matter.

Finally, the School Committee takes the position that this appeal is really all about the Petitioner’s attempt to shift to the School Committee the responsibility for her failure to attend a series of School Committee meetings over a period of three months. It views her appeal as an attempt to legitimize her voluntary absence in the face of growing criticism. The appeal was filed in early December of 2006 when the Petitioner found herself in a “political maelstrom” as a result of her continued absences from School Committee meetings. The sequence of events demonstrates that over two months had elapsed between the emergence of the “imminent threat” to continued breaches of her confidentiality rights and her filing of this appeal. In the interim, the composition of the School Committee had changed and the alleged perpetrator of the violations¹⁰ was not even a member of the Committee. After the issuance of the interim order in this matter and the resumption of her attendance at meetings, the Petitioner was quoted in the local paper (Respondent’s Ex.C) and attributed her return to the interim order protecting her against unlawful disclosure of information protected by both state and federal law. Her public discussion of the reason for her return belies her position that discussion of such issues is private and must be kept confidential. There is an ulterior motive for the Petitioner’s request for relief and her use of the Commissioner’s hearing procedure constitutes an abuse of process, the Committee argues.

⁸ The IDEA litigation has been adjudicated in favor of the School Committee and for this reason, the Petitioner’s appeal to the Commissioner is moot. See footnote 1 of the Memorandum in Support of the Motion to Dismiss.

⁹ There was no evidence submitted on this point

¹⁰ The former chair of the School Committee

For these reasons, the School Committee requests that her Petition be denied and dismissed.

DECISION

The School Committee's jurisdictional arguments are well taken. The East Greenwich School Committee did not violate the Petitioner's confidentiality rights when the former chair issued a public statement in early September of 2006 with respect to her pending IDEA litigation. There is no evidence that the former chair acted as an agent of the School Committee or that it had authorized such statements in any way. Thus the former chair's impermissible¹¹ disclosures do not constitute a "decision or doing" of the Committee which aggrieved Jane Doe and her family. However, consideration of the statutory obligations placed upon local school committees by IDEA leads to our conclusion that the inaction of the School Committee in the period following two disclosures of confidential information¹² has conferred upon Jane Doe the status of a "person aggrieved" under R.I.G.L. 16-39-2 and entitles her to relief.

Specifically, the federal regulations promulgated pursuant to IDEA entitled "CONFIDENTIALITY OF INFORMATION" require that:

300.623 Safeguards.

- (a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.
- (b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information
- (c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures, under Sec.300.123 and 34 CFR part 99.
- (d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

¹¹ His statements confirmed the existence of a complaint linked to Jane Doe – information protected from disclosure as it constituted personally identifiable information contained in an educational record maintained by both the school district and the Rhode Island Department of Education. The discussion of procedural safeguards in 20 USC 1415 (b) (7) (A) specifically references confidentiality of due process complaint notices. As indicated in our findings of fact, the former chair's public comments went beyond the mere fact of the litigation's existence.

¹² As our findings of fact indicate, there was another disclosure on which an August 10, 2006 newspaper article was based. The source of this information remained undetermined according to the evidence in this record.

These same obligations of a local school district, or “participating agency”¹³ are imposed by state regulation. The Regulations Governing The Education of Children With Disabilities, promulgated by the Board of Regents on December 14, 2000 at Section 300.572. reiterate, almost verbatim, the language of the federal regulations. Regulatory provisions in this regard stem from the federal requirement that the State “must have policies and procedures in effect to ensure that public agencies in the State comply with Sections 300.610 through 300.626. See 34 CFR Section 300.123.

Thus, while the East Greenwich School Committee has argued (correctly, we believe) that it is not responsible for any past violations of Ms. Doe’s confidentiality rights and those of her family and that it does not sanction or condone such disclosures, it is nonetheless responsible for safe-guarding this information from further disclosure. Stated another way, the School Committee has a legally-imposed duty to act affirmatively to protect Ms. Doe and her family from future violations of their confidentiality rights. Ms. Doe and her family have had confidential information with respect to an IDEA-related claim disclosed to the public – she thus stands in a position different from that of other parents and families within the district whose educational records remain private. The language cited above - the district’s obligation to “protect” confidentiality and the individual official’s responsibility for “ensuring” confidentiality - are our focus. This language goes beyond the confidentiality provisions of both FERPA and the state’s Educational Records Bill of Rights. When applied to the facts here, such provisions require affirmative measures. The School Committee’s disclaimer of responsibility as to past violations does not indicate that it will act to “protect” or “ensure” Ms. Doe’s confidentiality rights. Written affirmation that legal counsel has advised the current members of the School Committee as to the confidentiality rights of all families in the district does not provide a safeguard to a child whose educational record has already been disclosed to the public.

Since the East Greenwich School Committee has, to date, declined to take any “action” on the requests of Ms. Doe for such protections and safeguards, we find that the inaction of the School Committee is a “decision or doing” that “aggrieves” her and her family under R.I.G.L. 16-39-2. In addition, since the Commissioner’s intervention is evidently needed to ensure compliance with the LEA’s responsibility to protect Jane Doe’s confidentiality rights under IDEA, the Commissioner has an independent obligation to act to enforce such laws under 34 CFR Section 300.123, R.I.G.L. 16-1-5 (9) and 16-60-6 (9) (vii). Although the more traditional route utilized to request that the Department of Education intervene to direct compliance by a local district with a provision of IDEA is through the state complaint process described in Section 300.660-662 of the Regents’ regulations, an appeal to the Commissioner is not inappropriate, if the individual has the requisite standing. As we have found in this case, Ms. Doe is aggrieved by the failure of the School Committee to take affirmative action to protect her rights, and she thus has the requisite standing.

¹³ Defined to include any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the Act. (300.611 Definitions); In state regulations, a participating agency is similarly defined.

As for the defenses raised by the School Committee, the record does not support the argument that the Petitioner waived her confidentiality rights by her own prior public disclosures of the fact that she has litigation pending against the School Committee. The factual assertion on which the waiver argument is based remains “upon information and belief” rather than upon proven fact. With respect to the claim that her appeal to the Commissioner is moot because a hearing officer has already issued a decision in the due process matter, the record does not indicate whether such decision has become final. If the IDEA-based litigation has come to a conclusion, there is no evidence that its resolution removes the possibility of future public discussions of it or the impact it may have on the Petitioner’s competency to continue as a member of the School Committee. The “conflict of interest” issue continues to be argued as a permitted context for public discussion of the John Doe litigation despite evidence that the claim has been adjudicated by a due process hearing officer.

The School Committee also argues that if the Commissioner were to order that it must refrain from public discussions of Ms. Doe’s litigation, such a restriction would constitute an impermissible prior restraint on the freedom of speech of School Committee members as well as members of the public who may want to address the issue at a public meeting. The relief the Petitioner has requested focuses on confirming that School Committee members themselves will not publicly discuss her IDEA-based litigation and that the Committee will not provide a public forum for others to discuss this confidential matter. She requests that discussions by members of the Committee, to the extent such discussions need to take place¹⁴ occur only in executive session. Such a limitation is consistent with the confidentiality requirements imposed by IDEA. Obviously, statutory confidentiality obligations imposed on an LEA, including its governing board, operate day to day to curtail public discussion of confidential matters related to students. In accepting the oath of office, School Committee members voluntarily agree to be bound by such statutory obligations and, to some extent, acknowledge that restrictions on their public comments are necessary to accomplish the goals of, in this case, special education laws. The receipt by School Committee members of highly sensitive and confidential information related to students is conditioned upon their acceptance of their confidentiality obligations. Thus, any limitations on the freedom of speech of School Committee members would be consistent with the legally-imposed restrictions to which members of the Committee agreed to be bound.

Counsel for the School Committee has correctly pointed out that the relief sought by the Petitioner would restrict members of the public from discussing the John Doe litigation in an open meeting of the School Committee. This would be the case. The restriction would clearly be designed to have a “chilling effect” on further public discussion of a matter which should not have become public knowledge in the first instance. Such action would affirmatively protect the statutory rights of the Petitioner and

¹⁴As indicated in the interim order decision in this matter, the record is not clear as to why the subject of “an evaluation of Ms. Doe’s performance” as a school committee member falls within the powers/duties of the School Committee, rather than a matter resting within the discretion of the electors of the town. Similarly, the reason for a public discussion of Ms. Doe’s conflict of interest remains unexplained on this record. State law clearly places such matters within the purview of the Rhode Island Ethics Commission. See R.I.G.L. 36-14-11 through 36-14-14.

be consistent with the responsibility of the School Committee to provide such protection. Once confidential information is improperly released, it is difficult to control its further dissemination, but if the East Greenwich School Committee were to provide a public forum for further dissemination of such information, its doing so would not be in compliance with state and federal law. We should point out that the School Committee's responsibility to prevent public discussion of confidential student-related matters extends to all of the students of the district, not just the Petitioner's child. The order requested by the Petitioner would be operative only at public meetings of the East Greenwich School Committee. Members of the public would not be restricted from engaging in discussions of this matter in other venues.

Finally, the argument that the Commissioner's appeal process has been used as a smoke screen to legitimize the failure of the Petitioner to attend meetings of the School Committee throughout a lengthy period in the fall of 2006 has not been shown to have merit. We take no position, however, on whether the existence of this dispute formed a proper basis for the Petitioner's extended absence from School Committee meetings during that time. The record is insufficient to draw any conclusions in this regard.

The record in this case contains a description of four resolutions that counsel for the Petitioner submitted to counsel for the School Committee for consideration at the Committee's meeting of January 9, 2007. See Petitioner's Ex. 16. The steps set forth in these four resolutions describe the type of reasonable affirmative measures that would protect the confidentiality rights of Jane Doe and her family. Consistent with our finding that both federal and state law require the School Committee to act affirmatively to protect these rights, we hereby require the East Greenwich School Committee to take the action set forth in these resolutions, which are attached to this decision as Attachment B and hereby incorporated in this decision.

The Petitioner's appeal is sustained, and the School Committee is directed to take the action described in accordance with this decision.

For the Commissioner

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

September 24, 2007
Date

*Note: Attachment A – Jane Doe v. East Greenwich School Committee December 22, 2006
Attachment B – copy of agreement with East Greenwich School Committee*