

**STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS**

COMMISSIONER OF EDUCATION

.....
Jane Bamberg

vs.

Providence School Board
.....

DECISION ON PRE-HEARING DISCOVERY

The subpoenas sought by the petitioning teacher for pre-hearing discovery purposes will be issued. A protective order is hereby issued prohibiting disclosure of the subpoenaed material to third parties not properly connected to the present litigation. Nothing in the present decision prohibits the Providence School Board from contesting the admission of the subpoenaed material at the hearing in this contested case.

DATE: October 11, 2012

Travel of the Case

This de novo hearing concerns a teacher who is now appealing a decision of the Providence School Board to dismiss her from her tenured teacher position with the School Board. In order to prepare her case for a hearing on the merits, she is requesting the Commissioner to issue subpoenas for discovery purposes in advance of the hearing. The present decision is limited to a ruling on pre-hearing discovery in this case.

Conclusions of Law

The Rhode Island Supreme Court has held that Rhode Island agencies operating under the Administrative Procedures Act have authority to issue subpoenas in advance of a hearing for discovery purposes. *La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights*, 419 A.2d 274 (R.I. 1980) The respondent teacher in this matter is requesting that we issue such a prehearing subpoena in order to facilitate hearing preparation. The petitioner in this matter, the Providence School Board, objects to the issuance of such subpoenas primarily on the grounds that the materials being sought are (1) not relevant to this matter; and (2) in most instances the records being sought are records personally identifiable to a student and therefor protected from disclosure by the Federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. 1232g)

The FERPA Privacy Issue – Authority to Subpoena Student Records

Under FERPA, education records are defined as follows:

Education records (a) The term means those records that are:

- (1) Directly related to a student: and
- (2) Maintained by an educational agency or institution or by a party acting for the agency or institution. (FERPA 34 CFR 99.3(2)(iii))

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. While FERPA gives a measure of confidentiality protection to student records, FERPA itself recognizes that personally identifiable records are subject to disclosure in accordance with a subpoena:

(9) (1) The disclosure is to comply with a judicial order or lawfully issued subpoena.

The Rhode Island Commissioner of Education has authority to issue subpoenas in contested cases:

R.I.G.L. § 16-39-8 Subpoena power of the department of elementary and secondary education. –

In any hearing conducted within the department of elementary and secondary education, the commissioner of elementary and secondary education or the hearing officer shall have the power to issue subpoenas to compel the attendance of witnesses and the production of documents or other material. Subpoenas shall also be issued by the commissioner or hearing officer at the request of any party participating in any hearing. If not complied with, subpoenas issued under this section shall be enforceable in a contempt action brought in the superior court of Providence County by the commissioner of elementary and secondary education or any party in interest.

We note here that the Rhode Island Supreme Court has explicitly held that FERPA and its Rhode Island analogue, the Educational Records Bill of Rights Act (R.I.G.L.16- 71-1, et seq.) do not create a “school-disabled student” evidentiary privilege “which prevents personally identifiable student records from being subpoenaed. *Gaumond v. Trinity Repertory CO.*, 909 A.2d 512, at 515 (R.I. 2006) We therefore must conclude that no privilege prevents the disclose of the student records sought in this matter.

Relevancy in Discovery Matters

The petitioner Providence School Board also objects to disclosure of other sought after records because, in the view of the Providence School Board, these records are not relevant to the dispute now before the Commissioner. Concerning “relevancy” objections in discovery matters, the Rhode Island Supreme Court has held from the very inception of our present discovery rules that:

The court is bound under the new rules to give the concept of relevancy, as it applies to discovery purposes, a liberal application and the test to be applied is whether the material sought is relevant to the subject matter of the suit, not whether it is relevant to the precise issues presented by the pleadings, hence it is broader than the rules governing relevancy of evidence adduced at trial.

Borland v. Dunn, 321 R.I. 337 (1974)

When we look at the record now before us, we must conclude that the records sought meet the standard for discovery purposes although this does not mean that we are bound to find these records relevant for purposes of the actual hearing that will take place in this matter. *Borland v. Dunn*, 321 R.I. 337 (1974) The Providence School Boards objection to the relevancy of the items sought to be discovered seems to us to be premised on the incorrect assumption that to be discoverable an item must be relevant to the precise issues contained in the case rather than just being relevant to the subject matter of the contested case now before us. *Borland v. Dunn*, 321 R.I. 337 (1974)

Effect of a Prior Superior Court Ruling

Finally, we note that the Providence School Board has suggested that the Superior Court has denied pre-hearing discovery in this matter. We believe that this position is incorrect. The Court itself declined to order prehearing discovery and left this issue to be determined through the administrative hearing process.

Rulings on Discovery Requests

The Providence School Board has already provided the petitioning teacher with a copy of her personnel file and thus the Board has fully responded to **Item 1** contained in petitioner's subpoena request. This request is therefore moot.

As to the remaining discovery requests:

Item 2 concerns a request for all educational records concerning the student connected with this case. For the reasons set forth above we find that this item is subject to production by subpoena, as are **Items 3** and **4** which call for the production of the student's disciplinary records.

Item 5 is a request for documentation reflecting training given to the petitioner concerning physical restraint of students. We find that under the relaxed standard of relevancy governing pre-hearing discovery, as explained above, we must find that this item is discoverable. If the petitioning teacher did not receive training in physical restraint, it will suffice to state this fact.

Item 6 calls for the production of all statements, memorandum, correspondence, documents, DVDs, video recordings, and audio recordings related to the incident involving the petitioning teachers and the student occurring on May 20, 2011. It appears to us that all the items mentioned here are clearly subject to discovery. We therefore order their production to the extent that these items are under the custody or subject to the control of the School Board. Of course, the School Board does not have to produce items protected by attorney client privilege.

Item 7 is a request for the School Board's restraint policy. This item, which in any event would be a public record, is clearly discoverable.

Item 8 is a request for all relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the petitioning teacher. These items too are clearly discoverable so they are subject to subpoena.

Item 9 is a request for all witness statements to the event in the custody of the Providence School Board. These items are plainly discoverable, including any items which may be in Spanish rather than just in an English translation.

Item 10 is a request for the names and addresses of all the witnesses the Providence School Board intends to call at the hearing on the merits in this matter. These items are plainly discoverable.

Item 11 is a request for all Mt. Pleasant High School policies relating to physical restraint. Under the relaxed rules of relevancy governing discovery we must find that this item, to the extent that such policy exists, is discoverable and is therefore subject to subpoena.

Conclusion

The subpoenas sought will be issued. A protective order is hereby issued prohibiting disclosure of the subpoenaed material to third parties not properly connected to the present litigation. Nothing in the present decision prohibits the Providence School Board from contesting the admissibility of the subpoenaed material at the time of hearing.

For the Commissioner

Forrest L. Avila, Esq.
Hearing Officer

David V. Abbott, Acting Commissioner
Deputy Commissioner/General Counsel

Date: October 11, 2012