



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**BRIANNA BELL,
Requester**

v.

**CENTRAL SUSQUEHANNA
INTERMEDIATE UNIT #16,
Respondent**

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Docket No.: AP 2022-1989

FACTUAL BACKGROUND

On July 8, 2022, Brianna Bell, Esq. (“Requester”) submitted a request (“Request”) to the Central Susquehanna Intermediate Unit #16 (“CSIU”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in relevant part:

The disability categories and number identified in each category of special education students who were residents of North Central Secure Treatment Unit and who received itinerant support during each of the following school years: 2020-2021; 2021-2022 (disaggregated).

On August 12, 2022, following a thirty-day extension, 65 P.S. § 67.902(b), the CSIU denied the Request, arguing that the responsive records would constitute educational records under the Family Education Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g *et seq.*, and would identify minors. 65 P.S. § 67.708(b)(30).

On August 30, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial, and arguing that the Request did not seek any information which would

identify individual students.¹ The OOR invited both parties to supplement the record and directed the CSIU to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 9, 2022, the CSIU submitted a position statement arguing that the denial was authorized under FERPA because the records are directly related to students, stored in the CSIU database, and would identify individual students because the CSIU's enrollment encompasses only 135 students over 2020-2021 and 158 students in 2021-2022, respectively, and therefore, the responsive records would show many unique combinations of disability. The CSIU additionally argued that the Requester's identity as guardian *ad litem* for a student in the CSIU should be considered, as she would be more likely able to identify individual students based on the responsive record.² The CSIU further argues that Section 708(b)(30) should apply, that the Request is expressly seeking non-aggregate information, and that the students at the CSIU have a constitutional right to privacy, as disclosure of the information could make public various sensitive individual data. In support of this argument, the CSIU submitted the verification of Rae Ann Crispell, the CSIU's Open Records Officer, who attests that only court-ordered students are housed at CSIU, where they are simultaneously enrolled in a treatment program by the Department of Human Services, and the responsive record categorizes every student by sex, dormitory, and disabilities or combination of disabilities of each student.

The Requester did not make any submission on appeal.

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).").

² Notably, the identity of a requester may not be considered while construing RTKL exemptions. *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*). However, the Requester's identity and access to student information is a consideration when determining a record's status under FERPA. Therefore, the OOR will only consider the Requester's identity in this appeal in its FERPA analysis.

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the factfinder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The identified report is exempt under FERPA

The CSIU denied the Request as seeking an “education record” under FERPA. FERPA protects “personally identifiable information” contained in “education records” from disclosure and financially penalizes school districts that have “a policy or practice of permitting the release of education records ... of students without the written consent of their parents.” 20 U.S.C. § 1232g(b)(1). Regulations implementing FERPA define “education records” as those records that are “[d]irectly related to a student” and are “[m]aintained by an educational agency or institution or by a party acting for the agency or institution.” 34 C.F.R. 99.3. While the express language of FERPA’s implementing regulation would appear to encompass all records held by an educational institution pertaining to a student, a review of case law interpreting FERPA reveals that not all of these records constitute “education records” as defined by FERPA. Just because a record involves a student does not automatically implicate the confidentiality provisions of FERPA. *See Bockis v.*

Agora Cyber Charter Sch., OOR Dkt. AP 2016-0845, 2016 PA O.O.R.D. LEXIS 848; *Newhouse v. Manheim Twp. Sch. Dist.*, OOR Dkt. AP 2016-0541, 2016 PA O.O.R.D. LEXIS 759.

Regulations implementing FERPA define “personally identifiable information” as:

- a) The student’s name;
- b) The name of the student’s parent or other family members;
- c) The address of the student or student’s family;
- d) A personal identifier, such as the student's social security number, student number, or biometric record;
- e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother’s maiden name;
- f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3. While the RTKL does not require an evaluation of the circumstances surrounding the request for records, FERPA does. *See* 34 C.F.R. § 99.3(g).

In support of this argument, the CSIU submitted the verification of Ms. Crispell, who attests that:

- d. The North Central Secure Treatment Unit (NCSTU) is a secure 108 bed facility for male and female adolescents operated by the Pennsylvania Department of Human Services/Juvenile Services (DHS). Students can stay at the North Central Secure Treatment Unit for a period of 6, 9, 12, or 24 months. Students are discharged when they are approaching their 21st birthday.
- e. Every student at NCSTU arrives by court order. All of the students are adjudicated delinquent and almost always have a substantial history of social-emotional, behavioral, mental health, family, school, conduct, and/or community difficulties. Once at NCSTU, a student is required to successfully complete a treatment program that the DHS provides in order to be released.

f. Students committed to NCSTU by the court systems across the Commonwealth of Pennsylvania demonstrate a wide range of academic levels. Some experience significant learning disabilities, have a long history of truancy, and are far below the expected grade level; while others have diplomas and are ready for post-secondary study.

g. In 2020-2021, a total of 135 students were enrolled in the [CSIU] schools at the North Central Secure Treatment Unit.

h. In 2021-2022, a total of 158 students were enrolled in the [CSIU] schools at the North Central Secure Treatment Unit.

i. The daily census averages about 65 students a day as some students will leave prior to the end of the academic year.

j. Additionally, there are four buildings at the North Central Secure Treatment Unit that house students. Those four buildings are A/B, C/D, Green, and Reed.

k. Males admitted to building C/D typically have been assessed with mental and/or behavior health issues that may require psychiatric care, and academic and/or learning disabilities.

l. Males admitted to building A/B typically have been charged with serious crimes: aggravated assault; drug offenses; and/or physical or sexual abuse and may have been adjudicated delinquent on those charges.

m. Females admitted to the Reed and Green buildings typically have been charged with serious crimes: aggravated assault; drug offenses; and/or physical or sexual abuse and may have been adjudicated delinquent on those charges.

n. The Requester is a legal court appointed guardian ad litem for at least one student enrolled in the CSIU program at the NCSTU and likely has some knowledge regarding the makeup of the student body.

o. The Document requested in Item #4 was created and maintained by the CSIU for its own records and provides the information in a format that would reasonably identify the student to a person in the school community. This information is currently stored in our School System Database.

p. The Document categorizes students by their sex and then narrows the information down even further by which building the student is housed and receives academic instruction. Actual names of students are not listed but they are provided descending numbered aliases such as "Name 1", "Name 2", "Name 3", etc.

q. Finally and most importantly, the Document provides the disability or combination of disabilities the student is receiving support for. This information alone may lead a person in the school community to reasonably identify the minor child and/or adjudicated juvenile. This is especially true for students who receive services for a combination of disabilities as each individual combination is unique to that student.

r. The decision to deny the [R]equest under ... [FERPA], [RTKL] 65 P.S. § 67.708(b)(30), and the Constitutional Right to Privacy was based on the fact that the sex, housing location, and disability(s) type information in conjunction with a diminutive student body would reasonably lead to highly sensitive information regarding the minor child's and/or adjudicated juvenile's criminal history, health, safety, and welfare being provided, which could realistically identify that student.

s. In addition, it is my understanding that the Department of Human Services only releases this type of information under court order due to the sensitivity of the data.

Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the CSIU has acted in bad faith or that responsive records exist, the CSIU's evidence "should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the CSIU states that the responsive record is a report that lists each student enrolled in the CSIU; each student is listed as "Student 1", "Student 2", etc., and categorized as male and female students, and by which building serves as their dormitory and educational facility. Finally, each listing includes any disability or disabilities for which the students are registered. CSIU admits that this record is facially anonymized but argues that because CSIU's enrollment numbers are much lower than the ordinary school districts and the list is further subdivided into recognizable categories, many of the entries would be unique markers, and any individual with reasonable knowledge of the CSIU's student body could identify individual students. CSIU asserts that these

facts satisfy paragraphs f and g of 34 C.F.R. § 99.3, and therefore, qualify as educational records under FERPA. Given the CSIU's small size and the subdivisions of the responsive document, Ms. Crispell's attestation credibly asserts that the document could be used to identify individual students, and may, therefore, constitute an education record under FERPA. Because the document identified by the CSIU is reasonably likely to identify individual students, it is exempt under FERPA.³

2. The CSIU has not demonstrated that it cannot provide aggregate data

On appeal, the Requester argues that the CSIU's basis for denial is at odds with the language of the Request, which seeks aggregate data and not any specific record that would identify any student. The CSIU argues that the Request is explicitly seeking disaggregated data; the disability categories of each individual student receiving services. Though the CSIU admits that "[i]f the [Request] sought information like [a] general tally of students receiving disability services or some cumulative data not broken down by student, then the [R]equest would be considered 'aggregated' and require disclosure on part of the CSIU[,]," it asserts that "the document that is being requested provides a combination of information that would allow a party to distinguish the properties of individual minors and adjudicates[.]"

The RTKL defines aggregated data as a "tabulation of data which relate to broad classes, groups, or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories." 65 P.S. § 67.102. A request which facially seeks aggregated data and categories may still be subject to exemption if the record shows that the categories of data are so small that a reasonable person could still cross-reference them to identify individuals.

³ Because this record is exempt under FERPA, the OOR will not separately analyze Section 708(b)(30) of the RTKL.

Conroy-Smith v. Haverford Twp. Sch. Dist., OOR Dkt. AP 2021-1182, 2021 PA O.O.R.D. LEXIS 1497.

Here, the Request seeks:

The disability categories and number identified in each category of special education students who were residents of North Central Secure Treatment Unit and who received itinerant support during each of the following school years: 2020-2021; 2021-2022 (disaggregated).

The CSIU interpreted the Request as seeking a record that breaks disability categories down by student, which it has demonstrated would violate FERPA. An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010)). The OOR determines the reasonableness of the agency's interpretation from the text and context of the request alone, as neither the OOR nor the Requester are permitted to expand the request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Commw. Ct. 2010); *McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) ("Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal.").

A request for "categories" and "[the] number identified in each category of special education students... who received itinerant support during each of the following school years:" is facially a request for aggregated information - a list of categories and the number of students in each category. Though the CSIU argues at length that the Request cannot be satisfied by a simple

tally, both a straightforward reading of the Request and the Requester's own appeal filing support a contrary interpretation.

However, the Request ends with a parenthetical word; "disaggregated." The CSIU points to this as support that the Request is seeking data of individual students, but an equally natural reading is that the Request is asking that the tallied categories of special education for the years 2020-2021 and 2021-2022 be separate from one another rather than a provision of numbers for both years at once. Furthermore, the other items of the Request, which are not at issue in this appeal, also end with the same parenthetical, but could only be seeking aggregated data. For example:

6. The number of special education students who were residents of North Central Secure Treatment Unit and were assessed for Covid Compensatory Services during each of the following school years: 2020-2021; 2021-2022 (disaggregated).

7. The number of special education students who were residents of North Central Secure Treatment Unit and who received Covid Compensatory Services during each of the following school years: 2020-2021; 2021-2022 (disaggregated).

Each of these items of the Request seeks only a number; therefore, the parenthetical can only mean that the years themselves should be disaggregated. Therefore, because the most natural reading of the Request indicates that it is seeking annual sets of tallied categories and not individualized student data, the CSIU's reading of the Request was not a reasonable interpretation.

The CSIU does not claim, on appeal, that it is unable to produce such aggregated data; to the contrary, it admits in its position statement that it would be required to disclose tallies or "some cumulative data not broken down by student." Although the CSIU argues—and has proven—that a record which lists individual students' combinations of disabilities risks violating FERPA, there is no reason to believe that a list of categories and the total numbers of students in each category will identify any student; at the most, it will confirm that one or more students at the CSIU have

been diagnosed with each category of disability. Therefore, the Request seeks aggregated data in the form of a list of categories and the number of students in each category, and the CSIU has not submitted any argument or evidence that this record does not exist. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).⁴

3. The constitutional right to privacy does not apply to the responsive aggregated data

The CSIU argues that, because the Request is seeking information about students and disabilities, the OOR must consider the state constitutional right to privacy. The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

However, before proceeding to the balancing test, the OOR must determine whether any individual's right to privacy is implicated by the responsive records. The right to privacy is held by individuals and implicated by potential disclosure of personal information; the Supreme Court has described the "right to informational privacy" as "namely the right of an individual to control access to, and dissemination of, personal information about himself or herself." *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017). In *Butler Area Sch. Dist. v.*

⁴ The exemption under the RTKL at Section 708(b)(30) cannot apply to aggregated data, and so the OOR will not analyze that separately. 65 P.S. §§ 67.102; 708(d) ("The exceptions [to the RTKL] set forth in subsection 708(b) [do] not apply to aggregated data ... except for data protected under subsection (b)(1), (2), (3), (4), or (5).").

Pennsylvanians for Union Reform, the Commonwealth Court explained that “[t]he first step [in the privacy analysis] is assessing whether the information at issue is sufficiently personal to trigger protection as a privacy interest.” 172 A.3d 1173, 1182 (Pa. Commw. Ct. 2017).

Here, there is likely to be a privacy right implicated in disclosures that would identify an individual student and confirm details about their diagnoses or treatment at CSIU, and this is the argument which CSIU made regarding the record properly withheld under FERPA. However, an individual does not have a right to privacy in a document which lists only statistics and from which no individual identity can be gleaned. Therefore, there is no discernable right to privacy in the provision of the responsive aggregated data, and the CSIU is required to provide those records.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and within thirty days, the CSIU is required to provide aggregated data listing the categories of disabilities present in the student body and the total number of students registered within each category. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Northumberland County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: October 31, 2022

/s/ Jordan C. Davis

SENIOR APPEALS OFFICER
JORDAN DAVIS

Sent via email to: Brianna Bell, Esq. (via email only);
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