10-ORD-069

April 8, 2010

In re: Jonathan R. Sholar/Caldwell County School District

Summary: Caldwell County School District violated Open Records Act in denying parent the right to inspect his daughter's education records consisting of communications concerning his daughter exchanged by District administrators and staff. Although KRS 61.878(1)(a) and (i) might authorize nondisclosure of these records as to the public generally, federal and state laws guaranteeing a parent's right of access to his or her child's education records mandate release to the parent requester.

Open Records Decision

The question presented in this appeal is whether the Caldwell County School District violated the Open Records Act in partially denying Jonathan R. Sholar's February 25, 2010, request for access to education records relating to his daughter, records relating to District employee Jason Gossett, and records relating to District policies. We find that the District violated the Act by refusing to afford Mr. Sholar access to "all documents, emails, notes, correspondence and memoranda involving [his daughter], and all communication and correspondence in whatever tangible medium between [eight named District employees] involving [his daughter]."

In a response dated March 1, 2010, Caldwell County Superintendent Carrell Boyd agreed to afford Mr. Sholar access to all records identified in his request with the exception of communications concerning his daughter in any

"tangible medium."[1] Superintendent Boyd advised Mr. Sholar that "[i]t would be inappropriate authorization as those files are exempt pursuant to KRS 61.878." Upon receipt of notification of Mr. Sholar's appeal, Caldwell County Board of Education attorney Marc Wells briefly explained that Mr. Sholar's request "was denied based upon the provisions of KRS 61.878(1)(a)(i)." Mr. Wells stated that "the information which was requested would constitute correspondence with private individuals which is not intended to give final notice of any action of this public agency and disclosure of the information would constitute an unwarranted invasion of personal privacy."

Communications between District employees that relate to Mr. Sholar's daughter might enjoy protection from disclosure to the public, generally, as preliminary records per KRS 61.878(1)(i) and/or (j), if, in fact, they were not adopted into final agency action. More importantly, these communications would certainly enjoy protection from disclosure to the public pursuant to KRS 61.878(1)(k) and (l),[2] incorporating 20 U.S.C. §1232g and KRS 160.700 *et seq.*, the federal and state Family Educational Rights and Privacy Acts. However, it is these statutes which *guarantee* Mr. Sholar's right to inspect his daughter's educational records. The latter term is broadly defined to include, at the federal level, "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an

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[1] We assume that the only information withheld from Mr. Sholar was, as Superintendent Boyd indicated, Jason Gossett's social security number which the Superintendent characterized as "personal information." Superintendent Boyd did not cite the exception authorizing nondisclosure of Mr. Gossett's social security number, KRS 61.878(1)(a), in contravention of KRS 61.880(1), nor did he indicate what, if any "personal information" he withheld. The Caldwell County School District is statutorily obligated to generally identify, in writing, any "personal information," as well as any other record, or portion of a record, withheld. Additionally, the District must "include a [written] statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld."

[2] KRS 61.878(1)(k) and (l) permit public agencies to withhold:

> (k) All public records or information the disclosure of which is prohibited by federal law or regulation;
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> (l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.

educational agency or institution,"[3] and at the state level, to include "data and information directly related to a student that is collected and maintained by educational institutions or by a person acting for an institution . . . ."[4]

As the District knows, FERPA and its state counterpart regulate access to "education records."[5] With the exception of certain narrow categories of records identified at 20 U.S.C. §1232g(4)(B)(i)-(iv), that term is defined to include all information, in whatever form, that satisfies the two part test described above. The corresponding provision in Kentucky's statute also defines the term "education record" expansively, containing only four exceptions that track the language of the federal exclusions. Under both the federal and state law, the term is intended to be inclusive. FERPA and KFERPA preclude the disclosure of personally identifiable student information to third parties in the absence of a parent or eligible student's prior written consent. More importantly for purposes of our analysis, these statutes insure the right of a parent, or a student who has reached the age of eighteen, to inspect the parent's child's or the eligible student's own education records. Communications concerning Mr. Sholar's daughter, in whatever form, clearly constitute "education records" because they directly relate to his daughter and are maintained by an educational agency or institution. As a practical and legal matter, compliance with FERPA is mandatory inasmuch as educational institutions that fail to comply risk forfeiture of their federal funding in derogation of their educational mission.

20 U.S.C. §1232g(4)(B) excludes from the definition of "educational record":

> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereof which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

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[3] 20 U.S.C. §1232g(4)(A).

[4] KRS 160.700(3).

[5] At page 6 of 00-ORD-148, this office recognized that student records "do not have to be related to academic matters to be 'education records' under FERPA." Citing *U.S. v. Miami University*, 91 F.Supp 1132, 1149 n. 17 (S.D. Ohio 2000).

> (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
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> (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or
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> (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

The Caldwell County School District advances no argument that the requested communications between and among District administrators and employees that relate to Mr. Sholar's daughter fall within one or more of these exclusions. Assuming, for the sake of argument, that the communications constituted "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereof," within the meaning of 20 U.S.C. §1232g(4)(B)(i), they are not "sole[ly] possess[ed by] the maker thereof." Instead, they are, by their nature, communications exchanged and shared by the named administrators or employees. Absent proof to the contrary, we assume that the remaining exclusions are facially inapplicable.

Mr. Sholar possesses an absolute right to inspect any and all educational records, including the requested communications, relating to his daughter by virtue of 20 U.S.C. §1232g and KRS 160.700. The District's refusal to disclose

these records to him constituted a violation of the Open Records Act.[6] As noted, these same laws prohibit disclosure of communications relating to his daughter exchanged by District administrators and employees, or any other education records relating to her, without his consent. The Caldwell County School District should immediately make arrangements for Mr. Sholar to inspect and obtain copies of these records. Accord 99-ORD-217.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

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#105

Distributed to:

Jonathan R. Sholar
Carrell Boyd
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[6] The District does not question Mr. Sholar's status as a "parent" for purposes of FERPA or KFERPA analysis. Compare 01-ORD-178. That term is understood to include "a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 34 C.F.R. §99.3. Pursuant to 34 C.F.R. §99.4, an educational institution must give full rights under the Act to either parent, unless the institution has been provided with evidence that there is a court order, a state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes that right.