COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11838

MICHAEL CHAMPA
Appellee

v.

TOWN OF WESTON PUBLIC SCHOOLS & others
Appellants

ON APPEAL FROM A JUDGMENT OF THE
MIDDLESEX SUPERIOR COURT

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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ISSUE PRESENTED

Whether settlement agreements between Weston Public Schools and the parents of students with disabilities, regarding placement of students in out-of-district private schools, are public records or protected from disclosure under the statutory or privacy exemptions under G.L. c. 4, § 7, Twenty-sixth.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Massachusetts ("ACLUM") is a statewide civil rights and civil liberties organization that has long defended and promoted both the right of access to government records and the right to individual privacy. With respect to the issues raised in this case, ACLUM has worked both to allow access to certain education documents for public oversight, see ACLUM v. Ne. Mass. Law Enforcement Council, Inc., Suffolk Cnty. Sup. Ct., No. 2014-02035-G (filed June 24, 2014), and to protect student privacy, see Protect Student Privacy, ACLUM (2015), https://aclum.org/student_privacy. In contrast, it is ACLUM's understanding that schools routinely insist on confidentiality clauses that undermine both transparency and privacy. ACLUM has a strong interest in seeing the correct balance preserved in this case.

BACKGROUND

I. THE MASSACHUSETTS PUBLIC RECORDS LAW

The Massachusetts Public Records Law requires the Commonwealth's governmental entities to disclose public records upon request. G.L. c. 66, § 10; 950 C.M.R. § 32.02. "Public records" include "all . . . documentary materials or data . . . made or received by any officer or employee of any agency, executive office, [or] department . . . of the Commonwealth or any political subdivision thereof." G.L c. 4, § 7, cl. 26.

The Public Records Law exempts certain narrowly-defined categories of information from the definition of "public records" and thus from the disclosure requirement. Id. The first of these exemptions, Exemption (a), covers "materials and data" that are "specifically or by necessary implication exempted from disclosure by statute." Id.

Exemption (a), like all exemptions, is to be applied sparingly. Any record that contains both exempt and non-exempt information must be redacted and released. See G.L. c. 66, § 10(a); Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 287-88 n.15 (1979) (custodian must disclose "any portion [of record] that falls within the statutory definition of 'public record' after exempt portions have been deleted"). A statute that orders the government to keep information

confidential only relieves the government of its obligation to disclose that specific information.

II. FERPA AND THE MASSACHUSETTS STUDENT RECORDS LAWS

The disclosure of student information in the Commonwealth is governed by two statutes: the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and the Massachusetts student records law, G.L. c. 71, §§ 34D et seq. Both statutes have extensive implementing regulations. 34 C.F.R. § 99.1 et seq.; 603 C.M.R. § 23.01 et seq. The purpose of these laws is to limit improper disclosure of student information by schools while preserving a right of access for students and parents. See United States v. Miami Univ., 91 F. Supp. 2d 1132, 1140 (S.D. Ohio 2000) (discussing FERPA).

FERPA and the Massachusetts laws regulate information, not documents. FERPA defines "education records" as any materials that "contain information directly related to a student." 20 U.S.C. § 1232g(a)(4)(A). The Massachusetts laws likewise define "student records" as "all information . . . concerning a student" that meets certain criteria. 603 C.M.R. § 23.02. Both laws also limit the non-consensual release of "information from" an education record or student record to third parties, rather than

prohibiting the release of documents as a whole. 34 C.F.R. § 99.30(a); 603 C.M.R. § 23.07(4).

Thus, while the colloquial term "record" often connotes a discrete file or document, in the context of student privacy it is a term of art that refers to certain student-related information.[1] FERPA and the Massachusetts law regulate the disclosure of this information regardless of how it is memorialized or where it is kept. On the other hand, neither law has any bearing on documents whose disclosure, after appropriate redactions, would not reveal qualifying information.

III. FACTS

In December 2011, Michael Champa submitted a public records request to Weston Public Schools ("Weston") under G.L. c. 66, § 10. He requested settlement agreements Weston had signed with parents or guardians that limited or conditioned Weston's obligation to provide publicly funded out-of-district placement for children with special needs ("Agreements"). Record Appendix ("R.A.") 10.

[1] While schools, parents, and courts may say that a document is or is not a "student record," this is best understood as shorthand for saying that the document, in its current form, contains information that qualifies as part of a student record.

The Superior Court found that the Agreements "contain, at minimum, the student's name, the name of the out-of-district private school the child will attend and any financial arrangements for that the student's attendance there and may also contain information regarding what special education services the child will receive." R.A. 43. Weston further states that the Agreements describe students' "need for extended day, extended year, and/or residential services." Weston Br. 9. All but one of the Agreements also contain confidentiality clauses. Id. at 10.

SUMMARY OF ARGUMENT

This case raises the question whether Weston's Agreements fall under FERPA or the Massachusetts regulations, and if so, whether either of these laws supports an exemption from the Public Records Law under G.L c. 4, § 7, cl. 26(a). The Superior Court held that the Agreements were not protected by FERPA or the Massachusetts regulations, thereby obviating the need to reach the second question. R.A. 45-49. It went on to hold that certain information was protected under the privacy exemption, and thus ordered disclosure of the Agreements subject to redaction by Weston. Id.

Although the Superior Court may have been correct to order the disclosure of redacted Agreements, its

reasoning was flawed and represents a serious infringement of student privacy. Properly understood, the Agreements contain information that qualifies as both an education record and a student record. By ruling that the Agreements are entirely outside the ambit of state and federal student privacy laws, the Superior Court placed sensitive student information beyond the control of students and parents.

Critically, the Superior Court did not need to reach this conclusion to order disclosure of the redacted Agreements. Just as it would imperil privacy to hold that none of the information in the Agreements is protected, it would be equally erroneous to hold that the Agreements are entirely exempt from disclosure merely because they contain some information that implicates FERPA and the Massachusetts regulations.

The correct resolution of this case -- which respects both privacy and transparency -- lies in how the statutory and regulatory schemes work together. Some parts of the Agreements are exempt from disclosure under the Public Records Law, insofar as FERPA prohibits disclosure of information from education records. Likewise, to the extent that the Massachusetts regulations can trigger Exemption (a), those same parts of the Agreements are exempt because

they are student records.[2] But to the extent that release is permitted under Federal and Massachusetts law, it is required under the Public Records Law.

FERPA and the Massachusetts regulations permit disclosure –- and thus, the Public Records Law requires it -- in two key circumstances. One is if a parent or eligible student consents to the disclosure. The other is after redacting all student identifying information. Once all direct and indirect identifiers are removed, such that a reasonable person would not be able to identify an individual student, a document is no longer a "record" protected by FERPA or state regulations. In this way, the existing laws and regulations already balance privacy and transparency.

It is essential that confidentiality clauses -- which serve neither privacy nor transparency -- be given no weight in this balancing act. Schools may attempt to use these clauses to avoid their duties as custodians of public records, which would eviscerate the Public Records Law. Indeed, when schools demand that parents accept confidentiality clauses as part of

[2] ACLUM assumes that the regulatory scheme in 603 C.M.R. § 23.01 et seq. qualifies as a "statute" under Exemption (a), without expressing an opinion on the subject. To resolve this case, it is enough to recognize that the regulations do not prohibit disclosure of student records with identifying information removed or with consent, and thus Exemption (a) cannot apply in those circumstances.

the resolution of a dispute involving a student, schools wrest control over student information away from parents and students. This is directly contrary to the consent-driven frameworks of FERPA and the Massachusetts student record regulations.

ACLUM lacks the factual details necessary to offer a view of whether, in this case, the Superior Court struck the correct balance between privacy and transparency.[3] But two things are clear. First, the Agreements are both "education records" and "student records." Second, on remand and after further development of the record, the Agreements must nevertheless be disclosed with appropriate redactions.

ARGUMENT

The governing statutory structure, as well as the public's dual interest in transparency and privacy, compels the disclosure of the Agreements with -- but only with -- proper redactions. The unredacted Agreements contain both "education record" information under FERPA and "student record" information under 603 C.M.R. § 23.01 et seq. But they can be disclosed once

[3] The record contains the Agreement between Weston and Champa. R.A. 79-81. However, given the individualized nature of the Agreements and the Superior Court's statement about what they "may" contain, ACLUM does not address the appropriate extent of the redactions.

redacted, and a factual analysis must be undertaken on remand to determine what redactions are necessary.

I. THE SUPERIOR COURT ERRED IN HOLDING THAT THE UNREDACTED AGREEMENTS WERE NOT EDUCATION RECORDS UNDER FERPA OR STUDENT RECORDS UNDER THE MASSACHUSETTS REGULATIONS

In holding that the unredacted Agreements were neither education records nor student records, the Superior Court read FERPA and the Massachusetts student record regulations too narrowly. This improper reading was unnecessary to the Court's resolution of this case: even if the unredacted Agreements contain information that is part of an education record or student record, they still could -- and indeed must -- be released in redacted form. But, if upheld by this Court, the Superior Court's incorrect reading would unduly harm student privacy by limiting students' ability to access their own records, 20 U.S.C. § 1232g(a)(1); 603 C.M.R. § 23.07(2), and potentially allowing schools to share personal information about students without permission. This Court should therefore make clear that such unredacted Agreements are both student records and education records.

A. The unredacted Agreements are education records under FERPA.

FERPA defines "education records" as "materials which (i) contain information directly related to a student; and (ii) are maintained by an educational

agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The Agreements at issue here, which result from the Individualized Education Program ("IEP") process and establish a student's school placement, are "clearly education records, directly concerned with which school and education plan would be best for the student." Kirwan v. The Diamondback, 721 A.2d 196, 205 (Md. 1998); cf. G.J. ex rel. E.J. v. Muscogee Cnty. Sch. Dist., 704 F. Supp. 2d 1299, 1311 (M.D. Ga. 2010) aff'd sub nom. G.J. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258 (11th Cir. 2012) (documents "necessary for the development of [student's] IEP" are "educational records").

The Superior Court reached the opposite conclusion, reasoning that the Agreements did not meet the first prong of the FERPA definition because they "do not directly relate to a student's academic progress." R.A. 48-49. That reasoning is inconsistent with the statutory text and pertinent case law.

Neither FERPA's text nor its implementing regulations limit an education record to information "directly relat[ing] to a student's academic progress." See 20 U.S.C. § 1232g; 34 C.F.R. § 99.1 et seq. As this Court has recognized, "FERPA contains no definitions of or limitations on what sorts of items may be placed in an 'education record,' but rather

makes any information that is 'maintained' concerning a student part of that student's 'education record.'" Commonwealth v. Buccella, 434 Mass. 473, 483 n.8 (2001); see United States v. Miami Univ., 294 F.3d 797, 812 (6th Cir. 2002) ("Congress made no content-based judgments with regard to its 'education records' definition.").

Consistent with this definition, other courts have held that education records include information beyond a student's formal academic progress. See, e.g., Miami Univ., 294 F.3d at 812 (disciplinary records); Lewin v. Cooke, 28 F. App'x 186, 193 (4th Cir. 2002) (audio tape of expulsion hearings). Education records cover any information that, like the unredacted Agreements, is "maintained by the [school] District" and has "a direct bearing on [a student's] placement and educational plan." See Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40, 49-50 (D.N.H. 1994).

B. The unredacted Agreements are student records under the Massachusetts regulations.

The Massachusetts regulations define student records as "information . . . concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth." 603 C.M.R. § 23.02. The regulations

describe two types of information that qualify as student records: "transcripts" and "temporary records." Id.

Transcripts are limited to specific types of identity and academic data. Id. In contrast, the temporary record includes any information that meets the general definition of a student record and is (i) "relevant to the educational needs of the student," id. § 23.03, and (ii) "clearly . . . of importance to the educational process," id. § 23.02. The Superior Court correctly ruled that the unredacted Agreements are not transcripts. But the Superior Court also ruled that they are not part of the "temporary record," R.A. 47, and that ruling was mistaken in two respects.

First, the Superior Court read a non-existent third requirement into the Massachusetts regulations, namely, that the information relate to "a student's educational progress." Id. To do this, it relied on the examples of temporary record information listed in 603 C.M.R. § 23.02,[4] concluding that they "all relate

[4] "[Temporary record] information may include standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff." Even if this list of examples was meant to be exhaustive, the Agreements would qualify as temporary records because they necessarily include staff evaluations of students' abilities to progress at Weston Public Schools.

to evaluations of a student's progress." Id. But some of the items listed in the regulation, such as "extracurricular activities," do not involve "evaluations of a student's progress." Moreover, this list was never meant to be exclusive; it merely illustrates information the temporary record "may include." 603 C.M.R. § 23.02 (emphasis added); see id. § 23.01 (student record regulations should be "liberally construed").

Guidance issued by the Massachusetts Department of Elementary and Secondary Education ("DESE") confirms that "temporary record" should be read more broadly. DESE's website describes the temporary record as including, in addition to the examples listed in the regulations, "disciplinary records[] and other information,"[5] including health records.[6] Neither disciplinary or health information would fit under the Superior Court's narrow definition.

Second, the Superior Court cited Commonwealth v. Buccella, 434 Mass. 473 (2001), as "reject[ing] . . .

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[5] DESE, Summary of Regulations Pertaining to Student Records, Mass.gov (last updated Feb. 8, 2005), http://www.doe.mass.edu/lawsregs/advisory/cmr23qanda.html?section=summary.

[6] DESE, Questions Often Asked About the Student Record Regulations, Mass.gov (last updated Feb. 8, 2005), http://www.doe.mass.edu/lawsregs/advisory/cmr23qanda.html.

[a] broad interpretation" of student records. R.A. 47. However, the records at issue in Buccella were "only briefly in the school's possession" and treating them as student records would "be absurdly cumbersome" for teachers. 434 Mass. at 479-81.[7] Buccella does not compel such a narrow construction of student records in general.

Correctly interpreted, the regulatory definition of "temporary records" includes the unredacted Agreements. These Agreements result from and take the place of the IEP process, R.A. 64, 75, and thus are of "[clear] importance to the educational process," 603 C.M.R. § 23.02. They are "relevant to [students'] educational needs," id. § 23.03, in that they identify "the out-of-district private school the child will attend" and "may also contain information regarding what special education services the child will receive." R.A. 43. See Phillip C. ex rel. A.C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012) (IEP process is "[t]he basis for the handicapped child's entitlement to an individualized and appropriate education") (internal quotation ommitted). Finally, the schools or services described in the unredacted Agreements may reveal deeply private

[7] Neither of these is true with regard to the Settlement Agreements.

facts about students' medical and behavioral history. R.A. 50-51. This places them squarely in the definition of the temporary record set forth in the regulations and supported by DESE.

II. ALTHOUGH THE UNREDACTED AGREEMENTS ARE EDUCATIONAL RECORDS AND STUDENT RECORDS, THEY MUST BE DISCLOSED UNDER G.L. C. 66, § 10 IF THEY ARE APPROPRIATELY REDACTED OR THE STUDENT OR PARENT CONSENTS TO THEIR DISCLOSURE.

Identifying the unredacted Agreements in this case as "education records" and "student records," properly protects student privacy. But this privacy protection is not incompatible with transparency. On one hand, schools cannot automatically release the unredacted information under FERPA and Exemption (a) of the Public Records Law.[8] On the other, the Public Records Law requires schools to disclose information whenever FERPA permits disclosure, and FERPA permits disclosure when records are redacted or the school obtains consent.

[8] FERPA severely penalizes schools for disclosing education records. 20 U.S.C. §1232g(b). By necessary implication, this exempts education records from disclosure under the Public Record Laws. G.L. c. 4, § 7, cl. 26(a). See, e.g., Miami Univ., 294 F.3d at 810 (applying Ohio law); Osborn v. Bd. of Regents of Univ. of Wis., 647 N.W.2d 158, 167-69 (2002); Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 524 (Pa. Commw. Ct. 2011).

A. The Agreements must be disclosed if all information reasonably capable of directly and indirectly identifying the affected student is redacted.

FERPA defines education records in terms of the information they contain, not the documents they include. 20 U.S.C. § 1232g(a)(4)(A). The same is true of student records under the Massachusetts regulations. 603 C.M.R. § 23.02. As a result, only this information triggers Exemption (a). Under the Public Records Law, the fact "[t]hat some exempt material may be found" in a document does not justify withholding the entire document. Reinstein, 378 Mass. at 290.

Thus, it is not permissible for a public entity to withhold an entire document merely because it contains some information qualifying as an education record or student record. Public entities, including Weston in this case, can and must disclose the documents with the qualifying information redacted.

Although the Superior Court ordered disclosure of the redacted Agreements, the parties debate the extent to which the remaining information identifies individual students. The current record is inadequate to permit ACLUM to express a view on whether the Agreements, if redacted per the Superior Court's instructions, would permit a reasonably informed person to identify the affected students. Accordingly,

we describe the relevant law and suggest that the Court remand for further factual development.[9]

1. Appropriately redacted Agreements are not education records under FERPA and must be released.

FERPA expressly allows for disclosure of student information without consent "after the removal of all personally identifiable information," in a process called "de-identification." 34 C.F.R. § 99.31(b)(1). De-identification is adequate when "a student's identity is not personally identifiable []through single or multiple releases, [] taking into account other reasonably available information." Id. "[O]nce personally identifiable information is deleted, by definition, a [document] is no longer an education record since it is no longer directly related to a student." Osborn, 647 N.W.2d at 168-169 n.11 (custodian may deny request "only if [the records] would make a student's identity traceable.").

De-identification requires the redaction of direct identifiers such as a student's name, address, and identification numbers, as well as those of family

[9] The Superior Court invited Weston to apply for clarification regarding further redactions under Exemption (c) if necessary. R.A. 51. This is a laudable method for handling the sensitive balancing required in this case and, had the Superior Court correctly interpreted FERPA and the Massachusetts regulations, would likely have provided adequate safeguards for both privacy and transparency.

members. 34 C.F.R. § 99.3. The school must also redact "information 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." Id. This latter provision is intended to provide "the maximum privacy protection for students" and must be applied from the viewpoint of "a reasonable person in the school community" with knowledge of "local publicity, communications, and other ordinary conditions." Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,832 (Dec. 9, 2008).

The degree of redaction required to de-identify an education record depends on the nature of the request, the size of the school and its community, and the availability of other information. See Sherry, 20 A.3d at 517, 525 (disciplinary records with student and teacher name redacted were not de-identified, where records contained grade, period, and date of offense and release was to community member); Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 490 (Iowa 2012) (considering nature of requester in whether redacted education records would identify students); Hardin Cnty. Sch. v. Foster, 40 S.W.3d 865, 870 (Ky. 2001) (Cooper, J., dissenting) (noting ease of cross-referencing disciplinary records and directory information in small school). Schools must

pay special attention to lists of characteristics that, in combination, could identify a single student. See Osborn, 647 N.W.2d at 171 (academic and demographic information did not identify graduate students, but inclusion of high schools or undergraduate institutions likely would).

Because the possibility of indirect identification is in dispute, this Court should remand for further proceedings in light of the principles articulated here.

2. Appropriately redacted Agreements are not temporary records under the Massachusetts regulations and must be released.

Even assuming for the sake of argument that the Massachusetts regulations could support an exemption from the Public Records Law under G.L. c. 66, § 10, cl. 26(a), that exemption would not apply to any record that has been de-identified within the meaning of FERPA. Like FERPA, state regulations define and protect student records in terms of information, not documents. 603 C.M.R. § 23.02 (student records comprise "all information . . . concerning a student"); Id. § 23.07(4) ("[N]o third party shall have access to information in or from a student record . . . ."). The regulations prohibit only the release of information containing (1) "the student's name" or

(2) other information by which the "student may be individually identified." Id. § 23.02.

Accordingly, once a document is redacted to remove these identifiers, it is by definition no longer a student record, cf. Osborn, 647 N.W.2d at 168 n.11, and therefore must be released under the Public Records Law.

B. The Agreements must be disclosed if the affected students or their parents or guardians consent to the disclosure.

Where there is consent, there is no federal prohibition on releasing education records.[10] In such instances, the records must be released in response to a Public Records request. The Massachusetts regulations similarly permit disclosure of student records with the "specific, informed written consent of the eligible student or the parent." 603 C.M.R. § 23.07(4). Thus, even if the regulations could trigger Exemption (a), they would not do so when a parent or student has consented to the disclosure.

In light of these provisions, if the affected students or their parents consent to the release of

[10] FERPA does not penalize schools for disclosing education records with a parent or eligible student's written consent. See 20 U.S.C. § 1232g(b)(1) & (b)(2)(A); Miami Univ., 294 F.3d at 817 (purpose of FERPA is to "to protect [students'] rights to privacy by limiting the transferability of their records without their consent." (quoting Joint Statement, 120 Cong. Rec. 39858, 39862 (1974)) (emphasis added).

the unredacted Agreements, they are not "exempted from disclosure by statute" under Exemption (a) and must be disclosed pursuant to the Public Records Law. There was no discussion of consent in the Superior Court opinion.

III. CONFIDENTIALITY CLAUSES IN IEP-RELATED AGREEMENTS BETWEEN PARENTS AND MUNICIPALITIES SHOULD NOT BE ENFORCED TO PREVENT PARENTS FROM CONSENTING TO THE RELEASE OF DOCUMENTS RESPONSIVE TO A PUBLIC RECORDS REQUEST.

As described above, statutory and regulatory schemes already exist to balance student privacy and government transparency. Where the two overlap, specific processes for redaction and consent ensure the proper equilibrium. The parties correctly acknowledge that confidentiality clauses do not add a new exemption to this landscape. Champa Br. 14-15; Weston Reply Br. 6. Indeed, the Massachusetts Public Records Law contains no such exemption.[11] But so long as they are enforced, these clauses threaten to upset this balance by disrupting statutorily-mandated processes for redaction and consent.

[11] See Compl. ¶ 19, Smith v. City of Newton, No. 2011-CV-05272 (Mass. Super. Feb. 22, 2011) ("Smith Compl."), ACLUM Appendix ("ACLU A.") 3 (noting former Attorney General Martha Coakley's longstanding policy of refusing to include confidentiality clauses in Settlement Agreements involving state agencies "on the ground that such clauses are, absent some specifically applicable statute that authorizes them, inconsistent with the state public records laws.").

First, confidentiality clauses generally prohibit parties from disclosing any portion of the covered contract. This all-or-nothing approach conflicts with the Public Records Law, FERPA, and the Massachusetts regulations, all of which emphasize segregability. Confidentiality clauses improperly shift focus away from privacy of specific information and towards secrecy for whole documents. This nullifies an essential part of state and federal law.

Second, confidentiality clauses also undermine student privacy laws by taking control of student information away from students and parents. Student privacy laws do not require that student information always be secret. Rather, they demand that students and parents be allowed to choose when to disclose information. See Miami Univ., 294 F.3d at 806-07; cf. Ostergren v. Cuccinelli, 615 F.3d 263, 285 (4th Cir. 2010) (describing concept of privacy as control). Confidentiality clauses reduce this choice to a one-time decision, often made when parents are focused on securing a better educational environment for their child rather than preserving the right to participate in public discussion.[12]

[12] Parents who have signed such an agreement have stated that "the alternative to signing [ ] was months of costly litigation during which the plaintiffs would simultaneously have to bear the heavy expense of the private school for their son, and in addition make him

Weston implies that these clauses are welcomed by parents and students. Weston Reply Br. 9-10. However, it is ACLUM's understanding that school districts regularly impose confidentiality clauses on parents. This is troubling given published accounts of schools using confidentiality to hide information of public concern. See Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d 1191, 1192 (Alaska 1989) (settlement agreement); Librach v. Cooper, 778 S.W.2d 351, 352 (Mo. Ct. App. 1989) (superintendent's severance pay); Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 666 (Ohio Ct. App. 1988) (child abuse by teacher). For example, South Hadley Public Schools invoked a confidentiality agreement to avoid disclosing a $225,000 settlement paid to a family after their daughter's suicide, amid allegations that the school failed to adequately respond to harassment targeting the student. See Compl. ¶ 9, Bazelon v. Town of South Hadley, No. 2011-CV-212 (Mass. Super. Dec. 2, 2011), ACLU A. 8.

When faced with such pressure, parents are forced to confront an unfair choice: accept an unwanted-confidentiality agreement to resolve a conflict with a school district, or prolong the conflict to the

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available for further evaluations by the defendant." See Smith Compl. ¶ 9, ACLU A. 2.

detriment of their children. Cf. McInnes v. LPL Fin., LLC, 466 Mass. 256, 266 (2013) ("[C]ontracts [of adhesion] are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances.") (internal quotation marks omitted).

As other courts have recognized, "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert" the purpose of public records laws. Hechler v. Casey, 333 S.E.2d 799, 809 (W. Va. 1985) (quoting Washington Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 263 (D.C. Cir. 1982)); Tribune-Review Pub. Co. v. Westmoreland Cnty. Hous. Auth., 833 A.2d 112, 117 (Pa. 2003); Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 624 A.2d 857, 862 (Vt. 1993); Anchorage Sch. Dist., 779 P.2d at 1193.[13] Because confidentiality clauses in public school contracts interfere with both student records laws and public records laws, they have no place in the carefully orchestrated balance between privacy and transparency.

[13] See generally Richard Fossey et al., Are School Districts' Confidential Settlement Agreements Legally Enforceable?, 67 Ed. Law Rep. 1011, 1014 (1990) ("[A]s a general matter, the courts have ruled that the public's right to know the terms upon which a school district settled its dispute generally outweigh a school district's reasons for keeping a settlement agreement confidential.")

CONCLUSION

For the foregoing reasons, ACLUM respectfully urges this Court to hold that the unredacted Agreements are education records under FERPA and student records under the Massachusetts regulations. ACLUM further urges the Court to articulate standards for disclosure of education records and student records as discussed herein, and to remand with instructions for the Superior Court to determine whether the Agreements have been or can be redacted to remove all direct and indirect student identifying information.

Respectfully submitted,

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Dated: August 26, 2015

CERTIFICATION PURSUANT TO MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16

I hereby certify that, to the best of my knowledge, the brief filed herewith complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including, without limitation, Rule 16 and Rule 20.

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11838

MICHAEL CHAMPA

Appellee

v.

TOWN OF WESTON PUBLIC SCHOOLS & others

Appellants

ON APPEAL FROM A JUDGMENT OF THE
MIDDLESEX SUPERIOR COURT

CERTIFICATE OF SERVICE

I, Charles L. Solomont, hereby certify that on August 26, 2015, I served the attached Brief of *Amicus Curiae* Massachusetts Civil Liberties Union, by mailing copies thereof, postage prepaid, to:

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ADDENDUM

20 U.S.C. § 1232g

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)

(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if

(i) the student is, upon request, notified of the names of all persons making confidential recommendations and

(ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)

(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in

subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term “education records” does not include—

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

(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;

(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

(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.

(5)

(A) For the purposes of this section the term “directory information” relating to a student includes the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)

(i) authorized representatives of

(I) the Comptroller General of the United States,

(II) the Secretary, or

(III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of

the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—
(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—
(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student. [1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons;

(J)
(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena;

(K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service, for the purposes of conducting program monitoring, evaluations, and performance measurements of State and local educational and other agencies and institutions receiving funding or providing benefits of 1 or more programs authorized under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.) for which the results will be reported in an aggregate form that does not identify any individual, on the conditions that—
(i) any data collected under this subparagraph shall be protected in a manner that will not permit the personal identification of students and their parents by other than the authorized representatives of the Secretary; and

(ii) any personally identifiable data shall be destroyed when the data are no longer needed for program monitoring, evaluations, and performance measurements; and

(L) an agency caseworker or other representative of a State or local child welfare agency, or tribal organization (as defined in section 450b of title 25), who has the right to access a student’s case plan, as defined and determined by the State or tribal organization, when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student, provided that the education records, or the personally identifiable information contained in

such records, of the student will not be disclosed by such agency or organization, except to an individual or entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with the State or tribal laws applicable to protecting the confidentiality of a student's education records.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency, except when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 note)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required.

(3) Nothing contained in this section shall preclude authorized representatives of

(A) the Comptroller General of the United States,

(B) the Secretary, or

(C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That

except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)

(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)

(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—
(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)
(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 [2] of title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations
Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection

shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent
For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section
No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance
The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions
The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure
Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety

or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C. 1001 et seq., 42 U.S.C. 2751 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) of this section or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b (g)(5)(B) of title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general.— An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.

G.L. c. 66, § 10

Section 10. (a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search. The following fees shall apply to any public record in the custody of the state police, the Massachusetts bay transportation authority police or any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half inch by eleven inch sheet of paper.

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person’s request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the administrative remedies provided by the commissioner of administration and finance with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a

custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

(c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion, obtain copies of certain public records from local officials for a fee as provided for in this chapter.

The commissioner of the department of criminal justice information services, the department of criminal justice information services and its agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined by chapter one hundred and forty shall not disclose any records divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor, as defined in said chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

The home address and home telephone number of law enforcement, judicial, prosecutorial, department of youth services, department of children and families, department of correction and any other public safety and criminal justice system personnel, and of unelected general court personnel, shall not be public records in the custody of the employers of such personnel or the public employee retirement administration commission or any retirement board established under chapter 32 and shall not be disclosed, but such information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180 or to a criminal justice agency as defined in section 167 of chapter 6. The name and home address and

telephone number of a family member of any such personnel shall not be public records in the custody of the employers of the foregoing persons or the public employee retirement administration commission or any retirement board established under chapter 32 and shall not be disclosed. The home address and telephone number or place of employment or education of victims of adjudicated crimes, of victims of domestic violence and of persons providing or training in family planning services and the name and home address and telephone number, or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.

G.L. c. 4, § 7, clause 26

Twenty-sixth, "Public records'' shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

[There is no subclause (k).]

(l) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and

chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.

(o) the home address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public

utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.

Any person denied access to public records may pursue the remedy provided for in section ten of chapter sixty-six.

G.L. c. 71, §§ 34D et seq.

Section 34D. The board of education shall adopt regulations relative to the maintenance, retention, duplication, storage and periodic destruction of student records by the public elementary and secondary schools of the commonwealth. Such rules and regulations shall provide that a parent or guardian of any pupil shall be allowed to inspect academic, scholastic, or any other records concerning such pupil which are kept or are required to be kept.

Section 34E. Each school committee shall, at the request of a parent or guardian of a student, allow such parent or guardian to inspect academic, scholastic, or any other records concerning such student that are kept or are required to be kept, regardless of the age of such student. Each school committee shall, at the request of a student eighteen years of age or older, allow such student complete access to all school records relative to him or her.

Section 34 F. Repealed, 1976, 50, Sec. 2

Section 34G. In the event that any private educational institution providing a course of study through the twelfth grade level ceases operation, the owner or administrators shall transfer transcripts of all students or former students to the department of education; provided, however, that in the case of a student who is transferring to another private or public educational institution, such student's records shall be transferred to the school the student will be attending, rather than to the department. The department may, upon request of a former student of an educational institution which has transferred transcripts pursuant to this provision, provide such student with a copy of his transcript. For the purposes of this section a transcript shall mean the documentary record or records which contain the name, address and phone number of the student, the student's birthdate, name, address and phone number of parent or guardian, course titles, grades, or equivalent thereof when grades are not applicable, course credit, grade level completed and the year completed. Said educational institution shall limit the student record information transmitted to the department to that required to be contained in the transcript.

Section 34H. (a) Each public elementary and secondary school shall provide student records, including, but not limited to, the following information, in a timely and appropriate manner to

the parents of a child enrolled in the school if the parents are eligible for information under this section and request the information in the manner set forth in this section: report cards and progress reports; the results of intelligence and achievement tests; notification of a referral for a special needs assessment; notification of enrollment in an English language learners program established under chapter 71A; notification of absences; notification of illnesses; notification of any detentions, suspensions or expulsion; and notification of permanent withdrawal from school. Each school shall also make reasonable efforts to ensure that other written information that is provided to the custodial parent but not specified in the preceding sentence be provided to the requesting parent if that parent is eligible for information under this section. All electronic and postal address and telephone number information relating to either the work or home locations of the custodial parent shall be removed from information provided under this section. Receipt of this information shall not mandate participation in any proceeding to which notification pertains, nor shall it authorize participation in proceedings and decisions regarding the child's welfare which are not granted through the award of custody. For purposes of this section, any parent who does not have physical custody of a child shall be eligible for the receipt of information unless: (1) the parent's access to the child is currently prohibited by a temporary or permanent protective order, except where the protective order, or any subsequent order which modifies the protective order, specifically allows access to the information described in this section; or (2) the parent is denied visitation or, based on a threat to the safety of the child, is currently denied legal custody of the child or is currently ordered to supervised visitation, and the threat is specifically noted in the order pertaining to custody or supervised visitation. All such documents limiting or restricting parental access to a student's records or information which have been provided to the school or school district shall be placed in the student's record.

(b) A parent requesting information under this section shall submit a written request to the school principal.

(c) Upon receipt of a request for information under this section, the school shall review the student record for any documents limiting or restricting parental access to a student's records or information which have been provided to the school or school district and shall immediately notify the custodial parent of the receipt of the request. Notification must be made

by certified mail and by first class mail in both the primary language of the custodial parent and in English. The notification shall also inform the custodial parent that information requested under this section shall be provided to the requesting parent after 21 days unless the custodial parent provides to the principal of the school documentation of any court order which prohibits contact with the child, or prohibits the distribution of the information referred to in this section or which is a temporary or permanent order issued to provide protection to the child in the custodial parent's custody from abuse by the requesting parent unless the protective order or any subsequent order which modifies the protective order, specifically allows access to the information described in this section.

[There is no subsection (d).]

(e) At any time the principal of a school is presented with an order of a probate and family court judge which prohibits the distribution of information pursuant to this section the school shall immediately cease to provide said information and shall notify the requesting parent that the distribution of information shall cease.

(f) The principal of each public elementary and secondary school shall designate a staff member whose duties shall include the proper implementation of this section.

[There is no subsection (g).]

(h) The department of education shall promulgate regulations to implement the provisions of this section. Said regulations shall include provisions which assure that the information referred to in this section is properly marked to indicate that said information may not be used to support admission of the child to another school.

34 C.F.R. § 99.30(a)

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in§ 99.31.

34 C.F.R. § 99.3

§ 99.3 What definitions apply to these regulations?
The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to—

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

Authorized representative means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct—with respect to Federal- or State-supported education programs—any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

Biometric record, as used in the definition of personally identifiable information, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

Dates of attendance. (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study;grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—

(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

Early childhood education program means—

(a) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 et seq.), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(b) A State licensed or regulated child care program; or

(c) A program that—

(1) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and

(2) Is—

(i) A State prekindergarten program;

(ii) A program authorized undersection 619 or part C of the Individuals with Disabilities Education Act; or

(iii) A program operated by a local educational agency.

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

Education program means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(3), (b)(5))

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.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are notaccessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of§ 99.8.

(3)

(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, “treatment” does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

(Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; “secondary school level” means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally Identifiable Information

The term includes, but is not limited to—

(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.

35 C.F.R. § 99.31(b)(1)

(b)

(1) De-identified records and information. An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

950 C.M.R. § 32.02

950 CMR 32.00 shall be construed to ensure the public prompt access to all public records in the custody of state governmental entities and in the custody of governmental entities of political subdivisions of the Commonwealth, and to ensure that disputes regarding access to particular records are resolved expeditiously and fairly. 950 CMR 32.00 shall not limit the availability of other remedies provided by law.

603 C.M.R. § 23.01 et seq.

23.01: Application of Rights

603 CMR 23.00 is promulgated to insure parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records and to assist local school systems in adhering to the law. 603 CMR 23.00 should be liberally construed for these purposes.

(1) These rights shall be the rights of the student upon reaching 14 years of age or upon entering the ninth grade, whichever comes first. If a student is under the age of 14 and has not yet entered the ninth grade, these rights shall belong to the student's parent.

(2) If a student is from 14 through 17 years of age or has entered the ninth grade, both the student and his/her parent, or either one acting alone, shall exercise these rights.

(3) If a student is 18 years of age or older, he/she alone shall exercise these rights, subject to the following. The parent may continue to exercise the rights until expressly limited by such student. Such student may limit the rights and provisions of 603 CMR 23.00 which extend to his/her parent, except the right to inspect the student record, by making such request in writing to the school principal or superintendent of schools who shall honor such request and retain a copy of it in the student record. Pursuant to M.G.L. c. 71, section 34E, the parent of a student may inspect the student record regardless of the student's age.

(4) Notwithstanding 603 CMR 23.01(1) and 23.01(2), nothing shall be construed to mean that a school committee cannot extend the provisions of 603 CMR 23.00 to students under the age of 14 or to students who have not yet entered the ninth grade.

23.02: Definition of Terms

The various terms as used in 603 CMR 23.00 are defined below:

Access shall mean inspection or copying of a student record, in whole or in part.

Authorized school personnel shall consist of three groups:

(a) School administrators, teachers, counselors and other professionals who are employed by the school committee or who are providing services to the student under an agreement between the school committee and a service provider, and who are working directly with the student in an administrative, teaching counseling, and/or diagnostic capacity. Any such personnel who are not employed directly by the school committee shall have access only to the student record information that is required for them to perform their duties.

(b) Administrative office staff and clerical personnel, including operators of data processing equipment or equipment that produces microfilm/microfiche, who are either employed by the school committee or are employed under a school committee service contract, and whose duties require them to have access to student records for purposes of processing information for the student record. Such personnel shall have access only to the student record information that is required for them to perform their duties.

(c) The Evaluation Team which evaluates a student.

Eligible student shall mean any student who is 14 years of age or older or who has entered 9th grade, unless the school committee acting pursuant to 603 CMR 23.01(4) extends the rights and provisions of 603 CMR 23.00 to students under the age of 14 or to students who have not yet entered 9th grade.

Evaluation Team shall mean the team which evaluates school-age children pursuant to M.G.L. c. 71B (St. 1972, c. 766) and 603 CMR 28.00.

Parent shall mean a student's father or mother, or guardian, or person or agency legally authorized to act on behalf of the student in place of or in conjunction with the father, mother, or guardian. Any parent who by court order does not have physical custody of the student, is considered a non-custodial parent for purposes of M.G.L. c. 71, § 34H and 603 CMR 23.00. This includes parents who by court order do not reside with or supervise the student, even for short periods of time.

Release shall mean the oral or written disclosure, in whole or in part, of information in a student record.

School-age child with special needs shall have the same definition as that given in M.G.L. c. 71B (St. 1972, c. 766) and 603 CMR 28.00.

School committee shall include a school committee, a board of trustees of a charter school, a board of trustees of a vocational-technical school, a board of directors of an educational collaborative and the governing body of an M.G.L. c. 71B (Chapter 766) approved private school.

Student shall mean any person enrolled or formerly enrolled in a public elementary or secondary school or any person age three or older about whom a school committee maintains information. The term as used in 603 CMR 23.00 shall not include a person about whom a school committee maintains information relative only to that person's employment by the school committee.

The student record shall consist of the transcript and the temporary record, including all information recording and computer tapes, microfilm, microfiche, or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth. The term as used in 603 CMR 23.00 shall mean all such information and materials regardless of where they are located, except for the information and materials specifically exempted by 603 CMR 23.04.

The temporary record shall consist of all the information in the student record which is not contained in the transcript. This information clearly shall be of importance to the educational process. Such information may include standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff.

Third party shall mean any person or private or public agency, authority, or organization other than the eligible student, his/her parent, or authorized school personnel.

The transcript shall contain administrative records that constitute the minimum data necessary to reflect the student's educational progress and to operate the educational system. These data shall be limited to the name, address, and phone number of the student; his/ her birthdate; name, address, and phone number of the parent or guardian; course titles, grades (or the equivalent when grades are not applicable), course credit, grade level completed, and the year completed.

23.03: Collection of Data: Limitations and Requirements

All information and data contained in or added to the student record shall be limited to information relevant to the educational needs of the student. Information and data added to the temporary record shall include the name, signature, and position of the person who is the source of the information, and the date of entry into the record. Standardized group test results that are added to the temporary record need only include the name of the test and/or publisher, and date of testing.

23.07: Access to Student Records

(1) Log of Access. A log shall be kept as part of each student's record. If parts of the student record are separately located, a separate log shall be kept with each part. The log shall indicate all persons who have obtained access to the student record, stating: the name, position and signature of the person releasing the information; the name, position and, if a third party, the affiliation if any, of the person who is to receive the information; the date of access; the parts of the record to which access was obtained; and the purpose of such access. Unless student record information is to be deleted or released, this log requirement shall not apply to:

(a) authorized school personnel under 603 CMR 23.02(9)(a) who inspect the student record;

(b) administrative office staff and clerical personnel under 603 CMR 23.02(9)(b), who add information to or obtain access to the student record; and

(c) school nurses who inspect the student health record.

(2) Access of Eligible Students and Parents. The eligible student or the parent, subject to the provisions of 603 CMR 23.07 (5), shall have access to the student record. Access shall be provided as soon as practicable and within ten days after the initial request, except in the case of non-custodial parents as provided in 603 CMR 23.07 (5). Upon request for access, the entire student record regardless of the physical location of its parts shall be made available.

(a) Upon request, copies of any information contained in the student record shall be furnished to the eligible student or the parent. A reasonable fee, not to exceed the cost of reproduction, may be charged. However, a fee may not be charged if to do so would effectively prevent the parents or eligible

student from exercising their right, under federal law, to inspect and review the records.

(b) Any student, regardless of age, shall have the right pursuant to M.G.L. c. 71, section 34A to receive a copy of his/her transcript.

(c) The eligible student or the parent shall have the right upon request to meet with professionally qualified school personnel and to have any of the contents of the student record interpreted.

(d) The eligible student or the parent may have the student record inspected or interpreted by a third party of their choice. Such third party shall present specific written consent of the eligible student or parent, prior to gaining access to the student record.

(3) Access of Authorized School Personnel. Subject to 603 CMR 23.00, authorized school personnel shall have access to the student records of students to whom they are providing services, when such access is required in the performance of their official duties. The consent of the eligible student or parent shall not be necessary.

(4) Access of Third Parties. Except for the provisions of 603 CMR 23.07(4)(a) through 23.07(4)(h), no third party shall have access to information in or from a student record without the specific, informed written consent of the eligible student or the parent. When granting consent, the eligible student or parent shall have the right to designate which parts of the student record shall be released to the third party. A copy of such consent shall be retained by the eligible student or parent and a duplicate placed in the temporary record. Except for information described in 603 CMR 23.07(4)(a), personally identifiable information from a student record shall only be released to a third party on the condition that he/she will not permit any other third party to have access to such information without the written consent of the eligible student or parent.

(a) A school may release the following directory information: a student's name, address, telephone listing, date and place of birth, major field of study, dates of attendance, weight and height of members of athletic teams, class, participation in officially recognized activities and sports, degrees, honors and awards, and post-high school plans without the consent of the eligible student or parent; provided that the school gives

public notice of the types of information it may release under 603 CMR 23.07 and allows eligible students and parents a reasonable time after such notice to request that this information not be released without the prior consent of the eligible student or parent. Such notice may be included in the routine information letter required under 603 CMR 23.10.

(b) Upon receipt of a court order or lawfully issued subpoena the school shall comply, provided that the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.

(c) A school may release information regarding a student upon receipt of a request from the Department of Social Services, a probation officer, a justice of any court, or the Department of Youth Services under the provisions of M.G.L. c. 119, sections 51B, 57, 69 and 69A respectively.

(d) Federal, state and local education officials, and their authorized agents shall have access to student records as necessary in connection with the audit, evaluation or enforcement of federal and state education laws, or programs; provided that except when collection of personally identifiable data is specifically authorized by law, any data collected by such officials shall be protected so that parties other than such officials and their authorized agents cannot personally identify such students and their parents; and such personally identifiable data shall be destroyed when no longer needed for the audit, evaluation or enforcement of federal and state education laws.

(e) A school may disclose information regarding a student to appropriate parties in connection with a health or safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. This includes, but is not limited to, disclosures to the local police department and the Department of Social Services under the provisions of M.G.L. c. 71, section 37L and M.G.L. c. 119, section 51A.

(f) Upon notification by law enforcement authorities that a student, or former student, has been reported missing, a mark shall be placed in the student record of such student. The school shall report any request concerning the records of the such child to the appropriate law enforcement authority pursuant to the provisions of M.G.L. c. 22A, section 9.

(g) Authorized school personnel of the school to which a student seeks or intends to transfer may have access to such student's record without the consent of the eligible student or parent, provided that the school the student is leaving, or has left, gives notice that it forwards student records to schools in which the student seeks or intends to enroll. Such notice may be included in the routine information letter required under 603 CMR 23.10.

(h) School health personnel and local and state health department personnel shall have access to student health records, including but not limited to immunization records, when such access is required in the performance of official duties, without the consent of the eligible student or parent.

(5) Access Procedures for Non-Custodial Parents. As required by M.G.L. c. 71, § 34H, a non-custodial parent may have access to the student record in accordance with the following provisions.

(a) A non-custodial parent is eligible to obtain access to the student record unless:
1.the parent has been denied legal custody or has been ordered to supervised visitation, based on a threat to the safety of the student and the threat is specifically noted in the order pertaining to custody or supervised visitation, or
2.the parent has been denied visitation, or
3.the parent's access to the student has been restricted by a temporary or permanent protective order, unless the protective order (or any subsequent order modifying the protective order) specifically allows access to the information contained in the student record, or
4.there is an order of a probate and family court judge which prohibits the distribution of student records to the parent.

(b) The school shall place in the student's record documents indicating that a non-custodial parent's access to the student's record is limited or restricted pursuant to 603 CMR 23.07(5)(a).

(c) In order to obtain access, the non-custodial parent must submit a written request for the student record to the school principal.

(d) Upon receipt of the request the school must immediately notify the custodial parent by certified and first class mail, in English and the primary language of the custodial parent, that it will provide the non-custodial parent with access after 21 days, unless the custodial parent provides the principal with

documentation that the non-custodial parent is not eligible to obtain access as set forth in 603 CMR 23.07 (5)(a).

(e) The school must delete all electronic and postal address and telephone number information relating to either work or home locations of the custodial parent from student records provided to non-custodial parents. In addition, such records must be marked to indicate that they shall not be used to enroll the student in another school.

(f) Upon receipt of a court order that prohibits the distribution of information pursuant to G.L. c. 71, §34H, the school shall notify the non-custodial parent that it shall cease to provide access to the student record to the non-custodial parent.

APPENDIX

COPY

COMMONWEALTH OF MASSACHUSETTS

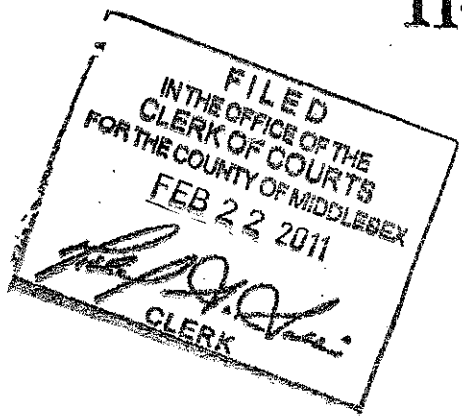
MIDDLESEX, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.

11-0572

GREG SMITH AND
NANCY MACIAS-SMITH,
Plaintiffs

v.

CITY OF NEWTON, acting as the
NEWTON PUBLIC SCHOOLS,
Defendant



VERIFIED COMPLAINT FOR DECLARATORY RELIEF

1. The Plaintiffs bring this complaint seeking declaratory relief, pursuant to G.L. c. 231A, § 1 *et seq.*, from the confidentiality provision of a settlement agreement (the "Agreement") between them and the defendants, and further seeking a declaration that the defendants' administrative practice of routinely requiring such confidentiality provisions as a condition of settling cases involving the claims of special needs students for services is in violation of federal and state constitutional provisions and the laws of this Commonwealth.

PARTIES TO THE ACTION

2. Plaintiffs Greg Smith and Nancy Macias-Smith, husband and wife, are residents of Newton, Massachusetts, county of Middlesex. They are the parents of a special needs student, formerly in the Newton Public Schools and currently, pursuant to the terms of the Agreement, enrolled in a private special needs school.

3. Defendant City of Newton ("Newton"), is a municipal corporation organized under the laws of Massachusetts and through its subsidiary agency, the Newton Public Schools, administers the public schools in the City of Newton.

STATEMENT OF FACTS

4. On or about September 3, 2010, the plaintiffs and the defendant (acting as the Newton Public Schools) entered into the Agreement. A copy of the Agreement is attached hereto

as **Exhibit A.**[1]

5. The Agreement was the culmination of negotiations during which the plaintiffs sought to have Newton pay their son's tuition at a private special needs school pursuant to its obligations under G.L. c. 71B § 5. The defendants initially resisted paying for the plaintiffs' son's tuition at the private school the plaintiffs had placed him at.

6. The plaintiffs had withdrawn their son from his Newton public school and enrolled him in the private school in the spring of 2010, as a result of serious difficulties he had encountered in his public school. After switching schools the plaintiffs' son's academic performance and emotional state improved dramatically.

7. After some weeks of negotiations, the defendant sent a draft settlement agreement to the plaintiffs. Included in that draft agreement was a confidentiality clause, virtually identical to the confidentiality clause in the Agreement at Paragraph 13.

8. The plaintiffs, through their attorney, objected to the inclusion of the confidentiality clause and made clear that they had no desire for, and would waive, the protection it might afford to their or their son's privacy, but the defendants insisted on its inclusion, stating that they routinely included such a clause in settlement agreements.

9. Because the alternative to signing the Agreement was months of costly litigation during which the plaintiffs would simultaneously have to bear the heavy expense of the private school for their son, and in addition make him available for further evaluations by the defendant, they signed the Agreement which included the confidentiality provision.

10. Subsequent to signing the Agreement, the plaintiffs were unable, due to the confidentiality clause contained therein, to discuss the negotiations and resolution of their son's case with other Newton parents and voters, with members of the Newton Public School board or with elected Newton officials.

11. The plaintiffs believe that their experience, and the particulars of how their son's case was resolved with the defendant, bear on how special needs students are and should be treated, as a matter of policy, in their community.

12. The confidentiality clause, which the plaintiffs resisted but could not prevent from being made part of the Agreement, due to their limited resources and their son's educational needs, has restricted their rights to speak and to petition government, in violation of Art. 16 of the Massachusetts Declaration of Rights and the First Amendment to the United States Constitution.

[1] The Plaintiffs have filed a separate Motion to Impound the Agreement, and will file it as an impounded exhibit if the Court allows that Motion.

13. The defendant's insistence on a confidentiality clause as a condition of settling with the plaintiffs and providing funding for the plaintiffs' son's special educational needs is an unconstitutional conditioning of statutorily-mandated benefits.

14. The Agreement is a public record of the Newton Public Schools, as defined in G.L. c. 4 § 7, clause twenty-sixth, and is presumptively available to the public pursuant to G.L. c. 66 §10(a & c). Of the enumerated exemptions from the broad statutory definition of public records, only one arguably applies to the Agreement: "materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G.L. c. 4 §7, clause twenty-sixth (c).

15. The "specifically named individual(s)" in this case are the plaintiffs and their son, and they expressly waive any concerns that disclosure of their personal information would invade their privacy.

16. Moreover, the exemptions to the definition of public records are "strictly construed", *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609 (1993). The Agreement, redacted of the plaintiffs' names and other identifying information is a public record.

17. The inclusion of a confidentiality agreement in the Agreement is an effort by the defendant to avoid the requirements of the Massachusetts Public Records Law.

18. The plaintiffs sought an opinion from the Attorney General, by letter from their attorney dated December 14, 2010, without revealing the contents of the Agreement, that the confidentiality clause was unenforceable. A copy of the letter sent to the Attorney General is attached as **Exhibit B**.

19. The Attorney General responded by letter dated December 23, 2010, stating that statutorily she was not authorized to render an opinion, but nonetheless noted that it was her "longstanding policy" not to include confidentiality clauses in settlement agreements involving state agencies, "on the ground that such clauses are, absent some specifically applicable statute that authorizes them, inconsistent with the state public records law." A copy of the Attorney General's letter is attached as **Exhibit C**.

20. By letter dated January 14, 2011 to the Newton City Solicitor, the plaintiffs, through their attorneys advised the defendant of the correspondence with the Attorney General, providing copies of that correspondence, and called on the defendant to acknowledge that the confidentiality clause of the Agreement is unenforceable and violates public policy as embodied in the public records law as well as violating the plaintiffs' constitutional rights. A copy of that letter is attached as **Exhibit D**.

21. By letter dated January 20, 2011, the Newton City Solicitor responded, rejecting the unenforceability of the confidentiality clause in the Agreement and claiming that the

Agreement is a "student record" and therefore not a public record. A copy of that letter is attached as **Exhibit E**.

22. The response of the defendant ignores the fact that any statutory protections afforded to the plaintiffs' or their son's identity is for their benefit, not the defendant's benefit. It further ignores that the Agreement, and all other such agreements, fall within the definition of public records except to the limited extent that personally identifying information must be redacted.

23. In fact, the defendants seek to keep from the public, not the identifying information regarding the plaintiffs and their son, as to which the plaintiffs made clear they would waive protections, but instead seek to maintain confidential terms such as the cost of the Agreement and the manner in which the Agreement was negotiated. These are, and should be, matters of public record and discussion, and the plaintiffs wish to be free to discuss these issues, including the points in their own settlement agreement, in order to further legitimate public debate and promote the public good.

WHEREFORE, the plaintiffs request that the Court:

a. Enter judgment declaring that the confidentiality provision of the Agreement, Paragraph 13 thereof, is unenforceable and void as against public policy embodied in the Massachusetts Public Records Law, the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights.
b. Enter judgment declaring that Paragraph 13 of the Agreement is severable from the remaining provisions of the Agreement, and that all other provisions are still in full force and effect as between the parties.
c. Enter judgment declaring that the defendant's policy of insisting on confidentiality clauses in settlement agreements over the objection of parents violates the Massachusetts Public Records Law, the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights.
d. Award the plaintiffs the costs of this litigation.
e. Award such other relief as this Court deems just and proper.

GREG SMITH AND NANCY MACIAS-SMITH
By their attorneys,

Harvey A. Silverglate, of Counsel (BBO #462640)
David Duncan (BBO # 546121)
Zalkind, Rodriguez, Lunt & Duncan, LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

Dated: 2/14/11

Verification of Plaintiff

I, Greg Smith, being duly sworn, depose and say: that I am one of the plaintiffs in the above-entitled action; that I have read the foregoing complaint and know the facts alleged therein; and that the facts alleged are true of my own knowledge, except as to facts therein alleged on information and belief; and as to those matters I believe them to be true.

Greg Smith
89 Norwood Avenue
Newton, MA 02460

Sworn to me this 18 day of February, 2011.

Notary Public

DAVID DUNCAN
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
January 5, 2018

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPSHIRE, SS

SUPERIOR COURT
DOCKET NO. 2011CV212

EMILY BAZELON,
Plaintiff,

vs.

TOWN OF SOUTH HADLEY,
CARLENE C. HAMLIN, IN HER OFFICIAL CAPACITY AS CLERK-TREASURER OF THE TOWN OF SOUTH HADLEY, AND
EDWARD J. RYAN, JR., IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE TOWN OF SOUTH HADLEY,
Defendants.

VERIFIED COMPLAINT FOR DECLARATORY AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

NATURE OF THE COMPLAINT

1. This Complaint, brought under the Massachusetts Public Records Act, G.L. c. 66, § 10, by Emily Bazelon, a reporter and editor for Slate, a national news organization, seeks a Court order requiring the Defendants to produce as public documents the settlement agreement between the Town of South Hadley and the representatives of Phoebe Prince, whose suicide, with the allegations of bullying linked to it, have received local, national, and international media attention.

PARTIES

2. Plaintiff Emily Bazelon is a reporter and senior editor at Slate, an online magazine with ten million unique monthly visitors. Ms. Bazelon is residing in New Haven, Connecticut as the Truman Capote Fellow for Creative Writing and Law at Yale Law School.

3. Defendant Town of South Hadley ("South Hadley" or "the Town") is a municipal corporation in Hampshire County, Massachusetts.

4. Defendant Carlene C. Hamlin is the Clerk-Treasurer of South Hadley, who as such is the keeper of public records for the Town. The claim against Ms. Hamlin is brought against her only in her official capacity as an employee of South Hadley.

5. Defendant Edward J. Ryan, Jr. is the Town Counsel for South Hadley, with his residence and principal place of business in South Hadley. The claim here is brought against Mr. Ryan only in his capacity as an officer of South Hadley and as the holder of the record at issue in this lawsuit.

FACTS

The Settlement Agreement

6. On or about January 14, 2010, and thereafter, it was reported both locally and in the national media that South Hadley High School student Phoebe Prince (Phoebe) committed suicide allegedly after severe bullying by students at the school.

7. Local and national media further reported that members of the Prince family asserted that prior to Phoebe's suicide they warned the school that Phoebe was susceptible to bullying and was being bullied at the school and elsewhere by students. *See* Fred Contrada, Gus Sayer: *Phoebe Prince Bullying Case Puts South Hadley School Superintendent on World Stage*, THE REPUBLICAN (May 2, 2010).

8. On July 13, 2010, Phoebe Prince's parents, Jeremy Prince and Anne O'Brien, filed a complaint at the Massachusetts Commission Against Discrimination ("MCAD"). This Complaint (Exhibit A) alleged that the South Hadley Public Schools had failed to protect Phoebe Prince from discrimination that amounted to sexual harassment.

9. The MCAD complaint charged specifically that officials "failed to adequately address or remedy the harassing conduct of the school's students which had the purpose or effect of unreasonably interfering with Phoebe's education by creating an intimidating, hostile, and sexually offensive educational environment." The complaint also alleged incidents of bullying at the school in the week leading up to Phoebe's suicide that went unaddressed by school officials.

10. In November 2010, the MCAD complaint was withdrawn because the South Hadley Public Schools and Mr. Prince and Ms. O'Brien had reached an agreement that, as reported in the local and national media, was characterized by the Prince family as "satisfactory.".

11. The settlement between the Prince family and the Town received national news coverage though no news outlet has reported the amount of the settlement agreement. *See, e.g.*, Anne-Marie Dorning, *New Developments Raise New Questions in Suicide of Phoebe Prince*, ABC NEWS (Dec. 15, 2010).

The Public Records Request

12. Plaintiff Emily Bazelon has written extensively on the Phoebe Prince case, including a three-part series, "What Really Happened to Phoebe Prince?" which was a finalist for the Michael J. Kelly Award and the Gannett Investigate Online Journalism Award for 2011. *See* Emily Bazelon, *What Really Happened to Phoebe Prince*, SLATE (July 20, 2010); *see also* Emily Bazelon, *Suicide in South Hadley*, SLATE (Mar. 30, 2010); *Bullies Beware*, SLATE (Apr. 30, 2010), Jesse Baker & Emily Bazelon, *Talking to Flannery Mullins*, SLATE (May 26, 2011).CMs. Bazelon writes on cyberbullying and anti-bullying laws across the nation and is writing a book on that subject to be published by Random House.

13. On May 9, 2011, Ms. Bazelon filed a Massachusetts Public Records request (Exhibit B-1) via both e-mail and postal mail with Carlene C. Hamlin, Clerk of the Town of South Hadley, seeking access to the settlement agreement between South Hadley Public Schools and Mr. Prince

and Ms. O'Brien. Ms. Bazelon's request included a request for the settlement documents, including documents that detailed the terms and the amount on which the parties settled.

14. A public record in Massachusetts is defined by G.L. c. 4, § 7 to include "documentary materials or data . . . made or received by any officer or employee . . . of any political subdivision [of the commonwealth]." The Town of South Hadley is a political subdivision of the Commonwealth.

15. The Agreement between the family representatives of Phoebe Prince is a public record, not subject to any exception in G.L. c. 4, § 7 cl. 26. The data regarding the amount of settlement is likewise a public record, not subject to any exception, under G.L. c. 4, § 7 cl. 26.

16. Clerk Hamlin referred Emily Bazelon's request to the Town Counsel, the defendant Edward J. Ryan, Jr.

17. On May 10, 2011, Mr. Ryan, on behalf of the Town and Clerk Hamlin, denied Ms. Bazelon's request (Exhibit B-2) and produced no documents or any part of any document or any data contained in any document regarding the claim or the settlement.

18. Mr. Ryan had received the settlement document as an officer and employee of South Hadley.

19. In his denial of plaintiff Emily Bazelon's request, Mr. Ryan stated that he believed he was the only person in the Town who at that time possessed a copy of the settlement agreement.

20. Mr. Ryan did not claim a statutory exemption under G.L. c. 66, § 10 to justify withholding the document or any or all of the requested data.

21. Rather, Mr. Ryan asserted that he need not produce any documents or data in his possession because the document contained a confidentiality clause and further, that the settlement was not subject to the Public Records Law because it was paid by the Town's insurer, which meant that no public funds were used in the settlement.

22. The Superintendent of Schools publicly reported that the Prince family MCAD claim had been turned over to the Town's insurance company.

23. On May 28, 2011, plaintiff Emily Bazelon via e-mail (Exhibit C) requested that Mr. Ryan reconsider his denial of her request or specify the statutory basis for withholding the Settlement Agreement and segregate any non-exempt portions of the document or documents at issue.

24. Plaintiff Emily Bazelon did not receive a response to her May 28, 2011 request.

25. Documents indicate that as a result of the Settlement Agreement the Town paid an increased premium for its future insurance policy. In addition, the Town's insurance policies at all relevant times have had a deductible payable by the Town.

26. On July 5, 2011, plaintiff Ms. Bazelon submitted an administrative appeal of the Town of South Hadley's denial of her public records request to the Massachusetts Supervisor of Public Records (Exhibit D).

27. On October 19, 2011, plaintiff Emily Bazelon requested, through her attorney, that Mr. Ryan ask the Town to voluntarily waive any privilege attached to the requested settlement agreement (Exhibit E).

28. On November 3, 2011, Mr. Ryan responded, declining to produce the documents. He stated that on August 11, 2011, he had sent a copy of the settlement agreement to Shawn A. Williams, Assistant Director of the Division of Public Records, for Mr. Williams to review *in camera* (Exhibit F).

29. To date the Supervisor of Public Records has not rendered an opinion. Despite frequent efforts, Ms. Bazelon has been unsuccessful in reaching the Supervisor of Public Records to determine the status of her appeal.

First Claim for Relief: Ruling Under G.L. c. 66, § 10

30. Paragraphs 1 through 29 above are hereby re-alleged as though fully set forth herein.

31. The Superior Court has jurisdiction of this claim under G.L. c. 66, § 10(b).

Second Claim for Relief: Equitable Relief Under G.L. c. 214, § 1

32. Paragraphs 1 through 31 above are hereby re-alleged as though fully set forth herein.

33. Plaintiff Emily Bazelon requires equitable relief to support and supplement the adjudication.

Prayers For Relief On Both Counts

WHEREFORE, plaintiff Emily Bazelon requests that the Court:

(1) Issue a declaratory judgment pursuant to, *inter alia*, G.L. c. 231A, that the records that Emily Bazelon has requested are public records within the meaning of G.L. c. 66, § 10, and that the Town of South Hadley has no right to withhold such records;

(2) Enter preliminary and permanent injunctions ordering the defendants to allow the requested inspection and copying of the public records;

(3) Issue a short order of notice for a hearing to show cause why the Court should not grant the relief requested in these Prayers for Relief;

(4) Grant such other and further declaratory and equitable relief as the Court deems just and proper, and

(5) To award her the costs of this action.

THE PLAINTIFF
EMILY BAZELON,
by her attorney,

Date: 12/2/11

William C. Newman, Esq., BBO #370760
American Civil Liberties Union of Massachusetts
Western Regional Office
39 Main Street, Suite 8
Northampton, MA 01060
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