

April 14, 2011

Dear Dr. Client:

As part of our commitment to provide you with a legal resource that can offer cogent day-to-day advice and clear strategies for a secure future, we offer our pledge to also be your partner in information. We recognize the need for you to be immediately responsive to the changing requirements of the law, government regulations, and community needs. As such, our office will prepare *Action Papers* in response to the ever-changing laws and regulations affecting public education. Receipt of an Action Paper is an indication that your School District may want to consider changing a practice or policy. It also may indicate that your District is required by law to initiate or discontinue a practice or policy.

RIGHT TO KNOW LAW - STUDENT DISCIPLINARY RECORDS

Decisions issued by the Pennsylvania Office of Open Records (OOR) regarding the interpretation of the Pennsylvania Right to Know Law (RTKL) continue to reach the Pennsylvania Commonwealth Court. Recently, the Commonwealth Court addressed the issue of whether student disciplinary records are subject to disclosure pursuant to the RTKL. The Court concluded that student disciplinary records were not public records and were not to be disclosed.

In the case of Sherry v. Radnor Township School District, 2011 WL 122 6262 (Pa Cmwlth), Sherry requested all de-identified records or reports of Academic Honor Code violations maintained by the District for the 2007-2008 and 2008-2009 school years. De-identified records referred to the fact that the names of the student who committed the violation and the teacher who reported the violations were redacted. The School District denied Sherry's request for two reasons; (1) that the records were exempt from disclosure as a noncriminal investigation pursuant to Section 708(b)(17) of the RTKL; and (2) based upon the Family Educational Rights and Privacy Act (FERPA).

Sherry appealed the School District's denial to OOR. OOR requested additional information from the District specifying the legal and factual basis for its denial of Sherry's request together with citations to legal authority and sworn affidavits. In response, the District submitted sworn affidavits from the High School Principal and a high school teacher who was also a member of the High School Academic Honor Council.

The High School Principal's affidavit explained that student disciplinary infractions, including infractions considered to be a violation of the Honor Code are reported to administration officials via a student discipline and attendance report. The reports consisted of

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a single page document which included the student's name and grade; teacher's name, date, the period of the offense, an area to describe the inappropriate behavior; the teacher's discipline for the behavior and an area to describe any administrative action taken. The Principal's affidavit also indicated that the reports were maintained by the disciplinary secretary in a locked drawer and that a single copy was provided to the Honor Council for its meeting in the spring of 2008 and that the copy was returned to the discipline secretary after the meeting. Although the reports were de-identified, the Principal noted that the reports still contained information that could be used to identify the student involved.

The high school teacher's affidavit explained that the Honor Council consisted of students, teachers and a community member/parent representative. The student members were selected through a multi step process including teacher votes, a written paper and student body votes. All the members of the Honor Council received training on the confidentiality of student education records under FERPA. The Honor Council receives and reviews a copy of the violation report with the student and teacher's names redacted and then returns the report to the disciplinary secretary. The Honor Council does not impose punishment, but reviews the reports to identify relevant issues that need to be addressed with the student body. The affidavit also states that despite the redaction of names, the reports still contain information which could identify the student involved.

The OOR agreed with the School District and concluded that the requested records were exempt as noncriminal investigation records under Section 708(b)(17) of the RTKL and that the release of the records was precluded by FERPA. Sherry then filed an appeal of the OOR decision to the Court of Common Pleas of Delaware County which agreed with the OOR and denied the access to the requested records.

On appeal to the Pennsylvania Commonwealth Court, Sherry argued that the trial court erred in concluding that the requested documents were exempt from disclosure as a noncriminal investigation. Sherry stated that the District failed to identify any specific investigation justifying the withholding of the requested documents and that the records/reports sought were nothing more than materials that exist in connection with the District's performance of its duties.

The Commonwealth Court disagreed. The Court found that the record of Honor Code violations maintained by the District constituted records that represented noncriminal investigations. The Court also stated that these records surpass the District's routine performance of its duties and entail a systematic or searching inquiry, detailed examination, and/or official probe into purported student rule violations on the District's premises. The Court went on to state that the reports noted and contained a description of the violative conduct, witness/teacher statements, and the cause and results of the investigation thus the requested documents were exempt as noncriminal investigation records under Section 708(b)(17) of the RTKL.



As to Sherry's argument that the requested records were not exempt from disclosure pursuant to FERPA, the Commonwealth Court also disagreed. Sherry argued that FERPA was inapplicable because the requested reports were de-identified. The Court stated that because the records requested still contain elements which could be used to identify the student involved, that FERPA precludes the release of "personally identifiable information". Therefore, the Court concluded that FERPA precluded the release of the requested records.

The Commonwealth Court's decision in the Sherry case confirms the long held belief that student disciplinary records as a general rule do not constitute public records and are not to be disclosed pursuant to the RTKL. We would also note that the Sherry decision underscores the importance of using appropriately worded affidavits when dealing with the OOR. In this case, it was clearly helpful to the School District's case that the affidavits of the Principal and high school teacher both consistently pointed out that notwithstanding the redaction of the student and teacher's names from the records, that the records still contained information which could identify the student involved. Had this information been excluded from the affidavits, the Court's decision in the Sherry case may have been different.

Should you have any questions, please feel free to contact our office.

Best regards,

ANDREWS & PRICE

