FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Christopher Peak and New Haven Independent,

Complainants

against

Docket #FIC 2019-0369

Principal, Amistad Academy; and Amistad Academy,

Respondents

February 13, 2020

The above-captioned matter was heard as a contested case on November 7, 2019, at which time the complainants and the respondents appeared and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies, within the meaning of §1-200(1), G.S.

2. It is found that, by email dated April 9, 2019, the complainants requested "records of any alleged misconduct regarding…Achievement First employees…Simon Obas and Morgan Barth…" from their initial date of hire. The complainants identified the types of records they were seeking as "written complaints, investigatory findings, supporting statements or corrective action."

3. It is found that, by email dated April 15, 2019, the respondents acknowledged receipt of the request, and informed the complainants that they would gather and review the requested records and contact them when the "request is complete."

4. It is found that, on May 22, 2019, the respondents provided some responsive records but withheld others, including records pertaining to an incident that occurred on October 18, 2018, involving Mr. Barth.

5. By email dated April 20, 2019, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide them with copies of all records responsive to the request, described in paragraph 2, above.

6. Section 1-200(5), G.S., provides:

> "[p]ublic records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

7. Section 1-210(a), G.S., provides in relevant part that:

> [e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours or . . . (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by the subsection shall be void.

8. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

9. It is found that the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

10. The respondents claimed that the records they withheld from the complainants are exempt from disclosure pursuant to §§1-210(b)(10), 1-210(b)(17), and 1-210(b)(1), G.S.

11. The hearing officer ordered the respondents to submit the records described in paragraph 10, above, to the Commission for in camera inspection. Such records were submitted on December 2, 2019, and consist of 153 pages. The records shall be referenced herein as IC 2019-0369-001 through IC 2019-0369-153.

12. After careful in camera inspection of the records, it is found that the following records are not responsive to the request described in paragraph 2, above, and therefore shall not be further considered herein: IC 2019-0369-003 through 008; IC 2019-0369-012 through 016; IC 2019-0369-023 through 026; IC 2019-0369-027, lines 1 through 26 (i.e., the first two emails on the page) only; IC 2019-0369-036 through 037; IC 2019-0369-039 through 071; and IC 2019-0369-120 through 153.

13. With regard to the remainder of the in camera records (i.e., IC 2019-0369-001 through 002; IC 2019-0369-009 through 011; IC 2019-0369-017 through 022; IC 2019-0369-027, lines 27 through 42 (i.e., the third email on the page) only; IC 2019-0369-028 through 035; IC 2019-0369-038; and IC 2019-0369-072 through 119), the respondents claimed, first, that such records are exempt from disclosure because they contain communications privileged by the attorney-client relationship.

14. Section 1-210(b)(10), G.S., provides that disclosure is not required of "communications privileged by the attorney-client relationship."

15. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

16. Section 52-146r(2), G.S., defines "confidential communications" as:

> ... all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice. . . .

17. The Supreme Court has also stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell at 149.

18. After careful in camera inspection of each of the records, identified in paragraph 13, above, it is found that none contains communications between an attorney and a public agency client.

19. Accordingly, it found that the records, identified in paragraph 13, above, are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

20. Next, the respondents claimed that the in camera records identified in paragraph 13, above, are exempt from disclosure pursuant to §1-210(b)(17), G.S., and the Family Educational Rights and Privacy Act ("FERPA").

21. Section 1-210(b)(17), G.S., provides that disclosure is not required of "[e]ducational records which are not subject to disclosure under [FERPA], 20 USC 1232g."

22. "[E]ducation records" is defined at 20 USC §1232g(a)(4)(A), as 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.

23. After careful in camera inspection of the records identified in paragraph 13, above, it is found that such records are teacher/employee disciplinary records. It is also found that some of these records contain the name or other identifying information of a student or students.

24. Section 1-210(b)(17), G.S., permits nondisclosure of the records at issue only if such records are, in the first instance, "education records," within the meaning of 20 USC §1232g(a)(4)(A).

25. The respondents cited no Connecticut court decision interpreting the phrase "directly related to a student," in 20 USC §1232g(a)(4)(A), in the context of disclosure of teacher/employee disciplinary records.

26. Courts in other jurisdictions, however, have examined the phrase "directly related to a student," and concluded that records of complaints and investigations of misconduct by teachers, administrators or staff, in cases where students are the alleged victims and witnesses and therefore are identified in the records, are not education records protected by FERPA, because they do not contain information "directly related to a student." Rather, such disciplinary records are "directly related" to the subject of the complaint, and only tangentially related to the student. See e.g., Easton Area School District v. Miller, 191 A.3d 75 (Pa. Commw. Ct. 2018), *appeal pending* Easton Area School District v. Miller, 201 A.3d 721 (Pa. 2019) (video of teacher who roughly disciplined a student was "directly related" to the teacher and only tangentially related to the student); Cummerlander v. Patriot Preparatory Academy, 2013 WL 12178140 (S.D. Ohio 2013) (student witness statements are not education records because they do not directly relate to student witnesses but rather to the person who is the subject of the complaint); Briggs v. Board of Trustees Columbus State Community College, 2009 WL 2047899 (S.D. Ohio 2009) (records of student complaints about a teacher are "directly related" to the teacher and not to the students who complained); Young v. Pleasant Valley School District, 2008 WL 11336157 (M.D. Pa. 2008) (emails containing complaints about a teacher are not "directly related to a student," but rather are directly related to the teacher and only tangentially related to the student); Wallace v. Cranbrook Educational Community, 2006 WL 2796135 (E.D. Mich. 2006) (student statements alleging misconduct by a teacher are not "education records" because they are not "directly related to a student"); Baker v. Mitchell-Waters, 160 Ohio App.3d 250 (2005) (record of allegations of abuse of students by teachers do not directly relate to students); Ellis v. Cleveland Municipal School District, 309 F.Supp.2d 1019 (N.D. Ohio 2004) (records of allegations of teacher misconduct directly relate to the activities and behaviors of the teachers and do not directly relate to the students involved). But see Rhea v. District Board of Trustees of Santa Fe College, 109 So.3d 852 (Fla. Dist. Ct. App. 2013) (email written by student complaining about inappropriate classroom

behavior of teacher is an "education record" protected by FERPA because the record is "directly related" to the student, even though it may also be "directly related" to the teacher).

27. In prior Commission decisions, the Commission employed a broader construction of the term "education records," largely relying upon the phrase "Personally Identifiable Information" as set forth in the regulations at 34 CFR §99.3, to identify what information is protected under FERPA. Utilizing that analysis, if a record "personally identified" a student, the Commission generally concluded that the record was exempt under FERPA and that the agency was prohibited from disclosing it. See Jeffrey Roets and the Wethersfield Federation of Teachers v. Superintendent of Schools, Wethersfield Public Schools, et al., Docket #FIC 2010-069 (portions of report of investigation into allegations of misconduct by school officials that personally identify a student are protected by FERPA); Jay Hardison v. Superintendent of Schools, Darien Public Schools, et al., Docket #FIC 2016-0853 (written witness statements made in connection with an investigation into an incident involving school football coach and a student, wherein student is personally identified in the statements, are records that are "directly related to a student" and therefore are "education records" protected by FERPA); Jay Hardison v. Superintendent of Schools, Darien Public Schools, et al., Docket #FIC 2017-0036 (video depicting incident in which school football coach struck a student, where video was part of misconduct investigation, constituted an "education record" of the student that was protected under FERPA, as it targeted an already identified student and contained information that personally identified that student and other students); but see e.g., Linda Lambeck and the Connecticut Post v. Chairman, Board of Education, Bridgeport Public Schools, et al., Docket #FIC 2013-677 (video depicting school principal dragging a student, wherein student is not personally identifiable, is not "directly related to a student" and therefore is not an "education record" protected under FERPA).

28. More recently however, looking to burgeoning and relevant law in other jurisdictions, the Commission employed the narrower analysis utilized in the decisions cited in paragraph 26, above. See Jay Hardison v. Superintendent of Schools, Darien Public Schools, et al., Docket #FIC 2017-0615 (parent emails that relate directly to complaints about school procedures, are not "directly related to a student" and therefore are not "education records" protected by FERPA). Upon careful consideration, and a review of current relevant law on the topic, it is found that the teacher/employee disciplinary records in this case, identified in paragraph 13, above, are not "education records" because they relate directly to teacher/employee discipline and are not "directly related to a student."

29. It is concluded that such records therefore are not exempt from disclosure pursuant to §1-210(b)(17), G.S., and FERPA. This conclusion is consistent with, and the Commission hereby adopts, the line of reasoning in cases from other jurisdictions, as described in paragraph 26, above, related to teacher/employee disciplinary records, where such disciplinary records include the images, names and/or other information that identifies a student.

30. Finally, the respondents claimed that IC 2019-0369-017 through 022 are exempt from disclosure pursuant to §1-210(b)(1), G.S.

31. Section 1-210(b)(1), G.S., provides that disclosure is not required of "preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

32. It is found that the respondents did not offer evidence that the public agency had determined that the public interest in withholding IC 2019-0369-017 through 022 clearly outweighed the public interest in disclosure.

33. Accordingly, it is found that the respondents failed to prove that the records identified in paragraph 13, above, are exempt from disclosure pursuant to §1-210(b)(1), G.S.

34. Based on upon the foregoing, it concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the records, identified in paragraph 13, above.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Forthwith, the respondents shall provide a copy of the records described in paragraph 13, above, to the complainant, free of charge.

2. Although not raised by the respondents, the Commission notes that §1-210(b)(11), G.S., permits non-disclosure of the names or addresses of students enrolled in any public school or college. In complying with paragraph 1 of the order, the respondents may redact the names, addresses, email addresses, and other identifying information, of students and parents of students contained in the records.

3. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 13, 2020.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

CHRISTOPHER PEAK AND NEW HAVEN INDEPENDENT, 51 Elm Street, Suite #307, New Haven, CT 06510

PRINCIPAL, AMISTAD ACADEMY; AND AMISTAD ACADEMY, c/o Attorney Melika S. Forbes, 335 Adams Street, #700, Brooklyn, NY 11201

Cynthia A. Cannata
Acting Clerk of the Commission

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