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8 Attorney for Petitioner Irvin Muchnick

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11 IRVIN MUCHNICK,
12 Petitioner,
13 vs.
14 UNIVERSITY OF CALIFORNIA, BOARD OF
15 REGENTS,
16 Respondent.

) Case No. RG17857115
)
) HAYWARD DIVISION
)
) DECLARATION OF ROY S. GORDET
) IN SUPPORT OF
) RESPONSE BRIEF OF PETITIONER
) RE RESPONDENT'S MOTION FOR
) PROTECTIVE ORDER RE PREPARATION
) OF VAUGHN INDEX
)
)
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)
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21 Hearing Date: April 26, 2018
22 Time: 9:00 a.m.
23 Judge: Hon. Kimberly E. Colwell
24 Dep't: 511
25 Petition Filed: April 18, 2017

26 I, Roy S. Gordet, under penalty of perjury, under the laws of California, state as follows:

- 27 1. I am a Member of the Bar of California and admitted to practice before all courts in California.
28 2. I am counsel of record to Petitioner Irvin Muchnick in the above-captioned lawsuit. I make these statements based on my personal knowledge.

1 3. With regard to the meet and confer between counsel subsequent to the filing of the Petition, the
2 purported claim that Petitioner rejected an offer to permit Petitioner to inspect documents under a
3 protective order is skewed. Respondent's idea was "floated" to me as merely a possibility. It was
4 expressly stated by Mr. Goldstein that that offer was conditional and pending authorization that had
5 not yet been obtained by counsel for Respondent, and no concrete offer permitting Mr. Muchnick to
6 view the documents under some type of protective order was ever proposed.

7 4. At the February 27, 2018 Case Management Hearing, Respondent's counsel represented in open
8 Court that he could not reveal either *the number of documents being withheld* or even a *ballpark*
9 *range of the number of documents being withheld*, because, he contended, such a disclosure is
10 barred by FERPA.

11 5. Counsel for Respondent at the Case Management Hearing represented to the Court that the
12 reasons why FERPA barred disclosing the number of documents at issue would be explained in
13 Respondent's Motion for a protective order

14 6. In a conversation outside the courtroom after the first Case Management Hearing, Mr. Goldstein,
15 counsel for Respondent, said to me that Respondent's Office of General Counsel has other
16 attorneys whose expertise is FERPA issues and he intended to consult with them on issues related
17 to the application of FERPA when a student is deceased, and that he would get back to me with
18 substance on this legal point..

19 7. Submitted as Exhibit 1 is the relevant portion of an email thread between counsel concerning
20 FERPA where I provided to counsel for Respondent a brief summary of the results of my
21 preliminary case law research related to the inapplicability of FERPA under the facts of this case. I
22 never received any comments back from Mr. Goldstein on the cases cited.

23 8. Respondent's counsel provides substantial detail about how and when he obtained and then
24 disclosed documents to Petitioner after obtaining authorization from the family of the deceased
25 football player's family. These disclosures came after the Case Management Hearing and after the
26 Court ruled that Respondent should move for a protective order. At no time, either in its Motion or
27 in communications with Petitioner, does Respondent inform anyone when Respondent made that
28 request to the student's family, although the implication was that Respondent had been diligent in
making such a request. Respondent then used this waiting game for the authorization and possible
acquisition of the documents as its excuse for backing out of an agreement to submit a Joint Case
Management Report and to then eventually submit its own Case Management Report immediately
before the Hearing.

1 9. Submitted as Exhibit 2 is a Department of Education policy letter, which, according to
2 commentators in the field, is commonly used in support of the proposition that there are no
3 violations of FERPA based on disclosures of a student's educational records when the student was
4 more than 18 years of age and is deceased.

5 Executed on April 8, 2018 in Daly City, California

6 A handwritten signature in black ink, appearing to be 'A. G. S.', is located to the right of the text. The signature is cursive and somewhat stylized.

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EXHIBIT 1

From: Roy S. Gordet
To: ["Michael Goldstein"](#)
Subject: Muchnick v. Regents
Date: Wednesday, December 20, 2017 09:32:00 AM

Good Morning Michael,

Thank you for your detailed response of December 6. I appreciate your discussion of the outstanding issues and your proposals for addressing those issues.

After carefully considering your response, my client and I are requesting a "standard" Vaughn Index. As you may know, Mr. Muchnick received a first Vaughn Index in our FOIA case that Judge Breyer considered inadequate and required the government to supplement. I can provide a copy of that supplemental Vaughn Index as an example of what we are looking for from your office, or we can discuss another format that your office would prefer, perhaps a format that your office has used in the past.

Under the circumstances we are not seeing a superior alternative for dealing with our justifiable concerns that there exist responsive documents that will not be considered by an objective arbiter to fall within CPRA or FERPA exemptions and that therefore must be produced by the Regents.

In light of the amount of time that has transpired since Mr. Muchnick's original requests, we believe that your office should move forward with the preparation and finalization of the Vaughn Index promptly. We should discuss how much time you need; we would prefer not to present the issue to the Court.

As for FERPA, thank you for suggestions, such as the regulations about obtaining consents. We will look into that. In the meantime, generally speaking, my reading of the FERPA cases runs contrary to your interpretation of FERPA's statutory language. Based on the cases, and our reasonable assumptions about the kinds of documents that must have been generated following the two key incidents that we are most interested in knowing more about, the application of FERPA to the facts of this case is very limited for several reasons.

Most importantly, FERPA applies to student records related to such things as grades and probably not to emails generated by university officials related to an incident with broad university and public implications. I commend to you *DeFeo v. McAboy*, 260 F. Supp. 2d 790 (E.D. Mo. 2003) where campus police department law enforcement records, generated as the result of an incident in which one student struck another with his automobile, were not "education records" within the meaning of FERPA. As noted in *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D.Mo.1991), the function of FERPA is "to protect educationally related information." It defies common sense that the types of administrative documents that we believe will be responsive to Mr. Muchnick's CPRA requests are "educationally related information".

Courts have held that FERPA does not prevent the disclosure of records specifying reasons for teacher certificate revocations or the names of the victim and witnesses to an alleged incident of sexual harassment by a teacher. *Brouillet v. Cowles Publishing Co.*, 114 Wash. 2d 788, 791 P.2d 526, 533 (1990). Courts have similarly held that student witness statements are not governed by FERPA. *Staub v. East Greenbush School Dist. No. 1*, 128 Misc.2d 935, 491

N.Y.S.2d 87,88 (1985).

It should not be overlooked that the cases generally hold that FERPA was designed to protect systematic, rather than individual, releases of sensitive information. *See e.g. Daniel S. v. Board of Education of York Community High School*, 152 F. Supp. 2d 949 (N.D. Ill. 2001). There will be no “systematic” disclosure of documents if the Regents comply with Mr. Muchnick’s specific CPRA requests.

Lastly, because public policy favors disclosure, all exemptions are narrowly construed. *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889, 896, 34 Cal.Rptr.3d 82.) A government agency opposing disclosure bears the burden of proving that an exemption applies. *Id.*

In response to one of your suggestions, we are not interested in the “sample” approach involving a protective order where only I would review certain sample documents in your office. Such an approach would not address our concerns.

In conclusion, we need to move forward, and for us the next important step is a Vaughn Index, as you and I discussed early on in this case and as requested at the top of this message. Based on the cases cited above and other cases I did not feel a need to present at this time, we do not see FERPA or CPRA exemptions as preventing your office from preparing and producing a comprehensive Vaughn Index similar to what we received in our FOIA case from the US Attorneys office. Please let me know how you think we can most expediently proceed with this approach. As always, your cooperation will be appreciated.

Best regards,
Roy



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EXHIBIT 2



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT

Ms. Margaret Parker
Florida Department of Education
325 West Gaines Street
Room 1244
Tallahassee, Florida

FEB 20 2009

Dear Ms. Parker:

This is to respond to your September 29, 2008, letter regarding Florida's State Child Abuse Death Review Committee (Committee) that provides for the review of the circumstances of all deaths of children occurring as a result of abuse or neglect. In order to conduct the reviews, Florida law provides that certain State officials shall be provided with access to any information or records that pertain to a child whose death is being reviewed by the Committee and that are necessary for the committee to carry out its duties, including information or records that pertain to the child's family. You also note that Florida law provides the Committee with the authority to subpoena students' education records. This Office administers the Family Educational Rights and Privacy Act (FERPA) and is responsible for providing technical assistance to educational agencies and institutions on the law.

You ask whether a court order or subpoena is necessary when the Committee is requesting the education records of a deceased child. Specifically, you ask whether the protections and requirements of FERPA that pertain to education records still apply when the child is deceased. This Office has received many inquiries about this question, and our longstanding guidance on it is provided herein.

FERPA provides specifically that the rights afforded by FERPA belong to the student once he or she becomes an eligible student. 34 CFR § 99.3 "Eligible student." The FERPA rights of eligible students lapse or expire upon the death of the student. This interpretation is based on the common law principle that a cause of action based upon an invasion of privacy is personal, and the right to bring such an action lapses with the death of the person who held it. *See, e.g., Cordell v. Detective Publications, Inc.*, 419 F. 2d 989, 990 and n. 3 (6th Cir. 1969). Therefore, FERPA would not protect the education records of a deceased eligible student and an educational agency or institution may disclose such records at its discretion.

However, FERPA rights do not lapse or expire upon the death of a non-eligible student. FERPA provides specifically that the rights it affords rest with the parents of students until that student reaches 18 years of age or attends an institution of postsecondary education. There is nothing to suggest that parents' rights under FERPA should

Page 2 – Ms. Margaret Parker

terminate solely because their child is deceased. Rather, since the parents hold the rights in these circumstances, they may exercise those rights so long as the education records exist. Accordingly, FERPA would not permit the disclosure of the education records of a deceased non-eligible student without the parent's prior written consent or a subpoena. See §§ 99.30 and 99.31(a)(9) of the FERPA regulations.

I trust that the above information is responsive to your inquiry. If you have any additional questions, please do not hesitate to contact this Office again.

Sincerely,

A handwritten signature in black ink that reads "Paul Gammill". The signature is written in a cursive style with a large, sweeping "P" and a long, horizontal flourish at the end.

Paul Gammill
Director
Family Policy Compliance Office