

10/3/11

STATE OF RHODE ISLAND  
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 09 ERA 047

EEOC No. 16J-2008-00352

Complainant

v.

DECISION ON MOTION  
TO QUASH

Respondents

INTRODUCTION

On August 29, 2008, \_\_\_\_\_ (hereafter referred to as the complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission) alleging that \_\_\_\_\_

discriminated against her with respect to terms and conditions of employment because of her race and color. On October 21, 2009, the complainant amended her charge to add the \_\_\_\_\_ (hereafter referred to as \_\_\_\_\_) as a respondent. On July 19, 2010, the Commission issued a Subpoena Duces Tecum to the Keeper of the Records of \_\_\_\_\_. The subpoena ordered the production of various documents. On July 29, 2010, \_\_\_\_\_ filed a Motion to Quash with respect to some of the records subpoenaed. Following the filing of the Motion to Quash, the \_\_\_\_\_ produced some of the documents that were subpoenaed. At the present date, \_\_\_\_\_ continues to object to producing "Copy of all complaints filed with regard to 8<sup>th</sup> Grade Student B from 2006-present" and "All documents relating to the reassignment of problem students from 2006-present". On or around June 15, 2011, \_\_\_\_\_ provided additional information in support of its Motion to Quash. On or about August 3, 2011, \_\_\_\_\_ was given two weeks to provide any additional arguments with respect to its Motion. \_\_\_\_\_ did not provide anything further.

DISCUSSION

The Commission has the authority to subpoena witnesses and documents. R.I.G.L. Section 28-5-13(7). The Commission may exercise this power during investigation or during hearings.

Commission Procedural Regulation 15.01(D) provides in part that:

Upon a motion to quash ... the Commission or a Commission member may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue or (2) condition the denial upon just and reasonable conditions.

... moves to quash the subpoena as described above, arguing generally that the subpoena requests documents that contain confidential and personal information of non-parties to the case, that those parties have not supplied waivers, and that the subpoena process is unfair and invalid. With respect to the specific documents cited above, ... argues that the documents are "privileged and confidential and relate to non-parties to this matter". Motion to Quash, p. 2. In its June 15, 2011 submission, ... cites 20 U.S.C. § 1400 and "R.I.G.L. § 16.71.3(a)(7)" as the statutory authority for keeping the records confidential.

THE PRODUCTION OF THE RECORDS PURSUANT TO THE COMMISSION SUBPOENA  
WOULD NOT VIOLATE LAWS ON THE CONFIDENTIALITY OF STUDENT RECORDS

R.I.G.L. Section 16-71-3(a)(7) provides that:

**§ 16-71-3 Educational records access and review rights – Confidentiality of records.** – (a) The parent, legal guardian, or eligible student, shall have the following enumerated rights:

...

(7) The right to have the records kept confidential and not released to any other individual, agency or organization without prior written consent of the parent, legal guardian or eligible student, except to the extent that the release of the records is authorized by the provisions of 20 U.S.C. § 1232g or other applicable law or court process.

20 U.S.C. § 1232g, which is referenced in R.I.G.L. Section 16-71-3(a)(7), and which also relates to confidentiality of the individual educational plans referenced in 20 U.S.C. § 1400, provides in relevant part as follows:

...

(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.**

20 U.S.C. § 1232g [Emphasis added]. 20 U.S.C. § 1232g is referred to as The Family Educational Rights and Privacy Act of 1974 (FERPA).

The Rhode Island Supreme Court has reviewed the FERPA and determined that it does not create an evidentiary privilege. See Gaumond v. Trinity Repertory Co., 909 A.2d 512 (R.I. 2006) (a student with disabilities could not claim a privilege for previous versions of an injury report created by teachers related to an accident on a field trip when the student was suing the defendant for damages related to his injuries).

In addition, federal court cases addressing production of information in civil rights cases have held that the FERPA does not prohibit disclosure of educational information when it is justified. In Maxey v. Sioux City Community School Dist., 2009 WL 35171 (D. Iowa 2009), the plaintiff in a discrimination case against a school district demonstrated that her legitimate need for personally identifiable educational information was sufficient to justify a court order for the information. An alleged incident of discrimination occurred during a class and the plaintiff sought the names and addresses of the students in attendance in order to ascertain the identity of critical witnesses. The court held that its order to disclose the information would meet the standards of the FERPA for allowable disclosure; the court stayed the order for a limited time period to allow the school district to give notice of the order to the parents of the involved students. In Ragusa v. Malverne Union Free School Dist., 549 F.Supp.2d 288 (D.N.Y. 2008), the District Court held that the FERPA does not prohibit release of educational records from which all personally identifiable information has been redacted. Ragusa also held that FERPA permits disclosure of education records to comply with a judicial order.

In this case, Plaintiff has demonstrated a need for the requested education records- she has shown that these records are relevant at least to some degree in that they may aid her in an attempt to demonstrate that Defendants' articulated reasons for the denial of tenure were a pretext for unlawful discrimination.

*Id.* at 293. See also Victory Outreach Center v. City of Philadelphia, 233 F.R.D. 419, 420 (D. Pa. 2005), in which the court denied a university's motion to quash/motion for a protective order relating to a subpoena of alumni records, designed to identify witnesses for plaintiff's §1983 suit. The District Court held that:

Defendant's second argument that the court should grant its Motion for a Protective Order is that the request violates FERPA. Defendant's argument is incorrect. Under FERPA, an educational institution may release personally identifiable information contained in a student's records if the institution is subpoenaed.

*Id.*

In the instant case, the complainant alleges that, because of her race and color, she was treated differently than other teacher's assistants with respect to the respondents' response to her reports about a particular special education student, Student "B". The complainant alleges that when other teacher's assistants raised concerns about Student "B", those concerns were addressed promptly and Student "B" was transferred to another assistant, whereas when the complainant raised concerns about Student "B", her concerns were not addressed for some time and she was eventually transferred to a different grade. [redacted] moves to quash the subpoena for "Copy of all complaints filed with regard to 8<sup>th</sup> Grade Student B from 2006-present" and "All documents relating to the reassignment of problem students from 2006-present". It is clear that the documents in question are critical to the investigation of the validity of the complainant's allegations. The Commission hereby clarifies that the students in question may be identified by code letters and that personally identifiable information relating to the students and their families may be redacted. The Commission notes that information gathered during investigation is not a public record. Given that the Commission concludes that personally identifiable information may and should be redacted, the production of the records is not a violation of the FERPA. Even if it is argued that the production of the redacted records falls within FERPA, such production is authorized because the Commission has issued a valid subpoena for the records and denied the Motion to Quash after weighing the need for disclosure against the privacy interests of the students.

The Commission orders production of the redacted documents within one month from the date of this Order, in order to give [redacted] an opportunity to notify the students and their families of the subpoena and this Decision and Order.

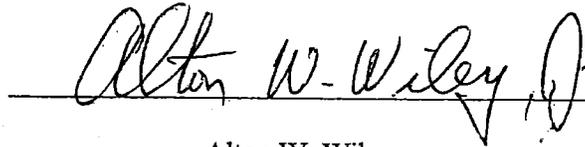
**' DOES NOT PROPERLY RAISE OTHER ARGUMENTS AGAINST PRODUCTION  
OF THE RECORDS UNDER SUBPOENA**

[redacted] provides no specific argument and no authority in support of its statement that the subpoena process is unfair and invalid. [redacted] was notified that it could submit additional arguments and it chose not to do so. Given these circumstances, the Commission finds that [redacted]'s passing reference to these contentions is insufficient to raise an issue for consideration.

**ORDER**

's Motion to Quash is denied. P may use letters rather than names to identify the students and may redact personally identifiable information about the students and their families from the records. must produce the redacted documents on or before one month from the date of this Order.

Entered this 3<sup>rd</sup> day of October, 2011.

A handwritten signature in cursive script, reading "Alton W. Wiley", is written over a horizontal line. The signature is written in dark ink and includes a large, stylized initial "W" at the end.

Alton W. Wiley  
Commissioner