



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

FELICIA HUREWITZ,
Complainant

v.

CENTRAL SUSQUEHANNA
INTERMEDIATE UNIT,
Respondent

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Docket No. AP 2009-0861

INTRODUCTION

Felicia Hurewitz, (the “Requester”), submitted a request to Central Susquehanna Intermediate Unit (“CSIU”) seeking hearing officer and appeals panel decisions pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). CSIU denied based upon statutes and regulations. The Requester timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part and denied in part**, and CSIU is required to take further action as directed.

FACTUAL BACKGROUND

On August 15, 2009, the Requester submitted a right-to-know request to CSIU seeking:

- (1) All Hearing Officer decisions regarding cases filed in whole or in part under 22 PA Code chapter 16 from June 15, 2007 to the present and which are not already listed on the ODR website;
- (2) All Appeals Panel decisions for cases filed in whole or in part under 22 PA code chapter 16 from June 15, 2007 to the present and which are not already listed on the ODR website.
- (3) A copy of appeals decision 1920, and the Hearing officer decision by Mr. Culleton that goes with AP 1920.

(the “Request”). The decisions at issue address disputes pertaining to student gifted individualized education plans (GIEP). She contends that since the decisions are placed on the Office of Dispute Resolution (ODR) website, student privacy information can be redacted so they are not identifiable and protected by the Family Educational Rights and Privacy Act (“FERPA”). The Requester submitted the same request to the Office of Dispute Resolution (“ODR”), which she contends is a separate and independent agency that subcontracts with CSIU for all funding.¹

After invoking the thirty-day extension, Lynn Cromley, the Open Records Officer (ORO) for CSIU, denied the Request stating that the records at issue were protected by FERPA and 16 Pa. Code §16.63(d) (the “Denial”). CSIU also advised that “all of the gifted decisions that you requested and that ODR may release as public records are available through publicly accessible electronic means posted on the PATTAN website at <http://odr.pattan.net>. Decisions not posted on the website were closed gifted decisions and are not permitted to be released in any form.”

The Requester timely appealed the Denial of CSIU, and alleged deemed denial by ODR on October 7th. In support, she argues that ODR should have responded as a separate agency, and contends that the records are not protected. She contends that ODR is an independent office from CSIU that should have had its own posted ORO, and should have responded to her Request. With regard to the Denial, she contends that CSIU’s response was not sufficient because it did not specify how the exemptions applied to the requested records. The Requester believes the closed hearing officer decisions should be available on-line with student information redacted. She argues that decisions for cases filed under the Individual Development Educational Assessment Act and 22 Pa. Code Chapter 14 must be made available by law under 34 C.F.R. §300.513(d)(2). She argues that special education hearing decisions may involve gifted students,

¹ Because the Requester submitted her request to ODR on August 12th and never received a response from ODR, that request is deemed denied, and was not timely appealed to the OOR. Further, she was advised that the CSIU ORO served as ORO for ODR. Thus, this determination pertains solely to the appeal timely filed of CSIU’s denial.

and that a single educational plan is developed for the student, so they cannot be protected by the legal exemptions cited. The Requester supplied copies of “closed gifted decisions” from ODR’s website as well as lists of available special education and gifted cases for 2007-08 and 2008-09. She asserts the public should have access to how hearing officers interpret gifted regulations.

1. Appeal as to ODR.

The OOR reviewed the Appeal and dismissed as untimely that part related to ODR’s deemed denial. The Requester submitted a motion for reconsideration regarding the separate agency status of ODR. The OOR considered whether the response by ORO Lynn Cromley was made on behalf of CSIU or ODR or both. The responses were both stated to be on behalf of CSIU, and were upon CSIU letterhead. Further, CSIU submitted a sworn statement by Ms. Cromley that no response was made by ODR as an agency separate and apart from CSIU, and further that CSIU has created, funds and administers the ODR. Therefore, Chief Counsel for the OOR reaffirmed the dismissal of an appeal as to any deemed denial by ODR and noted the public nature of the records would be addressed in the Final Determination on the CSIU Appeal. The OOR will not consider the status of ODR as an agency as that party has been dismissed.

2. Appeal as to CSIU.

Counsel for CSIU confirmed that CSIU is the sole agency party and submitted an affidavit of the Director of ODR, and a Memorandum of Law in support of the Denial. CSIU explains that the gifted student decisions are student educational records protected by FERPA, as the records of closed gifted hearings are expressly made records of the student under 22 Pa. Code §16.63. CSIU argues that the closed hearing decisions were previously made available on-line prior to the Department of Education’s amendment of Section 16.63 in October 2008. ODR Director Kerry Smith’s affidavit, made under penalty of perjury, explains the relationship between ODR and CSIU (“ODR Affidavit”). She explains that ODR provides for due process

hearings for parties to an educational dispute. She explains that through a contract with the Department of Education (“Department”), CSIU performs administrative services for ODR. ODR is required to make hearing officer findings and decisions for special education students with disabilities available to the public as per 34 C.F.R. §300.513(d). She notes gifted student hearings are not governed by federal law and that closed gifted hearings are shielded by state regulation.

Through its contract with the Department, CSIU provides an impartial review system of disputes between families and local education agencies regarding the programs and services for students with disabilities or who are mentally gifted. There is no dispute among the parties that the records at issue in this case are decisions from state level hearings regarding students with disabilities (special education) or who are mentally gifted. Both parties agree that pursuant to federal regulation, purely disability/special education decisions are public, subject to redaction of personally identifiable information as defined in FERPA. However, CSIU maintains that all hearings involving gifted students are protected under FERPA and Department regulations, 22 Pa. Code §16.63 and §16.65, govern hearings involving gifted student issues. CSIU maintains that closed hearing decisions for gifted students are not accessible under 22 Pa. Code §16.63(d).

CSIU submitted an additional affidavit of Kerry Smith attesting that decisions from open hearings involving students who are both gifted and have special education needs will be made available on the website by November 30th after all personal identification information is redacted. She advises that seven such decisions will be added as a result. Decisions from closed hearings involving students who are both gifted and have special education needs will be made available after redaction of all parts of the decisions pertaining to the gifted designation also by November 30th. Thus, the CSIU agreed to produce redacted records and post them upon the ODR website.

Additional time was allotted by the Requester to address the issues regarding agency status of ODR, extending the Final Determination due date to November 18, 2009.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). CSIU, as an intermediate unit, qualifies as a local agency subject to the RTKL and its obligations of mandatory disclosure. *See* 65 P.S. §67.102, §67.302. Records of a local agency are presumed “public” unless the record is: (1) exempt under Section 708; (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. CSIU asserts that the hearing officer and appeals panel decisions requested are protected from release by Department of Education regulations within Chapter 16 of Title 22 of the Administrative Code and FERPA.

Decisions resulting from both closed and open hearings related to disputes of gifted education plans are at issue. Hearings held under Chapter 16 may involve students who are gifted *and* have special education needs. The parties do not dispute that these decisions involving gifted status of students, and the related educational services, qualify as educational records that are protected under FERPA, and therefore require redaction of all “personally identifiable information.” However, the Requester challenges that records pertaining to gifted students are protected from disclosure pursuant to Department regulations when they can be produced in redacted form with all personally identifiable information redacted.

CSIU claims that two laws protect Chapter 16 gifted student hearing dispositions from disclosure: (1) FERPA and (2) Department regulation 22 Pa. Code §16.63(d) (“Regulation”). FERPA applies to all education records, which includes decisions resulting from hearings, both open and closed. The Regulation pertains solely to closed Chapter 16 hearings. Each ground is addressed in turn.

1. Decisions from Open Hearings Held Under Chapter 16 Must Be Redacted.

Chapter 16 expressly incorporates FERPA's protection to gifted student decisions. "Personally identifiable information" of a gifted student, or a student thought to be gifted is confidential pursuant to FERPA, (20 U.S.C.A. § 1232g), and its regulations at 34 C.F.R. Part 99 (relating to family educational rights and privacy), Chapter 12 (relating to students) and other applicable law. *See* 22 Pa. Code §16.65. There is no dispute that as a matter of law, FERPA applies to protect the confidentiality of all gifted student records. However, records may be disclosed pursuant to FERPA provided that they do not contain personally identifiable information ("PII") and are not traceable to a student.

The entirety of decisions from open Chapter 16 hearings are not protected under FERPA. Pursuant to Section 706, agencies have a mandatory duty of redaction and are required to provide the public portions of any record. 65 P.S. §67.706. Therefore, hearing officer or appeals panel decisions resulting from open Chapter 16 hearings on gifted students must be made available with PII redacted and the remainder of the decisions produced.

CSIU represented that it is in the process of obtaining software that can perform the proper redactions and permit the public portions of ODR decisions to be posted. CSIU initially defended its failure to provide the redacted decisions due to lack of software and backlog awaiting placement of the PATTAN website. These are not proper grounds for denial. During the course of the Appeal, CSIU acknowledged as much and agreed to provide the records in redacted form by posting them on its website by November 30th. Nonetheless, the OOR is compelled to determine that the records requested should have been provided in redacted form when originally requested as there were no proper grounds to withhold them in their entirety. This Appeal is granted to the extent that it challenges the failure of CSIU to provide decisions resulting from *open* hearings

related to gifted only students, with all PII redacted. The OOR makes no finding regarding a requirement to post decisions on a website, only that they are public records under the RTKL.

2. Decisions from Closed Hearings Held under Chapter 16 May Be Protected.

CSIU also defended withholding the decisions requested based upon the Regulation. The Requester contends that the Regulation does not protect the decisions resulting from closed hearings from access under the RTKL. In addition, the Requester contends that federal law requires public accessibility of special education related decisions, regardless of whether the student involved also qualifies as gifted, and that CSIU ignores the reality that some students will qualify as both gifted, (permitting a closed hearing upon request), and special education needs, (requiring decisions to be public).

Department Regulation, 22 Pa. Code §16.63 clearly states:

(d) The hearing must be an oral, personal hearing and be open to the public unless the parents request a closed hearing 5 days in advance of the hearing. If the hearing is open, the decision issued in the case, and only the decision, shall be available to the public. *If the hearing is closed, the decision shall be treated as a record of the student and may not be available to the public.*

22 Pa. Code §16.63(d)(emphasis supplied).

The Regulation explicitly states that closed hearings are performed at the request of the parent, and “may not be available to the public.” The Regulation thus qualifies as a state regulation that exempts a record from qualifying as a public record, and overcomes the presumption of openness. 65 P.S. §67.305. In this context, it is apparent that the Regulation is intended to prohibit disclosure of closed hearing decisions to the public, serving as a proper exemption for closed hearing decisions pertaining to gifted students. Therefore, the Appeal is denied to the extent that it seeks decisions resulting from *closed* hearings on gifted students for whom special education needs are not also disputed.

With regard to closed Chapter 16 hearing decisions pertaining to gifted students, in which special education needs are also addressed, these decisions must be produced with the portions of the decisions pertaining to special education disclosed. Federal regulations provide that after PII is redacted, decisions involving special education needs met through Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, by formulation of an Individualized Education Plan (IEP) must be available to the public. Section 300.513 explicitly states that after deleting the PII, “the public agency must make those findings and decisions available to the public.” 34 C.F.R. §300.513(d)(2). Thus, to the extent that the decisions involved gifted students who were also special needs students, federal law requires the findings and decisions to be publicly available.

The federal regulation does not pertain to gifted students, does not address such hearings or decisions, and does not require public accessibility of such decisions, except to the extent they involve special education needs governed by federal statute. Therefore, the state and federal regulation do not directly conflict and can be reconciled to permit compliance with both.

Pursuant to Section 706, all non-public portions of a record may be redacted, with the remainder subject to access. The Regulation protects the closed hearing disposition regarding gifted student education plans from disclosure, so those portions are properly withheld under an exemption to the RTKL. The Regulation protects the entirety of all decisions resulting from closed hearings that pertain *solely* to gifted students. Another law makes the special education needs portion of any findings/decisions public, meaning that to the extent a decision addresses both gifted and special education issues, the special education part is not protected by the Regulation and cannot be permissibly withheld on that basis, except for PII. Therefore, with regard to closed hearing decisions pertaining to both special education and gifted students, CSIU may only redact the decisions as related to gifted students from disclosure, and is required to provide such records in redacted form.

On a separate procedural issue, the OOR recommends Ms. Cromley to clearly designate upon whose behalf she is responding, *i.e.*, CSIU or ODR, should both CSIU and ODR be served with the same right-to-know request in the future to avoid any confusion about who is the responding party to be named in any appeal. As the appeal of the deemed denial by the ODR was dismissed, this Final Determination does not address whether the ODR is a separate agency subject to the RTKL.

CONCLUSION

For the foregoing reasons, the Requester's Appeal is **granted in part and denied in part**. CSIU is directed to release open hearing decisions for gifted only students with all PII redacted. Closed hearing decisions addressing solely gifted students are exempt by the Regulation. Decisions resulting from closed hearings must be produced if they also qualify as special education needs decisions, with all gifted portions and PII redacted. CSIU is directed to provide these records, redacted as specified, to the Requester within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Northumberland County Court of Common Pleas. 65 P.S. §67.1302(a). All parties must be served with notice of the appeal. The OOR shall be served notice and have an opportunity to respond according to court rules as per Section 1303. This Final Determination shall be posted at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: November 18, 2009

LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Felicia Hurewitz; Lynn Cromley for CSIU