IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

DONALD RICHARDSON, on behalf of himself and his minor child K.R., et al.,	:	
Plaintiffs,	:	Case No. 3:12cv00342
vs.	:	District Judge Thomas M. Rose Chief Magistrate Judge Sharon L. Ovington
BOARD OF EDUCATION OF HUBER HEIGHTS CITY SCHOOLS, et al.,	:	
Defendants.	:	

ORDER

I.

This case arises from allegations concerning an in-school incident of student hazing, harassment, and/or bullying, and Defendants' responses to it. Plaintiffs claim that Defendant Board of Education of Huber Heights City Schools failed to take any meaningful steps to prevent such incidents and to protect Plaintiff K.R. in violation of K.R.'s rights under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. Plaintiffs further raise a claim under 42 U.S.C. §1983, asserting that Defendant Board of Education violated K.R.'s rights under the Due Process Clause of the Fourteenth Amendment to the Constitution. And Plaintiffs raise state-law claims against two individual Defendants under

theories of battery, false imprisonment, and intentional infliction of emotional distress.

On October 24, 2013, a Protective Order issued considering, in part, the possibility that some student records might contain material or information subject to confidentiality under the Family and Educational Rights Privacy Act of 1974 (FERPA), 20 U.S.C. §1232g. The Protective Order contained a provision that requires in camera review of documents in certain files – school disciplinary files – of "any party or non-party student or former student ...." (Doc. #24, PageID at 132). The case is presently before the Court at Defendant Board of Education's behest for such an in camera review of school disciplinary files of B.C., R.M., and K.R. (Doc. #s 33-36). The files are presently sealed and Defendant Board of Education has provided Plaintiffs' counsel with copies of the sealed documents.

Defendant Board of Education seeks a determination of which documents, if any, will be produced to Plaintiffs and other Defendants following in camera review.

II.

Earlier in this case, before the Protective Order issued, Defendant Board of Education stated that it "acknowledges and does not dispute the relevancy of the information and educational records it seeks to disclose under Rule 26 and is not contesting the other parties' right to such information." (Doc. #16, PageID at 85-86). Although Defendant Board of Education's Notices appear not to alter this position, *see* Doc. #s 31, 32, 33, it seeks a determination of relevancy under paragraph 8 of the Protective Order, which states, in pertinent part:

> Upon request of an interested party, the Court shall conduct an in camera review of any documents contained in a school disciplinary file. During such in camera inspection, the Court shall consider:
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> a. whether the records are necessary and relevant to the pending action;
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> b. whether good cause has been shown by the party seeking disclosure; and
>
> c. whether the discovery of the records outweighs confidentiality considerations.

(Doc. #24, PageID at 132-33).

FERPA "protects educational records or personally identifiable information from improper disclosure." *Doe v. Woodford County Bd. of Educ.,* 213 F.3d 921, 926 (6th Cir. 2000); *see United States v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002); 20 C.F.R. §1232g(b)(1). One exception to FERPA protection exists when educational records or personally identifiable "information is furnished in compliance with judicial order ...." 20 U.S.C. §1232g(b)(2)(B). Compliance with FERPA is incentivized by withdrawal or the lack of federal funding for an educational agency or institution that does not adhere to FERPA's mandates. *See Miami Univ*., 294 F.3d at 806; *see also Frazier v. Fairhaven Sch. Comm*., 276 F.3d 52, 68 (1st Cir. 2002) (FERPA "takes a carrot-and-stick approach: the carrot is federal funding; the stick is the termination of such funding to any educational institution ..." that fails to comply with FERPA).

FERPA's burdens, however, do not translate into a private right of action to enforce its provisions. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 287, 122 S. Ct. 2268, 2277 (2002); *see also Miami Univ.*, 294 F.3d at 809, n.11; *Bevington v. Ohio Univ.*, 93 Fed. App'x 748, 750 (6th Cir. 2004); *Smith v. Indian Hill Exempted Vill. Sch. Dist.*, 1:10-CV-718, 2011 WL

4348101 at *6 (S.D. Ohio May 5, 2011) (Bowman, M.J.). In addition, FERPA "does not... , by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure." *Edmonds v. Detroit Public School Systems*, 12cv10023, 2012 WL 5844655 at *3 (E.D. Mich. Nov. 19, 2012) (quoting *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F.Supp.2d 1019, 1022 (N.D. Ohio 2004)) (other citations omitted). Because of this and in light of the terms of the Protective Order, the issue in the instant case becomes whether the sealed documents submitted for in camera review are relevant and therefore discoverable under Fed. R. Civ. P. 26(b)(1), which states, in part:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to any party's claim or defense .... For good cause, the court may order discovery of any matter relevant to the subject matters involved in the action. Relevant information need not be admissible at the trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence ....

"The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad." *Lewis v. ACB Bus. Serv., Inc.,* 135 F.3d 389, 402 (6th Cir. 1998). "Generally, [Rule] 26(b) enables parties to discover any unprivileged evidence or information relevant to their claim." *Surles ex rel. Johnson v. Greyhound Lines, Inc.,* 474 F.3d 288, 305 (6th Cir. 2007) (citation omitted). Yet, it is not an abuse of discretion to preclude "discovery when the discovery requested would be irrelevant to the underlying issue to be decided." *Green v. Nevers*, 196 F.3d 627, 632 (6th Cir. 1999).

Upon in camera review, the documents submitted under seal by Defendant Board of Education contain information that is relevant under the Protective Order and Rule 26(b)(1)

to the parties' claims or defenses. Much of the information is relevant under Rule 26(b)(1) to determining who did what before, during, and after the alleged incident. Other information carries Rule 26(b)(1) relevance concerning what school administrators and others did, or did not do, in response to the incident, including information about disciplinary proceedings and decisions. At a minimum, such information is relevant under Rule 26(b)(1) to Plaintiffs' claim that Defendant School Board violated their rights under the Due Process Clause. The documents in Plaintiff K.R.'s file include information relevant under Rule 26(b)(1) to damages issues concerning the effects the incident might, or might not, have had on his emotional health. For all these reasons, the Defendant Board of Education may provide copies of the presently sealed documents to Plaintiffs and other Defendants during discovery to the extent necessary to complete the discovery phase of litigation.

This does not quite end the present in camera review because some of the documents contain personal identifiers that must be redacted by the parties' counsel before disclosure to any party during discovery. The personal identifiers that must be redacted are dates of birth, student identification numbers, telephone numbers – including parents' cell phone or other telephone numbers – addresses, and photographs. Counsel need not redact school telephone, fax numbers, and addresses.

Lastly, although Defendant Board of Education may provide copies of the documents under seal to Plaintiffs and other Defendants during discovery after certain information is redacted as set forth herein, the documents (Doc. #s 34, 35, 36) shall otherwise remain sealed in the record of this case.

IT IS THEREFORE ORDERED THAT:

1. Defendant Board of Education may provide copies of the presently sealed documents (Doc. #s 34, 35, 36) to Plaintiffs and other Defendants during discovery;

2. Before disclosure, the sealed documents must be redacted as set forth herein; and

3. The documents (Doc. #s 34, 35, 36) shall otherwise remained sealed in the record of this case, absent further Order of the Court.

March 11, 2014

s/Sharon L. Ovington
Sharon L. Ovington
Chief United States Magistrate Judge