

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMBER BLUNT, et al. : CIVIL ACTION
: :
v. : :
: :
LOWER MERION SCHOOL : :
DISTRICT, et al. : NO. 07-3100

MEMORANDUM

Bartle, C.J.

May 7, 2009

Before the court are the objections of parents of certain students receiving special education in the Lower Merion School District ("LMSD") to the production by the Pennsylvania Department of Education ("PDE") of certain statistical information about those students in connection with plaintiffs' pending motion for class certification.

This putative class action lawsuit was brought by parents of African-American students in the LMSD, Concerned Black Parents of the Mainline, Inc., and the Mainline Branch of the NAACP. The defendants are the LMSD and the PDE. Plaintiffs bring claims for violations of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq., Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, et seq., § 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The plaintiffs seek to remedy

the alleged systemic failure of the defendants to provide appropriate special education to African-American students in the LMSD.

On December 22, 2008, the plaintiffs filed a motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure seeking to certify the following class:

All present and future African American students in the Lower Merion School District who are denied access to the general education curriculum; are placed in below grade level classes; receive a modified curriculum; and/or are sent to separate, segregated schools that provide them with an education inferior to the education provided their Caucasian peers with and without disabilities.

The court subsequently granted the parties a period of time to engage in discovery with respect to the class action certification issue. During this discovery period, the plaintiffs served discovery requests seeking the disclosure of educational records and data for students in the LMSD. Specifically, the plaintiffs seek (1) adequate yearly progress data for the LMSD from 2004 through the present, broken down by race for all races, and (2) Penn Data¹ by exceptionality, age, gender, race and educational environment for special education students in the LMSD from 2004 to the present. This includes information concerning the age, race, gender, eligibility for

1. The Penn Data system is a database in which certain information is recorded for every special education student in Pennsylvania. It is reported by each school district to the local Intermediate Unit and then to PDE.

special education, disability classification, where the students receive their special education programming, and the category of proficiency each child received on state-wide testing. The PDE objected to the production of this information claiming the production of such data would violate its obligation to protect the confidentiality of student records under the Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g, and the IDEA.

On March 9, 2009, the court ordered the PDE to produce this data on or before April 10, 2009. That Order authorizes the PDE to remove information that could identify specific students. It states: "The Pennsylvania Department of Education may remove from the disclosed data any student names or social security numbers or other student-specific identification numbers." See Doc. #81. That same day the court entered a Protective Order to ensure the confidentiality of such documents and data when produced to plaintiffs' counsel. On March 31, 2009, the PDE notified the parents of students in the LMSD that the educational records and data of their children had been ordered disclosed. This notice was required pursuant to 20 U.S.C. § 1232g(b)(2)(B) of the Family Educational and Privacy Rights Act and its implementing regulations, 34 C.F.R. § 99.31(a)(9)(ii). Upon receiving numerous objections to the production of this information from the notified parents, the court ordered that the March 9, 2009 Order be stayed so that the parents could raise their objections at a hearing in open court. On May 1, 2009, the

court held a hearing at which some parents of children currently or formerly enrolled in the LMSD or former students who had objected to the production of their educational records or data appeared to explain their objections.

The parties do not dispute the relevance of the requested information. This discovery dispute instead requires us to weigh the statutory privacy interests of the parents and students, non-parties to this lawsuit, against the need and relevance of the discovery in resolving the class action issues before the court. The students enrolled in the LMSD and their parents have a privacy interest in their educational records and data. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(ii). Under the Family Educational and Privacy Rights Act, funds under any applicable program may be withheld from any educational agency or institution that fails to notify parents and students of court orders or subpoenas ordering the release or access to personally identifiable information in educational records.

Certain parents have voiced a particular concern with the release of this educational information due to the societal stigma connected with special education. Fears have been expressed that the potential for the inadvertent online dissemination of this information is high. Furthermore, even though the PDE will redact the names, addresses and social security numbers of the students, parents are worried that their children could be identified by virtue of the low number of

students enrolled in special education and the degree to which the information will be categorized.

Against this privacy interest, we must consider the importance of the requested information to this lawsuit. Plaintiffs assert claims of widespread and systemic racial discrimination by a School District and the Department of Education. There is no doubt that the issues at stake are of the utmost importance and justify the disclosure of information that will allow this matter to be resolved.

This conclusion is buttressed by the protections offered by the Protective Order entered on March 9, 2009. Pursuant to this Order, the confidential documents and personally identifiable information derived from such documents shall be used and disclosed solely for the purposes of this lawsuit. This information shall not be revealed, disclosed, or made available for inspection or copying to any person except under the terms of the Protective Order or as required to be disclosed by law or court order. The parties are required to maintain in a secure manner all confidential documents and personally identifiable information derived therefrom. Such information may only be disclosed to a very limited group of persons involved in the litigation, including counsel of record, experts, consultants or employees of document handling services specifically retained by the parties, court personnel working on the case, the author or addressee of the document, and persons agreed upon by the parties. If a party wishes to submit a confidential document or

personally identifiable information derived therefrom to the court, the party must move to file the pleading under seal. These are significant protections that severely limit the scope of persons that will have access to the protected information and minimize the potential for unauthorized release of the information.

In light of the privacy protections afforded by the Protective Order, the potential for harm to the privacy interests of parents and students in the LMSD is outweighed by the importance of this information to this lawsuit, which centers on the constitutional and statutory rights of children and the alleged violation of those rights by their own School District.

Having heard the objections raised by these interested parties and after careful consideration, we will order the production of the requested educational information and data. However, we will specifically prohibit the PDE from disclosing the names, addresses and social security numbers of the students or parents involved.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMBER BLUNT, et al. : CIVIL ACTION
 :
 v. :
 :
 LOWER MERION SCHOOL :
 DISTRICT, et al. : NO. 07-3100

ORDER

AND NOW, this 7th day of May, 2009, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the Order dated March 9, 2009 (Doc. #81) is VACATED;

(2) the Order dated April 15, 2009 (Doc. #93) is VACATED;

(3) the Pennsylvania Department of Education shall provide complete responses, on or before May 15, 2009, to Plaintiffs' Interrogatories Nos. 1 and 2 and Requests for Document Production Nos. 2, 3, 5, 6, and 7 served on January 9, 2009, including disclosure of any responsive educational records or data the confidentiality of which may be protected under federal law. The Pennsylvania Department of Education may not disclose names, addresses, and social security numbers of either the students or their parents;

(4) the Seventh Scheduling Order dated March 9, 2009 (Doc. #80) is VACATED;

(5) defendants shall file and serve any briefs in opposition to plaintiffs' motion for class certification on or before May 20, 2009; and

(6) plaintiffs shall file and serve any reply brief on or before June 3, 2009.

BY THE COURT:

/s/ Harvey Bartle III
C.J.