UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, and JAMES MCGAUGHEY,
Plaintiffs,
v.
HARTFORD BOARD OF EDUCATION, HARTFORD PUBLIC SCHOOLS, and ROBERT HENRY,
Defendants.

CASE NO. 304CV1338(JCH)

September 27, 2004

Defendants' Objection To Motion For Permanent Injunction

Introduction

Plaintiffs State of Connecticut Office of Protection and Advocacy for Persons With Disabilities (OPA) and James McGaughey (McGaughey), OPA's executive director, seek an injunction requiring defendants Hartford Board of Education (HBOE) and Superintendent of Schools Robert Henry to allow OPA access to HBOE's Hartford Transitional Learning Academy (HTLA) without parental notice or consent for the purpose of observing school activities and interviewing students and staff. In addition, OPA seeks an order requiring defendants to provide OPA with a list of HTLA parents and their contact information, again without their knowledge or consent.

During a conference with the Court on August 31, 2004, the parties and the Court agreed to merge proceedings on the plaintiffs' request for a preliminary injunction with plaintiff's request for a permanent injunction. The parties also agreed to jointly develop Stipulations of Fact for the purposes of these proceedings. Those Stipulations have been filed by the plaintiff, and are referred to herein.

In addition, defendants submit the attached Affidavit of Jody S. Lefkowitz, Affidavit of Sandra Cruz-Serrano and Affidavit of Gail Johnson in support of this Opposition.

Summary of the Facts

HTLA is a public school providing a therapeutic educational program for students of all grade levels who have been identified as requiring special education and related services under the auspices of the Individuals with Disabilities in Education Act, 20 U.S.C. Section 1400 et seq. (IDEA). HTLA's students all have an IDEA identifying label of "seriously emotionally disturbed." Most HTLA students also exhibit challenging behaviors. (Fact Stipulation No.7; Lefkowitz Affidavit, paras 4 and 5)

HTLA is not a residential program and does not provide any overnight services. (Lefkowitz Affidavit para 6). HTLA students have parents or other family members who are responsible for making decisions

about their schooling. Some are in the legal custody of the Connecticut Department of Children and Families (DCF). (Lefkowitz Affidavit para 7).

Contrary to OPA's claim, HTLA is not a program for students who have severe or chronic developmental disabilities that result in substantial functional limitations of major life activities. Nor is HTLA is a program for students who suffer from severe or disabling traumatic brain injuries. Students who suffer from severe or chronic developmental disabilities that result in substantial functional limitations of major life activities or from severe or disabling traumatic brain injuries are placed in other programs within HPS or in qualified and approved outside facilities, and not at HTLA. (Lefkowitz Affidavit paras 8-10).

The decision to place students at HTLA is made by the individual student's Pupil Planning Team (PPT). Each student's PPT team consists of the student's parent as well as teachers, support staff and administrators who are familiar with the student's needs. Parents are notified of all PPT team meetings, and every effort is made to afford parents and guardians a full opportunity to attend and participate in the decision making process. (Lefkowitz Affidavit para 11).

Individualized behavior intervention plans are developed for most HTLA students either before or shortly after their entry to HTLA. These plans are based on an individualized functional behavior assessment of each student's needs. (Lefkowitz Affidavit para 12).

HPS has trained the HTLA teaching staff, as well as other special education teachers who work with special education students, concerning the development and implementation of behavior intervention plans. HTLA staff has also been trained to use appropriate and safe de-escalation and physical management procedures with students who lose control of their behavior. (Lefkowitz Affidavit paras 13-15).

Despite HTLA's therapeutic environment and efforts to prevent disruptive behaviors, it is sometimes necessary to seclude students whose behavior is disruptive or dangerous and who cannot be immediately de-escalated. Records are maintained of these seclusion incidents. (Lefkowitz Affidavit para 16).

In addition, it is sometimes necessary to physically restrain students whose behavior presents a risk of injury to themselves or others. Again, records are maintained of each restraint incident. (Lefkowitz Affidavit para 17). HTLA staff are trained and instructed that physical restraint is the last choice in responding to a student who loses control of his or her behavior and threatens injury to him or herself or others. (Lefkowitz Affidavit para 18). HTLA staff is also trained to use proper and safe physical restraint procedures when restraint is necessary as a last resort to prevent injury. (Lefkowitz Affidavit para 15).

Physical restraint is not child abuse or neglect - it is a sometimes necessary means to prevent a student from injuring himself or herself or others. (Lefkowitz Affidavit para 19).

HTLA parents are informed upon admission that their children will be restrained if necessary to avoid injury to the student or others. (Fact Stipulation Nos. 9 and 10 and Exhibits A and B).

HBOE has adopted a policy regarding student records in compliance with the Family Educational Rights and Privacy Act, 20 U.S.C. Section 1232g (FERPA). HPS does not provide notice to parents that parent names or contact information will be disclosed upon request without their individualized consent or that parents have the right to object to the release of such information without prior consent. (Cruz-Serrano Affidavit paras 4 – 5).

HPS takes allegations of child abuse or neglect in all of its schools very seriously. (Johnson Affidavit para 5). HPS' Department of Human Resources has received reports of alleged misconduct involving potential abuse or neglect of HTLA students by staff both from HTLA administration and from DCF, whose responsibility it is to investigate incidents of potential child abuse or neglect. (Johnson Affidavit para 6).

HBOE's Human Resources Department promptly investigates such reports of abuse or neglect. Where DCF is involved, the Human

Resources Department fully cooperates with DCF in a coordinated investigation. (Johnson Affidavit para 7).

DCF reports the findings of its investigations of alleged abuse or neglect to Superintendent Henry, who shares them with the Human Resources Department. (Johnson Affidavit para 8). HPS has taken and will continue to take[1] corrective action in any case involving an HPS or DCF investigation that substantiates child abuse or neglect by HPS staff in any school. (Johnson Affidavit para 11).

At least over the past two years, DCF has not substantiated abuse or neglect in any incident at HTLA. In fact, as recently as June 29, 2004, DCF reported that it did not substantiate abuse or neglect in a reported incident at HTLA. (Johnson Affidavit paras 9 and 10).

In or before February 2004, Plaintiffs decided to investigate HTLA jointly with The Office of the Child Advocate (OCA). (Fact Stipulation No. 15). Plaintiff OPA and OCA sent Defendant Henry a letter dated February 3, 2004, notifying him of the investigation. (Fact Stipulation No. 16 and Exhibit D).

Representatives of Plaintiff OPA and OCA went to HTLA on February 10, 2004 announcing to the school's Principal their intentions.

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[1] Nearly all HPS employees are members of collective bargaining units and have the right to challenge disciplinary actions before a neutral arbitrator. In addition, the Teacher Tenure Act affords tenured teachers the right to a neutral hearing panel in all discharge cases. (Johnson Affidavit para 11).

Defendant Henry's representative, Principal Macauley, refused to allow Plaintiff OPA and OCA access to HTLA documents and did not allow Plaintiff OPA and OCA access to students at the HTLA facility for interviews or observations. (Fact Stipulation No. 17).

Plaintiff OPA, OCA and Defendant Henry, and representatives of each, met on April 7, 2004 to discuss the matter. At the meeting, Defendant Henry agreed to and later did provide Plaintiff and OCA with requested documents that did not contain personally identifiable information derived from HTLA student records. Defendant Henry, however, refused to provide OPA or OCA with the names, addresses and telephone numbers of parents of HTLA students. (Fact Stipulation No. 18).

At that meeting, Defendant Henry's representatives explained to plaintiff and OCA during the April 7, 2004 meeting their belief that the Family Educational Right to Privacy Act [FERPA], 20 U.S.C. Section 1232g, prevents the disclosure of student records and access to students for interviews and observations, absent parent consent. (Fact Stipulation No. 19).

Defendants' representatives and Plaintiffs' representatives exchanged correspondence concerning the matter during the following months, but were unable to come to a meeting of the minds. (Fact Stipulation No. 22 and Exhibits E, F, G, H, I and J). This suit followed.

In the meantime, on August 30, 2004 HPS delivered documents to OPA's co-investigator, OCA, pursuant to a subpoena issued by OCA for HTLA secondary level student education records. (Lefkowitz Affidavit para 20). See Exhibit K. Included in the records that were provided were student Individualized Education Plans that identify the name of each student's parent(s) along with address and telephone number. Also included among the documents provided pursuant to the subpoena were records of student restraint and seclusion at HTLA. (Lefkowitz Affidavit para 21).

Argument

A. Standard for Issuing Permanent Injunction

OPA's burden here is to establish "the absence of an adequate remedy at law and irreparable harm if the relief is not granted" and that the balance of equities tips in favor of the moving party. N.Y. State Nat'l Org for Women v. Terry, 886 F.2d 1339, 1362 (2d Cir. 1989); Sierra Club v. Hennessey, 695 F.2d 643, 647 (2d Cir. 1982). In addition, because it is seeking a permanent injunction, OPA must show actual success on the merits of its claims. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n. 12 (1987).

B. OPA Cannot Establish Success On the Merits

1. *FERPA and IDEA Prohibit The Requested Access*

Two federal statutes, the Family Educational Rights to Privacy Act, 20 U.S.C. Section 1232g (FERPA) and the Individuals with Disabilities in Education Act, 20 U.S.C. Section 1400 et seq (IDEA) prohibit public school systems from providing the information and the access requested by OPA without individualized and specific parent[2] consent.

FERPA broadly mandates that educational institutions receiving federal funding must implement a strictly defined policy to maintain the confidentiality of "education records" and "information contained therein." With exceptions that do not apply here[3], schools may allow disclosure only with specific parent consent.

FERPA provides, in part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following . . ."

20 U.S.C. Section 1232g(b).

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[2] For ease of discussion, the term "parent" consent is intended to include also the consent of a student's legal guardian or an adult student.

[3] FERPA allows disclosure without parental consent to school officials with an educational need for the information, school systems to which the student seeks to enroll, and the state education department for compliance purposes, among other things. 20 U.S.C. Section 1232g(b)(A) through (J). None of those exceptions applies in this case, however.

"Directory Information" is defined in paragraph (5) of subsection (a) as follows:

> (A) For the purpose of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.
> (B) Any educational agency or institution making public directory information shall give public notice of the categories of information which has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

"Education records" are defined broadly:

> [T]hose records, files, documents and other materials which
> (i) contain information directly related to a student; and
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution

20 U.S.C. Section 1232g(a)(4)(A).

"Personally identifiable information" is defined in the FERPA implementing regulations as follows:

> Personally identifiable information includes, but is not limited to:
> (a) The student's name;
> (b) The name of the student's parent or other family member;
> (c) The address of the student or the student's family;
> (d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable.

34 C.F.R. Section 99.3.

HBOE has not notified parents, as FERPA would require for disclosure of "directory information," that their names or contact information is subject to disclosure without consent[4]. (Cruz-Serrano Affidavit para 5).

IDEA also mandates that the Secretary of Education "in accordance with the provisions of [FERPA] . . . assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by . . . local educational agencies pursuant to" . . . IDEA. 20 U.S.C. Section 1417(c).

The OPA's request for the names and contact information of HTLA parents as well its request for access to HTLA for interviews and observations of students and staff run afoul of the mandates of FERPA and IDEA. It is beyond dispute that the names and addresses and telephone numbers of HTLA students' parents constitutes "personally identifiable" information concerning students that is contained in their "education records." Even if HPS could legally disclose this information as

[4] Section 1232g(a)(5) defining "directory information" suggests that an educational institution may not legally designate parent names and addresses as "directory information" subject to disclosure without specific consent.

"directory information," it has not provided the mandatory notice to parents of its intention to do so and therefore may not disclose the information without parental consent.

In addition, the access that OPA requests to the HTLA school building for the purpose of observing and interviewing students and staff necessarily will involve disclosure of "personally identifiable" information contained in the students' education records at the least because all of the students at HTLA are identified as requiring special education or related services under IDEA - a "personally identifiable" fact contained in their education records. Without question, any observation or interview of students or staff will also reveal or disclose student names or other personal characteristics that would make the students easily traceable.

Necessarily, such access would also reveal the students' specific special education identification as "seriously emotionally disturbed" since all HTLA students fall within this category. In all likelihood, such access would also involve disclosure of the students' specific special education programs, including for instance provisions for therapeutic services, language services and individual behavior intervention plans.[5] Information reflected in the various evaluations and assessments of HTLA students' academic, cognitive and emotional strengths and weaknesses would likely

[5] Indeed, from OPA's Memorandum in Support of Motion for Preliminary Injunction, it appears that OPA is particularly interested in the students' individual behavior intervention plans. (Plaintiff's Memorandum, p. 6).

be revealed through such interviews. The requested interviews would also likely involve disclosure of students' academic achievement and disciplinary history.

All of this information – likely to be revealed through the requested access – is personally identifiable information contained in students' education records and is protected from disclosure without parental consent under FERPA and IDEA.

Superintendent Henry made these facts clear to OPA and its co-investigator OCA both during their meeting on April 7, 2004 and in subsequent correspondence. (Fact Stipulation No. 21 and Exhibits E, F, G, H, I and J)

2. *OPA's Statutory Jurisdiction Does Not Encompass The Requested Access Or Override FERPA and IDEA Mandates*

OPA argues that its federal authorizing statutes, the DD, PAIMI and PAIR Acts[6] (OPA Acts) permit the access it seeks and "trump" FERPA and IDEA. Both aspects of this argument are incorrect. None of the OPA Acts authorize the requested access in this case, and even if they did, FERPA and IDEA clearly take precedence.[7]

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[6] 42 U.S.C. Sections 15041 et seq (DD Act); 42 U.S.C. Sections 10801 et seq (PAIMI Act); 29 U.S.C. Section 794e (PAIR Act).

[7] Plaintiffs also seem to concede FERPA's and IDEA's role in their request when they argue that they will use parent names to obtain individualized consent for access to student records. See Plaintiff's Memorandum, p. 10. The

OPA's claim that the OPA Acts override or "trump" FERPA and IDEA essentially argues that the OPA Acts work a repeal by implication of FERPA and IDEA. The law is clear that when two federal statutes appear in conflict, the courts will only rarely find such a repeal by implication:

> [T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.

Morton v. Mancari, 417 U.S. 535, 550 (1974).

> The rarity with which [the Court] has discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue."

Matsushita Elect. Industrial Co. v. Epstein, 516 U.S. 367, 381 (1996).

This is not an appropriate case for implied repeal because the various federal statutes can be harmonized. As discussed below, the OPA Acts simply do not authorize the sweeping demands of OPA in this case.

It is instructive and significant that, according to OPA's papers[8] and as far as defendants have been able to ascertain, the only court in the United States to address the precise issue presented here – whether the OPA is allowed access to personally identifiable information contained in public school education records without parental consent – has decided that OPA is not allowed such access.

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argument is circular, however, because the parent names are also protected information under FERPA and IDEA.

[8] Plaintiff's Memorandum, p. 20.

In Washington Protection and Advocacy System, Inc. v. Evergreen School District, C03-5062 FDB (W.Wash 2003) (attached), the district court denied the Washington OPA's request for a preliminary injunction seeking student names and parent names and contact information for those participating in a special education program operated by the Evergreen public school district. As here, the Washington OPA claimed that it had probable cause to suspect abuse or neglect in the program based on complaints about a student's special education program.

The Washington court denied the requested injunction in a thoughtful opinion noting, among other things, that the court "is not sufficiently satisfied that the [OPA Acts] override FERPA and IDEA." (Id. at p. 4). The Court went on to find that the OPA had not demonstrated sufficient probable cause to believe that the school system was abusing or neglecting any student and that disclosure of contact information for all students in the special education program was not warranted. (Id. at p. 5 and 6.)

The Washington court relied in part on staff comments conceding that the DD Act does not supercede FERPA in a discussion of proposed implementing regulations:

> Comments: several commenters requested including regulations to indicate that the provisions regarding access of records under the Developmental Disabilities Act and regulations take precedence over other Federal statutes and regulations. If that was not possible, commenters wanted

> language to specifically reference the Federal Education Rights and Privacy Act (FERPA) which sets out certain restrictions on the release of records by educational institutions (20 U.S.C. 1232(g)) [sic]; 34 CFR part 99
> Response: We did not include such a provision because such a requirement goes beyond the authority of the Developmental Disabilities Act and these regulations. However, we have included language comparable to the PAIMI provisions at Section 1386.22(i) on Delay or Denial of Access. If a system is denied access to facilities and its programs, individuals with developmental disabilities, or records covered by the Act or these regulations, it shall be provided promptly with a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name and address of the legal guardian, conservator, or other legal representative of an individual with developmental disabilities.[9]

61 FR 51142-01

The only other court to approach addressing the issue was the district court in Michigan Protection and Advocacy Service, Inc. v. Miller, 849 F.Supp. 1202 (W.D.Mich 1994). There, the Michigan OPA sought access to residential facilities for developmentally disabled and mentally ill individuals operated by the Michigan Department of Social Services. Although the Michigan OPA was not, as here, seeking information contained in education records, but instead access to individuals in a residential program, the district court held that such access was not barred by IDEA.

[9] The regulations to which staff refer do not purport to require public school systems to disclose the names or addresses of parents. See discussion at p. 28-29 below.

Noting that "Section 1232g(b) [FERPA] does prohibit federal funding to educational institutions which permit the release of records without parental consent," the court held that the DD and PAIMI Acts authorized the OPA access to the state facility. Michigan Protection & Advocacy Services Inc. v. Miller, 849 F.Supp. 1202, 1208 (W.D. Mich. 1994).

The Miller case is readily distinguishable from this situation because the facilities involved were residential programs, not educational institutions. The request apparently did not even implicate education records or personally identifiable information contained in education records governed by FERPA or IDEA, but instead sought access to individuals in residential programs. Moreover, and unlike HTLA, the residential facilities there housed individuals with developmental disabilities.[10]

3. *The DD Act Does Not Apply To HTLA Students*

The DD Act would not authorize OPA's requested access to the HTLA students or information concerning their parents even if there was probable cause to suspect abuse or neglect because HTLA students are

[10] The DD Act, as discussed more fully below, does not apply to HTLA's students because they do not suffer from developmental disabilities as defined there. Unlike the PAIMI Act, which addresses individuals with mental illness and arguably does apply to HTLA students, the DD Act authorizes broader investigatory "access" to clients without parental or guardian consent. See discussion at page 23 below.

not developmentally disabled as defined in the Act. The DD Act, at 42 U.S.C. Section 15043(a)(2) authorizes the OPA to:

> (B) investigate incidents of abuse and neglect of *individuals with developmental disabilities* if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

42 U.S.C. Section 15043(a)(2)(emphasis added).

The DD Act further authorizes OPA to:

> (H) have access at reasonable times to any *individual with a developmental disability* in a location in which services, supports, and other assistance are provided to such an individual, in order to carry out the purpose of this part;
>
> (I) have access to all records of –
> - (i) any *individual with a developmental disability* who is a client of the system [with consent of client or guardian];
> - (ii) any *individual with a developmental disability* [if individual cannot consent and does not have a guardian and a complaint has been received or there is probable cause to suspect abuse or neglect];
> - (iii) *any individual with a developmental disability* [if guardian fails or refuses consent and there is a complaint or probable cause to suspect abuse or neglect after the OPA offers assistance].

42 U.S.C. Section 15043(a)(2)(emphasis added).

"Developmental disability" is defined by the DD Act as follows:

> (A) In general. The term "developmental disability" means a severe, chronic disability of an individual that –
> - (i) is attributable to a mental or physical impairment or combination of mental and physical impairments;
> - (ii) is manifested before the individual attains age 22
> - (iii) is likely to continue indefinitely;

(iv) results in substantial functional limitations in 3 or more of the following areas of major life activity:
  (J) Self-care.
  (K) Receptive and expressive language.
  (L) Learning.
  (M) Mobility.
  (N) Self-direction.
  (O) Capacity of independent living.
  (P) Economic self-sufficiency; and

(v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

As the Lefkowitz Affidavit establishes, the HTLA students are not individuals with developmental disabilities or traumatic brain injuries as defined by the DD Act. Students who do have developmental disabilities are provided services at sites other than HTLA. (Lefkowitz Affidavit paras 8 - 10).

Accordingly, the DD Act simply would not authorize OPA access to either HTLA students or their records even if other required conditions for access were met.

4. *The PAIMI Act Does Not Authorize the Requested Access*

The PAIMI Act, upon which OPA also relies, comes closer to covering HTLA students[11], but provides narrower investigatory power than the DD Act, and clearly does not authorize the access requested here.

[11] Although their qualifying identification is "seriously emotionally disturbed" which carries a different definition under IDEA than the PAIMI Act's definition of "mental illness," most HTLA students probably qualify as individuals with mental illness for PAIMI's purposes.

The PAIMI Act authorizes OPA to:

(1)(A) investigate incidents of abuse and neglect of *individuals* with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

. . .

(3) have access to facilities in the State providing care or treatment;

(4) in accordance with section 10806 of this title, have access to all records of –

(A) any *individual* who is a client of the system if such *individual*, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;

(B) any *individual* . . . –

(i) who by reason of the mental or physical condition of such *individu*al is unable to authorize the system to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the system or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect; and

(C) any *individual* with a mental illness, who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy, whenever –

(i) such representative has been contacted by such system upon receipt of the name and address of such representative;

(ii) such system has offered assistance to such representative to resolve the situation; and

(iii) such representative has failed or refused to act on behalf of the individual.

42 U.S.C. Section 10805(a)(emphasis added).

OPA's implementing regulations define "facility" for the purpose of Section 10805(a)(3)'s provision for "access to facilities in the State" as follows:

> Facility includes any public or private residential setting that provides overnight care accompanied by treatment services. Facilities include, but are not limited to the following: general and psychiatric hospitals, nursing homes, board and care homes, community housing, juvenile detention facilities, homeless shelters, and jails and prisons, including all general areas as well as special mental health or forensic units.

42 C.F.R. Section 51.2

A review of the law makes plain that OPA is not authorized to have the requested access. First, OPA may not have access to the HTLA facility because HTLA clearly is not a "facility" for the purposes of Section 10805(a)(3) - HTLA is not a residential setting and does not provide overnight care. (Lefkowitz Affidavit para 6).

Second, OPA may not have parent name or contact information for any individual student under subpart (A) of Section 10805(4) because OPA has not produced authorization for disclosure of such record information from any OPA client.

Third, OPA may not have the name or contact information for any individual HTLA student under subpart (B) of Section 10805(4) because HTLA students have parents or others who are authorized to make decisions about their schooling. (Lefkowitz Affidavit para 7).

Fourth, OPA may not have the name or contact information for any individual HTLA parent under subpart (C) Section 10805(4) because it has not demonstrated that it has received a complaint with respect to any individual student and has not claimed or demonstrated that the health or safety of such individual student is "in serious and immediate jeopardy"[12] and has not demonstrated that it has contacted such student's representative, offered assistance, and that such representative has failed to act.

Finally, OPA may not have the parent name or contact information for HTLA students in general because Section 10805(a)(4) manifestly does not authorize disclosure in the face of generalized complaints or probable cause that are not specific to particular individuals. Each subpart of Section 10805(a)(4) makes reference to complaints regarding *individuals* and probable cause concerning *individuals*. The Act contains no provision for generalized access to records or the confidential information contained in them.

In summary, like the DD Act, the PAIMI Act simply does not authorize the access or disclosure that OPA seeks here. Even if the evidence supported OPA's claim that it has probable cause to suspect that

[12] OPA's claim that some students have been injured during restraint, or have been secluded inappropriately or do not have individual behavior intervention plans is a far cry from evidence of serious and immediate jeopardy to safety or health.

HTLA students are being subject to abuse or neglect, OPA's investigatory authority does not extend so far as it claims.

Significantly, Congress has provided more limited investigatory powers under the PAIMI Act than under the DD Act. While investigators under the DD Act may have access to any "location in which services, supports, and other assistance are provided," (42 U.S.C. 15043(a)(2)) the PAIMI Act limits such access to "residential setting[s] that provide overnight care . . ." (42 C.F.R. Section 51.2). In addition, the PAIMI Act limits access to records without consent and where there is a guardian who does not cooperate to situations in which there is a threat that the "health or safety of the individual is in serious and immediate jeopardy." (42 U.S.C. Section 10805(a)(4)(c)).

5. *The PAIR Act Does Not Authorize The Requested Access*

OPA's final claim to authority is based on the PAIR Act. The Pair Act is a funding statute for OPA to provide services for individuals with a broader range of disabilities than those identified under the DD Act or the PAIMI Act. It manifestly does not mandate access to confidential education records or the information contained in them for such individuals.

6. *HTLA Students Are Not Subject To Abuse or Neglect*

OPA's investigatory powers under each of the OPA Acts hinges on the existence of probable cause to believe that an individual is being subjected to abuse or neglect. Here, the claim is based on the allegation that some HTLA students and parents have reported inappropriate physical restraint or seclusion and that some students have claimed physical injury as a result of restraint. In addition, OPA makes the unsupported allegation that HTLA students have not been adequately assessed before entering HTLA and/or that they are not provided with individualized behavior intervention plans.

Defendants dispute the factual assumptions underlying all of these arguments. While it is true that some HTLA students have been physically restrained and/or secluded, there is no evidence that these steps were taken inappropriately. To the contrary, the investigations that have been conducted by DCF, a state agency charged with the responsibility to investigate reports of abuse or neglect, indicate otherwise. DCF has not substantiated abuse or neglect at HTLA in at least two years. (Johnson Affidavit para 9).

It goes without saying that HPS takes allegations of alleged abuse or neglect very seriously. Although there have been no recent substantiated cases at HTLA, HPS certainly would take corrective action with any employee involved in such an incident. (Johnson Affidavit 11).

Nor can an inference be drawn that the mere existence of a restraint or seclusion constitutes abuse or neglect. Restraint procedures are sometimes necessary - as a last resort - to prevent injury. Seclusion is sometimes necessary to remove a child whose behavior is disruptive or dangerous and cannot be de-escalated. HTLA parents acknowledge that restraint may be necessary for their child upon admission to the program. (Lefkowitz Affidavit paras 16 – 19; Stipulation of Fact Nos. 9 and 10 and Exhibits A and B).

HTLA staff is trained in physical management and de-escalation procedures, as well as appropriate measures for physical restraint. Records are maintained of each incident of restraint or seclusion. This is not abuse or neglect. (Lefkowitz Affidavit paras 13-15 and 18 and 19).

In addition, the unsubstantiated claim that students are placed at HTLA without adequate evidence or assessment of their needs is belied by the facts. Each student's placement at HTLA is determined by a team consisting of the student's parent and school staff who are knowledgeable about the student's needs. Parents are afforded every opportunity to participate in placement decisions. (Lefkowitz Affidavit para 11).

Finally, the majority of HTLA students do have individualized behavior intervention plans. These plans are based on a functional behavioral assessment of that student's needs. (Lefkowitz Affidavit para 12). Thus, although all HTLA students are expected to comply with certain

minimum standards of conduct (Exhibit C), their behavior intervention plans are individualized. (Lefkowitz Affidavit para 12).

The evidence presented by OPA does not rise to the level of probable cause to suspect "abuse" or "neglect" as defined in the PAIMI or DD Acts.[13] Although HTLA students have been restrained and some have claimed minor injury, this does not establish either abuse or neglect - restraint is sometimes necessary precisely in order to prevent injury! Nor would the absence of behavior intervention plans or adequate assessments legally constitute or abuse or neglect, should they be proven.

Moreover, even if OPA had demonstrated that an individual HTLA student was subjected to abuse or neglect, this would not establish a generalized "probable cause" as to the entire school. Both the PAIMI and DD Acts speak only of probable cause to access records of *individuals*, not groups. Indeed, the decisions cited by OPA in support of a generalized access to information stand for just the opposite. In Pennsylvania Protection and Advocacy, Inc. v. Royer-Greaves School for the Blind, 1999 WL 179797 (E.D.Pa 1999), the court held that alleged general complaints

[13] The definition of "abuse" is "any act or failure to act which was performed or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused or may have caused, injury or death to an individual . . . ." 42 C.F.R Section 51.2 (PAIMI Act); 45 C.F.R. Section 1386.10 (DD Act). The definition of "neglect" is "a negligent act or omission by an individual responsible for providing treatment or habilitation services which caused or may have caused injury or death to an individual . . . or which placed an individual . . at risk of injury or death." (Id.)

of unsafe conditions did not constitute sufficient individualized probable cause for release of individual records)[14].

In Georgia Advocacy Office v. Borison, 520 S.E. 2d 701 (1999), the court held that an allegation that physicians conducted a fraudulent drug study was sufficient to support access only to records of particular study participates who fit within the OPA Act's guidelines and who were subject to abuse or neglect. There, the court ordered the trial court to identify such individuals through an in camera review of the drug study records, and did not allow plaintiffs access to all records. Georgia Advocacy Office v. Borison, 520 S.E. 2d 701, 784 (1999).

7. *OPA Has No Authority To Access Parent Names Or Contact Information*

OPA's claimed right to parent "directory information" is also beyond its authority. Ironically, the term "directory information" comes only from FERPA, which manifestly does not include parent names or contact information in its definition of that term. 20 U.S.C. Section 1232g(a)(5)(A). Washington Protection and Advocacy System, Inc. v. Evergreen School District, C03-5062 FDB (W.Wash 2003) (attached), p. 5 (parent names and contact information is not "directory information" under FERPA.)

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[14] Although the Royer-Greaves case also directed the defendant to provide a list of all guardians and contact information under the DD Act and its regulations, that portion of the decision is not applicable here. OPA is not entitled to parents names or addresses under the similar provisions of the PAIMI Act. See discussion at pages 28-29 below.

Moreover, even if it could, HBOE does not notify parents that their names or contact information will be disclosed without consent or provide an opportunity to prevent such disclosure. (Cruz-Serrano Affidavit para 6). Without such notice, HBOE may not disclose even directory information.

None of the OPA Acts mentions "directory information" or directs that such information be disclosed to OPA. Nor do any of the OPA Acts make any provision for disclosure of parent names or contact information.

The PAIMI Act's regulations do state that "the P&A system shall be provided promptly with . . . in the case of a denial [of access to facilities or records covered by the Act] for alleged lack of authorization, the name, address and telephone number of the legal guardian, conservator, or other legal representative of an individual with mental illness." C.F.R. Section 51.43. This regulation, however, has no application here because the access requested is not authorized under the Act, as discussed above.

In addition, as a general matter, HTLA parents are not the "legal guardian, conservator, or other legal representative of an individual with mental illness" as that term is defined in the regulations.[15] Most HTLA students live with parents or other family members. (Lefkowitz Affidavit

[15] 42 CFR Section 51.2 states: "[L]egal guardian, conservator, and legal representative all mean an individual whose appointment is made and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers, and having authority to consent to health/mental health care or treatment of an individual with mental illness. . . ."

para 7). For the remainder, OPA is free to seek consent from DCF for those students who are in the custody of DCF.

The PAIMI regulations clearly contemplate disclosure under situations that are very different than presented here – where individuals with mental illness are resident in institutions, have been determined to be incompetent and are under the guardianship of court appointed conservators or similar representatives. Unlike HTLA students who go home to families every day, the individuals contemplated by the regulations are at the mercy of their conservators because they cannot help themselves and are isolated from family, community and advocates like OPA.

HTLA students do not have "guardians" as contemplated in the regulation. They are children in the custody of their parents or other family members. They are not incompetent. They are not isolated. They are not helpless or at the mercy of "guardians." Section 51.43 surely was not intended to address the situation of the HTLA students who have access to many resources, including advocates like OPA, to address potential incidents of abuse or neglect.

C. Adequate Legal Remedies Are Available; No Irreparable Injury

Even if OPA could establish success on the merits of its claims, it cannot demonstrate the irreparable injury or the absence of an adequate remedy at law to protect students from abuse or neglect. Connecticut's

child abuse and neglect laws, IDEA and other protections are available to protect students from alleged abuse and neglect.

Significantly, and unlike the severely disabled people who are isolated in residential treatment facilities for the mentally ill or developmentally disabled, the HTLA students are neither incompetent nor isolated. They go home every day to their parents and families. The students and their parents have access to community resources, like the OPA, the Hartford Police department and lawyers and advocates who can and will protect their interests.

The HTLA students and their parents have a broad array of remedies available to them in the event that they are abused or neglected. They can pursue criminal remedies for assault. See C.G.S. Section 53a-59 (criminal assault). They can sue the school district for negligence. See Purzycki v. Town of Fairfield, 244 Conn. 101 (1998)(negligence action against school system). They can file a complaint with the Connecticut Department of Education to enforce the education laws. See C.G.S. Section 10-4b.

In addition, IDEA provides comprehensive procedural and substantive protections for special education students. See 20 U.S.C Section 1400 et. seq. The procedural safeguards available under IDEA include the right to examine records, the right to an impartial hearing to determine whether a student's program is being implemented appropriately

or whether independent evaluations are necessary, the right to appeal, and the right to file a complaint with the United States Department of education. Notably, attorneys' fees are also available to the prevailing party in administrative and litigation matters brought under IDEA. 20 U.S.C. Section 1415.

The United States Department of Education has implemented an extensive network of regulations to enforce IDEA. 34 C.F.R. Part 300. State law also protects special education students (C.G.S Section 10-76a et seq) and sets forth an administrative procedure for review of complaints regarding special education programs. C.G.S. Section 10-76h.

Any parent of an HTLA student who believes that the student's program or placement at HTLA is not appropriate or is not based on sufficient evaluative data or is not being implemented correctly, may pursue adequate administrative remedies under IDEA. Any claim that a student has been inappropriately restrained or secluded may be addressed and remedied through the IDEA procedures. If a student requires an individualized behavior intervention plan and one has not been provided, the parent may pursue IDEA remedies. If a student has not been adequately assessed before placement at HTLA, the parent may pursue IDEA remedies.

In addition, Connecticut state law establishes a strict mechanism for investigating and remedying incidents of child abuse and neglect in,

among other places, public schools. C.G.S. Section 17a-101 et seq. Nearly all public school employees are mandated to report suspected child abuse or neglect to DCF. Id. Students, parents or others who suspect abuse or neglect are also free to report incidents to DCF. Penalties are imposed for failure of mandated reporters to report suspected abuse, and employers are prohibited from discriminating against those who make reports. C.G.S Section 17a-101a and 101e.

DCF, in turn, is mandated to investigate such reports within thirty days and, in the case of an incident involving a public school system, to report its findings to the Superintendent of Schools. C.G.S. Section 17a-101i.

As the Affidavit of Gail Johnson establishes, HPS takes reports of child abuse or neglect seriously, investigating all incidents and taking appropriate corrective action with involved employees. HPS coordinates its investigations with DCF and receives completed DCF investigation reports. Although DCF has investigated reports of abuse or neglect at HTLA, its investigations have not substantiated abuse or neglect. (Johnson Affidavit paras 5 - 8). If DCF's investigation or HPS' own investigation had substantiated abuse or neglect, appropriate corrective action would have been taken. (Johnson Affidavit para 11).

In short, there are an abundance of legal remedies available to address incidents of abuse or neglect of HTLA students that do not require

the unauthorized disclosure of education records or information contained in them. OPA certainly has every right to pursue any of these remedies on behalf of its clients.

OPA's focus on impediments to carrying out its own responsibilities as an OPA as "irreparable injury" misses the point. The only injury or harm that could stem from abuse or neglect of HTLA students is injury to the students themselves, not to OPA. Indeed, OPA recognizes this fact when it argues that the OPA Acts are "civil rights laws." (Plaintiff's Memorandum, p. 12). If the OPA Acts are civil rights laws, they are laws protecting the civil rights of the students, not the agency.

In light of the multitude of available remedies to correct incidents of abuse or neglect at HTLA, OPA cannot establish either irreparable injury or the absence of available legal remedies in support of its claim for injunctive relief.

D. <u>OPA Has Access To Parents Through OCA Subpoena</u>

Significantly, OPA already has the names and contact information for HTLA's secondary[16] parents as a result of defendant Henry's compliance with a recent subpoena issued by OPA's co-investigator, the Office of the Child Advocate. (Lefkowitz Affidavit paras 20 and 21).

[16] HTLA serves students in all school grades. OCA's recent subpoena sought records only related to its secondary level students.

Although OCA has not served a subpoena for records relating to HTLA's primary grade parents, nothing prevents it from doing so.

OPA and OCA are free to contact HTLA parents using the information provided in the subpoenaed documents to obtain access to students for the purposes of the interviews they seek. OPA's effort here to undermine the rights of the HTLA parents to control access to their children and their education records is inappropriate and unnecessary. Parents do and should have the right to disclose or not disclose confidential information concerning their children. OPA should not be permitted to shut parents out of the process.

E. The Requested Access Would Disrupt HTLA Operations And Deny Parental Rights

The Court should also consider the tremendously disruptive impact on HTLA's educational operation that granting OPA's request would bring. Not only would the access take valuable time away from instruction - HTLA's important mission - but would inevitably undermine parent and student confidence in HTLA's effectiveness and credibility.

Students and parents would certainly be confused, and might interpret the process as implying that their teachers, therapists and administrators have done something wrong or inappropriate. HTLA's effectiveness would be undermined, to the detriment of the very students that OPA seeks to protect.

OPA's request also ignores the legitimate and important interest of parents to control access to their children and their confidential information. Indeed, OPA's demand is for access without notice to parents and even over parent objection! As the public policy underlying FERPA makes clear, parents have the right to control who knows what about their children, at least in the public schools.

In the absence of impropriety at HTLA and in light of the many other private and government watchdogs with responsibility for ensuring HTLA's compliance with laws and regulations, the balance of hardships weighs heavily against allowing the disruption and violation of parental rights that OPA's request would entail. Sierra Club v. Hennessey, 695 F.2d 643, 647 (2d Cir. 1982).

Conclusion

For all of the foregoing reasons, defendants respectfully request that the Court deny the requested injunction.

DEFENDANTS HARTFORD
BOARD OF EDUCATION AND
ROBERT HENRY

By:_____

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF
PROTECTION AND ADVOCACY FOR PERSONS
WITH DISABILITIES, and JAMES MCGAUGHEY,
Plaintiffs, CASE NO
v 304CV1338(JCH)
.
HARTFORD BOARD OF EDUCATION,
HARTFORD PUBLIC SCHOOLS, and
ROBERT HENRY,
Defendants.

Affidavit of Jody S. Lefkowitz

1. I am Senior Director for Exceptional Children for the Hartford Public Schools (HPS).

2. I am over the age of eighteen and believe in the obligation of the oath.

3. My responsibilities include supervision of HPS' Special Education Department.

4. The Hartford Transitional Learning Academy (HTLA) houses one of HPS' programs for students in all grades who have been identified as requiring Special Education or Related Services pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. Section 1400 et seq.

5. HTLA is a program for students who are identified as "seriously emotionally disturbed" and require a therapeutic school environment.

6. HTLA is not a residential program and does not provide any overnight services.

7. Most HTLA students are in the custody of a parent or another family member. Although some are in the custody of the Department of Children and Families, this is the exception rather than the rule.

8. HTLA is not a program for students who have severe or chronic developmental disabilities that result in substantial functional limitations of major life activities.

9. HTLA is not a program for students who suffer from severe or disabling traumatic brain injuries.

10. Students who suffer from severe or chronic developmental disabilities that result in substantial functional limitations of major life activities or from severe or disabling traumatic brain injuries are placed in other programs within HPS or in qualified and approved outside facilities, and not at HTLA.

11. The decision to place students at HTLA is made by the individual student's Pupil Planning Team (PPT) at a meeting in accordance with the requirements of IDEA. Each student's PPT team consists of the student's parents or guardian as well as teachers, support staff and

administrators who are familiar with the student's needs. Parents and guardians are notified of all PPT team meetings, and every effort is made to afford parents and guardians a full opportunity to attend and participate in the decision making process.

12. Individualized behavior intervention plans have been developed for the majority of HTLA students either before or shortly after their entry to HTLA and are based on an individualized functional behavior assessment of the student's needs.

13. HPS has trained the HTLA teaching staff, as well as other special education teachers who work with special education students, concerning the development and implementation of behavior intervention plans.

14. HTLA staff has also been trained to use appropriate and safe de-escalation and physical management procedures with students who lose control of their behavior.

15. HTLA staff has also been trained to use proper and safe physical restraint procedures as a last resort to prevent injury.

16. Based on the severity of behavior, it is sometimes necessary to seclude a student whose behavior is disruptive or dangerous and cannot be immediately de-escalated. Records are maintained of seclusion incidents.

17. In addition, based on the severity of behavior, it is sometimes necessary to physically restrain students whose behavior presents a risk of injury to themselves or others. Again, records are maintained of each restraint incident.

18. HTLA staff are trained and instructed that physical restraint is the last choice in responding to a student who loses control of his or her behavior and threatens injury to him or herself or others.

19. Physical restraint is not child abuse or neglect – it is sometimes a necessary means to prevent a student from injuring himself or herself or others.

20. On August 30, 2004 HPS delivered documents to the State of Connecticut Office of the Child Advocate pursuant to a subpoena issued for HTLA secondary level student records.

21. Included in the records that were provided were student Individualized Education Plans that identify the name of each student's parent or guardian along with address and telephone number. Also included among the documents provided pursuant to the subpoena were records of student restraint and seclusion at HTLA.

_____
Jody S. Lefkowitz
Senior Director for Exceptional Children

Subscribed and sworn to before me this day of September, 2004 at Hartford, Connecticut.

_____
Commissioner Superior Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF
PROTECTION AND ADVOCACY FOR PERSONS
WITH DISABILITIES, and JAMES MCGAUGHEY,
Plaintiffs, CASE NO
v 304CV1338(JCH)
.
HARTFORD BOARD OF EDUCATION,
HARTFORD PUBLIC SCHOOLS, and
ROBERT HENRY,
Defendants.

Affidavit of Sandra Cruz-Serrano

22. I am Director of Administration and Operations for the Hartford Public Schools (HPS).

23. I am over the age of eighteen and believe in the obligation of the oath.

24. My responsibilities include supervision of several of HPS' operational functions.

25. The Hartford Board of Education has adopted a policy regarding student records in compliance with the Family Educational Rights and Privacy Act, 20 U.S.C. Section 1232g (FERPA).

26. HPS does not provide notice to parents that parent names or contact information will be disclosed upon request without their

individualized consent or that parents have the right to object to the release of such information without prior consent.

_____
Sandra Cruz-Serrano

Subscribed and sworn to before me this day of September, 2004 at Hartford, Connecticut.

_____
Commissioner Superior Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF
PROTECTION AND ADVOCACY FOR PERSONS
WITH DISABILITIES, and JAMES MCGAUGHEY,
Plaintiffs, CASE NO
v 304CV1338(JCH)
.
HARTFORD BOARD OF EDUCATION,
HARTFORD PUBLIC SCHOOLS, and
ROBERT HENRY,
Defendants.

Affidavit of Gail Johnson

27. I am Director of Human Resources for the Hartford Public Schools (HPS).

28. I am over the age of eighteen and believe in the obligation of the oath.

29. My responsibilities include supervision of HPS' personnel functions.

30. My department is responsible for investigating employee misconduct and taking or recommending that the Superintendent take appropriate corrective action.

31. We take reports of alleged abuse or neglect of students very seriously. We investigate each such incident promptly.

32. On occasion, my department receives reports of alleged misconduct involving potential abuse or neglect of HTLA students by staff.

We receive these reports both from HTLA administration and from the Connecticut Department of Children and Families (DCF), whose responsibility it is to investigate incidents of potential child abuse or neglect.

33. When we receive such reports, my department promptly investigates them. Where DCF is involved, my department's investigator fully cooperates with DCF in a coordinated investigation.

34. DCF reports the findings of its investigations to Superintendent Henry, who shares them with me.

35. DCF has not substantiated abuse or neglect in any incident at HTLA in at least the last two years.

36. In fact, DCF reported that it did not substantiate abuse or neglect in a reported incident at HTLA as recently as June 29, 2004.

37. HPS has taken and will continue to take[17] corrective action in every case involving an HPS or DCF investigation that substantiates child abuse or neglect by HPS staff.

_____
Gail Johnson
Director for Human Resources

Subscribed and sworn to before me this day of September, 2004 at Hartford, Connecticut.

_____
Commissioner Superior Court

[17] Nearly all HPS employees are members of collective bargaining units and have the right to challenge disciplinary actions before a neutral arbitrator. In addition, the Teacher Tenure Act affords tenured teachers the right to a neutral hearing panel in all discharge cases.

Certificate of Service

This is to certify that the foregoing was served by placing a copy in the United States mail, postage prepaid, at Hartford Connecticut this 27th day of September 2004 addressed as follows:

Nancy B. Alisberg
Paulette G. Annon
Office of Protection and Advocacy for
Persons with Disabilities
60B Weston Street
Hartford, CT 06120

_____
Ann F. Bird