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WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY DEPUTY

CV 03-05062, 2000000025

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1 **BACKGROUND**

2 This case was prompted by complaints WPAS received from Mr Finders, a parent of a
3 student with disabilities enrolled in the District WPAS is a protection and advocacy system ("P&A
4 system") designated by the Governor of the State of Washington under RCW 71A 10 080 to
5 implement a program for the protection and advocacy of the rights of persons with developmental
6 disabilities pursuant to the Developmentally Disabled Assistance and Bill of Rights ("DD") Act, 42
7 U S C § 15041 *et seq* , the Protection and Advocacy for Individuals with Mental Illness ("PAIMI")
8 Act, 42 U S C § 10801, *et seq* , the Protection and Advocacy for Individuals with Traumatic Brain
9 Injury ("PATBI") Act, the Protection and Advocacy for Individual Rights ("PAIR") Act
10 (hereinafter "the P&A Acts")

11 Mr Finders complained that his child along with other students with disabilities at Heritage
12 High School ("Heritage") were required by the District to collect garbage and recycling, as well as
13 lunchroom tables and chairs after school lunches as part of the school's WEP ¹ In addition, N F ,
14 Mr Finder's child, reported that a Heritage teacher required students with disabilities to collect
15 recyclable trash on a daily basis and cash in the recycling at a local store The teacher allegedly
16 saved and used the collected funds for field trips

17 Acting on these complaints, WPAS sent Heritage's Special Service Department a probable
18 cause letter on December 6, 2002 requesting right of access to names, addresses, and phone
19 numbers of all students and their parents or guardians who participate in both the special education
20 program and the WEP WPAS specifically stated in its December 6, 2002, letter that its probable
21 cause authority ("P&A authority") allows P&A's to investigate incidents of *abuse and neglect* of
22 individuals with disabilities if the incidents are reported to the system and there is probable cause to

23
24 ¹The record reveals that approximately 125 high school students in the District participate in
25 the WEP WEP participants qualify for "individualized educational programs" under the IDEA and
26 receive academic credit for their participation Participation in the WEP is voluntary and requires
parental permission

1 believe that the incidents occurred *See Decl of Tara Herival, Exh 3A*

2 The District, through its attorney, denied WPAS request claiming that WPAS lacked the
3 authority to obtain the information without parental consent The District maintains this position
4 here and argues that release of the requested information would violate Family Educational Rights
5 and Privacy Act ("FERPA"), 20 U S C § 1232g *et seq* and the Individuals with Disabilities
6 Education Act ("IDEA"), 20 U S C §§ 1400 *et seq* The District further argues that the WPAS does
7 not have probable cause to believe that students in the District are being abused and neglected

8 WPAS argues in its memoranda supporting its Motion for Preliminary Injunction that it has
9 a statutory right of access under the aforementioned P&A Acts WPAS does not agree that FERPA
10 and the IDEA trump its P&A authority WPAS also argues that Mr Finder's complaint is sufficient
11 to establish probable cause that disabled students in the District are being abused and neglected and
12 that the District is violating its constitutionally protected rights to freedom of speech and
13 association under the First Amendment to the United States Constitution

14 Resolution of this matter requires a determination as to whether WPAS has met the standard
15 for a preliminary injunction

16 **STANDARD FOR PRELIMINARY INJUNCTION**

17 To obtain a preliminary injunction, WPAS bears the burden of showing either (1) a
18 combination of probable success on the merits and the possibility of irreparable injury, or (2)
19 serious questions as to these matters and the balance of hardships tips sharply in its favor
20 *Stuhlbarg v Int'l Sales Co Inc v John D Brush & Co* , 240 F 3d 832, 839-840 (9th Cir. 2001)
21 These two tests represent "a continuum of equitable discretion whereby the greater the relative
22 hardship to the moving party, the less probability of success must be shown " *See Regents of Univ*
23 *of Calif v ABC, Inc* , 747 F 2d 511, 515 (9th Cir 1984)

24 Injunctions are classified as either "mandatory" (those commanding performance of acts on
25 the part of defendants) or "prohibitory" (those prohibiting acts on the part of defendants). *See*

1 *Meghrig v KFC Western, Inc* , 516 U S 479, 484-485 (1996) Although the factors for
2 consideration of mandatory and prohibitory injunctions are the same, mandatory injunctions are
3 subject to a higher scrutiny *See Dahl v HEM Pharmaceuticals Corp* , 7 F 3d 1399, 1403 (9th Cir
4 1993)

5 Mandatory preliminary injunctions go “well beyond simply maintaining the status quo” and
6 are particularly disfavored *See Stanley v University of Southern California*, 13 F 3d 1313, 1320
7 (9th Cir. 1994) As such, mandatory preliminary relief should be denied unless the facts and law
8 clearly favor the moving party *Id*

9 Because WPAS seeks to require the District to go beyond the status quo and release
10 otherwise private information, the Court construes WPAS’s request for preliminary relief as a
11 motion for mandatory preliminary injunction Thus, the Court, applying the heightened standard,
12 will only issue WPAS’s requested injunction if the law and the facts weigh heavily in WPAS’s
13 favor

14 DISCUSSION

15 **1. Likelihood of Success On the Merits**

16 The primary issue before the Court is whether WPAS has sufficiently demonstrated a
17 likelihood of success on the merits To establish a likelihood of success here, WPAS must show
18 that the facts and the law clearly support access to the District’s records A careful review of the
19 record reveals that WPAS has not satisfied its burden for purposes of this motion

20 First, the Court is not sufficiently satisfied that the P&A Acts override the FERPA and
21 IDEA *Michigan P & A Serv, Inc v Miller*, 849 F. Supp 1202 (W D Mich 1994), the only case
22 cited by WPAS for this proposition, is not persuasive The *Michigan P & A Serv* court, faced with
23 a motion for summary judgment, addressed whether the P&A service was being denied reasonable
24 access to *individuals* *See Id* at 1205 The court did not address the issue we face here whether the
25 P&A service had the authority to gain access to parent/guardian contact information for previously

1 unidentified students with disabilities participating in a WEP In the absence of persuasive
2 authority on this particular issue, the Court is not inclined to disrupt the status quo and grant
3 WPAS's request The District's citation to Developmental Disabilities Program, 61 Fed Reg
4 51,147 (1996) (codified at 45 C F R 1385) supports this conclusion

5 Moreover, the Court does not agree that the two bodies of law can be "harmonized" as the
6 type of information sought cannot properly be characterized as "directory information " Directory
7 information, a term WPAS concedes is defined only under FERPA, clearly does not include contact
8 information for parents/guardians or information sufficient to establish which students are
9 participating in the WEP See 20 U S C § 1232g(a)(5)(A)

10 Second, even if the Court could find that the P&A Acts give WPAS the authority to access
11 the requested information, WPAS still must establish a likelihood of success on its argument that it
12 has probable cause to believe that the District is abusing and neglecting N F and other students
13 with disabilities participating in the WEP

14 Under the DD Act, P&A systems have the authority to investigate incidents of abuse and
15 neglect of individuals with developmental disabilities if the incidents are reported to the system or
16 if there is probable cause to believe that such individual has been subject to abuse or neglect 42
17 U S C 15043(B) Probable cause under the DD and PAIMI Acts is "a reasonable belief that an
18 individual with mental illness has been, or may be at significant risk or being subject to abuse or
19 neglect " 42 C F R § 51.2, 42 C F R § 1386.19

20 Having reviewed the facts of this case carefully, the Court does not find that the allegations
21 are sufficient to establish probable cause that N F has suffered abuse and neglect Even assuming
22 WPAS's allegations to be true, the Court simply finds that collecting and recycling garbage does
23 not present a serious risk or potential for injury as contemplated by the P&A Acts Furthermore,
24 WPAS's argument that it is the "sole and final arbiter of whether probable cause exists" is
25

1 unpersuasive Plaintiff's Motion for Preliminary Injunction at 11 WPAS cites no case law
2 establishing that its probable cause determinations cannot be reviewed by this Court

3 WPAS further argues that the allegations here are sufficient to require the District to release
4 contact information for *all* disabled student participating in the WEP in the District Probable cause
5 for generalized access to records has been established in a handful of cases For instance, in *Iowa*
6 *Protection and Advocacy Services v Gerard Treatment Programs*, 152 F Supp 2d 1150 (N D
7 Iowa 2001) the court permitted the Protection and Advocacy organization to access patients records
8 at a psychiatric medical institution after a patient died from the misuse of restraints The *Girard*
9 court found that broad access was necessary to determine whether patient abuse and neglect was
10 occurring in the institution

11 The facts of this case are not so compelling The Court has already established that there is
12 an insufficient showing of abuse and neglect to grant WPAS access to N F 's records Even if this
13 Court was satisfied that there is probable cause that N F. is suffered abuse and neglect, the evidence
14 is insufficient to establish that *all* disabled students in the District are required to participate in the
15 activities complained of Complaints from one parent at one school in the District are insufficient
16 to establish probable cause to believe that disabled students throughout the District are being abused
17 and neglected As such, the Court is not inclined to grant WPAS "broad access" to the requested
18 records.

19 Finally, the Court is not satisfied that a likelihood of success has been established on
20 WPAS's First Amendment claim Again, the cases cited by WPAS concern access to individuals,
21 not school records identifying students with disabilities participating in the WEP Thus, a
22 preliminary injunction will not be issued for this reason

23 **2. Irreparable Injury**

24 WPAS argues that the students with disabilities in the District will suffer irreparable harm if
25

1 preliminary relief is not granted For support, WPAS relies on *Cheema v Thompson*, 67 F 3d 883,
2 885 (9th Cir 1995), *overruled on other grounds by City of Boerne v Flores*, 521 U S 507 (1997)
3 The Court, however, is not persuaded by *Cheema*

4 *Cheema* is a school safety case that concerns the interests of three Sikh students whose
5 religious beliefs required them to carry ceremonial knives at all times *See Id* The students sought
6 a preliminary injunction against the enforcement of a school weapons ban *See Id* Besides being
7 factually dissimilar, *Cheema* stands for the proposition that denial of an educational opportunity
8 amounts to irreparable injury The issue here is not whether the students with disabilities
9 participating in the WEP will suffer irreparable injury but whether WPAS will suffer irreparable
10 injury by the District's actions

11 The District argues that irreparable injury cannot be established because the WPAS, Mr
12 Finders, and any other parent of special education students at Heritage have available an adequate
13 legal remedy, other than injunctive relief, under the IDEA and Title II of the Americans with
14 Disabilities ("ADA") Act, 42 U S C §§ 12141 *et seq* The District points out that remedies under
15 these statutes would preserve privacy interests in educational records While these remedies are
16 available to Mr Finders, and other similarly situated parents, the Court is not persuaded that they
17 are available to the WPAS Nonetheless, WPAS has failed to establish, for purposes of this motion,
18 that it will be irreparably injured if its request is not granted

19 Furthermore, the Court recognizes that the deprivation of First Amendment freedoms, for
20 even minimal periods of time, can constitute irreparable injury for preliminary injunction purposes
21 *See Elrode v Burns*, 427 U S 347, (1976) However, given the tenuous nature of WPAS's First
22 Amendment claim, the Court is unwilling to disrupt the status quo and order the District to release
23 the contact information

24 **3. Balance of Hardships**

25 When examining the balance of hardships, the Court must weigh carefully the relative

1 hardships to the parties. The greater the relative hardship to the moving party, the less strong need
2 be the showing of probable success that is required. *Beltran v. Myers*, 677 F.2d 1317, 1320 (9th Cir.
3 1982). The Court is not convinced that the equities tip sharply in WPAS's favor. Rather, the Court
4 finds that the balance of interests favors preservation of the status quo and the right to privacy in
5 educational records.

6 **CONCLUSION**

7 WPAS has failed to show that the facts and the law weigh so heavily in its favor that
8 disruption of the status quo and of issuance of a mandatory preliminary injunction is warranted.
9 Having failed to meet its burden, the Court has no choice but to deny WPAS's request for a
10 preliminary injunction requiring the District to release the names of all students with disabilities
11 participating in the District's WEP and contact information for their parents and/or guardians.

12 ACCORDINGLY

13 IT IS SO ORDERED

- 14 (1) Plaintiff's Motion for a Preliminary Injunction (Dkt. #2) is **DENIED**, and
15 (2) The Clerk of the Court is directed to send copies of this Order to counsel for Plaintiff
16 and Defendants.

17 DATED this 11 day of April, 2003

18 
FRANKLIN D. BURGESS
19 UNITED STATES DISTRICT JUDGE
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car

United States District Court
for the
Western District of Washington
April 14, 2003

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:03-cv-05062

True and correct copies of the attached were mailed by the clerk to the following

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