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**IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA**

COMMONWEALTH CHARTER
ACADEMY CHARTER SCHOOL,

Petitioner,

v.

SUSAN SPICKA AND
EDUCATION VOTERS OF PA,

Respondents.

Civil Action No. 2022 CV 7857

BRIEF OF RESPONDENTS

Respondents, Susan Spicka and Education Voters of Pennsylvania (“Requestors”), are advocates for public education who seek through this case to scrutinize how Petitioner Commonwealth Charter Academy Charter School (“CCA”) handles taxpayer funds. Specifically, they have filed a request under the Right to Know Law (“RTKL”) for

copies of Community Class Registration Forms. Parents and guardians submit these forms to obtain reimbursement payments from CCA for classes taken outside of the cyber charter school.

Last year, the Pennsylvania Office of Open Records (“OOR”) ruled in Requestors’ favor, and CCA then appealed from OOR’s Final Determination to this Court. The primary legal theory underpinning CCA’s appeal involves the interplay of the RTKL and the Family Educational Rights and Privacy Act (“FERPA”). But after CCA filed its appeal, the Pennsylvania Supreme Court rejected this exact legal theory, fully clearing the way for the release of the registration forms. For that reason, and for the other reasons set forth below, this Court should wholly affirm the Final Determination of OOR.

I. PROCEDURAL HISTORY

On May 23, 2022, Requestors submitted a RTKL request (“Request”) to CCA for Community Class Registration forms from select years. CR at 10 (Request at 1-2).¹

On June 30, 2022, following a thirty-day extension of time to respond, CCA denied the Request, providing only the aggregate cost of the classes for each year, but refusing to disclose the registration forms. CR at 8-9 (Denial at 1-2). On July 21, 2022, Ms. Spicka and Education Voters appealed this denial to OOR. CR at 6-7 (Appeal at 1-2). On September 16, 2022, OOR issued a Final Determination granting the appeal and requiring the CCA to provide the registration forms, redacted of any identifying information, within thirty days. CR at 65-71 (Final Determination at 1-7).

¹ The Certified Record OOR filed did not have Bates numbers, so Certified Record pincites in this Brief refer to the PDF page numbers of the Certified Record.

On October 13, 2022, CCA filed its Petition for Review in this Court, seeking review of OOR's Final Determination. On October 20, 2022, this Court stayed consideration of this case pending a final decision by the Supreme Court of Pennsylvania in *Central Dauphin School District v. Hawkins*, 88 MAP 2021. On December 21, 2022, the Supreme Court issued its opinion in the *Central Dauphin* case. 286 A.3d 726 (Pa. 2022) ("*Central Dauphin*"). On March 7, 2023, this Court lifted the stay and, after a conference with the parties on May 31, 2023, ordered briefing in support of the parties' "arguments in consideration of the Pennsylvania Supreme Court decision in *Central Dauphin School District v. Hawkins*."

II. STATEMENT OF FACTS

On May 23, 2022—over 14 months ago—Ms. Spicka and Education Voters of Pennsylvania, a statewide, non-profit, non-partisan public education advocacy organization, submitted their Request to CCA. The Request sought:

Copies of ALL 'Community Class Registration Forms' for the 2019-2020 and 2020-2021 school year that were submitted to CCA with the following UNREDACTED information:

- Course title
- Number of time[s] the class meets
- Start date
- Cost of the class
- Amount requesting for the reimbursement

CR at 10 (Request at 1). CCA denied this request, asserting that the forms were exempt from disclosure under various subsections of § 708(b) of the RTKL and protected by FERPA, 20 U.S.C. § 1232(g), and the constitutional right to privacy. CR at 8 (Denial at 1).

Ms. Spicka and Educator Voters appealed to OOR. In response, CCA argued that the forms were education records protected by FERPA and exempt from access under Sections 102 and 305(a) of the RTKL. CR at 32-37 (CCA Submission at 5-10). OOR found that Requestors' appeal was sufficient under the RTKL and rejected CCA's FERPA argument, finding that the forms are not exempt from disclosure and that redaction would sufficiently de-identify the forms. CR at 66-70 (Final Determination at 2-6). OOR issued a Final Determination requiring CCA to provide the registration forms within thirty days. *Id.* at 70 (Final Determination at 6). CCA then filed this appeal.

III. QUESTIONS PRESENTED

1. Are education records automatically exempt from disclosure under the RTKL if, in unredacted form, they would be covered by FERPA?
Suggested answer: No.
2. Did OOR correctly hold that the records at issue here could be de-identified to avoid disclosure of information protected by FERPA?
Suggested answer: Yes.
3. Did Requestors sufficiently state their grounds for appeal in their initial submission to OOR?
Suggested answer: Yes.

IV. ARGUMENT

The documents that CCA seeks to withhold from disclosure are public records for purposes of the RTKL and must be disclosed in redacted form. The Pennsylvania Supreme Court has now squarely rejected the central legal theory in CCA's Petition for Review, foreclosing any argument that the forms are categorically exempt from disclosure under the RTKL. Moreover, OOR's Final Determination is entirely consistent with the

framework set forth by the Pennsylvania Supreme Court in *Central Dauphin*. And CCA's makeweight argument about the sufficiency of Requestors' appeal to OOR is without merit.

Ms. Spicka and Education Voters have waited over a year for these public records, and the Court should promptly affirm the Final Determination of OOR.

A. *Central Dauphin* Has Gutted CCA's Main Argument

CCA's Petition for Review asserts that OOR "made legal errors" in its Final Determination when addressing the relationship of FERPA to the RTKL. Pet. For Review ¶ 21(a). But this argument cannot survive *Central Dauphin*.

1. FERPA Education Records Are Not Categorically or Automatically Exempt from Disclosure Under the RTKL

CCA maintains that the forms are exempt from disclosure under the RTKL because they are education records under FERPA. Pet. for Review ¶ 21. Regulations implementing FERPA define "education records" as those records that are "[d]irectly related to a student" and are "[m]aintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. § 99.3. OOR determined the forms requested here to be education records. CR at 69 (Final Determination at 5). CCA argues that the forms' status as education records renders them categorically exempt from disclosure under Sections 102 and 305(a) of the RTKL, which provides for the exclusion

of records that are exempt under other state or federal laws.² *See* Pet. for Review ¶ 21.

The Supreme Court has now considered and definitively rejected this argument.

Central Dauphin clarifies how FERPA interacts with the RTKL. Specifically, the Supreme Court held that classification of a record as an education record under FERPA does not render it automatically exempt from disclosure under Sections 102 and 305(a). 286 A.3d at 741. Instead, “the critical exemption from disclosure under FERPA is not the entire category of education records ... but rather the students’ personally identifiable information.” *Id.* Education records for purposes of FERPA in an agency’s possession are “presumed public” and the agency bears the burden of proving they are exempt from disclosure by a preponderance of the evidence. *Id.* at 742. Thus, CCA’s argument that the records are categorically exempt from access under FERPA and Sections 102 and 305(a) of the RTKL must fail.

2. Education Records Are Subject to the Redaction Provisions of the RTKL and FERPA

CCA further contends that because the forms are education records protected by FERPA, they are not subject to the RTKL’s redaction requirement. *See* Pet. for Review ¶ 21(f) (stating that Section 706’s redaction requirement “does not apply if a record is exempt from disclosure under the RTKL”). However, the school district in *Central*

² Section 102 defines “public record” as one that is not privileged nor exempt under Section 708 or “any other Federal or State law or regulation or judicial order or decree” and Subsection 305(a) presumes a record of an agency is public unless exempt under, *inter alia*, “any other Federal or State law or regulation or judicial order or decree.” 65 P.S. §§ 67.102, 67.305(a)(3).

Dauphin mounted an identical argument,³ and the Supreme Court rejected it, holding instead that the redaction provisions of both the RTKL and FERPA regulations apply to education records. 286 A.3d at 742-45.

The RTKL's redaction provision provides:

If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted.

65 P.S. § 67.706. This is mandatory language. *See Central Dauphin*, 286 A.3d at 743 n.12 (“Section 706 of the RTKL mandates agencies ... to redact information exempt from disclosure and does not given them discretion in this regard; they are simply required to comply with the law.”).

The FERPA regulations also contemplate redaction, permitting schools to release education records without student or parent consent when the records have been “de-identified,” that is, when all personally identifiable information has been removed. *See* 34 C.F.R. § 99.31(b)(1). “Personally identifiable information” includes details such as names, addresses, birth dates, other “information that alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school

³ *Compare Central Dauphin*, 286 A.3d at 737 (“[T]he District contends, the record is exempt from disclosure under FERPA, a federal law, and therefore is by definition not a public record and the redaction provision does not apply[.]”), *with* Pet. for Review ¶ 21(g) (“[S]ince OOR concluded the Community Class Registration Forms constitute education records protected by FERPA, the forms are not public records and are exempt from disclosure under the RTKL; thus, the records need not be redacted.”).

community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty,” or “[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.” 34 C.F.R. § 99.3.

When considering whether redaction will sufficiently de-identify a record such that it must be disclosed, a court must engage in a “context-specific, case-by-case, fact sensitive examination[], ... which turn[s] on reasonableness—that is, whether the [agency] ‘has made a **reasonable** determination that a student’s identity is not personally identifiable’ when ‘taking into account **other reasonably available information.**”’ *Central Dauphin*, 286 A.3d at 744 (citing *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 727-28 (Pa. 2020) and 34 C.F.R. § 99.31(b)(1)) (emphasis in original). If redaction sufficiently de-identifies records, they must be disclosed. *Id.* at 744, n.12.

Applying this framework, the *Central Dauphin* Court found that the school district failed to meet its burden to show that the record at issue—a school bus surveillance video deemed to be an education record—was exempt from disclosure. *Id.* at 745. It did not disturb the lower court’s finding that that video could be sufficiently redacted. *Id.* at 743. Therefore, the Court affirmed the Commonwealth Court’s ruling and ordered disclosure of the surveillance video with redaction of students’ personally identifiable information. *Id.* at 745.

B. OOR’s Final Determination Ordering the Redaction and Disclosure of the Community Class Registration Forms is Correct in Light of *Central Dauphin* and Should be Affirmed

In the wake of *Central Dauphin*, CCA's only remaining avenue would be to argue that the records here cannot be sufficiently de-identified. But OOR has already engaged in the "context-specific, case-by-case, fact sensitive" examination that FERPA and the RTKL require and has correctly concluded that, under the circumstances presented here, redaction would successfully de-identify the community class registration forms. See *Central Dauphin*, 286 A.3d at 745 (citing 34 C.F.R. § 99.31(b)(1)); CR at 69-70 (Final Determination at 5-6).

Although the Final Determination in this case predated the Supreme Court's *Central Dauphin* decision, OOR applied an analysis that precisely tracks the analysis set forth in *Central Dauphin*. See CR at 69 (Final Determination at 5) (citing *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 729-30 (Pa. 2020), a plurality decision applying an analytical framework subsequently endorsed by the majority in *Central Dauphin*). Thus, OOR's determination is entirely consistent with now-controlling precedent, and it should be affirmed.

Like the bus surveillance video in *Central Dauphin*, OOR found that the registration forms at issue here are education records for purposes of FERPA. CR at 69 (Final Determination at 5). The inquiry does not end there. Under the framework set forth in *Central Dauphin*, the registration forms are presumed to be public, and CCA bears the burden of proving they are exempt from disclosure by a preponderance of the evidence.

OOR correctly found that CCA cannot meet this burden. *Id.* at 70 (Final Determination at 6). CCA's sole argument in its Petition for Review is that the forms are

exempt under FERPA and Sections 102 and 305(a) of the RTKL, Pet. for Review ¶ 21, an argument foreclosed by the *Central Dauphin* opinion.

No further factfinding is necessary here. OOR has already examined the factual record, including affidavits from CCA employees, and found that, while the forms are education records, they may be sufficiently redacted. CR at 70 (Final Determination at 6). OOR's reasoning is grounded in the fact that Requestors want only the registration forms and do not seek the attendance or payment forms that parents or guardians also submit. *Id.* And from the registration forms, Requestors seek only five unredacted fields—course title, number of times the class meets, start date, cost of class, and amount requested for reimbursement—none of which are remotely personally identifying. As Requestors have emphasized throughout this case, they do not seek student names, financial information, or anything else meeting the definition of “personally identifiable information” under FERPA. Moreover, OOR has already considered and rejected CCA's argument that Ms. Spicka and Education Voters have “infiltrated” the CCA community via social media such that they could identify students using the forms.⁴ *Id.* at 69-70 (Final Determination at 5-6). Instead, OOR correctly determined here that “[f]urther redacting the registration forms of any information not sought sufficiently de-identifies the forms such that they

⁴ To the extent that CCA argues that Ms. Spicka or Education Voters have obtained inside information such that CCA believes that they know the identity of the student to whom the education record relates in violation of 34 C.F.R. § 99.3(g), this argument fails. First, redaction would eliminate the possibility of knowledge of the identity of any student. Second, the video in *Central Dauphin* involved circumstances much more likely to result in revelation of students' identities, because the incident had generated multiple news stories and public legal filings. 286 A.3d at 739. Still, the Court there held that redaction would sufficiently de-identify the record. *Id.* at 744.

may be released under FERPA.” *Id.* at 70 (Final Determination at 6).⁵ With such redaction, “there are no constitutional right to privacy concerns[.]” *Id.*

Since OOR has already conducted the factual analysis described by the Court in *Central Dauphin*, no further development of a factual record is warranted, and the Court should affirm the Final Determination and order the mandatory redaction and disclosure of the registration forms.

C. Requestors’ appeal was sufficient under Section 1101(a) of the RTKL

Finally, OOR correctly held that Ms. Spicka and Education Voters of PA’s appeal to OOR was sufficient under Section 1101(a) of the RTKL. *See* CR at 66-67 (Final Determination at 2-3).

Section 1101(a) of the RTKL requires that an appeal “state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1). An appeal to OOR need be only “minimally sufficient.” *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013).

In its initial denial, CCA stated the following rationale: the forms “are exempt from disclosure under section 708(b)(1),(6), and (15) of the RTKL. Disclosure of the records is also subject to the federal Family Educational Rights and Privacy Act

⁵ Notably, the bus surveillance video in *Central Dauphin* that had to be redacted and disclosed was replete with much more sensitive identifying information than the CCA registration forms, such as students’ faces and jersey numbers, and was significantly more difficult to redact. *See* 286 A.3d at 732, 745.

(FERPA) and related state laws and rights to privacy under the Pennsylvania Constitution.” CR at 8-9 (Denial at 1-2).⁶

Requestors’ appeal to OOR amply satisfied Section 1101(a). First, Requestors’ used OOR’s standard electronic appeal form, which *ipso facto* satisfies Section 1101(a). The form states that “the records are public records in the possession, custody or control of the Agency[.]” CR at 6-7 (Appeal at 1-2). It further provides that “the records do not qualify for any exemptions under §708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation[.]” *Id.* This language on OOR’s standard appeal form is substantially identical to language the Commonwealth Court held to be sufficient in *Barnett v. Pennsylvania Department of Public Welfare*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013); *see also* CR at 66-67 (Final Determination at 2-3). As here, in *Barnett* an agency cited numerous RTKL exemptions in denying a request, and the requestor then submitted an appeal to OOR stating generally that the records did “not qualify for any exemptions under [S]ection 708, privilege, and Federal or State law or regulation.” *Barnett*, 71 A.3d at 405-06. The Commonwealth Court found that such a statement sufficiently addressed the Department’s grounds for denial; the fact that “Requestor does not discuss any specific subsections of Section 708(b) of the RTKL...does not render the OOR Appeal deficient.” *Id.* at 405.

⁶ Section 708(b)(1) exempts records the disclosure of which would result in the loss of state or federal funds, § 708(b)(6) exempts personally identifying information, and § 708(b)(15) exempts academic transcripts. 65 P.S. §§ 67.708(b)(1), (6), (15).

Second, even if the standard form language were somehow insufficient, Requestors went above and beyond that stock text by stating on their appeal form that “[t]he information requested does not include any information that would identify individual students or their families...[and only seeks] information about the classes and costs.” CR at 7 (Appeal at 2). This provided additional refutation of CCA’s rationale: the records sought are not personally identifying under § 708(b)(6), nor are they academic transcripts under § 708(b)(15), nor are they protected by FERPA such that disclosure could result in a loss of funding under §708(b)(1).

Nonetheless, CCA contends that OOR erred in its determination of sufficiency. Pet. for Review ¶ 19. This argument fails. The sole case CCA cites in support of its position, *Department of Corrections v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011), involved starkly different facts. There, after the agency denied the request for lack of specificity, the requestor filed a handwritten notice of appeal that consisted of nothing but a bald *ipse dixit*: “[t]he above Pa. right to know requests are public.” *Id.* at 431. The Commonwealth Court held that this handwritten notice—which contained none of the language found on the standard appeal form—was insufficient to satisfy § 1101(a). *Id.* at 434. That determination is entirely distinct from the present case, where Spicka and Education Voters not only used OOR’s standard form but also wrote an additional response to CCA’s stated reasons for denial.

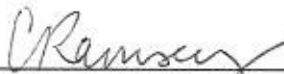
Finally, the Final Determination here is consistent with widespread practice by RTKL requestors across Pennsylvania. OOR regularly finds that the use of its own

standard appeal form satisfies §1101(a).⁷ A holding that OOR’s standard form is insufficient would create disruption for countless cases. Citizens, having relied on the form issued by OOR itself, would find themselves suddenly procedurally barred from accessing public records. Such a holding would contravene the Pennsylvania Supreme Court’s direction that “courts should liberally construe the RTKL to effectuate its purpose of promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.” *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) (internal quotation marks and citation omitted). This Court should affirm that Requestors’ appeal to OOR was sufficient.

V. RELIEF

This Court should affirm the Final Determination of OOR in full.

Date: August 14, 2023


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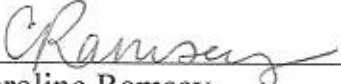
⁷ See e.g., *In the Matter of Dan Auerbach v. City of Phila. Law Dep’t*, No: AP 2023-0404, 2023 WL 2983683 (Pa. OOR Apr. 14, 2023), at *3 (collecting cases finding the use of the standard OOR appeal form to be sufficient to satisfy § 1101(a)).

CERTIFICATE OF SERVICE

I, Caroline Ramsey, hereby certify that the foregoing Brief was sent for delivery on August 15, 2023 to the Court by FedEx and to counsel below by email per agreement:

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