UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M.G. and V.M. on behalf of themselves individually and their child, Y.T.; M.W. on behalf of herself individually and her son, E.H.; A.D. on behalf of herself individually and as next friend of her son, D.D.; N.S., on behalf of himself individually and as next friend on behalf of his child, K.S.; E.H.1, on behalf of herself individually and as next friend on behalf of her child, E.H.2; E.E.G., on behalf of herself individually and as next friend on behalf of her son, Y.A.; A.G., on behalf of herself individually and as next friend on behalf of her sons, S.B. and K.B.; individually and on behalf of others similarly situated,

Plaintiffs,

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION; NEW YORK CITY BOARD OF EDUCATION; CARMEN FARIÑA, in her official capacity as Chancellor of the New York City School District; NEW YORK STATE EDUCATION DEPARTMENT, COMMISSIONER MARYELLEN ELIA, in her official capacity as Commissioner of the New York State Education Department,

Defendants.

ORDER

13-cv-4639 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

In this class action suit, plaintiffs allege that the City and State defendants (together, "defendants") have adopted certain systemic policies which impede the provision of adequate special education services to New York City students, in violation of federal and state law.[1] Plaintiffs now seek discovery of education records maintained by defendants, including unredacted documents containing certain "personally identifiable information" about class members that is presumptively protected by the Family Educational Rights and Privacy Act of 1974 (FERPA).[2] Plaintiffs seek access to these unredacted documents after a notice-by-publication period during which families may opt out of disclosing this information to plaintiffs' counsel.[3] Although defendants do not object to

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[1] For purposes of this Order, familiarity with the January 4, 2016 Opinion and Order on class certification — including the factual background, applicable law, and procedural history discussed therein — is assumed. *See M.G. v. New York City Dep't of Educ.*, No. 13 Civ. 4639, 2016 WL 54687 (S.D.N.Y. Jan. 4, 2016). However, as explained in that Opinion, the classes and subclasses certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure are comprised of thousands of New York City schoolchildren. *See id.*

[2] 20 U.S.C. § 1232g.

[3] The parties have entered into a Stipulation of Confidentiality and Protective Order governing the handling of confidential material produced in this litigation (the "Confidentiality Agreement"). *See* Dkt. No. 68.

producing education records *per se*, they oppose plaintiffs' proposal for producing documents without the applicable FERPA redactions.[4]

II. LEGAL STANDARD

In relevant part, FERPA provides that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, . . . unless—
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> . . . such information is furnished in compliance with judicial order, . . . upon condition that parents and the students are notified of all such orders . . . in advance of the compliance therewith by the educational institution or agency.[5, 6]

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[4] Under FERPA, students' "personally identifiable information" is presumptively protected against disclosure. 20 U.S.C. § 1232g.

[5] 20 U.S.C. § 1232g(b)(2).

[6] Under FERPA, "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 members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; [or] (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. . . . 34 C.F.R. § 99.3.

Put simply, FERPA-protected information may be produced in response to a judicial order after reasonable notice has been provided to parents and students such that they are able to seek protective action.[7] Such notification does not require written consent.[8]

However, courts have held that "a party seeking disclosure of education records protected by FERPA bears 'a significantly heavier burden . . . to justify disclosure than exists with respect to discovery of other kinds of information, such as business records.'"[9] Thus, "before [judicial] approval for disclosure is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interests of the students."[10]

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[7] *See* 20 U.S.C. § 1232g(b)(2); 34 C.F.R. § 99.31(a)(9)(ii) (explaining that disclosure in response to a court order requires the disclosing agency to "make[] a reasonable effort to notify the parent or eligible student of the order . . . in advance of compliance, so that the parent or eligible student may seek protective action"). *See also Doe v. Ohio*, No. 91 Civ. 0464, 2013 WL 2145594, at *8 (S.D. Ohio May 15, 2013) (observing that "[i]In enacting FERPA, Congress did not create enforceable rights to nondisclosure").

[8] *See* 34 C.F.R. § 99.31(a).

[9] *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 292 (E.D.N.Y. 2008) (quoting *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977)).

[10] *Id.*(quotation marks and citation omitted).

III. PARTIES' ARGUMENTS[11]

A. Plaintiffs' Request

In support of their request for unredacted documents following a notice-by-publication period, plaintiffs explain that students' personally identifiable information is "need[ed] . . . to determine whether Defendants employed blanket practices"[12] because it will, *inter alia*, enable plaintiffs to "correspond [due process] complaints to the decisions and transcripts that arose from the complaint[,] . . . track children whose parents have had to file multiple . . . hearings[,] and . . . establish delays between the filing and implementation of the stay-put services."[13] Plaintiffs also observe that other courts have endorsed the notice-by-publication approach.[14]

Thus, plaintiffs maintain that

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[11] The parties filed letters setting forth their respective positions. *See* Dkt. Nos. 120, 123, 124, 126.

[12] March 4, 2016 Letter from Plaintiffs to the Court at 2.

[13] *Id.* at 4.

[14] *See Morgan Hill Concerned Parents Ass'n v. California Dep't of Educ.*, No. 11 Civ. 3471, Dkt. No. 151 (E.D. Cal. Jan. 26, 2016). *See also Doe*, 2013 WL 2145594, at *8 ("Taking into account the severe burden involved in giving personal notice, the limited nature of the privacy interests involved, and the lack of potential harm, the Court finds that it would not be reasonable to require direct personal notice.").

> (a) [they] have a genuine need for . . . personally identifiable information to establish proof in this action and (b) [because] FERPA allows the Defendants to disclose unredacted student educational records in response to a court order [and after a notice period], any redactions are unnecessary [as the documents would be covered by the Confidentiality Agreement between the parties] and will only delay resolution of this matter.[15]

Plaintiffs further assert that it would be unworkable to use coding in lieu of personally identifiable information (*e.g.*, identifying students by number, rather than personally identifiable information) because "such revisions would take far too long . . . given the volume of records and would likely contain numerous errors (which plaintiffs would have no ability to assess)."[16]

B. The City and State Defendants' Oppositions

Defendants — who submitted separate but overlapping letters in opposition — offer a variety of arguments against plaintiffs' proposal, including that: (1) plaintiffs' request for unredacted access to thousands of students' records is vague and over-broad; (2) coding would not significantly prolong production because, in any event, defendants will be required to sort through voluminous records to identify responsive documents; and (3) other courts that have proceeded in a fashion similar to that urged by plaintiffs have encountered significant

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15 March 4, 2016 Letter from Plaintiffs to the Court at 1.

16 *Id.* at 3.

difficulties in managing the notice process (even where a special master had been appointed to oversee discovery).[17, 18] Further, defendants assert that inconvenience or delay are insufficient reasons for requiring broad, unredacted document production.

Despite their shared opposition to plaintiffs' discovery request, the City and State defendants offer competing discovery solutions. The City defendants suggest

> that there are two viable options: (1) relevant documents may be produced with limited redactions provided that individual notice, not solely publication notice, is provided, and that families are given the opportunity to object to disclosure or (2) these records are produced following more extensive redactions [or coding] so that FERPA notice is not required.[19]

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[17] *See Morgan Hill*, No. 11 Civ. 3471, Dkt. No. 164 at 5 (Mar. 1, 2016) (observing, upon receipt of an overwhelming number of objections misconstruing the scope of the disclosure, that "[t]he public's response thus far . . . serves as a cautionary message to future courts considering the form and method of notice under the current FERPA regulations, when the information to be disclosed following notice is voluminous, as in this case where millions of educational records are contained in the CDE's databases subject to discovery"); *Doe v. Ohio*, No. 91 Civ. 0464 (indicating that notice-by-publication process took over one year).

[18] Defendants also maintain that notice-by-publication is inappropriate given the volume of student records sought by plaintiffs in this case. *See* March 15, 2016 Letter from State Defendants to the Court at 3.

[19] March 15, 2016 Letter from City Defendants to the Court at 1-2. *Accord id.* at 3.

The State defendants, by contrast, propose the following measures: (1) that plaintiffs begin — after appropriate notice — by examining the unredacted records of the class members who have contacted plaintiffs' counsel to date;[20] (2) that defendants produce the remaining class members' records with full FERPA redactions; and (3) that to the extent that plaintiffs seek an unredacted version of any record produced in redacted form, appropriate steps be taken to produce that specific record in compliance with FERPA.

III. DISCUSSION

Plaintiffs have shown a "genuine need" for unredacted student records, produced — in accordance with FERPA — after students and their families have received reasonable publication notice regarding the judicially-approved disclosure of their personally identifiable information and had the opportunity to object to such disclosure.[21, 22] Student-specific information is

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[20] *See MG*, 2016 WL 54687, at *10 (explaining that "at least forty" members of the NPS Class have contacted plaintiffs' counsel). Given the overlapping issues in this case, it is likely that at least some of the NPS Class members who have contacted plaintiffs' counsel to date are in more than one class and/or subclass certified in this case.

[21] *Ragusa*, 549 F. Supp. 2d at 292. *Accord* 20 U.S.C. § 1232g(b)(2); 34 C.F.R. § 99.31(a)(9)(ii).

[22] This Order does not address the details of the parties' compliance with this Order. As set forth below, the parties are directed to meet-and-confer regarding their discovery plan, including with respect to their FERPA obligations.

relevant to — and likely necessary for — proving plaintiffs' allegations in this case. Indeed, other courts interpreting FERPA have endorsed the approach proposed by plaintiffs,[23] which appropriately balances plaintiffs' need for unredacted records in this case with class members' privacy interests.

However, the *Morgan Hill* litigation — particularly the apparent confusion amongst families about who would have access to students' personally identifiable information and the way that such information would be used — emphasizes the importance of disseminating a clear notice regarding the scope of the proposed disclosure. As such, the parties are directed to jointly develop a notice that makes clear that defendants' disclosure of FERPA-protected information would be (1) made only to plaintiffs' counsel and the Court; (2) protected by a Confidentiality Agreement between the parties; and (3) produced in the context of a litigation in which plaintiffs seek injunctive relief on behalf of class members and their families.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' request for discovery of unredacted education records is GRANTED, subject to the conditions described

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[23] *See Morgan Hill*, No. 11 Civ. 3471 (Dkt. No. 151); *Doe*, 2013 WL 2145594, at *8.

herein.[24] Further, the parties are directed to meet-and-confer to develop a production plan that complies with this Order (including with respect to the form and content of the notice). A joint proposed plan for FERPA-compliant production must be submitted to this Court no later than April 21, 2016.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
April 8, 2016

[24] This determination is without prejudice, and may be reassessed, if necessary, in light of subsequent developments in the litigation.

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