2014 WL 4667545

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOT DESIGNATED FOR PUBLICATION

Court of Appeal of Louisiana,
First Circuit.

Dr. Barbara FERGUSON and Charles J. Hatfield
v.
LOUISIANA DEPARTMENT OF EDUCATION.

No. 2014 CA 0032. | Sept. 19, 2014.

On Appeal from the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, State of Louisiana, No. 616296, The Honorable William A. Morvant, Judge Presiding.

Attorneys and Law Firms

Barbara Ferguson, New Orleans, Louisiana, for Plaintiffs/Appellants, Barbara Ferguson and Charles J. Hatfield.

Joan E. Hunt, Willa LeBlanc, R. Christopher Frugé, Baton Rouge, Louisiana, for Defendant/Appellee, Louisiana Department of Education.

Before GUIDRY, THERIOT, and DRAKE, JJ.

Opinion

DRAKE, J.

***1** Plaintiffs-appellants, Dr. Barbara Ferguson and Charles J. Hatfield, appeal a judgment sustaining the raising an exception of no cause of action and dismissing their claims against defendant-appellee, Louisiana Department of Education. We reverse the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

This case involves a request for documents pursuant to the Louisiana Public Records Law, La. R.S. 44:1, *et seq.* [1] Plaintiffs originally filed a Petition for Mandamus, Injunctive Relief and Declaratory Judgment under the Louisiana Public Records Law, seeking the following information:

> A.) The extract of the Student Information System (SIS) files for Orleans Parish exported to a Microsoft access database for the 2009–2010 school year (specifically, the demographics file, the enrollment file and the discipline file).
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> B.) The extract of the Student Information System (SIS) files for Orleans Parish exported to a Microsoft access database for the 2010–2011 school year (specifically, the demographics file, the enrollment file and the discipline file).

Plaintiffs claimed that the defendant had the requested documents in its possession and had previously provided the documents to plaintiffs. Plaintiffs sought a writ of mandamus directing the custodian of records for the defendant to produce the documents requested, injunctive relief, declaratory relief, and damages.

Defendant filed exceptions raising improper cumulation of actions and improper use of summary proceedings. The trial court sustained both exceptions and permitted the plaintiffs to amend their petition. Plaintiffs amended their petition to seek injunctive relief, declaratory relief, and damages, without the writ of mandamus. Following the amendment, defendant filed an exception raising no cause of action, claiming that the Louisiana Public Records Law does not require it to create a record, by removing personally identifiable student information, to produce to plaintiffs. Defendant also claimed that it was not required to provide plaintiffs access to randomly-coded, otherwise de-identified, student education records that the defendant had previously produced to Stanford University's Center for Research on Education Outcomes (CREDO), pursuant to 20 U.S.C. § 1232g and the Louisiana Public Records Law. The trial court sustained the exception and permitted the plaintiffs fifteen (15) days to amend their petition to state a cause of action. A judgment was signed on October 17, 2013. The plaintiffs did not amend their petition, but filed a motion for devolutive appeal. This court issued a rule to show cause, because the October 17, 2013 judgment lacked decretal language, and gave the plaintiffs until March 20, 2014 to supplement the record with an appropriate judgment. The record was supplemented timely with an order dismissing plaintiffs' suit on January 8, 2014 (although the judgment is erroneously dated January 8, 2013). After a review of the record, this court maintains the appeal.

[1] The short title of La. R.S. 44:1, *et seq* is the "Public Records Law." La. R.S. 44:1.1.

DISCUSSION

***2** On appeal, plaintiffs contend that the trial court erred in granting the exception of no cause of action. Plaintiffs claim that documents, which have been prepared by the defendant and are in the custody of the defendant, are public records which must be produced upon request, or a violation of La. R.S. 44:1(A)(2)(a) results.

A peremptory exception raising the objection of no cause of action is authorized by Louisiana Code of Civil Procedure article 927(A)(5). The Louisiana Supreme Court summarized the nature of, and the procedure governing, this exception in *Fink v. Bryant*, 01–0987 (La.11/28/01), 801 So.2d 346, 348–49, as follows:

> The function of the peremptory exception of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether plaintiff is afforded a remedy in law based on the facts alleged in the pleading. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. The exception is triable on the face of the papers and for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. [Citations omitted].

The supreme court in *Fink* further explained that, in reviewing a trial court's ruling sustaining an exception raising no cause of action, an appellate court should subject the case to *de novo* review because:

> the exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. Simply stated, a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief.

Fink, 801 So.2d at 349 (citations omitted).

As the exception of no cause raising action presents a question of law, our task "is simply a review of whether the trial court was legally correct or legally incorrect." *See Thinkstream, Inc. v. Rubin*, 06–1595 (La.App. 1 Cir. 9/26/07), 971 So.2d 1092, 1100, *writ denied*, 07–2113 (La.1/7/08), 973 So.2d 730. The pertinent question is whether, construing the petition in the light most favorable to the plaintiff and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. *Louisiana State Bar Association v. Carr and Associates, Inc.*, 08–2114 (La.App. 1 Cir. 5/8/09), 15 So.3d 158, 167, *writ denied*, 09–1627 (La.10/30/09), 21 So.3d 292.

Plaintiffs claim that the defendant is in possession of student education records from Orleans Parish that the defendant has already assigned random identifiers to protect the confidentiality of the records and that have been disseminated to at least one other party. When the plaintiffs requested the records, defendant denied that the information was a public record pursuant to the Louisiana Public Records Law. On appeal, the defendant claims that the records are confidential under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Defendant further asserts that although 34 C.F.R. § 99.31(b)(2) of the FERPA administrative regulations **permits** defendant to create and assign randomly-assigned identification codes to student education records after removing all personally-identifiable student information from those records, FERPA does not **require** it.

***3** Plaintiffs assert that defendant admitted creating a 2010–2011 decoded student record document and releasing the document to CREDO. Plaintiffs argue that once defendant created that document pursuant to FERPA, it became a public record pursuant to the Louisiana Public Records Law.

Article XII, Section 3 of the Louisiana Constitution provides that no person shall be denied the right to examine public documents, except in cases established by law. The legislature has codified this right in the Louisiana Public Records Law.

As the jurisprudence recognizes, the Louisiana Public Records Law must be liberally interpreted to enlarge rather than to restrict the public's access to public records. *Bozeman v. Mack*, 97–2152 (La.App. 1 Cir. 12/21/98), 744 So.2d 34,

36, *writ denied*, 99–0149 (La.3/19/99), 740 So.2d 113. Any doubt concerning the public's right of access to certain records must be resolved in favor of the public's right to see. *Id.* The purpose of the law is to keep the public reasonably informed about how public bodies conduct their business and how the affairs of government are handled. *City of Baton Rouge/ Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 07–1088, 07–1089 (La.App. 1 Cir. 10/10/08), 4 So.3d 807, 817, *writs dismissed*, 08–2507, 08–2525 (La.1/16/09), 998 So.2d 99, 100.

Public Records are:

> All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, ...

La.R.S.44:1(A)(2)(a).

The Louisiana Public Records Law does not allow a state agency to inquire as to the reason for the request of the public record. *See* La. R.S. 44:32(A). The Louisiana Public Records Law does not apply to "the name, address, and telephone number of any student enrolled in any public elementary or secondary school in the state in a record of a public elementary or secondary school or a city or parish school board." La. R.S. 44:4(33)(a). Plaintiffs argue that the defendant has already redacted the personally-identifiable information from the documents they seek, and therefore, the documents are a public record, which no longer falls within the exception of La. R.S. 44:4(33)(a).

***4** Defendant argues that it cannot release the documents sought by plaintiffs, because to do so would violate FERPA. Under FERPA, federal education funds will not be made available to "any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information ... of students without the written consent of their parents to any individual, agency, or organization," other than under certain recognized exceptions. 20 U.S.C. § 1232g(b)(1); *United States v. Franklin Parish Sch. Bd.*, 922 F.Supp.2d 591, 598 (W.D.La.2013).

FERPA requires educational agencies to obtain prior written parental consent before releasing personally identifiable records in order to receive federal funding. The regulations pertaining to FERPA allow certain instances where an educational agency may release student records without parental consent. One of those instances is when the educational agency de-identifies the records and information so that all personally identifiable information has been removed by generating and assigning codes that would not allow the recipient to identify the student. 34 C.F.R. § 99.31(b). Once de-identified, the defendant argues that the information can **only** be released "for purposes of education research." 34 C.F .R. § 99.31(b)(2)(ii).

The defendant claims that it complied with 34 C.F.R. § 99.31(b) in releasing the information to CREDO, but that it cannot now release the information to just anyone upon request, including the plaintiffs. Under Louisiana law, the defendant cannot inquire as to the purpose of the released document. *See* La. R.S. 44:32(A). Therefore, defendant claims that it would violate FERPA to release the documents plaintiffs seek, even though the personally-identifiable information is removed, since defendant claims that the documents can only be used for educational research. The plaintiffs argue that once the student information was de-identified, it became a public record pursuant to the Louisiana Public Records Law.

The defendant argues that it is not **required** to disclose the education records since 34 C.F.R. § 99.31(d) states:

> Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party....

Plaintiffs argue that the defendant is required to disclose those education records once the information is de-identified, pursuant to the Louisiana Public Records Law.

Defendant claims that there is a clear conflict between 20 USC § 1232g and its implementing regulation 34 C.F.R. § 99.31, which do not require the disclosure of education records to the public once the information is de-identified, and the Louisiana Public Records Law, which requires the dissemination of the records if no personally identifiable information is present, once a document is created.

***5** The burden is on the party seeking to prevent disclosure to prove that withholding of a public record is justified. *State v. Mart,* 96–1584 (La.App. 1 Cir. 6/20/97), 697 So.2d 1055, 1059. As noted by this court in *Mart,* 697 So.2d at 1059–60, 20 U.S.C. § 1232g threatens to withhold federal funds from any educational institution that permits the release of educational records containing personally identifiable information therein without the written consent of the parents of the involved student or students. 20 U.S.C. § 1232g(b)(1) and (2). Section 1232g does not preclude the release of information pertaining to students to the public; rather, it acts to control the careless release of educational information by educational institutions by threatening to withhold federal funds for doing so. *Mart,* 697 So.2d at 1060. 20 U.S.C. § 1232g does not prohibit the dissemination of the documents containing redacted student information, as sought by the plaintiffs. *See Mart,* 697 So.2d at 1060.

We agree with the plaintiffs that the Louisiana Public Records Law does not conflict with FERPA. FERPA allows an educational agency to create a record to be used for education research only if the personally-identifiable information of the students is de-identified, or that the records are coded. According to FERPA, an educational agency can release a student's record if the agency removes personally identifiable information and replaces it with a code. An educational agency should not create a document unless it meets FERPA requirements. Once the document is legally created, the document becomes a public record under the Louisiana Public Records Law. Both parties agree that the defendant cannot inquire as to the purpose of the request for a document pursuant to the Louisiana Public Records Law.

If the documents created by defendant comply with FERPA, it is already decoded and can only be used for research. The Louisiana Public Records Law does **require** the defendant to release documents, which are created by it, that are in compliance with FERPA. The Louisiana Public Records Law requires the release of the documents created by defendant, and FERPA does not prohibit the release of those documents created for use for research. After *de novo* review, we find that the plaintiffs are able to prove facts in support of a claim that would entitle them to relief. Therefore, we reverse the trial court's judgment sustaining the exception raising no cause of action and dismissing the plaintiffs' suit.

CONCLUSION

For the reasons set forth above, this court maintains the appeal, the judgment of the trial court is reversed, and this matter is remanded to the trial court for further proceedings. Costs of the appeal, in the amount of $675, are assessed against defendant, Louisiana Department of Education.

APPEAL MAINTAINED; REVERSED AND REMANDED.

Parallel Citations

2014-0032 (La.App. 1 Cir. 9/19/14)