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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 07857

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**BRIEF OF PETITIONER COMMONWEALTH CHARTER ACADEMY**

Petitioner, Commonwealth Charter Academy Charter School, by and through its attorneys, Ball, Murren & Connell, LLC, files this Brief in support of its Petition for Review of a Final Determination issued by the Pennsylvania Office of Open Records on September 16, 2022.

## I. PROCEDURAL HISTORY

On September 16, 2022, the Pennsylvania Office of Open Records (“OOR”) issued a Final Determination in Susan Spicka and Education Voters of PA v. Commonwealth Charter Academy Charter School, OOR Docket No. AP 2022-1704. OOR Certified Record, Exhibit 6.

On October 13, 2022, Commonwealth Charter Academy Charter School (“CCA”) filed a Petition for Review of the Final Determination issued by OOR. In the Petition for Review, CCA requested a Stay pending issuance of a final decision in *Central Dauphin School District v. Hawkins*, No. 88 MAP 2021.

On October 20, 2022, President Judge John F. Cherry of the Dauphin County Court of Common Pleas issued a court order staying the proceedings.

On December 21, 2023, the Pennsylvania Supreme Court issued an opinion in *Central Dauphin School District v. Hawkins*, 286 A.3d 726 (Pa. 2022).

On February 21, 2023, Susan Spicka and Education Voters of PA (“Requesters” or “Respondents”) filed an Uncontested Motion to Lift Stay, which President Judge Cherry granted on March 7, 2023.

On May 31, 2023, President Judge Cherry conducted a status conference, wherein he set a schedule for the parties to file briefs in support of their respective arguments in consideration of the decision in *Central Dauphin School District v. Hawkins*.

## II. STATEMENT OF FACTS

CCA is a K-12 public cyber charter school duly authorized and organized under the laws of the Commonwealth of Pennsylvania. CCA recognizes that vital student learning and essential socialization and student maturation can occur outside a traditional school setting and therefore encourages students to engage in real world learning experiences as an extension of the CCA curriculum; consequently, CCA offers a Community Class Reimbursement (CCR) program wherein CCA will reimburse a parent/guardian for the instructional component of an extracurricular class taken in the community. For the 2019-2020 and 2020-2021 school years, CCA reimbursed up to \$200 per school year per student. To obtain a CCR, a parent/guardian is required to complete (by hand or otherwise) and submit a Community Class Registration Form with the attached Community Class Attendance Form, and proof of payment. Once received, CCA maintains the completed forms and accompanying proof of payment in its electronic filing system. In the system, there is a folder specifically designated for each individual student, wherein the documentation is maintained. OOR Certified Record, Exhibit 4.

On May 23, 2022, Susan Spicka, the Executive Director of Education Voters of PA – a statewide public education advocacy organization, submitted a Right-to-Know Law (“RTKL”) request to CCA. Requester sought the following:

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:

On June 30, 2022, CCA partially denied the request, insofar as it sought records exempt from disclosure under Section 708(b)(1), (6), and (15) of the RTKL. However, in this notification, CCA also provided the aggregate cost of the classes for the 2019-2020 and 2020-2021 school years. OOR Certified Record, Exhibit 1.

On July 21, 2022, the Requester appealed to OOR; and on August 8, 2022, CCA submitted a position statement to OOR, along with attestations, made under penalty of perjury, of the following CCA employees: Natasha Shane, Vice President of Family Services, and Timothy A. Eller, Senior Vice President of Outreach and Government Relations. OOR Certified Record, Exhibit 4.

On September 16, 2022, OOR issued a Final Determination directing CCA to provide redacted CCR forms to the Requesters. OOR Certified Record, Exhibit 6.

### III. QUESTIONS INVOLVED<sup>1</sup>

(1) In light of the federal law protecting student education records and the personally identifiable information contained therein, is CCA required to protect from disclosure personal student information in the original Community Class Reimbursement forms?

Suggested Answer: Yes

(2) If the Pennsylvania Supreme Court's recent decision in *Central Dauphin School District v. Hawkins* commands that student education records be released under the RTKL with the removal of personally identifiable information, is CCA complying with the RTKL by releasing the requested information from the original Community Class Reimbursement forms in an alternate form that minimizes the likelihood of identification of a student or other private individual?

Suggested Answer: Yes

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<sup>1</sup> In our Petition for Review, CCA also set forth a separate ground for review – that OOR erred by finding that the appeal was sufficient under Section 1101(a) of the RTKL. Due to the limited nature of the current request, CCA will not brief or pursue the issue further, and instead retain that issue for another matter.

#### IV. LEGAL DISCUSSION

##### A. THE COMMUNITY CLASS REIMBURSEMENT FORMS SUBMITTED BY PARENTS/GUARDIANS TO CCA ARE EDUCATION RECORDS PURSUANT TO FERPA AND CONTAIN PERSONALLY IDENTIFIABLE INFORMATION EXEMPT FROM ACCESS UNDER THE RTKL.

As a public school in Pennsylvania, CCA is statutorily required to, and does, comply with the Pennsylvania Right-to-Know Law ("RTKL"), 65 P.S. § 67.101 *et seq.*, and the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and its implementing regulations,<sup>2</sup> 34 CFR Part 99. However, these statutes differ greatly with respect to the who, what, and how of access to records. The RTKL, Act Number 3 of 2008, provides residents of the United States with access to official government information in order to promote transparency and accountability. See Act of February 14, 2008, P.L. 6, No. 3, Short Title; 65 P.S. § 67.102; *Pennsylvania State Educ. Ass'n v. Commonwealth, Dep't of Cmty. & Econ. Dev.*, 148 A.3d 142, 155 (Pa. 2016); *Pennsylvania State Police v. Grove*, 161 A.3d 877, 892 (Pa. 2017). In contrast, the purpose of FERPA is "to assure that parents and eligible students can access the student's education records, and to protect their right to privacy by limiting the transferability of their education records without their consent. 120 Cong. Rec. 39862." 73 Fed. Reg. at 74831.<sup>3</sup> That being said, the Pennsylvania Supreme Court recently held that education records in a public school's possession are presumed public under the

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<sup>2</sup> The Department of Education regulations were formerly titled, the "Privacy Rights of Parents and Students." 53 FD 11943, Apr. 11, 1988.

<sup>3</sup> Interesting to note, when amendments to Pennsylvania's open records law were being debated in the General Assembly in 2008, Pennsylvania's current governor, the Honorable Joshua D. Shapiro, then a member of the Pennsylvania House of Representatives, stated that disclosure of education transcripts "is governed by Federal law. The Family Educational Rights and Privacy Act is a Federal law that protects the privacy of student education records, and it applies to all schools that receive funds under an applicable program of the U.S. Department of Education." Pa. H. Jour. 367 (Feb. 6, 2008).

RTKL, and the school bears the burden to prove a record is exempt from disclosure. *Central Dauphin School District v. Hawkins*, 286 A.3d 726, 742 (Pa. 2022). Despite this broad pronouncement, antithetical to the protection of the Commonwealth’s children and the administrative burdens on our schools, the court did caution on multiple occasions throughout its majority opinion that “*these determinations [under FERPA and the RTKL] involve context-specific, case-by-case, fact-sensitive examinations, which turn on reasonableness* — that is, whether the District ‘has made a reasonable determination that a student’s identity is not personally identifiable’ when ‘taking into account other reasonably available information.’” *Id.* at 744 (citations omitted) (emphasis supplied). The court also “said, it is the responsibility of the agency, here the District, to balance student’s informational privacy rights, by implementing required redactions, in the first instance,” *Id.*, while recognizing that redactions may come in varying forms. *Id.* at 742 (“the District is obligated to redact students’ images by, for example, blurring or darkening portions of the video revealing the students’ identities”); *See also, Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 587 (D.C. Cir. 2020)(discusses the possibility of similar methods of segregability, i.e., screenshots in lieu of video footage.).

FERPA and its implementing regulations protect the privacy rights of parents and students attending educational institutions receiving federal funds by requiring schools to obtain parental consent before disclosing: (1) education records; or (2) any personally identifiable information contained in an education record. *See* 20 U.S.C. § 1232g(b)(1),(2). FERPA defines “education records” as those records that are “[d]irectly related to a student” and “[m]aintained by an educational agency or institution or by a party acting for

the agency or institution.” 20 U.S.C. § 1323g(a)(4)(A); see also 34 C.F.R. § 99.3.

Additionally, the regulations define “personally identifiable information” as:

- 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<sup>4</sup>;
- e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- 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; or
- g) Information 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. The Pennsylvania Supreme Court has interpreted the regulations to allow for the disclosure of “an education record ordinarily protected from disclosure to all but an eligible student or her parent ... without consent if the student’s personally identifiable information has been removed.” 34 C.F.R. § 99.31(b)(1); *Central Dauphin School District*, 232 A.3d at 730.

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<sup>4</sup> As used in the definition of “personally identifiable information,” “biometric record” means “a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and *handwriting*.” 34 C.F.R. § 99.3 (emphasis supplied).



In the *Central Dauphin School District* case, the requester submitted a request for a school bus surveillance video, which captured an incident which took place in a public setting between a student athlete and a parent. *Id.* at 719. The school district denied the request, arguing that the bus surveillance video was an “education record” protected from disclosure by FERPA. *Id.* On appeal, the Office of Open Records, the Dauphin County Court of Common Pleas (Judge William T. Tully), and the Commonwealth Court all concluded that the school district failed to demonstrate that the bus surveillance video qualified as an education record warranting any protection under FERPA. *Id.* at 720-721. The school district appealed to the Pennsylvania Supreme Court to address the following issue: “Whether the Commonwealth Court erred as a matter of law in determining that the requested video, which depicts children on a school bus during the school day, is not exempt from disclosure under [FERPA].” *Id.* at 721. The court ultimately determined the school district did not show that the requested video was exempt from disclosure under the RTKL or FERPA and ordered the school district to redact and disclose the video. *Id.* at 745.

Given the fact sensitive nature of determinations under FERPA and the RTKL, different circumstances can yield different results. *Id.* at n. 13. Such is the case here – where the request seeks a true educational record not a record of the school which contains personally identifiable student information.

Here, OOR found CCA successfully demonstrated that the CCR forms are education records that contain personally identifiable information protected by FERPA. OOR Certified Record, Exhibit 6. OOR determined the forms: contain a variety of identifiers, including name and address; directly relate to the student because they

identify courses taken by a student; and are maintained by CCA in each student's individual file. CCA respectfully requests that this Court not disturb that conclusion, based upon OOR's factual and legal determinations.

Since the CCR forms qualify as an education record, CCA is required by FERPA to redact all personally identifiable information prior to disclosure. 34 C.F.R. § 99.31(b)(1); *Central Dauphin School District*, 232 A.3d at 730.

CCA initially denied Requester's request for the CCR forms, and accompanying information, based upon the conclusion<sup>5</sup> that records that qualify as education records protected by FERPA are entirely exempt from access under the RTKL. See 20 U.S.C. § 1232g; 34 C.F.R. Part 99; 65 P.S. § 67.305(a) (records in the possession of a local agency shall be presumed to be a public record unless the record is exempt under section 708; is protected by a privilege; or is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree), 65 P.S. § 67.306 ("Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree."), and 65 P.S. § 67.708(b) (The following are exempt from access by a requester under the RTKL: "(1) A record, the disclosure of which: (i) would result in the loss of Federal or State funds by an agency or

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<sup>5</sup> For public schools, which regularly train their employees on the legal requirements related to confidentiality of student information and which provide information to parents/guardians and eligible students on an annual basis, the pronouncement that education records in the possession of a public school are presumed public, 286 A.3d at 742, is a shift in student-centered focus and in time demands. No longer may school professionals be completely devoted to the students and parents/guardians, but rather must prioritize devoting attention to satisfying the whim of any resident of the United States who submits a request for student education records of any type or quantity. Imagine for a minute, Jane Doe submits a request to the School District of Philadelphia for the report cards for all 179,000 students (approximate number) for the last marking period of the 2022-2023 school year. Instead of focusing time and attention to student learning and other student needs, the School District of Philadelphia is required to assess and redact information from each of the 179,000 records. It's absurd to think either the Pennsylvania General Assembly or the U.S. Department of Education intended this result. See, 1 Pa.C.S. § 1922(1) (in construing a statute – such as the RTKL – it is to be presumed by the courts of the Commonwealth that the General Assembly "does not intend a result that is absurd, impossible of execution or unreasonable").

the Commonwealth[.]”); OOR Certified Record, Exhibit 1. Consequently, CCA did not provide redacted copies of the CCR forms and accompanying information. Before OOR, CCA continued to pursue the argument that education records are exempt from access under the RTKL, but also argued, in the alternative, that personally identifiable information could not be removed in a way that would allow for disclosure of the records. OOR Certified Record, Exhibit 4. OOR addressed the argument related to redaction of personally identifiable information and ordered CCA to provide the CCR forms redacted of any identifying information. OOR Certified Record, Exhibit 6.

On appeal, CCA maintains that the original CCR forms are personal records of student educational endeavors (different in kind from videos of events that take place in public) and contain personally identifiable information, which cannot be redacted; therefore, CCA cannot provide access to the CCR forms in their entirety. Although CCA acknowledges that it did not previously explicitly address the mode by which a parent/guardian completes a CCR form, whether typed or handwritten, it can be inferred from the evidence related to submission, that almost all parents/guardians complete the forms by hand and then submit them electronically to CCA in varying forms. OOR Certified Record, Exhibit 4 (Affidavit of Natasha Shane, Vice President of Family Services). In other words, the CCR forms contain handwriting attributable to the parent/guardian, which the Court can easily verify by means of *in camera* review.

Handwriting is an identifying characteristic open for all to see. See, *U.S. v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972); *U.S. v. Mara*, 410 U.S. 19, 21 (1973); *In Re Casale*, 512 Pa. 548, 555-556 (1986).<sup>6</sup> As mentioned above, FERPA includes “handwriting” in the

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<sup>6</sup> These cases, all criminal in nature, involved efforts by either a grand jury or a District Attorney to obtain handwriting exemplars. In these cases, the court examined the expectation of privacy an individual has in

definition of “biometric record” which is included in the definition of “personally identifiable information.” Although, as used in the definition, “handwriting” relates to a student’s handwriting, CCA maintains that this inclusion supports a determination that handwriting is an identifying characteristic. And here, the handwriting of the parent/guardian constitutes “[o]ther information that, alone or in combination, is linked or linkable to a specific student.” In addition, Requester has demonstrated that she is willing to publicly share information obtained through RTKL requests and other sources, including private CCA Facebook groups. OOR Certified Record, Exhibit 4 (Affidavit of Timothy A. Eller, Senior Vice President of Outreach and Government Relations). Consequently, CCA cannot disclose the handwritten forms even with redactions to the Requesters; doing so would be in violation of FERPA, and is therefore, not required under the RTKL.<sup>7</sup> 65 P.S. §§ 67.305(a), 67.306.

**B. PARENTS/GUARDIANS HAVE A CONSTITUTIONALLY PROTECTED PRIVACY INTEREST IN THE INFORMATION.**

Under Section 706(b)(1), public records are exempt from public access if disclosure “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). Beyond that statutory protection, in *Pennsylvania State Education Association v. Commonwealth*, the Pennsylvania Supreme Court held that individuals possess a

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the physical characteristics of a person’s script. Although vastly different from the issues here, the determinations and holdings related to handwriting are instructive.

<sup>7</sup> In rendering its decision in *Central Dauphin School District*, the Pennsylvania Supreme Court discussed context-specific reasonableness and different circumstances yielding different results. To that end, although CCA is not required to create a record which does not currently exist in its possession, custody, or control, CCA is willing to create a spreadsheet and input the information from the five or six fields – if you also include end date – Requesters originally sought. That alternative is entirely reasonable under the circumstances and would better guarantee the privacy of legally-protected student academic information.

constitutional right to privacy in certain types of personal information. 148 A.3d 142, 158 (Pa. 2016) (“The right to informational privacy is guaranteed by Article 1, Section 1 of the Pennsylvania Constitution, and may not be violated unless outweighed by a public interest favoring disclosure.”). When a request for records implicates personal information, such information may be withheld when an individual’s interest in informational privacy outweighs the public’s interest in disclosure. OOR and Pennsylvania courts have thus far determined the following types of information implicate privacy concerns, subject to the balancing test: home addresses, telephone numbers, and social security numbers. *Id.* In balancing such interests, courts sometimes ask – does disclosure of the personal information reveal anything about the workings of government?

In its Final Determination, OOR concluded that “there are no constitutional right to privacy concerns for the OOR to address.” OOR Certified Record, Exhibit 6. OOR reached this conclusion based upon the faulty presumption that redacting any information not sought from the CCR forms sufficiently de-identifies the forms. As discussed above, handwriting is an identifying characteristic, and to the extent, a parent/guardian can be identified, the unredacted information reveals information about the parent’s/guardian’s personal choice related to what programs their child/children will participate in and the cost at which that participation comes.<sup>8</sup> CCA families reside in all parts of the Commonwealth – many in smaller communities where identities can be easily deciphered

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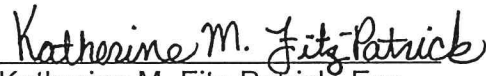
<sup>8</sup> CCA acknowledges that it did not provide notice to parents/guardians about the request, its disposition, or its appeal, or make redactions in the first instance. However, at the time of the request, its disposition, and appeal, CCA believed the requested records were entirely exempt. CCA did raise the issue and set forth its rationale related to constitutional privacy, but it was not able to fully fulfill its obligations due to the status of the law.

from the unrestricted publication of original handwritten forms. The risks to the privacy of students and their families when such academic records are divulged is real.

#### V. RELIEF REQUESTED

For the foregoing reasons, it is respectfully requested that this Honorable Court vacate the Final Determination of the OOR or hold an evidentiary hearing or *in camera review* to gather additional information and facts in response to the holdings from *Central Dauphin School District v. Hawkins* and the arguments contained herein.

Respectfully submitted,



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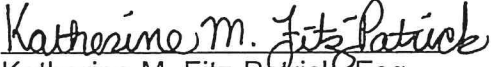
August 15, 2023

**CERTIFICATE OF SERVICE**

I, Katherine M. Fitz-Patrick, hereby certify that on August 15, 2023, a true and correct copy of the foregoing Brief of Petitioner was served via First-Class Mail, postage prepaid, and electronic mail upon:

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**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* and Local Rules of Judicial Administration 101 and 102 that require filing confidential information and documents differently than non-confidential information and documents.

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