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Omar Qureshi
QURESHI LAW

Jenny Yoo
QURESHI LAW

Navigating pupil privacy laws

A GUIDE FOR ATTORNEYS IN LITIGATION AGAINST SCHOOL DISTRICTS

In litigation against school districts, plaintiffs' lawyers need incident reports, disciplinary reports, communications with students and their families, and the identities of potential student witnesses. In some cases, students directly witness the tort. In others, students witnessed dangerous conditions or inappropriate behavior that should have warned the district of the danger that ultimately harmed the plaintiff. In certain situations, parents and students have communicated concerns to the district, which the district failed to act on, needlessly endangering other students.

School district lawyers often refuse to produce this information based on relevance or state and private pupil privacy laws such as the California Education Code and the federal Family Educational Rights and Privacy Act ("FERPA"). School districts can claim other common objections, such as vagueness, ambiguity and uncertainty, overbroadness as to time, undue burden and harassment, and attorney-client privilege.

However, in the vast majority of cases, plaintiffs are entitled to the information withheld on pupil privacy grounds. This article will outline the key arguments to bring in a motion to compel or motion to compel further responses to overcome school district privacy objections, so you can get the information you need to prosecute your case.

Argument 1: Incident reports, communications, and identities of student witnesses are relevant

All incident reports either directly related to or similar to the incident giving rise to the litigation are relevant. California's liberal discovery rules require parties to provide discovery of information on "any matter, not privileged, that is relevant to the subject matter involved in the pending action." (Code Civ. Proc., § 2017.010.) Moreover, "[i]n the context of discovery, evidence is 'relevant' if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement." (*Glenfed Dev. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117.)

The relevance standard is whether the evidence sought has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Doubts about discoverability are resolved in favor of disclosure. (See *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 97; see also *Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, 180 ["California rules of civil discovery are liberally construed in favor of disclosure"].) Naturally, this means that any information that would have any tendency in reason to prove that a district was on notice of a condition or behavior that needlessly endangered students is relevant.

Communications between students, families, and school district employees can capture important information about an incident. For example, a student's complaint about a dangerous condition of property can help establish that the school district was on notice about the subsequent injury a plaintiff suffered. Similarly, email exchanges between investigators and potential witnesses are sometimes even more helpful than the results of the investigation in terms of providing the plaintiff with useful information. Communications are key to understanding any incident, warnings about dangerous conditions, or investigations.

Moreover, the identities of witnesses, even if they are students, is relevant: The disclosure of the names and addresses of potential witnesses is a "routine and essential part of pretrial discovery." (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249-50) quoting *People v. Dixon* (2007) 148 Cal.App.4th 414, 443) (internal citations omitted).) This is because a "party's ability to subpoena witnesses presumes that he has the witnesses' contact information" and identities. (*Id*. at 1250.)

Witness names are fundamental and routine parts of discovery. As an example, the Judicial Council's Form Interrogatories, 12.0 series requests the "names, addresses, and telephone numbers of witnesses to the relevant incident, persons possessing tangible objects relevant to the investigation, and persons who have been interviewed or given statements about the incident or made a report or investigation of the incident." (*Ibid.* (quoting Judicial Council of Cal., Form Interrogatory Nos. 12.1-12.7).)

Moreover, names and contact information are not particularly sensitive, as opposed to "medical or financial details, political affiliations, sexual relationships, or personnel information." (*Id*. at 1253 (citing *Pioneer Elecs. (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370; *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1004).) In fact, the California Supreme Court found that the names and contact information of defendant's consumers constituted "no serious invasion of privacy." (*Pioneer Elecs. (USA), Inc.* at 370.)

In *Pioneer Electrics*, the Supreme Court required defendants to disclose the

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identities of consumers to help plaintiff identify potential class members. (*Ibid*.) These people may or may not have been class members and may well have possessed no actual evidence, and the Court still permitted the disclosure of their names and contact information. Alternatively, the identities of people who are known witnesses are therefore much more relevant and no more private.

Argument 2: State and federal pupil privacy laws

School districts often object to producing incident reports or identifying the names of student witnesses based on the California Education Code ("CEC") or Family Educational Rights and Privacy Act ("FERPA") grounds.

Districts regularly claim that California Education Code, section 49706(a) does not allow school districts to "permit access to pupil records without parental consent or under judicial order except as set forth in [the Code] and as permitted by Part 99 . . . of Title 34 of the Code of Federal Regulations." Part 99 of Title 34 of the Code of Federal Regulations is FERPA. (See 34 C.F.R. § 99.31.) So, if FERPA permits the disclosure of pupil records, then the California Education Code does so as well. Like the California Education Code, FERPA does not allow the disclosure of pupil records except with parental consent or "to comply with a judicial order." (34 C.F.R. § 99.31(a)(i).)

Fortunately for plaintiffs, FERPA, and therefore, the California Education Code, permits the disclosure of pupil names, addresses, and telephone numbers because this information is "directory information" not protected by FERPA. FERPA states that schools may not release education records "other than directory information" of students without parental consent or a court order. (20 U.S.C. § 1328g, subd. (b)(1).) "Directory information" is a student's name, address, telephone listing, date and place of birth, ..." (20 U.S.C. § 1238g, subd. (a)(2)(5)(A).) As such, "under FERPA a student's name, address, and telephone number may be released since the information is directory information." (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1439.) So, because California Education Code, section 49706(a) does not apply to information that may be disclosed under FERPA, the Code also permits the disclosure of student names, addresses, and telephone numbers.

Argument 3: Accessing pupil records via court order

Even if the information you seek is broader than "directory information," you are able to discover that information. In order for a party, like plaintiff, to access pupil records, he must first obtain a judicial order, which is what plaintiff is requesting by a motion to compel or motion to compel further. California Education Code, section 49077(a) states that "[a] school district must disclose information concerning a pupil in response to a court order." Moreover, the federal Family Educational Rights and Privacy Act (FERPA) provides that pupil records should be disclosed "to comply with a judicial order." (34 C.F.R. § 99.31(a)(i).) The way to access this information is through filing a motion to compel or motion to compel further responses citing FERPA, and therefore the California Education Code.

Make sure that the proposed order clearly identifies the relief you are seeking. For instance, if the Court is concerned that a pupil should have the right to object to the production of his education records, you could ask the Court for an order allowing you to subpoena the school district for records while simultaneously serving a Notice to Consumer, which would give the student an avenue to object to the production of his records. In order to do this, you might need the Court order to first provide the plaintiff with the directory information discussed above, so you know where to serve the student and/or his parents/guardians with the Notice to Consumer.

Argument 4: Constitutional objections do not prevent the disclosure of pupil information

School districts often object on constitutional privacy grounds, arguing that plaintiff must demonstrate a "compelling need" for student information. If the district makes this objection, be sure to address the constitutional issues in your moving papers.

First, the defendant likely will fail to properly assert a constitutional privacy right in its opposition to your motion to compel. In *Hill*, the Supreme Court held that in order for a party to assert a constitutional privacy right, that party must meet three threshold requirements. (*Hill*, 7 Cal.4th at 35.) First, the party must establish that it has a legally protected privacy interest. (*Ibid*.) Second, it must establish that it had an objectively reasonable expectation of privacy. (*Id*. at 36.) Third, it must establish that the threatened intrusion of privacy is serious. (*Id*. at 37.) If a party fails to prove any one of these three threshold requirements to the Court, the Court cannot conclude that forcing the party to disclose information would invade that party's constitutional privacy rights. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 555.) If the defendant fails to establish that these criteria are met, then it cannot prevail on its constitutional privacy interests. Instead, the party requesting discovery just needs to show that the information sought to be discovered is reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.010.)

Second, if the defendant convinces the Court in its opposition to your motion to compel that it has met these three threshold requirements, then the Court must balance privacy interests against the requesting party's interests in the information in question. (*Williams*, 3 Cal.5th at 555.) This is where the "compelling need" issue comes up. (*Id*. at 556.) If the privacy

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interest involves an "obvious invasion of an interest fundamental to personal autonomy," then, as discussed above, the requesting party must show a compelling need/interest in the information. (*Ibid.)* Otherwise, the Court must balance the two parties' competing interests in privacy and disclosure. (*Ibid.*) A standard balancing test is far less onerous than the compelling interest standard, so you will want to begin by explaining that the compelling interest standard is inappropriate.

The compelling interest standard is inappropriate in litigation against school districts. In *Hill v. National Collegiate Athletic Association*, the California Supreme Court held that a "compelling interest" was only required when there is an "obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships." (7 Cal.4th 1, 34 (1994).) In fact, in *Hill*, the Court found that the National Collegiate Athletic Association was permitted to require student athletes to be subject to mandatory urine drug testing. (*Id*. at 41.) The Court specifically stated that "we decline to hold that every assertion of a privacy interest under article I, section 1 must be overcome by a compelling interest," and it did not apply such a test in that case. (*Id*. at 34-35.)

Students' interest in their incident reports and disciplinary records is nowhere near an interest fundamental to their personal autonomy. It does not even rise to the level of privacy one might have in the contents of her urine and whether or not she had used drugs, like in *Hill*, in which the Supreme Court held that the compelling interest standard was improper. Moreover, students' disciplinary records are known by many adults with access to those records, and the information contained in those records was likely not highly private to begin with. For instance, if one of the students told a teacher in class that he planned to kill the plaintiff, his statement would not be private. If the student was reprimanded for making this statement, then multiple people would likely know that he was reprimanded. As such, the information contained in the disciplinary records is not private – many people other than the students involved would know about it.

In any case, disciplinary records created by the school district do not rise to the level of involuntary sterilization or her freedom to pursue consensual familial relationships. So, there is not an invasion of an interest fundamental to personal autonomy here, let alone an "obvious" one as required to use the compelling interest standard.

Once you have established that the compelling interest standard does not apply, you should demonstrate to the Court that the balance of the interests still cut in favor of your client. The "constitutional right to privacy does not provide absolute protection against disclosure of personal information; rather it must be balanced against the countervailing public interests in disclosure." (*Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1004.) Indeed, there is a general public interest in "facilitating the ascertainment of truth in connection with legal proceedings." (*Moskowitz v. Superior Court* (1982) 137 Cal.App.3d 313, 316.) Specifically, there is a public interest in "ensuring that those injured by the actionable conduct of others receive full redress for those injuries." (*Johnson v. Superior Court* (1992) 80 Cal.App.4th 661, 664.)

Conclusion

In navigating the litigation against school districts, ensuring access to records and information is crucial. Plaintiffs need a wide array of evidence to establish the grounds for their case, yet school districts can raise objections grounded in privacy laws and relevance. As this article demonstrates, the majority of these objections are surmountable. Through California's liberal discovery rules and federal laws, attorneys can write compelling arguments for disclosure of student records through motions to compel or motions to compel further responses. This information, which can range from incident reports to student identities, is pivotal in discovery for litigation against school districts.

Omar Qureshi is a trial lawyer at Qureshi Law. *Omar represents victims of child abuse and sexual abuse in lawsuits against school districts and other institutions. He also litigates civil rights cases and consumer class actions. Omar received his J.D. at Stanford Law School and his bachelors at Johns Hopkins University. Omar can be reached at omar@qureshi.law.*

Jenny Yoo is a civil rights fellow at Qureshi Law. *Jenny recently graduated from UCLA, earning a bachelor's degree in labor studies, political science, and sociology.*