SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

JOAN SASS,	TRIAL/IAS PART 9 NASSAU COUNTY
Plaintiff,	INDEX NO. 602712/12
- against -	MOTION SUBMISSION DATE: 2/5/14
WOODWARD MENTAL HEALTH CENTER, INC.. and WOODWARD CHILDREN'S CENTER,	MOTION SEQUENCE NO. 3
Defendants.	

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

RELIEF REQUESTED

The plaintiff moves for an order to compel defendants to disclose information and documents in their possession as regards to student records for the students listed in plaintiff's Amended Verified Complaint and requested by plaintiff's First Set of Interrogatories and Notice of Discovery and Inspection. The defendants, Woodward Mental Health Center, Inc. and Woodward Children's Center, (hereinafter referred to as "Woodward"), submit opposition. The plaintiff submits a reply.

This Court, after conference with counsel, directed Woodward to produce the demanded records for an *in camera* inspection, and directed counsel to provide the Court with a copy the deposition transcript for the plaintiff and the defendant. The parties have complied with the above directives. This Court has conducted an *in camera* inspection of the demanded records.

BACKGROUND

The plaintiff initiated this action for wrongful termination under New York State Labor Law §740(a)(c), the "whistleblower statute," and New York State Penal Law §177, enacted to deal with health care fraud. The goal of the "whistleblower statute" is to encourage employees to report hazards to supervisors and, if necessary, to public authorities with the intended effect of off-setting the frequent tendency of layers within organizations to screen out information which might cause embarrassment if it reached top of the organization or the outside. (*Rodgers v. Lenox Hill Hosp.*, 211 AD2d 248). The "whistleblower" statute does not seek to provide a remedy for every unfair discharge of employee; rather, it seeks to protect the employee who tries to protect public despite personal risk. (*Paul v. Aurora Medical Group, P.C.*, 670 NYS2d 747).

The rationale for the creation of the health care fraud crimes was "to get at the specific conduct by health care providers who defraud the system, make it easier to aggregate claims for fraud against a single health plan, and send a clear message to health care providers that the statute remains vigilant and will punish fraud against the health care system ." (NYS Penal Law §177; Practice Commentary, citing Legislative Memorandum).

Here, the plaintiff alleges that she was hired by Woodward under the title of Principal on or about September 12, 2011 and was wrongfully terminated approximately five months thereafter, on or about February 17, 2012. The plaintiff alleges that she objected to and refused to participate in the defendants' scheme to charge NYC Department of Education, and other governmental agencies and/or organizations, for the education of certain students despite the fact that certain students were not actually receiving certain services. The plaintiff identifies twelve students by their initials in plaintiff's complaint. The plaintiff claims that her employment was terminated because she objected to and refused to participate in the aforementioned scheme. Simply put, plaintiff alleges that she was terminated by Woodward for her refusal to participate in, and her objection to, defendants' actions that constituted healthcare fraud.

The plaintiff claims that Woodward defrauded governmental agencies, including Medicaid, because Woodward charged for services that Woodward did not provide, such as speech services and transportation services. The plaintiff, by way of discovery demands, Interrogatories and Document Demands, demands the production of records concerning the twelve students identified by their initials, including their attendance records, transportation records, addresses, phone numbers, email addresses, and detailed services provided to each student. Plaintiff seeks a copy of the twelve students' records of all services, including counseling records, speech records, acceptance and enrollment records, suspension records, and attendance records from September 2011 through the present. The plaintiff also demands Woodward's suspension records for all of its students from September 2011 through February 2012.

Woodward objected to the demand to produce the students' records on the ground that it requires Woodward to disclose information protected by the Family Educational Rights and Privacy Act, 20 USCA §1232g ("FERPA"). The plaintiff asserts that the requested student

records and information as regards to the twelve students "will demonstrate that the services charged for by defendants for the referenced students were not actually provided to said students." As plaintiff alleges the defendants violated NY Penal Law §177.05, claiming defendants intended to defraud a health plan, plaintiff provides that inspection of such records is material and necessary.

Woodward provides that it is a 501(c)(3) not-for-profit corporation and a P.L. 853 non-public school approved by the New York State Education Department. Students are referred to Woodward by their respective home public school districts and are then either approved or denied for enrollment by Woodward's staff. Woodward provides, by way of response to plaintiff's interrogatories, that the Committee on Special Education, ("CSE"), comprised of teachers, service providers, administrators and student's parents, refer the student to Woodward. Should placement of the student be determined as appropriate by Woodward staff, the student is enrolled and the student's records are maintained by Woodward and the home school district. Woodward provides that initial evaluations about services to be provided to a student are done by CSE, and thereafter. Woodward evaluates the student continuously.

The defendants submit the affidavit by Greg Ingino, Executive Director for Woodward. Mr. Ingino avers that the plaintiff was terminated by Woodward for poor performance. As to plaintiff's complaint that she was terminated after she complained of an alleged fraudulent scheme, Mr. Ingino submits that Woodward stopped receiving monies from Medicaid in 2008, three years prior to plaintiff's employment. As to plaintiff's request for billing records, of the twelve identified students, Mr. Ingino avers that Woodward only charges a yearly tuition to the student's home public school district, that Woodward does not bill a student's home public school district on a per-service basis, for example for speech therapy or counseling. Mr. Ingino provides that the cost of tuition is a uniform cost, regardless of specific services provided to a student. However, should a student need a one-to-one aide, the home public school district is charged a different schedule that sets the tuition rate explains Mr. Ingino. Woodward has forwarded letters to the parents of each of the twelve students identified seeking consent to turn over the information sought, and Mr. Ingino provides that Woodward has not yet received such consent.

Woodward, by way of opposition, agrees to the production of the following documentation:

a. Records demonstrating the tuition payments made on behalf of the 12 named students in plaintiff's discovery demands during the 2011-2012 school year;

b. A copy of the Individualized Education Plan ("IEP") for those 12 named students for the 2011-2012 school year;

c. Attendance records for the 12 named students for the 2011-2012 school year;

d. To the extent they exist, records demonstrating whether any of the 12 named students were suspended for any reason during the 2011-2012 school year; and

e. Any documents that show the dates that required services were provided to the 12 named students during the 2011-2012 school year.

Woodward objects to the remaining demands of the plaintiff on the grounds that the student records and student-related information, including addresses, phone numbers, email addresses, counseling speech and behavioral plans, and acceptance and enrollment records, are irrelevant and protected by FERPA.

DISCUSSION

20 U.S.C.A. §1232g (b)(2)(B) provides, essentially, that with respect to the inspection and review of student records, information may by released if furnished in compliance with a judicial order, or to any lawfully issued subpoena, upon the condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency. FERPA was enacted to assure parents of students access to their educational records, while simultaneously protecting such individuals' right to privacy. The approach takes a carrot-and-stick approach: the carrot is federal funding, while the stick is the termination of such funding to any educational institution which has a policy or practice of permitting the release of educational records of students without the written consent of their parents. (*Frazier v. Fairhaven School Committee*, C.A.1 (Mass) 2002, 276 F3d 52).

The purpose of the Family Educational Rights and Privacy Act (FERPA) is to ensure access to educational records for students and parents while protecting privacy of such records. (*Student Press Law Center v. Alexander*, D.D.C. 1991, 778 F Supp 1227).

In *Ragusa v. Malverne Union Free School District*, 549 F. Supp2d 288, a teacher brought an action against the school district, the board of education and superintendent alleging discrimination and moved to compel the production of certain student records. The Court held that the "privacy violations that result from any disclosure of educational records protected under Family Educational Rights and Privacy Act (FERPA) are no less objectionable simply because release of the records is obtained pursuant to judicial approval, unless, before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interests of the students." (*Id.*) The Court found that the requested records were relevant to whether grounds for denying teacher tenure, including poor classroom management skills, inability to engage students from bell to bell and inability to explain the material in a simple manner were a pretext for discrimination. The Court found that plaintiff's need for the requested records sufficiently outweighed the students' privacy issue, "particularly since the records can be produced in redacted form with all personally identifiable information removed." (*Id.*) A party seeking disclosure of education records protected by FERPA bears a significantly heavier burden to justify that disclosure exists with respect to alternative methods of discovery, for example, business records. (*Ragusa, supra*). FERPA does not create a privilege immunizing all student-identifying information from disclosure. (*In re Subpoena issued to Smith*, 155 Ohio Misc2d 46, 921 NE2d 731). "Nothing in FERPA limits the discoverability of education records." (*Id.*,citing *Ragusa, supra; Rios*, 73 F.R.D. 589*; Baker*, 160 Ohio App.3d at 256; *Vandiver v. Star-Telegram, Inc.*, (Tex. App. 1988), 756 S.W.2d 103).

As per this Court's review of the transcript of plaintiff's deposition conducted on February 3, 2014, the following matters were addressed. The plaintiff's understanding of the

Individualized Educational Plan, (IEP), is that it is generated by the district, can be amended by Woodward but must be "signed off" by CSE. Plaintiff, Ms. Sass, is aware that tuition for Woodward is charged to the student's home school district. Ms. Sass testified that she did not see the bills, had no involvement in Woodward's billing practices or process, was not involved in the creation of rates or billing of services to any of the school districts, and had no input into whether a home district chose to charge Medicaid. Ms. Sass testified that she was involved in the enrollment and attendance numbers. The plaintiff provided that a collective team of teachers, social workers, the principal [plaintiff herself] made the decision to suspend a student. Ms. Sass was aware of Mr. Ingino's concern about suspensions and knew of the upcoming State of Education Department audit. Ms. Sass testified that about 156 suspensions occurred from September through February, and that the team made a decision contrary to hers about 2 - 3 times. Ms. Sass provided that a student was considered still enrolled at Woodward regardless of suspension unless CSE took action, such as expelling the student. As to allegations contained in plaintiff's complaint, the plaintiff testified that social workers were not providing services consistent with the terms of the IEP; not that they were not providing the services at all; that she reviewed some case records kept by social workers that sometimes showed services and sometimes did not. The issue of record keeping was addressed to some staff, including social workers, however, plaintiff testified that although changes were implemented to alleviate scheduling problems, sessions were not necessarily being held. Ms. Sass testified that a social worker, Nancy Sutherland, told her that Nancy Sutherland and others were charging for sessions that did not exist, at or around the time frame plaintiff was informed she would no longer have access to records after February as the State was coming in for the audit. The plaintiff testified that Nancy Sutherland represented to the plaintiff that Nancy Sutherland falsified some of her documents, but plaintiff did not report this. When questioned further, plaintiff testified that Nancy Sutherland did not say she falsified some documents, but implied it when she told the plaintiff she created notes and records for sessions that did not occur. The plaintiff testified that Mr. Ingino told her to make sure that the charts reflect the sessions, to make it happen, and she took that to mean that he wanted her to have the records falsified.

Ms. Sass, when examined by her own counsel, testified that the students that were suspended when she was the Principal at Woodward, were suspended for violence, hitting, throwing furniture, biting, kicking and bringing razor blades to school. Ms. Sass testified that they were not suspended simply because they didn't listen well, or were disruptive, but rather, because of violence, and gave the following examples: a staff member who was punched in the jaw, students being punched as well as staff members. Ms. Sass testified that students at Woodward came from schools and/or districts that could not handle their behaviors which were difficult and were sent to Woodward to be educated and counseled and to work on their behavior.

As per this Court's review of the transcript of Woodward's deposition, Gregory Ingino, testified that Woodward had compliance issues with New York State, the plaintiff was hired to get them into compliance and she was not able to do that. Mr. Ingino testified that plaintiff's testimony concerning the problem with the social workers not fulfilling their duties was not accurate; that he went to her with his concerns and advised that paperwork must be in place. Mr. Ingino testified that plaintiff's testimony that "she was not allowed to go and review files is totally inaccurate." Mr. Ingino provided that tuition is set by the State Education Department. Mr. Ingino testified that in the first three month period that the plaintiff was hired, she was involved in 156 suspensions that were not all attributed to violent behavior.

CONCLUSION

Here, in addition to the documentation Woodward consented to produce limited to the time frame of the 2011-2012 school year on behalf of the 12 named students, *to wit*, tuition payments, the IEP plans, attendance records, and documentation showing "required" services, the plaintiff is entitled to the production of the counseling speech and therapy records, behavioral plans, acceptance and enrollment records and suspension records of the 12 named students. Additionally, plaintiff is entitled to the production of all Woodward student suspension records from September 2011 through February 2012. However, such records shall be produced in redacted form with all personally identifiable information removed. Plaintiff is not entitled to identifiable information such as the students' email addresses, phone numbers, addresses, or transportation records.

The above documentation is material and relevant to plaintiff's claim that Woodward charged for services that were not actually provided, and that plaintiff claims she would not participate in such practice. While arguably, as Woodward submits, the documentation requested as to services "charged" may eventually be considered a moot point is irrelevant as Woodward charges a uniform tuition, unless a student needs a one-to-one aid, the requested documentation is discoverable.

There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by a party or a person who possesses a cause of action. (CPLR §3101(a)(1)(2)). The Court of Appeals held that the statute providing that there shall be full disclosure of all evidence material and necessary in prosecution or defense of an action, regardless of the burden of proof, requires disclosure, upon request, "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Allen v. Crowell-Collier Publishing Company*, 288 NYS2d 449). The purpose of disclosure proceedings is to advance function of trial to ascertain truth and accelerate disposition of suits, and the statute providing for disclosure should be construed broadly to effectuate this purpose (*Id*).

Under the statute requiring full disclosure of all evidence material and necessary in prosecution of an action, the word "evidence" is not equivalent to that evidence which might be admissible on trial of the action, but means evidence required in preparation for trial. (*West v. Aetna*, 266 NYS2d 600). If there is some doubt of admissibility on trial of action, Special Term should permit discovery of the evidence and leave the ultimate decision of admissibility to the trial court. (*Id*). The information sought need not qualify as evidence admissible at the trial of an action, but only to lead to such evidence. (*Id*). Disclosure is required as to all relevant information calculated to lead to relevant evidence. (*Siegel New York Practice* §344).

Notably, Woodward has previously forwarded letters to the parents of the 12 named students seeking consent to turn over the information sought.

Upon the foregoing, it is hereby

ORDERED that Woodward shall produce the following documentation, on behalf of the 12 named students, limited to the 2011-2012 school year, in redacted form with all personally identifiable information removed, within twenty (20) days of service of this order with notice of entry:

(a) IEP records;
(b) attendance, acceptance and enrollment records;
(c) tuition payments records;
(d) in addition to the "required" services, counseling and speech records and behavioral plans;
(e) suspension records; and
(f) suspension records of all Woodward students from September 2011 - February 2012, and it is hereby further

ORDERED that Woodward shall comply with the notice conditions set forth in FERPA, 20 U.S.C.A. §1232g(b)(2)(B), and it is hereby further

ORDERED that use of the above information shall be limited to the instant action, and access to the above information shall be limited to plaintiff, plaintiff's counsel, and any potential expert at the time of trial, and plaintiff and plaintiff's counsel shall not photocopy any of the above redacted documentation, other than for use as an exhibit at the time of deposition and./or trial, and it is hereby further

ORDERED that upon the conclusion of this matter, plaintiff shall return all redacted copies to Woodward.

E N T E R :

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J.S.C.

Dated: March 12, 2014

cc: Mark L. Lubelsky and Associates
Lamb & Barnosky, LLP