

**A.M. v Holy Resurrection Greek Orthodox Church of
Brookville, N.Y.**

2019 NY Slip Op 30525(U)

March 5, 2019

Supreme Court, New York County

Docket Number: 156132/16

Judge: Sherry Klein Heitler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 30

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 A.M. and E.M., both minors, by and through their parents
 and natural guardians, EFTIHIA MIHOS and EVANGELOS
 MIHOS,

Index No. 156132/16
 Motion Sequence 009

DECISION & ORDER

Plaintiffs,

-against-

HOLY RESURRECTION GREEK ORTHODOX
 CHURCH OF BROOKVILLE, NEW YORK aka
 GREEK ORTHODOX CHURCH OF THE HOLY
 RESURRECTION, et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.S.C.

Plaintiffs A.M. and E.M., both of whom are minors, allege that non-party P.K., who is also a minor, sexually assaulted A.M. inside a church operated by defendant Holy Resurrection Greek Orthodox Church of Brookville. Defendant Father Demetrios Kehagias, who at the time was affiliated with the church, is P.K.'s father. Plaintiffs sued Holy Resurrection and Father Kehagias, among others, alleging that they negligently allowed P.K. to be on church grounds when they knew or should have known that P.K. had a propensity for violence.

Plaintiffs now move pursuant to CPLR 2307¹ for the issuance of a subpoena duces tecum to the New York City Department of Education for P.K.'s school records. This request arises from the deposition of Father Kehagias, which revealed that there may have been an incident involving P.K. at his school prior to his alleged assault of the Plaintiffs (Deposition pp. 17-18, 20-21):

- Q. When you told the police that you had concerns about P.K.'s behavior in the past, was that related to concerns that he had done something inappropriate in this case? . . .
- A. What happened several months earlier is that a young man from his school followed him into the bathroom, into his stall. From what I understand, he told that person to get out of

¹ CPLR 2307 provides that a subpoena served upon a "bureau of a municipal corporation . . . requiring the production of any books, papers, or other things, shall be issued by . . . a judge of the court in which an action which it is required is triable.

the stall; they wouldn't, just kind of standing there. This came from whoever the authority is that judges such cases at the school, and they found no fault in him, and they returned him back to his normal school.

* * * *

Q. Following that, there was some kind of investigation or procedure?

A. Yes.

Q. What was that?

A. Where there was an investigation, I forgot what that part of the school system is called. Where they have somebody who listens to what each side has to say, and then makes a determination based upon the evidence that is presented. . . .

Q. Did you go to any kind or [sic] hearings?

A. Went to a hearing.

Q. Where was the hearing?

A. That hearing was wherever they had the hearing for the Department of Education.

Q. Who attended the hearings?

A. My wife, myself, his attorney, my son, the other boy, and that is it.

Q. Did the other boy have an attorney?

A. I'm not aware.

Plaintiffs argue that it can be reasonably inferred from Father Kehagias' testimony that this incident was of a sexual nature. Defendants and counsel for P.K. respond that Plaintiffs' request is nothing more than a fishing expedition. What is undisputed is that the incident was investigated by P.K.'s school and that the Department of Education conducted a hearing of some kind. The result of that investigation is unclear, although counsel for P.K. in this case advised the court that the school did not take any disciplinary action against P.K.

In deciding whether to permit discovery into this matter the court must balance Plaintiffs' right to discovery (see CPLR 3101) against the rights of the minor children involved. *See Moores by Moores v City of Newburgh Sch. Dist.*, 213 AD2d 527, 527-528 (2d Dept 1995) ("although school records are not protected by any privilege, they are not discoverable unless their relevancy and

materiality to the action is established”); 20 USC 1232(g)²; cf. *Monica W. v Milevoi*, 252 AD2d 260, 262 (1st Dept 1999). Given the potentially sensitive nature of the records sought, and the fact they involve non-party children, the court agrees with Defendants and counsel for P.K. that Father Kehagias’ testimony is not sufficient to permit the disclosure of P.K.’s school records outright. On the other hand, there appears to have been an investigation which may shed further light on Father Kehagias’ state of mind and knowledge of his son’s alleged propensities, which are highly relevant to Plaintiffs’ claims in this case.

As such, the court will issue a limited subpoena for P.K.’s school records relating to the incident described in Father Kehagias’ deposition, including any records created as part of any investigation conducted by P.K.’s school or the Department of Education. These records will be reviewed by the court *in-camera*. Should the court determine that some or all of them are discoverable, the court will permit counsel for P.K. to review them and prepare a privilege log. Any documents that the court then deems discoverable will not be produced until a confidentiality order is signed by all interested parties. And, to protect the identity of the other child involved in this alleged incident without rendering the documents unintelligible, the child’s identifying information (name, social security number, address, etc.) shall be redacted and substituted with generic terms. For example, the child’s name shall be replaced with “Child”, his social security number replaced with “Child’s SS#” or “xxx-xx-xxxx”, and his address replaced with “Child’s Address”.³

In light of the foregoing, it is hereby

² The Family and Educational Rights and Privacy Act of 1974 (FERPA) does not create a privilege with respect to school records, but does limit their disclosure. See *Rios v Read*, 73 FRD 589, 598 (EDNY 1977) (FERPA “places a significantly heavier burden on a party seeking access to student records to justify disclosure than exists with respect to discovery of other kinds of information . . .”).

³ As another example, if the record contains the name(s) of Child 1’s parent(s), they should be redacted and replaced with “Child 1’s parent(s)”.

ORDERED that Plaintiff's motion is granted to the extent that the court will issue a limited subpoena duces tecum as set forth herein and will thereafter conduct an *in-camera* inspection; and it is further

ORDERED that Plaintiff serve a copy of this decision and order upon all interested parties, including the New York City Department of Education, within 10 days from the date of entry of this decision and order. Within 10 days of such service Plaintiff shall submit to the court a proposed subpoena duces tecum consistent with this decision and order, again on notice to all interested parties, including the New York City Department of Education; and it is further

ORDERED that the New York City Department of Education shall mail all responsive documents to the court at the following address:

Hon. Sherry Klein Heitler
Office of Policy & Planning
25 Beaver Street, Suite 1128
New York, NY 10004

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

DATED:

3-5-19


SHERRY KLEIN HEITLER, J.S.C.