

MEMORANDUM

TO: The Honorable South Kingstown Town Council
Theresa Murphy, Acting Town Manager

FROM: Michael A. Ursillo, Town Solicitor; Peter F. Skwirz, Assistant Solicitor

DATE: August 13, 2021

SUBJECT: *Report of investigation into AFL-CIO mailer*

I. Introduction –

In late April of 2021, the AFL-CIO issued a mailer in support of the school bond issue that was addressed to students of South Kingstown Schools. The mailer raised a concern that student information was improperly disclosed to the AFL-CIO and others. In response, the Council exercised its powers under Sec. 3131 of the Town Charter to investigate this matter. The purpose of this memorandum is to report the results of that investigation.

II. Facts and travel –

At the outset of our investigation, on April 29, 2021, we were provided an email from George Nee of the AFL-CIO that was addressed to legal counsel for the School Department. That email is attached as **Exhibit A**. In the email, Mr. Nee disclaims any knowledge of how the student information came to be released and stated that he was approached by Brad Dufault of Checkmate Consulting Group, LLC, about endorsing a mailer. Mr. Nee stated that Mr. Dufault handled all of the arrangements for having the mailer addressed and sent.

After receiving this email, as an initial step in the investigation, we sent out three letters of inquiry on May 3, 2021, to three known parties of interest: the School Department, Mr. Dufault, and Mr. Nee. These letters are attached as **Exhibits B, C, & D**. Mr. Nee sent a response letter dated May 7, 2021, attached as **Exhibit E**, where he again disclaimed any knowledge of the release or use of the student information. The School Department through legal counsel provided an initial response on May 7, 2021, through a letter attached hereto as **Exhibit F**. Mr. Dufault did not provide a response to our initial letter of inquiry but, instead, informed us that he had retained legal counsel and that all correspondence regarding this matter should be directed to his counsel.

In response to Mr. Dufault's refusal to testify, the Town Council authorized a subpoena, which was issued on May 13, 2021, attached as **Exhibit G**, requiring Mr. Dufault to appear before the Council on May 24, 2021, to testify. With regard to the School Department, this office maintained an ongoing cooperative dialogue with the School Department's legal counsel in order to obtain further information on this issue. This office did not further pursue investigation of Mr. Nee, as it appeared that he did not have significant further information to offer.

Mr. Dufault did not appear at the May 24, 2021, Town Council meeting and failed to comply with the subpoena issued by the Council. Accordingly, this office drafted a verified Superior Court complaint against Mr. Dufault, along with a motion seeking court ordered enforcement of the subpoena. We also drafted legal memorandum to the court in support of our request. We obtained authorization from both the Town Council and the School Committee to file the complaint with both the Town Council and School Committee named as plaintiffs seeking enforcement of the subpoena. The complaint, motion, and memorandum were filed with the court on June 3, 2021. They are attached hereto as **Exhibits H, I, & J**.

In the meantime, as a result of the ongoing dialogue between this office and legal counsel for the School Department, this office learned that, on April 8, 2021, School Superintendent Linda Savastano had sent an email to her Executive Assistant Jenna Ouellette requesting information on “our students and their mailing addresses.” Prompted by this request, Ms. Ouellette requested and received student names and addresses in an excel spreadsheet via email. On the same day, Ms. Ouellette forwarded this spreadsheet of information back to the Superintendent. A copy of this email chain is attached as **Exhibit K**.

The Superior Court case was scheduled to be heard before a Superior Court Justice on our motion to enforce the subpoena on Monday June 14, 2021. However, on Friday June 11, 2021, at 5:49 p.m., Superintendent Savastano issued a statement about the release of the student information for the mailer. In the statement, Ms. Savastano acknowledged that she “provided directory information to Stacey Bodziony, the Friends of South Kingstown Schools contact.” A copy of that statement is attached as **Exhibit L**.¹ In light of this statement, the court hearing on the enforcement of Mr. Dufault’s subpoena was passed. Mr. Dufault’s legal counsel, on June 16, 2021, provided a response letter to our inquiry of Mr. Dufault, attached as **Exhibit M**. This office was also able to obtain a sworn affidavit from Stacey Bodziony dated June 28, 2021, regarding her involvement with the student directory information, attached as **Exhibit N**.

¹ In her statement, Ms. Savastano states that she is “deeply sorry that [she] delayed in telling” about her involvement in the information release. But, she claims, the delay “was a mistake” caused by her failure to “connect[] the dots from [Ms. Bodziony’s] request to the mailers.” However, given the intense public scrutiny of this matter and the circumstances outlined in this report, it appears that Ms. Savastano’s delay may have been caused by a desire to avoid public criticism, and her disclosure only came about when it became clear that her involvement would eventually be revealed through other means. Regardless of the reason for her delay, it is undeniable that Ms. Savastano’s actions since April 26, 2021, unnecessarily increased the time and effort required to complete this investigation to provide the community with the answers they were seeking.

Based on the information obtained during our investigation, it appears that the following timeline of events occurred with regard to release of the student directory information:

- On April 8, 2021, Linda Savastano asked her Executive Assistant Jenna Ouellette for a list of school student names and their mailing addresses. The request also asked for names and addresses of employees and vendors. Subsequent emails in the chain indicate that it was time sensitive, without providing explanation.²
- Ms. Ouellette asked the appropriate school HR/IT staff for this information on April 8, 2021, and was provided with an Excel spreadsheet containing student names and mailing addresses. The spreadsheet did not contain other student information aside from names and mailing addresses. It did also contain the names and addresses of school department employees and vendors with addresses in South Kingstown.
- Ms. Ouellette provided this Excel spreadsheet to Ms. Savastano on April 8, 2021.
- In a statement made following this investigation, Superintendent Savastano admitted that she subsequently provided this information to Stacey Bodziony by email. However, the investigation did not reveal the email account used to send the mailer information. A search of Ms. Savastano's school department email did not show that this account was used by Ms. Savastano to transmit the information.
- Ms. Bodziony provided this information to Brad Dufault of Checkmate Consulting Group, LLC.
- Mr. Dufault used this information to prepare and circulate the AFL-CIO mailer, which was received by parents on or about April 25 & 26, 2021.

² As a point of reference, it is worth noting that prior to the events at issue in this investigation, at the March 11, 2021, School Building Committee meeting, a member of the public requested similar information and was denied.

- The School Department and the School Department’s legal counsel provided an update and legal opinion regarding the mailer in an April 26, 2021 memorandum, which is available at <https://www.skschools.net/common/pages/DisplayFile.aspx?itemId=44815232> (last checked 8/2/21). See **Exhibit O**.
- When the issue first came to light on April 26, 2021, Superintendent Savastano represented that a search was conducted going back to 2019 regarding the release of such information and that the relevant student information was not released in response to an AFL-CIO related request. Superintendent Savastano made a similar representation on May 3, 2021.
- The issue of the mailer was added onto the April 26, 2021. During public comment, parents and community members expressed overwhelming concerns about what was released, by whom, and when. The Town Council subsequently voted 5-0 to investigate the release of student information as authorized under section 3131 of the Town Charter.
- On April 30, 2021, the School Committee held a special meeting to consider amendments to policies 8231 and 8220 as they relate to the release of student information.
- On May 3, 2021, the School Committee and School Department issued a joint statement providing an update regarding the AFL-CIO mailer. See **Exhibit P**.
- On May 3, 2021, the Solicitor’s office issued letters of inquiry to the School Department, Checkmate Consulting, and the AFL-CIO.
- On May 4, 2021, Brad Dufault of Checkmate Consulting stated that all inquiries should be directed to his legal counsel. Follow-up phone call with his legal counsel revealed that Mr. Dufault would not voluntarily disclose any information about this issue.
- On May 4, 2021, the school bond referendum was rejected by the voters.

- On May 6, 2021, the School Committee held a special meeting regarding the mailer, where public comment was taken. Parents again expressed overwhelming concerns about what was released and by whom.
- On May 7, 2021, the Solicitor received a response to the initial letter of inquiry issued to the School Department and a response letter from George Nee of the AFL-CIO.
- On May 10, 2021, the Town Council voted to issue a subpoena to Brad Dufault of Checkmate Consulting, to testify before the Council on May 24, 2021.
- On May 13, 2021, the Council's subpoena was served on Mr. Dufault through his legal counsel.
- On May 17, 2021, the Solicitor's office sent a follow up inquiry to the School Department based on the responses to the initial inquiry.
- On May 20, 2021, the Solicitor's office had a phone conference with Mr. Dufault's legal counsel, where his counsel indicated that Mr. Dufault did not intend to attend the May 24, 2021, Council meeting.
- On May 21, 2021, the Solicitor received a further response from the School Department following the May 17, 2021, follow-up inquiry. In this response, it was revealed that Jenna Ouellette, Executive Assistant to the Superintendent, was asked to obtain a list of student information by the Superintendent, but she did not know why the Superintendent had requested the information. Also in this supplemental response, Ms. Savastano stated that she had requested the student information in the process of reviewing redistricting and in order to analyze a signed petition submitted to the RIDE School Building Authority for residency. There was no evidence provided to counsel or discovered in this investigation to substantiate Ms. Savastano's claims.

- On May 24, 2021, after Mr. Dufault failed to comply with the subpoena, the Council voted to authorize the Solicitor to file suit to enforce the subpoena in Superior Court.
- The Solicitor's office prepared pleadings and a legal memorandum for the Superior Court case, which were forwarded to the School Committee so that the School Committee could join the Town Council in seeking enforcement of the subpoena and join the Council's investigation.
- On May 31, 2021, the Solicitor's office sent further inquiry to the School Department, focused on the student information produced by Ms. Ouellette and the Superintendent's purported use of that information for the purpose of redistricting and analyzing petitions.
- On June 2, 2021, the School Committee votes to join the Council seeking enforcement of the subpoena against Mr. Dufault in Superior Court and join the Town Council's investigation into this matter. Further, the School Committee voted to join the Council's investigation of this matter at the June 2, 2021, meeting.
- On June 3, 2021, a complaint was filed in Superior Court jointly by the Town Council and the School Committee seeking enforcement of the subpoena against Mr. Dufault. A conference with Superior Court Justice Taft-Carter was scheduled to take place on June 14, 2021.
- On June 4, 2021, the Solicitor's office received a partial response to its inquiry letter dated May 31, 2021. Specifically, the Town received staff emails involving Ms. Ouellette and the production of student information at the request of the Superintendent, but did not receive a response to the portion of the May 31, 2021, inquiry regarding the Superintendent's use of that information.

- At this point the Solicitor's office learned that the Superintendent had retained separate legal counsel.
- On June 8, 2021, the School Committee held an executive session on the mailer issue and posted an agenda item regarding placing the Superintendent on administrative leave. The School Committee did not place the Superintendent on leave but, instead, directed the School Department's legal counsel to contact the Superintendent's legal counsel with regard to the Superintendent putting out a public statement about the mailer.
- On June 11, 2021, the Superintendent put out a public statement stating that she had provide the student information used in the mailer to Stacey Bodziony, a board member of the Friends of SK Schools, who, in turn, provided that information to Checkmate for use in the mailer.
- On June 12, 2021, Ms. Bodziony issued an email to the Solicitor's office confirming her involvement in the release of the student information and creation of the mailer.
- In light of these public statements from the Ms. Bodziony and the Superintendent, the June 14, 2021, Superior Court conference regarding subpoena enforcement was passed.
- On June 16, 2021, the Solicitor's office received a correspondence from Mr. Dufault's legal counsel confirming his role in receiving the student information and creating the mailer in question.
- On June 28, 2021, this office received a sworn affidavit from Ms. Bodziony regarding her role in release of the student information.
- Also on June 28, 2021, the Superintendent resigned her position.

- Ms. Savastano, Ms. Bodziony, and Mr. Dufault have indicated that copies of the student information used on the mailer have since been deleted and they no longer have access to it.
- This office has been unable to review the emails of Ms. Savastano following her resignation, as her school laptop has been cleared of such data by Ms. Savastano.

III. Legal Analysis –

i. Statutory privacy requirements –

The primary federal law regarding privacy of student records is the Family Educational Rights and Privacy Act (FERPA), codified as 20 U.S.C. § 1232g. The FERPA requires local educational institutions to implement policies to protect student privacy as a condition of receiving federal education aid. The FERPA has been described as taking “a carrot-and-stick approach: the carrot is federal funding; 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 (or personally identifiable information contained therein ...) of students without the written consent of their parents.’” Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 68 (1st Cir. 2002) (quoting 20 U.S.C. § 1232g(b)(1)). The FERPA, § 1232g(b)(2), generally provides that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records **other than directory information**” (emphasis added) without the written consent of the parent. Rhode Island law incorporates the requirements of the FERPA and applies it to local school districts. See RIGL 16-71-3(a)(7). Accordingly, while most student information may only be

released by a local education agency with prior parental consent, “directory information” may be released without prior express parental consent.

The U.S. Department of Education has promulgated a regulation that broadly defines “directory information” as “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” See 34 CFR § 99.3. While the statute gives some examples of what may be considered directory information, such as “student's name, address, telephone listing, date and place of birth, major field of study,” *etc.*, the FERPA generally “leaves each educational agency or institution free to determine for itself what categories of directory information it will release and for what purposes.” Elec. Privacy Info. Ctr. v. U.S. Dep't of Educ., 48 F. Supp. 3d 1, 6 (D.D.C. 2014). The way that a local educational institution determines what directory information it will release and what information will not be released is through a public notice and opt-out procedure prescribed in U.S. Department of Education regulations. See 34 CFR § 99.37.

ii. South Kingstown policy –

Pursuant to these mandates, at the time relevant to this investigation, the South Kingstown School Committee had promulgated two policies that are relevant here. First, on March 2, 1987, the Committee adopted policy 8220 regarding access to educational records, which was last revised on February 13, 2007. Policy 8220 provides in pertinent part:

“Anyone other than parents, eligible students, and herein authorized personnel of the South Kingstown School Department who wishes to review educational records, or directory information, must make a request to the custodian of the records that is the principal of the school the child attends for school records or the pupil personnel services director for special education records.”

If such a request is made, Policy 8220 generally requires consent of the parent for release, provided “that the South Kingstown School Department may disclose educational records without

the consent of the parent” in only certain enumerated circumstances. One of the enumerated circumstances where disclosure is allowed without parental consent is the “disclosure of directory information, which consists of the following:

- Name
- Participation in recognized activities/sports
- Address, telephone, and email
- Weight and height for athletic team members
- Photograph
- Degrees, honors, and awards
- Date and place of birth
- Dates of attendance and grade level.”

Policy 8220 goes on to state that parents have the right to “prohibit the disclosure of directory information” and that they “will be advised at the beginning of the school year of this right and steps that they must take in order avoid the disclosure of this information.”

Also relevant to this matter is Policy 8231. This policy was enacted on October 9, 2018, in response to the immigration policies of the Trump administration. The stated purpose of this policy to “provide equal educational opportunities to all students . . . without regard to their immigration status or national origin.” Policy 8231 implemented policies for preventing school personnel from inquiring about student immigration status. Policy 8231 also established procedures for handling requests from law enforcement and Immigration and Customs Enforcement (ICE) for student information or for access to students while on school grounds. Finally, as pertinent here, Policy 8231 included language about student record confidentiality, which reads as follows:

“If a non-school official seeks access to any student records, the District shall first obtain consent from a parent or guardian of the student prior to disclosure of any student records. This includes the following categories of information identified in Policy No. 8220 as directory information:

- Address, telephone, and email;
- Date and place of birth;

- Dates of attendance and grade level.”

iii. Compliance with statute and local policy –

As discussed above, federal and state law allow local school departments to release directory information without express parental consent. Federal and state law also gives local school departments discretion to define releasable directory information, which may include student names and mailing addresses. However, whether the names and mailing addresses of South Kingstown students qualify as directory information depends on whether the School Committee has enacted a policy defining this information as directory information. If the only relevant policy at issue were Policy 8220, it would be clear that the School Committee had defined directory information to include student names and mailing addresses. This issue becomes more complicated, however, when reading Policy 8231 in conjunction with Policy 8220.

At first blush, it appears that Policy 8231 may have attempted to remove a student’s address, telephone, and email; date and place of birth; and dates of attendance and grade level from the definition of releasable directory information. This would make sense given one of the overall purposes of Policy 8231, *i.e.*, to shield students with an undocumented immigration status from the potential threat of deportation proceedings. However, based on the conflict between Policy 8220 and Policy 8231, reasonable minds could differ on this point. Based on these conflicting local policies, there is no clear answer about whether the information released in this case is releasable directory information or not.³ It is clear that state and federal law allow a local education

³ It should be noted that in July of 2021, the School Committee has amended these policies in an attempt to clarify the intent and remedy the apparent conflict.

agency to designate this information as releasable directory information. It is, however, unclear whether the School Committee has actually done so.

iv. Practical consequences –

Based on the ambiguity in local regulation, it is unlikely that the state or federal government would take any enforcement action against the Town based upon the student names and addresses released by the Superintendent in connection with this mailer. There are also certain steps that a parent can take that the Council cannot. First, pursuant to 34 CFR § 99.63, if a parent believes there may have been a FERPA violation with regard to the educational information of her child, the parent may make a written complaint to the Office of the Chief Privacy Officer, U.S. Department of Education. The complaint can be mailed to “Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.” Pursuant to 34 CFR § 99.64(c), the complaint must be submitted to the Office within 180 days of the alleged violation. However, for the reasons discussed above, it is unlikely that enforcement action would be taken in this instance.

Alternatively, a parent may file a complaint with the Rhode Island Education Commissioner pursuant to RIGL 16-71-3(b) if she feels that the confidentiality of her student’s educational records has been breached, in violation of RIGL 16-71-3(a)(7). The Executive Staff Assistant at the legal department of the Rhode Island Department of Education may be contacted for more information about that process. She may be contacted by phone at 401-222-8979, or by email at Vilma.DiOrio@ride.ri.gov. Again, enforcement action does not appear likely.

This memorandum is not intended to provide an exhaustive list of available remedies that parents may have and is not intended to give legal advice to parents. If parents wish to obtain legal advice regarding this issue, it is advisable that they retain their own legal counsel. The purpose of

this section of the memorandum is merely intended to identify certain resources that parents may have available to them if they wish to pursue this further.

IV. Conclusion –

Our office spent over 110 hours in conducting this investigation. Following the investigation authorized by the Council into this matter, this report provides our considered opinion as to the relevant facts and legal analysis. Accordingly, this investigation has concluded.

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