COMMONWEALTH OF VIRGINIA
Special Education

Re: **, by and through her guardian,**

v.

Public Schools

DECISION CONCERNING LEA'S MOTION
TO DISMISS FOR MOOTNESS

Child & Guardian:

Child's Attorney:
None

LEA's Attorney:
Kathleen S. Mehfoud, Esquire

Administrative Hearing Officer:
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Introduction and Procedural History

By e-mail communication dated June 1, 2012, the School Board, by counsel, first informed the hearing officer and the Guardian that it would argue a motion to dismiss for mootness. In such e-mail, the School Board, by counsel, informed the hearing officer and the Guardian that the prior written notice of June 13, 2011 (which is the subject of this FERPA administrative proceeding) was removed from the student's educational records and had "been replaced with a newer version deleting the sentences that the parents found objectionable."

The parties scheduled and held a third pre-hearing conference call at 8:00 a.m. on June 5, 2012. , Ms. Mehfoud, , , Ms. Boeding (of Cavalier Court Reporting) and the hearing officer participated in the call.

Ms. Mehfoud argued that the hearing was moot and stated that his preliminary reaction was that the hearing was not moot. undertook to submit a brief concerning the issue of mootness by midnight on June 15, 2012.[1] Ms. Mehfoud stated that she only wanted an opportunity to respond to brief to the extent it went beyond arguments of mootness and only was allowed an opportunity to file a reply brief.

The School Board, by counsel, submitted its response brief by June 22, 2012 and submitted his reply brief by June 29, 2012. On July 12, 2012, the LEA sent the hearing officer without comment a case styled *Winzler v. Toyota*, 681 F.3d 1208 (10th Cir. 2012). requested and the hearing officer granted to the opportunity to submit by July 24, 2012, any form of response to the case which he chose. The hearing officer has received and considered the Guardian's response. The hearing officer, in his decision of July 16, 2012, granting the opportunity to respond to the *Winzler* case, stated that he would not be considering any additional submissions by the parties beyond the Guardian's response to the *Winzler* case. Accordingly, the issue of mootness is ripe for decision by this administrative hearing officer.

Decision

While the Guardian has offered many arguments and some support for his assertion that the hearing has not been mooted, ultimately, the hearing officer decides that the Guardian cannot overcome the admission made in his e-mail at 9:35 p.m. on March 10, 2012 to the hearing officer. In this e-mail, the Guardian unequivocally stated:

> This matter could be resolved without a hearing simply by acceding to the original request by deleting the language that I believed was inaccurate and misleading (they finally offered to do this about four months after my original request), without insisting on adding new language that is both surplusage and inaccurate and misleading without a hearing.

The School Board has now done precisely what specified by removing the two "surplusage" sentences from the prior written notice. himself stated that in this eventuality "[t]his matter could be resolved without a hearing." Under the *Massie* doctrine, established by the Virginia Supreme Court in the case of *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922), a party cannot rise above his or her own evidence.

In *Massie,* the Court paid particular attention to the correspondence and, in certain instances, observed that Massie's correspondence weighed even more heavily against Massie's positions than his testimony:

> "All these things appear in Massie's testimony; but they are even more convincingly established by his letters to Firmstone written

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1 References to the Guardian's opening brief and reply brief are cited in the following format "GOB <page number>" and "GRB <page number>", respectively. References to the School Board's brief are cited in the following format "SOB <page number>".

subsequent to the interview of October 30th."

Massie, 114 S.E. 654.

> "The sale was never made. All this appears from the plaintiff's testimony and from letters which he admits having written, and it is conclusive of the controversy."

Massie, 114 S.E. at 656.

The rationale of *Massie* applies equally to this administrative proceeding:

> "No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him."

Id. (Emphasis supplied.)

The hearing officer previously decided that following traditional jurisprudential principles and the reasoning in *Schaffer v. Weast*, 546 U.S. 49 (2005), the Guardian, as the person initiating this hearing, bears the burden of persuasion. The evidentiary standard is, of course, the preponderance of the evidence standard. Accordingly, the Guardian must prove upon a preponderance of the evidence that the challenged educational records are "inaccurate, misleading, or otherwise in violation of the privacy rights of students."[2]

The LEA may determine that the record is, in fact, inaccurate and/or misleading, in which event the LEA shall "amend the record accordingly" and notify the Guardian of the amendment in writing. Alternatively, the LEA may decide that the complaint is incorrect, in which case the LEA shall "inform the parent or eligible student of the right to place a statement in the record commenting on the contested information or stating why he or she disagrees with the decision of the" LEA. 34 C.F.R. § 99.21(b).

The Guardian takes issue with the fact that it was only after the Guardian expended considerable effort towards the sought FERPA hearing that the LEA removed the two "surplusage" sentences. The Guardian argues that the LEA's sole opportunity to amend the records and avoid the records hearing ended when the parent sent the LEA his original hearing request and that to allow otherwise would effectively pull the rug out from under the Guardian. GOB at 3-4. However, the hearing officer has found nothing in the statutory scheme, the implementing regulations or in applicable case law which so limits a School Board's timing as to when it can elect to amend the student records.

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2 20 USC § 1232(G)(a)(2). The Guardian previously conceded that there is no challenge to privacy rights.

Essentially, FERPA does not allow for the challenge of substantive decisions, or the timing of such decisions, made by educational institutions but rather mandates that educational institutions simply conform to fair recordkeeping practices:

> It is well settled that FERPA only allows students to challenge and correct "ministerial error" in their records, not to bring substantive claims regarding the reasons for a particular notation having been made. *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990).

Goodreau v. Rector and Visitors of the University of Va., 116 F.Supp.2d 694, 708 (W.D.Va. 1996); *See, also, Lewin v. Medical College of Hampton Roads*, 931 F.Supp. 443 (E.D.Va. 1996).

Under the FERPA hearing process, the Guardian may only seek an amendment of specific records which already exist concerning information which is allegedly inaccurate and/or misleading. *See, e.g.*, the reasoning in *LR v. Camden Bd. of Educ.*, 59 IDELR 11, 112 LRP 27402 (NJ Superior Ct. Appellate Division, 2012) (copy attached). The Guardian precisely followed this FERPA requirement concerning the prior written notice.

The relief the Guardian may be awarded in this FERPA hearing is limited to the amendment of the contested record, the specific prior written notice, if in fact it is determined to be inaccurate and/or misleading. As addressed above and by the Guardian's own admission, the School Board's removal of the "surplusage" two sentences cured any defect in the subject record and therefore any hearing is now moot.

Removal of the "surplusage" two sentences identified by the Guardian as creating the inaccuracy is the sole remaining relief recoverable by the Guardian on his claims. A recent federal case out of the Eastern District of North Carolina considered, amongst other things, whether the plaintiff's case was moot because of the Granville County School Board's expungement of the plaintiff's long-term suspension from school records. Adopting the reasoning in the recent *LK v. N.C. State Bd. of Educ.*, 56 IDELR 102, 111 LRP 18092 (E.D.NC 2011) (copy attached):

> Given the expungement, further proceedings in this case would be advisory in nature. They could not result in an award to plaintiff of any relief on his claims beyond what he has already received. The mootness doctrine precludes such advisory opinions.

See, also, LK v. N.C. State Bd. of Educ., 56 IDELR 135, 111 LRP 17872 (E.D.NC 2011) (copy attached) and *In re: Student with a Disability*, 111 LRP 55183 (NY State Ed. Agency 2011) (copy attached).

Similarly, all witness and document subpoenae requests from the Guardian are now moot. For the reasons stated above, the hearing officer hereby grants the School Board's motion to dismiss this FERPA administrative proceeding because of mootness.

ENTER: 7 / 27 / 12

John V. Robinson

John V. Robinson, Hearing Officer

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Attachments to Hearing Officer Decision 12-032

1. *L.R. on behalf of J.R. v. Camden Board of Education*, 59 IDELR 11, 15 FAB 23, 112 LRP 27402 (N.J. Sup. Ct. 2012).
2. *L.K., by Melissa Henderson v. N. C. Dept. of Public Instruction, et al.*, 56 IDELR 102, 111 LRP 18092 (E.D.N.C. 2011).
3. *L.K., by Melissa Henderson v. N. C. Dept. of Public Instruction, et al.*, 56 IDELR 135, 111 LRP 17872 (E.D.N.C. 2011).
4. *In re: Student with a Disability*, 111 LRP 55183 (N.Y. St. Ed. Agency July 13, 2011)

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