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STATE OF FLORIDA

THIRD DISTRICT COURT OF APPEAL

S.N.,

Case No.

Petitioner,

v.

MIAMI-DADE COUNTY SCHOOL BOARD
and DEBORAH SWIRSKY-NUNEZ,

Respondents.

_____ /

EMERGENCY PETITION FOR WRIT OF CERTIORARI

Pursuant to rules 9.100(c)(1), (2), and (3) and 9.190(b)(2), S.N., (“STUDENT”), petitions this court for a writ of certiorari to review a non-final order denying her from intervening in an administrative disciplinary proceeding initiated by the Miami-Dade County School Board (“BOARD”) against Deborah Swirsky-Nunez (“NUNEZ”), one of its employees, in which the STUDENT sought an order from the lower tribunal excluding or otherwise declaring her medical, psychological, psychiatric and other “education” records privileged pursuant to chapter 1002, Florida Statutes, secs. 90.503, 456.057, Fla. Stat. (2010).

I. BASIS FOR INVOKING JURISDICTION

Article V section 4(b) of the Florida Constitution provides that the district courts of appeal have jurisdiction to issue writs of certiorari seeking review of non-final administrative action. *See also* Fla.R.App.P. 9.030(b)(2)(A); 9.130(a)(1); 9.100(c)(2) and (3); 9.190(b)(2). The order to be reviewed was rendered April 21, 2011 by an Administrative Law Judge in the matter of *Miami-Dade County School Board v. Nunez*, DOAH Case No. 10-4143. This petition is timely under rule 9.100(c)(1).

II. STATEMENT OF THE FACTS

In *Miami-Dade County School Board v. Nunez*, DOAH Case No. 10-4143, the BOARD has requested that the Administrative Law Judge enter an order recommending that NUNEZ be dismissed from her employment. (App. 5). The STUDENT is not a party to the administrative proceeding and, yet, the BOARD intends to disclose her medical, psychological, psychiatric and other "education" records in that proceeding without her consent. (App. 6,7,8 and 9).

On June 16, 2010, the BOARD had taken agency action to suspend NUNEZ without pay and initiate dismissal proceedings against NUNEZ for alleged misconduct in office and violation of School Board Rules in accordance with secs. 1022.22(1)(f), 1012.33(1)(a) and (6)(a), and 447.209, Fla. Stat. (2010). This agency action triggered an administrative hearing.

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NUNEZ, who had been employed with the BOARD since October 14, 1986, was employed as the Instructional Supervisor of ESE (Exceptional Student Education), North Regional Center (Region I), when the BOARD took this action. Essentially, the BOARD alleges that NUNEZ used her position to obtain a McKay Scholarship, a program designed, among other things, to give parents of disabled children tuition for attendance at better-suited private schools, and that NUNEZ's child did not qualify for that program.

Following the denial of her emergency motion for temporary injunction enjoining the BOARD from disclosing her medical, psychological, psychiatric and other "education" records in *S.A.N. v. Miami-Dade County School Board*, 11th Judicial Circuit Case, and the entry of an order staying that circuit court case pending resolution of the administrative hearing, the STUDENT, at the suggestion of the circuit court judge, filed her Emergency Motion to Intervene in the administrative hearing on April 20, 2011. (App. 2). The STUDENT also filed as an attachment to the motion to intervene, her Motion to Exclude All Medical, Psychological, Psychiatric and Other "Education" Records Pursuant to Sec. 1002.22, Fla. Stat. (2010) and FERPA, which incorporated the circuit court filings. (App. 3). In those motions, the STUDENT sought to immediately halt the unauthorized disclosure of these records in the administrative

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proceeding pursuant to chapter 1002, Florida Statutes, secs. 90.503, 456.057, Fla. Stat. (2010).

On April 21, 2011, the Administrative Law Judge denied both motions without a hearing. (App. 1). Notably, the order does not reflect it was furnished to the STUDENT's counsel.

III. NATURE OF RELIEF SOUGHT

The nature of the relief sought by this petition is a writ of certiorari quashing the order of the lower tribunal denying the STUDENT's motion to intervene and further permitting the disclosure of her medical, psychological, psychiatric and other "education" records in an administrative proceeding in which the STUDENT is not a party. The BOARD intends to disclose these records and NUNEZ intends to disclose them in rebuttal. Unless this court grants immediate relief to remedy this serious infringement of the STUDENT's statutorily-protected right to privacy in her health records, the disclosure at the final administrative hearing scheduled for May 2, 2011 will irreparably harm the STUDENT.

IV. ARGUMENT

The STUDENT contends that the order departs from the essential requirements of the law because chapter 1002, Florida Statutes, and secs. 90.503, 456.057, Fla. Stat. (2010) expressly and unambiguously protect the

STUDENT's *medical, psychological, psychiatric and other "education" records* from non-consensual disclosure in the administrative proceeding and that only she has standing to raise this issue in that forum. *See Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984) (court cannot resort to statutory construction where statute plain and unambiguous).

Denial of Motion to Intervene

The court's denial of the motion to intervene on the grounds that the STUDENT had not suffered an injury in fact that would trigger a sec. 120.57, Fla. Stat., hearing and that the nature of the injury was not the type which the proceeding was designed to protect departs from the essential requirements of the law. First, the court did not conduct an evidentiary hearing to make a factual determination on the nature of the injury. (App. 1). Second, the court ignored the existence of several statutory privileges the STUDENT asserted as to her *medical, psychological, psychiatric and other "education" records*.

Every citizen in Florida has the right to protect these most intimate of records from unauthorized disclosure in any public forum. Several Florida statutes grant the STUDENT a **privilege** in her *medical, psychological, psychiatric and other "education" records*. Each follows:

(A) Sec. 90.503, Fla. Stat. (2010)

The “psychotherapist-patient” privilege grants the STUDENT an unequivocal privilege in her medical, psychological and psychiatric records. Sec. 90.503(2), Fla. Stat. (2010). It reads, in part: “A *patient has a privilege to refuse to disclose, and to prevent any other person from disclosing*, confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition ... between the psychotherapist and the patient ...” Further, it provides that only the patient or someone acting on behalf, or in place of, the patient, may raise the privilege.

Section 490.0148, Fla. Stat. (2010), expressly and unambiguously protects the STUDENT’s medical, psychological and psychiatric records from disclosure. It reads: “Psychologist and school psychologist records. – Each psychologist and *school psychologist who provides services as defined in this chapter shall maintain records*. The board or, in the case of a *school psychologist, the department may adopt rules defining* the minimum requirements for such records, including content, length of time such records shall be maintained, and *transfer of such records or of a summary of such records, or both, to a subsequent treating practitioner or other individual with the written consent of the client or clients.*”

Further, rules promulgated by the Florida Board of Psychology protect the confidentiality of the records sought to be introduced by the BOARD in this proceeding. Rule 64B19-19006(1), entitled “confidentiality,” reads, in part: “*Psychologists may disclose* that information [information entrusted to them by patient] only with the written consent of the service user.” It continues: “[t]he licensed psychologist *shall* maintain the confidentiality of all psychological records in the licensed psychologist’s possession ...except as otherwise provided by law or *pursuant to written and signed authorization of a service user specifically requesting or authorizing release or disclosure of the service user’s psychological records.*” Rule 64B19-19.006(4), F.A.C.

(B) Section 456.057, Fla. Stat. (2010)

The “doctor-patient” privilege grants the STUDENT an unequivocal privilege in her medical, psychological and psychiatric records. Sec. 90.501, Fla. Stat. (2010) (“Except as otherwise provided by this chapter, any other statute, ... no person in a legal proceeding has a privilege to ... (4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.”). Section 456.057(7)(a), Fla. Stat. (2010) creates a privilege in the STUDENT’s records. It reads: “*[R]ecords may not be furnished to, and the medical condition may not be discussed with, any*

person other than the patient's legal representatives or other health care practitioners and providers involved in the care or treatment of the patient, *except upon written authorization of the patient.*"

(C) Chapter 1002, Florida Laws

Chapter 1002, Florida Laws expressly and unambiguously grants the STUDENT an unequivocal privilege in all the medical, psychological, psychiatric and other "education" records being improperly disclosed by the BOARD in this proceeding and elsewhere. The STUDENT filed a Memorandum of Law in Support of "S.N" Emergency Motion to Intervene in the administrative proceeding. (App. 4). The STUDENT incorporates in full the arguments contained in that memorandum. The memorandum cited Florida statutes and case law irrefutably conferring upon the STUDENT a privilege over her medical, psychological, psychiatric and other "education" records.

As shown above, the court's denial of the motion to intervene departs from the essential requirements of the law because all of these statutes grant the STUDENT a privilege in her medical, psychological and psychiatric records and she is the only person with standing that may assert the privilege in the administrative proceeding. Accordingly, this court must quash the order denying the motion to intervene.

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**Student Standing Satisfies Standard for Intervention
In Administrative Proceeding That Will Permit Disclosure of
Her Medical, Psychological, Psychiatric and Other "Education"
Records**

In ruling against the STUDENT, the court ruled the STUDENT had not met the intervention standard in *Ameristeel v. Clark*, 691 So.2d 473, 477-478 (Fla. 1997). That standard requires a showing that the movant "will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing" and that "his substantial injury is of the type or nature which the proceeding is designed to protect. [emphasis added by judge]."

This court has applied a different and more relaxed standard for interventions in administrative proceedings. "Pursuant to section 120.565, a person seeking to intervene in a proceeding in which a party is seeking a declaratory statement under section 120.565, must establish that: (1) his 'substantial interest will be affected by the proceeding' and (2) he 'desire[s] to become [a] part[y] to the proceeding.'" *Ameriloss Public Adjusting Corp. v. Declaratory Statement Rendered*, ___ So.3d ___ (Case No. 3D09-363) (Fla. 3d DCA, Oct. 6, 2010) (interpreting standard for DOAH Rule 28-106.205). Section 120.565, Fla. Stat. (2010) provides that "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any

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rule or order of the agency, as it applies to the petitioner's particular set of circumstances." The STUDENT's substantive petition, filed together with the motion to intervene, seeks an order declaring the records privileged and subject to exclusion in this proceeding.

Turning for a moment to the court's specific ruling applying the *Ameristeel* standard, it is difficult to understand how the judge made the factual determination that the STUDENT would not suffer injury given the fact the court never conducted an evidentiary hearing. As set forth in the memorandum of law filed by the STUDENT, chapter 1002, Florida Statutes affords students express rights over their "education" records. *See Florida State University v. Hatton*, 672 So.2d 576, 577-578, 579 (Fla. 1st DCA 1996) (held disclosure could not be made to the Division of Administrative Hearings nor other student seeking to use records belonging to another student). Those records encompass a student's medical, psychological and psychiatric records collected by State School Boards. Chapter 1002, Florida Statutes, was specifically enacted to prevent harm to students through unauthorized disclosure of their records and, thus, it is inherent that unauthorized disclosure will result in injury.

The judge's underscoring of the phrase "proceeding [] designed to protect," suggests that the court believed the STUDENT could not meet the

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second prong of the standard. The STUDENT's attempt in circuit court to temporarily enjoin the BOARD from disclosing the records in the administrative hearing resulted in a denial of the temporary injunction and a stay of that circuit court proceeding pending resolution of the administrative proceeding. Given these circumstances, the STUDENT had no other recourse but to move to intervene in the administrative proceeding. Considering that the Florida legislature enacted chapter 1002 to protect STUDENTS, an unauthorized disclosure will result in *de facto* harm that should have triggered a section 120.57 hearing.

Lastly, the court found the STUDENT did not establish "good cause" for filing the motion to intervene 13 days before the final hearing. (App. 1). On April 20, 2011, the STUDENT filed her Motion to Intervene pursuant to DOAH Rule 28-106.205 seeking an order permitting consideration of her Motion to Exclude All Medical, Psychological, Psychiatric and Other "Education" Records Pursuant to Sec. 1002.22, Fla. Stat. (2010) and FERPA. She requested a closed evidentiary hearing on the motion after the filing of responses. (App. 2,3).

In the motion, the STUDENT, who has never been a party in the administrative proceeding, explained that she filed the motion 13 days before the final hearing because the circuit court had denied her motion for

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temporary injunction to enjoin the BOARD from disclosing the records on April 14, 2011. (App. 2, para. 8). Moreover, she continued, the circuit court had stayed consideration of the permanent injunction until the conclusion of the administrative proceeding against NUNEZ. She had, then, no option but to file her motion to intervene in the administrative hearing to remedy the impending substantial irremediable injury from disclosure in the administrative forum.

The STUDENT attached her proposed Motion to Exclude All Medical, Psychological, Psychiatric and Other "Education" Records Pursuant to Sec. 1002.22, Fla. Stat. (2010) and FERPA setting forth the factual basis for her argument that Florida law conferred a privilege upon the medical, psychological, psychiatric and other "education" records that the parties intended to disclose at the final hearing on the administrative complaint against NUNEZ on May 2, 2011. (App. 4). The STUDENT incorporates in full the facts and argument contained in the motion to exclude.

The court never convened any hearing, evidentiary or otherwise, in which the STUDENT, an adult and the very object of the privacy protections outlined in chapter 1002, Florida Statutes, participated. Instead, the court decided the matter on the papers filed. The BOARD never filed a response.

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In contrast, NUNEZ filed a response stating no objection to the granting of the motion to intervene and the corollary motion to exclude so long as the BOARD would be similarly enjoined from using these records. (App. 10).

Denial of Motion to Exclude

The court further departed from the essential requirements of the law when it denied the STUDENT's motion to exclude on the grounds that FERPA created no "student-school" privilege. (App. 1). As shown above, and in all filings with the court, the STUDENT has always argued that chapter 1002, Florida Statutes, which codified FERPA in Florida, includes more protections than FERPA. *See WFTV v. School Board of Seminole*, 874 So.2d 48, 58 (Fla. 5th DCA 2004) ("The State of Florida goes beyond the funding conditions specified in FERPA and protects the privacy of its students in its educational institutions by preventing the release of 'any personal information' contained in records or reports which permit the personal identification of a student." [footnote omitted]).

Accordingly, the court departed in from the essential requirements of the law when it failed to consider the rights of the STUDENT to protect her records pursuant to chapter 1002, Florida Statutes.

Respectfully submitted this 26th day of April, 2011.

/s/ Gonzalo Alberto Gayoso

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GONZALO ALBERTO GAYOSO
F.B.N. 850690
1825 Ponce de Leon Blvd., #271
Coral Gables, FL 33134
(786) 375-5027
gonzalogayoso.esq@gmail.com

CERTIFICATE OF SERVICE

Undersigned hereby certifies that a true and correct copy of the foregoing has been furnished electronically this 26th day of April, 2011, to:

Maria del Carmen Calzon, Esq.
Counsel for Respondent
1825 Ponce de Leon Blvd., #249
Coral Gables, FL 33134
calzonlawoffice@aol.com

Christopher J. LaPiano, Esq.
Arianne B. Suarez, Esq.
Counsel for Petitioner
Miami-Dade County School Board
1450 Northeast Second Avenue
Miami, FL 33133
cjlapiano@dadeschools.net

Courtesy Copy:

Judge Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(Via Fax Filing: (850) 921-6847)

/s/ Gonzalo Alberto Gayoso
GONZALO ALBERTO GAYOSO

CERTIFICATE OF COMPLIANCE

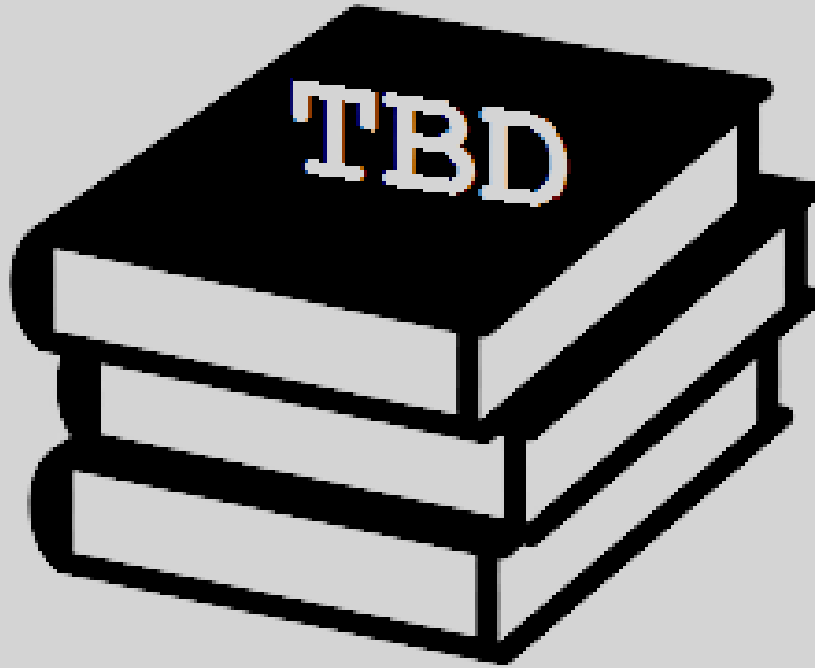
I HEREBY CERTIFY that this petition complies with the font requirements of rule 9.100(1) of the Florida Rules of Appellate Procedure.

/s/ Gonzalo Alberto Gayoso
GONZALO ALBERTO GAYOSO

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