

05-1240-CV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE STATE OF CONNECTICUT OFFICE OF
PROTECTION AND ADVOCACY
FOR PERSONS WITH DISABILITIES, *ET AL.*,
Plaintiffs-Appellees,

— v. —

HARTFORD BOARD OF EDUCATION, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
CASE NO. CIV.A.3-04-CV-1338

**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF
PROTECTION AND ADVOCACY SYSTEMS, INC. IN SUPPORT OF
PLAINTIFFS-APPELLEES URGING AFFIRMANCE**

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TABLE OF CONTENTS

	<u>Page(s)</u>
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
FERPA AND THE P&A ACTS SHARE THE COMMON PURPOSE OF PROTECTING STUDENTS SERVED BY HTLA FROM ABUSE AND NEGLECT; FERPA WAS NOT INTENDED TO PROTECT HTLA FROM P&A AGENCY OVERSIGHT	3
A. THE MISSION OF PUBLIC SCHOOLS AND FERPA	4
B. THE MISSION OF P&A AGENCIES	5
C. FACILITIES LIKE HTLA MAY NOT USE THE PRIVACY RIGHTS OF THE PEOPLE THEY ARE REQUIRED TO SERVE TO PROTECT THEMSELVES FROM OVERSIGHT INTENDED TO ASSURE THAT THEY ARE SERVING THOSE PEOPLE PROPERLY	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	<u>Page(s)</u>
<i>Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.</i> , 97 F.3d 492, 498–99 (11th Cir. 1996)	5
<i>Arizona Ctr. for Disability Law v. Allen</i> , 197 F.R.D. 689, 692–93 (D. Ariz. 2000)	5
<i>Iowa Prot. & Advocacy Sys., Inc. v. Gerard Treatment Programs L.L.C.</i> , 152 F. Supp.2d 1150, 1157, 1174–75 (N.D. Iowa 2001)	5, 8
<i>Office of Prot. & Advocacy v. Armstrong</i> , 266 F. Supp.2d 303, 321 (D. Conn. 2003)	6
<i>The Advocacy Ctr. v. Stalder</i> , 128 F.Supp.2d 358, 366 (M.D. La. 1999)	8
<i>U.S. v. Allis-Chalmers Corp.</i> , 498 F. Supp. 1027, 1030–31 (E.D. Wis. 1980)	7
 STATUTES	
Developmental Disabilities Assistance and Bill of Rights Act (the “DD Act”), 42 U.S.C. § 15041, <i>et seq.</i> (1975)	1, 4, 5, 6
Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g (1974)	2
Formula Grant Programs, 45 C.F.R. § 1386.22(e) (1984)	9
Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI”), 42 U.S.C. §§ 10801–10827 (1986)	1, 4, 5, 6, 8

Page(s)

Protection and Advocacy of Individual Rights Act (“PAIR”),
29 U.S.C. § 794e, *et seq.* (1994) 1

CONGRESSIONAL MATERIAL

Joint Statement in Explanation of Buckley/Pell Amendment,
120 Cong. Rec. 39858, 39862 (1974)4, 5

S. REP. No. 99-109 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1361 8

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Protection and Advocacy Systems, Inc. (“NAPAS”) is the membership organization for the nationwide system of protection and advocacy (“P&A”) agencies located throughout the fifty states, the District of Columbia, Puerto Rico, and the federal territories. Several federal statutes mandate that P&A agencies provide legal representation and related advocacy services on behalf of persons with disabilities. *See* Protection and Advocacy for Individuals with Mental Illness Act of 1986 (“PAIMI”), 42 U.S.C. §§ 10801–10827, Developmental Disabilities Assistance and Bill of Rights Act (the “DD Act”), 42 U.S.C. § 15041, *et seq.* (1975), and the Protection and Advocacy of Individual Rights Act (“PAIR”), 29 U.S.C. § 794e, *et seq.* (1994) (collectively the “P&A Acts”). The P&A system is the nation's largest network of legal advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A agency activities and provides training and technical assistance to the P&A network. It has participated as *amicus curiae* in a number of cases involving the rights of disabled or mentally ill individuals.

This case is of particular interest to NAPAS because access to non-residential public school facilities at times when the students are in attendance, and to records, such as the directory information sought in this case, is essential to the P&A agencies’ ability to fulfill their mandate under the P&A Acts to protect the

rights of individuals with disabilities and to investigate incidents of abuse and neglect. The extent to which operators of facilities like Hartford Transitional Learning Academy (“HTLA”) can use confidentiality statutes such as the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g (1974) – which are intended to protect those they are supposed to serve – to protect themselves from P&A agency oversight is an issue of first impression in this Circuit that is important to all P&A systems throughout the country and to the individuals with disabilities they protect. Consequently, the disposition of this case is likely to have far-reaching effects on the quality of P&A agency oversight not only in Connecticut, New York and Vermont, but also throughout the country.

SUMMARY OF ARGUMENT

The District Court’s decision correctly recognized that the respective missions of the P&A agencies and school systems are entirely complementary, and that FERPA and the P&A Acts must be read and enforced with that principle in mind. Schools like HTLA exist to provide an education and related services to their students – including those with disabilities – in a safe environment. In performing that central mission, schools necessarily come to possess confidential information. Congress adopted FERPA *to protect the students from the possible abuse or unjustified release of such information by the schools*. Congress similarly recognized that persons with disabilities are particularly susceptible to abuse and

neglect. To assure that such persons would receive services – including educational services – in environments in which they would not suffer abuse or neglect, Congress adopted the P&A Acts, thereby creating “watchdogs” to oversee the activities of facilities like HTLA, among others. Thus, FERPA and the P&A Acts have a common purpose; each in its own way is intended to prevent abuse of the population served by defendants. To permit agencies like defendants to use FERPA to protect themselves from P&A agency oversight, as defendants seek to do in this case, would stand that statute on its head and frustrate the intent of Congress in adopting FERPA and the P&A Acts. Consequently, the District Court’s decision to reject defendants’ effort and read FERPA and the P&A Acts in harmony should be affirmed.

ARGUMENT

FERPA AND THE P&A ACTS SHARE THE COMMON PURPOSE OF PROTECTING STUDENTS SERVED BY HTLA FROM ABUSE AND NEGLECT; FERPA WAS NOT INTENDED TO PROTECT HTLA FROM P&A AGENCY OVERSIGHT

The central fallacy of defendants’ position is their assumption that FERPA and the P&A Acts are “conflicting laws.”¹ Nothing could be further from the truth. In fact, the result below correctly recognized that FERPA and the P&A Acts are completely harmonious and share a central purpose – to protect HTLA students

¹ See Brief of Defendants-Appellants, 05-1240-cv (2nd Cir.) (“Defendants-Appellants’ Brief”) at 11 (arguing that the District Court “clearly overlooked its duty to interpret the potentially conflicting laws in a way that preserves the purposes of both.”).

from abuse and neglect *by HTLA*. Defendants err equally in assuming that the oversight mission of the Connecticut Office of Protection and Advocacy for Persons with Disabilities (the “Connecticut OPA”) is somehow inconsistent with HTLA’s educational mission. To the contrary, their respective missions are, and ought to be, the same – to assure that students with disabilities receive the education to which they are entitled in an environment free of abuse and neglect.²

A. THE MISSION OF PUBLIC SCHOOLS AND FERPA

HTLA, in its own words, is a public school whose mission is to provide “a therapeutic educational program for children . . . who have been identified as requiring special education and related services.”³ Although the school’s mission is to educate, and not to be a collector of information, in the ordinary course of business HTLA necessarily acquires possession of confidential information, including contact information of the type the Connecticut OPA sought in this case. A school’s abuse or unjustified release of students’ private information can, of course, injure the students and their families directly by violating their privacy. Such abuse can also corrode the relationship of trust and confidence between the school and its students (and their families) and, as a result, compromise the school’s educational mission. To prevent such abuse, FERPA restrains HTLA and

² 42 U.S.C. § 10805(a); 42 U.S.C. § 15043(a); 29 U.S.C. § 794e(f); 120 Cong. Rec. 39858, 39862.

³ Defendants-Appellants’ Brief at 3.

institutions like it from intentionally or negligently abusing or releasing such confidential information “by limiting the transferability of [students’] records without their consent.”⁴

B. THE MISSION OF P&A AGENCIES

In response to the discovery of “inhumane and despicable conditions” at a school for persons with developmental disabilities and at state-operated facilities, Congress mandated that P&A agencies protect the human and civil rights of individuals with disabilities.⁵ This mission is, of course, consistent with schools’ educational mission to educate, not abuse or neglect, students.⁶

Having found existing state systems for protecting individuals with disabilities to be ineffective,⁷ Congress vested P&A agencies with extensive authority to investigate incidents of abuse and neglect of such individuals,⁸ as the courts have recognized.⁹ Thus, when a P&A agency receives a complaint and has

⁴ 120 Cong. Rec. 39858, 39862.

⁵ *Iowa Prot. & Advocacy Sys., Inc. v. Gerard Treatment Programs L.L.C.*, 152 F. Supp.2d 1150, 1157 (N.D. Iowa 2001) (describing the genesis of the P&A system) (“*Gerard*”); S. REP. NO. 99-109, at 1; 42 U.S.C. § 10801(a)(1), (3).

⁶ *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 498–99 (11th Cir. 1996) (P&A Agency access to developmental center granted because, *inter alia*, “a facility’s legitimate interests are served when abuse and neglect are uncovered and can be corrected.”).

⁷ 42 U.S.C. § 10801(a)(4).

⁸ 42 U.S.C. § 10801(b)(2)(B) and § 10805(a); 42 U.S.C. § 15043(a); 29 U.S.C. § 794e(f).

⁹ *See Arizona Ctr. for Disability Law v. Allen*, 197 F.R.D. 689, 692–93 (D. Ariz. 2000) (P&A Agency is final authority on probable cause to investigate because “[t]o conclude

probable cause to investigate – as the Connecticut OPA did in this case – it has the authority to demand access to facilities and information concerning individuals with disabilities.¹⁰ That authority to visit HTLA’s facilities during normal school hours and to acquire directory information so that it may obtain parental consent to review students’ records is central to the Connecticut OPA’s ability to fulfill its mandated mission.¹¹

C. FACILITIES LIKE HTLA MAY NOT USE THE PRIVACY RIGHTS OF THE PEOPLE THEY ARE REQUIRED TO SERVE TO PROTECT THEMSELVES FROM OVERSIGHT INTENDED TO ASSURE THAT THEY ARE SERVING THOSE PEOPLE PROPERLY

As the above discussion of their respective missions shows, HTLA and Connecticut OPA serve a common goal – the provision of services to persons with disabilities in an abuse-free environment. The restraints FERPA places on HTLA and others in its position protect students from abuse of their confidential information, a purpose consistent with that of the P&A Acts. FERPA cannot, therefore, be read in a way that would frustrate the protective mission of the P&A Acts, which it shares.

otherwise would frustrate the purpose of the P&A laws to establish an effective system to protect and advocate for the rights of individuals with disabilities.”).

¹⁰ 42 U.S.C. § 10805(a); 42 U.S.C. § 15043(a); 29 U.S.C. § 794e(f).

¹¹ *Office of Prot. & Advocacy v. Armstrong*, 266 F. Supp.2d 303, 321 (D. Conn. 2003) (finding that courts have limited attempts by facilities to question a P&A Agency’s probable cause determination because of the understanding that a P&A Agency must have adequate investigatory access “in order to fulfill the role it has been entrusted with” to protect individuals with mental illness from abuse).

This reading of FERPA is consistent with decisions in similar settings, in which courts have rejected efforts by employers and others to use the privacy rights of those they serve as a shield against oversight intended to assure that they serve those populations properly. Thus, in *United States v. Allis-Chalmers Corporation*,¹² the court rejected defendant's claim that its employees' constitutionally-protected privacy rights outweighed the federal government's statutory access to directory information and medical records as part of an investigation into the existence of harmful toxic substances at the defendant's worksite. The court reasoned that governmental access to the medical records did not violate the employees' privacy rights because the government sought to protect the health of "the very employees for whom the company raised the privacy defense" and there was no evidence that the records would be misused, or that their private nature would be violated because the government had a duty to protect the confidentiality of the records.¹³

Courts have relied on the same reasoning to resolve perceived conflicts between the P&A Acts and state confidentiality statutes in favor of granting P&A agencies access to information. In *Gerard*, the court granted the P&A agency access to state-protected records of deceased children who had resided at a

¹² 498 F. Supp. 1027 (E.D. Wis. 1980) ("*Allis-Chalmers*").

¹³ *Id.* at 1030–31.

psychiatric medical institution.¹⁴ The court held that there was no evidence that the confidentiality of the patients' records would be abused because the P&A Acts require the P&A agency to keep the records confidential to the same extent as the medical institution and the P&A agency's mandate was to protect the interests of the patients.¹⁵

The same reasoning applies here, and HTLA's argument that the District Court's "interpretation of [the P&A Acts] eviscerated FERPA's overriding purpose" to protect students is quite misguided.¹⁶ Like the Federal Government in *Allis-Chalmers*, and the P&A agency in *Gerard*, the Connecticut OPA here – like P&A agencies everywhere – seeks access to facilities and information to protect the welfare of the population whose privacy rights are being asserted as a means to block such access. The similarities do not end there; the Connecticut OPA is also obligated under the statutes governing its conduct to safeguard the confidentiality of information it acquires,¹⁷ just as HTLA is required to do under FERPA.¹⁸ And

¹⁴ 152 F.Supp.2d at 1176.

¹⁵ *Id.* at 1174–75.

¹⁶ Defendants-Appellants' Brief at 1.

¹⁷ *See also The Advocacy Ctr. v. Stalder*, 128 F.Supp.2d 358, 366 (M.D. La. 1999) (court granted P&A access to prison inmates' mental health records, protected by state law, holding that there was no threat to the state's concern about the "confidentiality of inmate records and the dissemination of such records to the public" because the P&A has the same duty of confidentiality as the prison and "[t]here [was] no reason to suspect that the confidentiality of the records [would] be breached").

as the courts in *Allis-Chalmers* and *Gerard* correctly recognized, it would make no sense to allow the target of oversight or investigation to rely on the privacy rights of those whose health and welfare are protected by the investigative process to thwart it. Yet, that is precisely what HTLA seeks to do here.

Although they argue that their sole purpose here is to enforce FERPA's intent to protect HTLA's students, defendants have in fact manufactured a conflict between FERPA and the P&A Acts in an effort to protect HTLA and themselves from oversight, a purpose and effect the District Court correctly rejected. If defendants were successful here, HTLA and other facilities like it would be able to use FERPA – a statute intended to protect their students from one form of abuse by them – as a shield to protect themselves from oversight and investigation intended to prevent a different form of abuse by them. Such a result would be repugnant to the Congress' objectives in adopting FERPA in the first place, not to mention its purpose in adopting the P&A Acts. This Court should reject defendants effort and affirm the District Court's decision in all respects.

¹⁸ The confidentiality provisions of the P&A Acts are completely congruent with FERPA standards; indeed the P&A Acts adopt those standards. Congress intended that records obtained by the P&A Agencies “shall remain confidential and that the eligible system shall maintain confidentiality in compliance with applicable State, Federal, and local laws . . .” S. REP. NO. 99-109, at 10. PAIMI therefore requires that a P&A Agency must “maintain the confidentiality of such records *to the same extent as is required of the provider of such services.*” 42 U.S.C. § 10806(a) (emphasis added). Thus the Connecticut OPA is obligated to protect the confidentiality of information obtained by HTLA “to the same extent” HTLA must. Moreover, under the DD Act's implementing regulations, a P&A Agency must protect a client's record “from loss, damage, tampering, or use by unauthorized individuals” and must “[k]eep confidential all information contained in a client's records.” 45 C.F.R. § 1386.22(e).

CONCLUSION

For the foregoing reasons, and those set forth in the Brief of the Plaintiffs-Appellees, the decision of the District Court should be affirmed.

Dated: New York, New York
June 30, 2005

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I certify that the foregoing BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b). This brief contains 2325 words as determined by the word count function in Microsoft Office Word 2000, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: New York, New York
June 30, 2005

Saul P. Morgenstern

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE were today served by U.S. Express Mail, postage pre-paid, upon the following counsel of record for the parties and *amici*:

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