

**BEFORE THE PROFESSIONAL STANDARDS COMMISSION
OF THE STATE OF IDAHO**

LISA COLÓN DURHAM, Chief Certification Officer, Complainant,)	Case No. 21611
vs.)	
ERICA JEAN KEMERY, Respondent.)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER OF THE HEARING PANEL

The Chief Certification Officer Lisa Colón Durham (CCO) filed an Administrative Complaint against the Certificates of Erica Jean Kemery for disclosing confidential student information without written consent to do so. Ms. Kemery requested a hearing on the Administrative Complaint. A Hearing Panel of the Professional Standards Commission was convened and held a hearing as noticed beginning at 9:00 a.m. on Wednesday, March 1, 2017, in the Board Room of the Idaho Falls School District Office, 690 John Adams Parkway, Idaho Falls, Idaho. Dan Sakota chaired the Hearing Panel. Lisa Sherick and Joel Wilson were the other members of the Hearing Panel. Michael S. Gilmore, Deputy Attorney General, advised the Hearing Panel. Brian V. Church, Deputy Attorney General, represented the Chief Certification Officer. Lyndon Nguyen, MSBT Law, Boise, Idaho, represented the Respondent Ms. Kemery. This written decision of the Hearing Panel reviews the proceedings before the Panel, makes Findings of Fact and Conclusions of Law, and enters a Final Order to issue a letter of reprimand to Ms. Kemery.

I. SUMMARY OF THE PLEADINGS AND EVIDENCE

Ms. Kemery holds teaching and administrative certificates. Exhibit CCO-1. She was at all relevant times the Administrator¹ of Monticello Montessori Public Charter School (MMPCS). During the 2014-2015 school year, an MMPCS student (Student) presented with a rare neurological condition that continued into the 2015-2016 school year. Student's condition significantly impaired his normal life functions like sleeping and waking cycles, eating, drinking, and toiletting. Student's mother (Mother) had sought local and specialized medical diagnoses for him and had taken him to Primary Children's Hospital in Salt Lake City for examination.

¹ The Administrator of Monticello Montessori Public Charter School is analogous to a Superintendent of a school district. Both supervise operations of their school district or public charter school.

Mother provided MMPCS with documentation about Student's condition and needs from several medical professionals. The school's file included letters from Tyson Parker, a Physician's Assistant in Idaho Falls; Peter Castellanos, a Pediatric Neurologist in Idaho Falls; Travis Mickelson, MD, Division of Behavioral Health, Primary Children's Hospital, Salt Lake City; and the first page of five pages of Discharge Orders and Discharge Instructions from Primary Children's Hospital. Exhibit CCO-8a. Mr. Parker's letter dated September 9, 2015, said not to awaken Student while he was sleeping and if he fell asleep to let him awaken on his own and not awaken him. *Id.* Dr. Castellanos's undated letter (the school noted it as received on February 19, 2015) said Student "should not be allowed to sleep in school, but needs to be kept awake to get him on a better sleep pattern." *Id.* Dr. Mickelson's letter dated April 7, 2015, advised that Student's treatment "includes maintaining good appetite, sleep and exercise routines." *Id.* Mother testified that she told the school at the start of the 2015-2016 school year, consistent with the Mr. Parker's letter, that Student should be allowed to sleep and not be awakened while at school.²

MMPCS was between Scylla and Charybdis with conflicting advice from Mother and a PA on the one hand and from medical doctors on the other: Elaine Schauerhamer, MMPCS's Special Education teacher at the time, explained what happened next in her written statement:

The school staff explained to [Mother] that we needed to know what the doctors expected us to do at school to take care of [Student]. We had conflicting reports with some doctors saying to keep him awake at school and others saying to allow him to sleep. [Mother] had taken [Student] to Primary Children's so we thought that the doctors there were the most knowledgeable I called and explained to the nurse that our school needed to know how to care for [Student] I should have had a signed authorization from [Mother] before I made the phone call. A few weeks later [Ms. Kemery] and I determined that we needed to write to the doctor(s) to clear up things. . . . Unfortunately, I had not had [Mother] sign the authorization. [Ms. Kemery] . . . wrote a letter to the doctor(s). The doctor wrote back and gave his opinion of what we should do to care for [Student] at school.

Written Statement of Elaine Schauerhamer, Exhibit CCO-9.

² Mother's testimony continued to refer to Physicians Assistant Tyson Parker as a doctor even after it was pointed out to her that Mr. Parker was not a doctor.

On September 22, 2015, Ms. Kemery wrote the letter at issue to Dr. Chee Tan at Primary Children's Hospital. Exhibit CCO-2. The letter identified Student by name, described his medical conditions and that he was on an IEP, described in detail Student's time at school and the school's provision of services to him, described how Mother had recounted Student's time at home, and asked Dr. Tan's "professional advice on the question of whether [Student] should be encouraged to be awake during the school day, or if that would be harmful to his health." *Id.*

No witness contended that Mother had given the school written authorization to contact Dr. Tan or Primary Children's Hospital or to disclose Student's information to them. Mother may have given the school an oral authorization to do so. It is unclear whether there was once a general written authorization in the file because Mother removed the school's special education file for Student from the room where it was kept at the school and took it to another room, where the file was out of view of school personnel for a short time. When the file was retrieved from Mother, it had no general written authorization to disclose Student's information.

II. THE LAW TO BE APPLIED

Idaho law allows the Professional Standards Commission to discipline a certified educator for willful violation of a code of ethics adopted by the State Board of Education.³ State

³ Idaho Code § 33-1208, subsection 1.j provides:

§ 33-1208. Revocation, suspension, denial, or place reasonable conditions on certificate — Grounds. — 1. The professional standards commission may deny, revoke, suspend, or place reasonable conditions on any certificate issued or authorized under the provisions of section 33-1201, Idaho Code, upon any of the following grounds:

...

j. Willful violation of any professional code or standard of ethics or conduct, adopted by the state board of education;

...

Idaho Code § 33-1209 includes letters of reprimand among this Panel's disciplinary options for both administrative and teaching certificates:

§ 33-1209. Proceedings to revoke, suspend, deny or place reasonable conditions on a certificate — Letters of reprimand — —

...

(6) ... The hearing panel may determine to suspend or revoke the certificate, or the panel may order that reasonable conditions be placed on the certificate or a letter of reprimand be sent to the certificate holder, or if there are not sufficient grounds, the allegation against the certificate holder is dismissed and is so recorded.

Board of Education Rules, in turn, require certified educators to abide by all Federal, State and local education laws and statutes.⁴ One of the Federal education laws that certified educators must abide by is the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482. Section 1406(a) of the IDEA requires the Secretary of Education to issue regulations that “are necessary to ensure that there is compliance with the specific requirements of [the IDEA].” Section 1407(c) requires the Secretary of Education “take appropriate action ... to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained ... by State educational agencies and local educational agencies” The Secretary of Education has adopted regulations under the IDEA in Part 300 of Title 34 of the Code of Federal Regulations. Among other things, those regulations:

- explain that the requirements of the Secretary’s regulations apply to public charter schools in States that receive funds under the IDEA, 34 C.F.R. § 300.2;⁵
- require a parent’s written consent to the release of a student’s personally identifiable information in school records, 34 C.F.R. § 300.9;⁶ and

...

(11) For the purposes of this section, the term “teacher” shall include any individual required to hold a certificate pursuant to section 33-1201, Idaho Code.

⁴ Rule 76.02 of the State Board of Education Rules Governing Uniformity, IDAPA 08.02.02.076.02, provides:

02. Principle I — Professional Conduct. A professional educator abides by all federal, state, and local education laws and statutes. ...

⁵ 34 C.F.R. § 300.2 provides:

§ 300.2 Applicability of this part to State and local agencies.

(a) *States.* This part applies to each State that receives payments under [IDEA].

(b) *Public agencies within the State.* The provisions of this part—

(1) Apply to all political subdivisions of the State that are involved in the education of children with disabilities, including:

...

(ii) Local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools

...

(2) Are binding on each public agency in the State that provides special education and related services to children with disabilities

⁶ 34 C.F.R. § 300.9 provides:

§ 300.9 Consent.

- define the personally identifiable information for which written consent is required, 34 C.F.R. § 300.32.⁷

III. APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

The evidence is clear and convincing that Ms. Kemery sent a letter to Dr. Tan containing Student’s personal information and that MMPCS did not have Mother’s written consent to provide Student’s personal information in that letter. The question before us is whether Ms. Kemery willfully violated the IDEA and its regulations by doing so. The standards of the criminal law do not apply here, but they are instructive because they contain a higher standard for liability than required for civil or regulatory law. In the criminal law an act is willful if it is done with a purpose or willingness to do the act itself without regard to whether there was any intent to violate the law. See Idaho Code § 18-101, subsection 1. Ms. Kemery willfully sent the letter to Dr. Tan. That is enough, whether she was aware or not that there was no written consent to share Student’s personally identifiable information. To rule otherwise would allow any supervisor to insulate herself from a violation of IDEA’s confidentiality requirements by saying, in effect, “I relied my subordinate to have acquired the necessary consents.” Responsibility for complying with the IDEA’s confidentiality requirements should not be delegated; it is personal to the person sharing

Consent means that—

...

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

....

34 C.F.R. § 300.622 is similar to § 300.9:

§ 300.622 Consent.

(a) Parental consent must be obtained before personally identifiable information is disclosed to parties

⁷ 34 C.F.R. § 300.32 provides:

§ 300.32 Personally identifiable.

Personally identifiable means information that contains—

(a) The name of the child, the child’s parent, or other family member;

...

(d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

a student's private information. Some discipline is required here, if for no other reason than to make it clear that persons disclosing students' personally identifiable information are responsible for knowing whether necessary written consents were obtained.

That being said, we are also convinced that Ms. Kemery acted in good faith and was trying her best to act in Student's interests given the conflicting recommendations in Student's file. Something had to give when Mother and a PA were saying one thing and medical doctors another; further, Mother may have been shopping for medical opinions until she received the one she wanted. These facts show the difficulty facing MMPCS. We are further convinced of Ms. Kemery's good faith by her reaction to Mother wanting to withdraw Student from MMPCS and to transfer him to another school. Ms. Kemery wanted to work with Mother to keep Student at MMPCS. Many others in her position would not have tried to keep Student at her school and would have said, in effect, he will be someone's else's challenge now. Ms. Kemery did not. That is why in the end we believe that Ms. Kemery's action, although in violation of the IDEA, deserves the mildest possible discipline, namely, a letter of reprimand, and why anyone reading this decision should know of the mitigating circumstances regarding her action. The letter of reprimand should include this sentence: "Ms. Kemery has received a letter of reprimand, the lowest form of discipline available under the law, because of the extraordinary mitigating circumstances of her case."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Respondent Erica Jean Kemery holds seven administrative, elementary, and secondary certificates in Idaho. Exhibit CCO-1.
2. At all relevant times Ms. Kemery was the Administrator of Monticello Montessori Public Charter School (MMPCS), a public charter school in Ammon, Idaho.
3. At all relevant times, a boy that this document calls Student was enrolled in the special education program at MMPCS. Student suffers from a rare neurological condition that impairs his sleeping and waking cycles, among other things.

4. Student's Mother had provided MMPCS with documentation concerning Student's condition that contained conflicting medical advice. Exhibit CCO-8a.

5. Ms. Kemery wrote a letter dated September 23, 2015, to Dr. Chee Tan of Primary Children's Hospital that contained personally identifiable information about Student. Exhibit CCO-2. Neither Ms. Kemery nor MMPCS had Mother's written consent to do so.

B. Conclusions of Law

1. This Hearing Panel has authority under Idaho Code § 33-1208 and § 33-1209 to hear this contested case initiated by the Chief Certification Officer's Administrative Complaint against Ms. Kemery.

2. This Hearing Panel has authority under Idaho Code § 33-1208 and § 33-1209 to order the issuance of a letter of reprimand to Ms. Kemery if it finds she willfully violated any professional code or standard of ethics or conduct adopted by the State Board of Education. Under Uniformity Rule 76.02, IDAPA 08.02.02.076.02, this authority extends to violation of the Individuals with Disabilities Education Act (IDEA) and Federal Regulations adopted under it.

3. When Ms. Kemery sent the letter described in Finding of Fact 5, she violated the IDEA, in particular 20 U.S.C. § 1407(c), as implemented by 34 C.F.R. § 300.2, § 300.9 and/or § 300.622, and § 300.32.

4. It is within this Hearing Panel's discretion to order that the Chief Certification Officer place a letter of reprimand in Ms. Kemery's file for the violation described in Finding of

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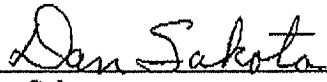
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Fact 5 and Conclusion of Law 3.

FINAL ORDER

IT IS THE FINAL ORDER of this Hearing Panel that the files for the certificates of Respondent Erica Jean Kemery include a letter of reprimand as described in this Final Order.

Dated this 7 of March, 2017.



Dan Sakota
Hearing Panel Chair

Review of Final Order

THIS IS A FINAL ORDER OF THE HEARING PANEL. Any party may file a Petition for Reconsideration of this Final Order within fourteen (14) days of its service date. The Hearing Panel is required by law to dispose of a Petition for Reconsideration within twenty-one (21) days of its filing or the Petition for Reconsideration will be considered to be denied by operation of law. See Idaho Code § 67-5243(3).

Petitions for Reconsideration of this Final Order may be filed by mail addressed to the Professional Standards Commission, Department of Education, Statehouse, Boise, ID 83720- 0027, or may be delivered to the Department of Education, Len B. Jordan Building, Room 200, 650 West State Street, Boise, Idaho, and must be received within fourteen (14) days of the service date of this Final Order.

Judicial Review

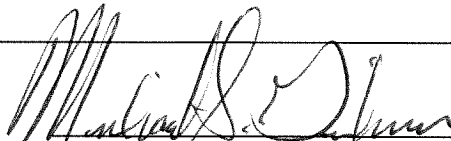
Pursuant to Idaho Code §§ 33-1209(8), 67-5270, and 67-5272, any party aggrieved by this Final Order or by another Order previously entered in this Contested Case may obtain Judicial Review of this Final Order and of all previously issued Orders in this Contested Case by filing a Petition for Judicial Review in the District Court as provided by those sections.

A Petition for Judicial Review must be filed within twenty-eight (28) days of the service date of this Final Order, or, if a Petition for Reconsideration is timely filed, within twenty-eight (28) days of the service date of a decision on the Petition for Reconsideration or denial of the Petition for Reconsideration by operation of law. See Idaho Code §§ 67-5246 and 67-5283.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2017, I caused to be served a true and correct copy of the preceding FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER OF THE HEARING PANEL by the method(s) indicated below and addressed to the following:

Lyndon Nguyen MSBT Law 950 West Bannock Street Boise, ID 83702	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail, Return Receipt Requested <input checked="" type="checkbox"/> E-mail: lpn@msbtlaw.com <input type="checkbox"/> Facsimile: (208) 331-1202
Brian Church, Deputy Attorney General Office of the Attorney General Statehouse Boise, ID 83720-0010	<input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail, Return Receipt Requested <input checked="" type="checkbox"/> E-mail: brian.church@ag.idaho.gov
Members of the Board, Monticello Montessori Public Charter School % Cheri Parker, Clerk of the Board 4707 S. Sweetwater Way Ammon, ID 83406	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail, Return Receipt Requested <input type="checkbox"/> E-mail:



Michael S. Gilmore
Deputy Attorney General