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October 27, 2014

Patricia Tumulty, Executor Director  
New Jersey Library Association  
P.O. Box 1534  
Trenton, NJ 08607

Re: Confidentiality of Children's Library Records

Dear Ms. Tumulty:

You have asked me to determine whether, and to what extent, parents may view the library records of their minor children. I have reviewed the relevant statutes and the governing case law, and have concluded that, although the question is difficult and not free from doubt, parents probably have a limited right of access to their minor children's library records, particularly when those children are below high school age.

Two statutes are directly relevant. N.J.S.A. 18A:73-43.2, the "Library Confidentiality Law," provides that library records are confidential except in limited circumstances not applicable here. The law is broadly written and applies to both public and private libraries.

However, N.J.S.A. 9:2-4.2 affords "every parent" access to "records and information pertaining to his or her unemancipated child, including, but not limited to, medical, dental, insurance, child care and educational records," unless 1) prohibited by state or federal law or 2) found by a court to be detrimental to the child's best interest or potentially injurious to the other parent.

These statutes conflict. Purely as a matter of statutory construction, resolution of that conflict favors confidentiality of library records.

Patricia Tumulty, Executor Director  
October 27, 2014  
Page 2

The primary indicator of statutory meaning is the language used. DiProspero v. Penn, 183 N.J. 477, 492 (2005). The library confidentiality statute is broad; the language of the parental records exception is more limited, and contains an express exception for statutory confidentiality.

The legislature is presumed to know its prior enactments. In re Comm'r of Insurance's Issuance of Orders, 137 N.J. 93, 96 (1994). The parental access statute, adopted in 1997, postdates the library confidentiality statute by 12 years. The interpretive presumption is that the legislature was aware of the library confidentiality statute when it excepted records protected "by federal and State law" from access under the parental access statute.

Moreover, when two statutes deal with the same subject, "a specific statute generally overrides a general statute." State v. Robinson, 217 N.J. 594, 609 (2014). N.J.S.A. 18A:73-43.2 is arguably a specific confidentiality restriction on records otherwise generally available to the parents of an unemancipated minor.

In other words, on that analysis, the library statute trumps the parental access statute, and parents have no access to their minor children's records.

For several reasons, however, I believe that analysis is overly simplistic. First, the paramount objective of all statutory construction is to ascertain and implement the legislature's intent. Dep't of Law and Pub. Safety v. Gonzalez, 142 N.J. 618, 627 (1995). Even when the words of a statute are plain, a court should not allow literal language to subvert an evident legislative objective. See State v. Haliski, 140 N.J. 1, 16 (1995)

The state has a strong interest in ensuring that parents have the right to raise and educate their children. N.J. DYFS v. E.P., 196 N.J. 99, 102 (2008). That right has both

Patricia Tumulty, Executor Director  
October 27, 2014  
Page 3

constitutional and statutory dimension. Id.; see Prince v. Massachusetts, 321 U.S. 155, 168 (1944). It is particularly strong when younger children are involved, and in matters that touch on a child's health, safety and welfare. See Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

The parental access statute embodies that state interest. It is difficult to believe that, when the legislature granted parents blanket access to their minor children's health and educational records, it nevertheless intended to deny parents the ability to know what their children were accessing or reading at the public library. An absolute prohibition on parental access would substantially undermine the very interest the statute was enacted to further.

Moreover, one might legitimately view the parental access statute as a specific exception to the general prohibition of the library confidentiality law.

I conclude, therefore, insofar as minor children are concerned, the library confidentiality statute should not be read literally, but rather should be read to permit some degree of parental access to the library records of "unemancipated children."

The extent of that access is essentially a question of First Amendment law. The First Amendment includes a right to obtain information. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980). This includes the right to obtain information from a library. See Kreimer v. Morristown Bur. of Police, 958 F.2d 1242, 1251 (3d Cir. 1992). It also includes the right to receive information anonymously. See, e.g., Lamont v. Postmaster General, 381 U.S. 301, 307 (1965).

But the right is not absolute. Most importantly for this issue, the scope of one's First Amendment rights varies with the age of the claimant.

Patricia Tumulty, Executor Director  
October 27, 2014  
Page 4

"Minors are entitled to a significant measure of First Amendment protection." Erznoznik v. City of Jacksonville, 422 U.S. 211, 212-213 (1975). But those rights are not as extensive as adults', and can be limited to advance the state's interest in parental supervision and control. Thus, for example, to protect minors' "physical and psychological well-being," the state may deny them access to "literature that is not obscene by adult standards." Sable v. FCC, 492 U.S. 115, 126 (1989). Similarly, the First Amendment rights of an older minor - say, a high school student - are more extensive than those of a younger child. See Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503 (1969). See also ACLU v. Ashcroft, 322 F.3d 240, 253-55 (3d Cir. 2003), aff'd 542 U.S. 656 (2004).

Where the dividing line falls between protected and unprotected speech in a particular context depends on the facts. A court will typically balance the First Amendment right involved against the strength of the state interest and the degree to which the proposed restriction on the right is "tailored" to address that interest. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978).

Thus, for example, the younger the child, the stronger the state's interest in parental supervision and consequently, the less protection the child's First Amendment right will receive. Several courts have afforded "older adolescents" First Amendment rights of access, to literature and the internet, greater than those granted to younger children. See, e.g., American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11<sup>th</sup> Cir. 1990), cert. denied, 500 U.S. 942 (1991); ACLU v. Johnson, 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998); Commonwealth v. American Booksellers Ass'n, 372 S.E.2d 618, 624 (Va. 1988), cert denied, 494 U.S. 1056 (1990).

The parental access statute applies to "unemancipated" children. In New Jersey, the presumptive age of emancipation is 18. Newburgh v. Arrigo, 88 N.J. 529, 543 (1982). If one assumes New Jersey adolescents 17 and younger have some First Amendment right to receive information anonymously, then the

Patricia Tumulty, Executor Director  
October 27, 2014  
Page 5

question becomes to what extent N.J.S.A. 9:2-4.2 encroaches on that right.

A definitive answer to that question does not exist. No New Jersey court has addressed the issue. However, based on the case law cited above, I believe most courts would conclude that a parent's right of access outweighs the First Amendment rights of an elementary school child, and that disclosure of a child's library records in accordance with the parental access statute would not violate the child's First Amendment rights.

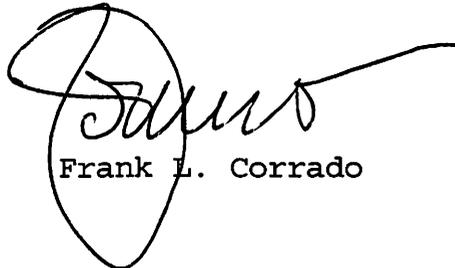
A high school student poses a closer question; I suspect that by age 16 or 17 the balance would begin to tip in favor of the child's First Amendment rights, absent some showing by the library, or the parents, that the particular circumstances warrant special solicitude for the parents' interest.

The bottom line is this: for elementary school children and younger, a library runs little risk if it permits parents access to their children's library records. For high school students, however, the library must take care that any permitted parental access does not run afoul of First Amendment concerns. The best protection against that risk is a clear, formal policy on confidentiality that requires parents to acknowledge their child's right to confidentiality.

I trust this answers the question posed. Please contact me if you need additional information.

Very truly yours,

BARRY, CORRADO & GRASSI, P.C.



Frank L. Corrado

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