

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

LOWER MERION SCHOOL DISTRICT

vs.

NICOLE SMITH

NO. 2022-19180

**CIVIL COVER SHEET**

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: JUSTIN M O'DONOGHUE, Esq., ID: 79997

Self-Represented (Pro Se) Litigant

**Class Action Suit**  Yes  No

**MDJ Appeal**  Yes  No

**Money Damages Requested**

**Commencement of Action:**

**Amount in Controversy:**

Petition

**Case Type and Code**

Miscellaneous: \_\_\_\_\_

Other \_\_\_\_\_

**Other:** OFFICE OF OPEN RECORDS

**LOWER MERION SCHOOL DISTRICT**  
Petitioner

v.

**NICOLE SMITH**

Respondent

: **IN THE COURT OF COMMON PLEAS OF**  
: **MONTGOMERY COUNTY, PENNSYLVANIA**  
:  
: **NO. 2022-**  
:  
: **Petition for Review of Administrative Agency**  
: **Determination**  
:  
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**ORDER**

**AND NOW**, this                    day of                    , 202\_\_, upon consideration of the Petition for Review of Lower Merion School District, and following hearing, briefing, and argument, it is hereby **ORDERED** and **DECREED** that the Final Determination of the Office of Open Records dated September 6, 2022 is **REVERSED** as to Item 1 of the underlying Request and the District is not required to take further action.

BY THE COURT:

\_\_\_\_\_

**JUSTIN M. O'DONOGHUE, ESQUIRE**

Attorney I.D. No. 79997

**BETHANY O. BYRNE**

Attorney I.D. No. 205526

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Attorneys for Petitioner

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**PETITION FOR REVIEW**

1. The Court has jurisdiction over this Petition for Review pursuant to 65 P.S. §67.1302. This Petition for Review is addressed to the Court's appellate jurisdiction.

2. Petitioner, Lower Merion School District, is a Pennsylvania public school district organized under the laws of the Commonwealth of Pennsylvania with its office located at 301 East Montgomery Avenue, Ardmore, Pennsylvania 19003 (the "District").

3. Respondent Nicole Smith ("Respondent") is an adult with a mailing address of P.O. Box 1101, Moultonborough, New Hampshire 03254.

4. On May 16, 2022, Respondent submitted a request (the "Request") to the District for records under the Right-to-Know Law ("RTKL").

5. The Request was related to “lesson plans”<sup>1</sup> from a named teacher, as well as materials used by the same named teacher.

6. In accordance with the RTKL, the District, through its Open Records Officer, invoked a 30-day extension on May 23, 2022.

7. The District did not respond to the request by the June 22, 2022 deadline, but did issue a denial to the request on July 5, 2022, indicating that the requests were insufficiently specific to allow the District to appropriately respond.

8. On July 6, 2022, Respondent appealed the District’s response to the Pennsylvania Office of Open Records (“OOR”).

9. Following submissions by both Parties, on September 6, 2022, the OOR issued a Final Determination at Docket No. 2022-1587 (the “Final Determination”). A true and correct copy of the Final Determination is attached hereto as Exhibit “A”.

10. The Final Determination granted the appeal in part and denied the appeal in part.

11. The District seeks review and reversal of certain elements of the Final Determination.

12. The Final Determination ordered the District to provide any requested undefined “lesson plans” free from redaction. Specifically, the District seeks reversal of the holding that any responsive records, if they exist, cannot be withheld or redacted where necessary.

13. The District believes request Item 1 to be insufficiently specific. Because the request did not identify a specific transaction or activity of the District, potentially responsive records were not able to be identified at the time of the appeal. For this reason, the District was not

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<sup>1</sup> The term “lesson plan” appears throughout this Petition in quotations because the records in the possession, custody, and control of the District are not lesson plans as traditionally understood, and because this is a broad and somewhat nebulous term. Traditional “lesson plans” are put in place for an entire class; the “lesson plans” at issue here are individualized objectives created from each student’s Individualized Educational Plan (“IEP”).

able to put forth an argument in front of OOR regarding the exemptions that could possibly apply to any records that may potentially be responsive to request Item 1.

14. Due to OOR’s determination that request Item 1 was sufficiently specific, the District accordingly began the search for responsive records in compliance with the Final Determination. In the course of that search, it became apparent that these documents are not “lesson plans” in terms of a plan for a class, but instead, these are individual student records, not necessarily responsive to the request and exempt from access under applicable law.

15. Upon review of sample “lesson plans” that have been accumulated by the teacher whose plans were requested, the District has determined that these documents are not true “lesson plans”, but rather are documents created from and related to each student’s Individualized Educational Plan (“IEP”).

16. There are only four (4) students in the named teacher’s class, each of whom have an IEP in place. Because these students need specialized instruction, this teacher does not prepare one “lesson plan” per class; instead, each student has their own set of goals and objectives drawn from their IEP. Each document is specific to a student and each time a student satisfies an objective, a new plan for that student is created.

17. These records include each student’s personal and demographic information, present educational levels, educational goals and objectives.

18. For this reason, the District has determined that these plans for individual students are not actually “lesson plans” in the sense of tools for planned instruction, but are documents created and maintained specifically with respect to each individual student; therefore they are exempt from disclosure under the Family Educational Rights and Privacy Act (“FERPA”) and the

Individuals with Disabilities Education Act (“IDEA”) and not subject to access under the Right to Know Law.

19. To the extent that these records are deemed to be “lesson plans”, they would be protected under FERPA, the constitutional right to privacy, and under Section 708(b)(30) of the RTKL.

20. Each accumulated record would be specific to one particular student and will at minimum contain the student’s name, as well as potentially other identifying information.

21. Even if these records were to be redacted, it is very likely that they could still be traced back to the four students in the named teacher’s class, as a member of the community would be able to identify which students are in this class.

22. These records contain information related to student IEPs, which the District maintains with respect to each student in the individual student’s file. Thus, any records accumulated by the District are educational records that are directly related to a student and maintained by an educational agency, and as such are not subject to the RTKL.

23. Student names are explicitly exempt under Section 708(b)(30) of the RTKL.

24. Parents and guardians of middle school children have a compelling interest in their children’s present education levels an individual educational goals and objectives not being made publicly available.

25. Similarly, middle school children have a compelling interest that their present education levels an individual educational goals and objectives not be made available to the public.

26. Given the extremely small size of the class at issue (4 students), releasing any information would allow individuals in the community to identify the students whose present education levels and educational goals and objectives were released.

27. The Requester presented no evidence that there is an interest of the public at large in having students' personal or educational information that would somehow outweigh the obvious privacy concerns in releasing the plans for individual students to those who request them under the RTKL.

28. The information contained in the records accumulated by the District is exactly the type of information that could only be provided in response to a FERPA request; if a parent requested to review the plan for their child, the accumulated records are what the District would provide in response.

29. The decision to release records that would jeopardize a student's FERPA and privacy rights is not the District's to make. The District does not have the ability to waive these rights that belong to students and their families.

**WHEREFORE**, Petitioner Lower Merion School District requests that a hearing on this matter be held with the subsequent entry of an order reversing the Final Determination dated September 6, 2022 as it pertains to the requested "lesson plans", and holding that records accumulated by the District since the Final Determination are either not "lesson plans" as responsive to the request, or to the extent that these records are deemed to be "lesson plans", that they are protected under FERPA, the right to informational privacy afforded by the Pennsylvania Constitution, and under Section 708(b)(30) of the RTKL.

Respectfully submitted,

**WISLER PEARLSTINE, LLP**

By:   
Justin M. O'Donoghue, Esquire



By: \_\_\_\_\_  
Bethany O. Byrne, Esquire

460 Norristown Road, Suite 110  
Blue Bell, Pennsylvania 19422  
*Attorneys for Petitioner*

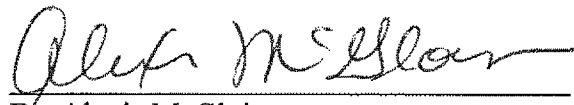


VERIFICATION

I, Dr. Alexis McGloin, Assistant Superintendent for the Lower Merion School District, hereby state that the facts set forth in the foregoing Petition for Review are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

Dated: 10/5/22

  
Dr. Alexis McGloin

**BETHANY O. BYRNE, ESQUIRE**  
Attorney I.D. No. 205526  
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Attorneys for Petitioner

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**CERTIFICATE OF SERVICE**

I, Bethany O. Byrne, Esquire, hereby certify that a true and correct copy of the Petition for Review was served via the Court’s electronic filing system, and U.S. First Class Mail, on this date to the following:

Nicole Smith  
P.O. Box 1101  
Moultonborough, NH 03254

Appeals Officer Jordan Davis  
Commonwealth Office of Open Records  
Keystone Building  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234

**WISLER PEARLSTINE, LLP**



Date: October 6, 2022

By: \_\_\_\_\_  
Bethany O. Byrne, Esquire  
460 Norristown Road, Suite 110  
Blue Bell, Pennsylvania 19422