DOCKET NO. HHB-CV-16-6032889-S	:	SUPERIOR COURT
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DIANA WENTZELL, COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF EDUCATION AND DEPARTMENT OF EDUCATION	:	JUDICIAL DISTRICT OF NEW BRITAIN
	:	
VS.	:	
	:	
FREEDOM OF INFORMATION COMMISSION AND MICHAEL SAVINO	:	MAY 16, 2017

MEMORANDUM OF DECISION

The plaintiffs, Dianna Wentzell, Commissioner of the Department of Education, and the Department of Education (collectively, department), brought this administrative appeal to challenge the ruling of the defendant, Freedom of Information Commission (commission), in favor of defendants, Michael Savino, a newspaper reporter, and his employer, the Manchester Journal Inquirer. The commission held that the department violated the Freedom of Information Act (FOIA or act) by failing to provide Savino with aggregate reports of district-wide student performance on certain mastery tests at the same time that the department made the aggregate information available to school superintendents. The department argues on appeal that the information was not available in report form on August 19, 2015, when superintendents were given electronic access to the information for their own districts only, but rather was available only in the system database of student information (student database).

The department further argues that pursuant to General Statutes § 10-10a (e), the student database is not a public record under General Statutes § 1-210 and is therefore not subject to the act. The commission argues, in opposition, that only personally identifiable student information in the student database is excluded from the scope of § 1-210.

For the reasons stated below, the court concludes that the commission misconstrued § 10-10a. Both the text of § 10-10a and the context of federal laws and other state statutes governing information about students support the conclusion that the legislature intended to protect all information in the student database, including aggregate information, from disclosure as a "public record" pursuant to § 1-210. Information in the student database becomes a public record subject to § 1-210 only when the department extracts aggregated information from the student database and puts it in a report or otherwise "de-identifies" it for persons statutorily authorized to request it. Because the commission erroneously construed § 10-10a to allow any member of the public to request information that exists only within the student database, the department's appeal is sustained.

FACTS AND PROCEDURAL HISTORY

The administrative record discloses the following facts:

On August 19, 2015, by an e-mail with the caption line "Embargoed Test Results," the department's deputy commissioner informed all school superintendents, in relevant part, that:

The Connecticut State Department of Education will provide **embargoed**

> **student assessment results** for the 2015 Smarter Balanced ELA[1] and mathematics results through the Online Reporting System (ORS) on August 19, 2015. Science results will soon be available for all districts through www.ctreports.com.
>
> These results are under embargo until further notice, but no later than the week of August 31-September 4, at which point in time the data will be made public. You will receive notification of the precise day and time the data will be made public.
>
> As a courtesy, the embargoed results are made available for districts before results are made public. The CSDE is continuing to conduct the final validation of these data. It is critical that districts do not make embargoed results public before the embargo is lifted. Releasing results (including discussing with the press or sharing results at Board of Education meetings) prior to the lift of the embargo jeopardizes your district's access to future embargoed releases.

(Emphasis in original.) Record (R.), pp. 31, 150.

Federal and state law require that all students in grades three through eight and grade eleven take mastery examinations that measure essential grade-appropriate skills in reading, writing, and mathematics. R., pp. 66-67; see also General Statutes § 10-14n. In 2014, the department contracted with the Smarter Balanced Assessment Consortium to have these tests administered through a computer-delivered system. R., pp. 66-67. This was a new method of testing in 2014. The vendor administered the tests and, after scoring, reported the results through an online reporting system. R., pp. 69-70. The online reporting system is a secure data system to which only authorized persons are given access. R., p. 70. The test results

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[1] "ELA" stands for English Language Arts. See Record (R.), pp. 68-69.

reported by the Smarter Balanced Assessment Consortium included individual results and some groupings at the district level. R., p. 70.

The "embargoed" information made available to the superintendents included both test results for individual students and aggregate test results for each superintendent's particular district. R., p. 151. No superintendent was given access to the student database for test results in districts other than his or her own. R., p. 70.

Savino learned of the release of information to the superintendents and sent an e-mail to the department requesting "the results of the Smarter Balance Assessment Consortium tests administered this past school year." R., pp. 15, 151. Although Savino did not explain that he was seeking only aggregate results, in the subsequent hearing before the commission's hearing officer, he testified that he was seeking only aggregate results because he knew that individual student results were not disclosable. R., pp. 59, 61-62. Despite the fact that his written request was not so qualified, the commission found that he was seeking aggregate state-wide and district-wide test results, not individual student test results. R., p. 151.

A department representative responded that the results would be released "once we have completed our final quality control check." R., p. 17. Savino construed this as a claim of exemption under General Statutes § 1-210 (b) (1), the exemption for "preliminary drafts or notes," and the commission found that the department had asserted that exemption. R., p. 151. Savino filed a complaint with the commission on August 20, 2015. R., pp. 1-2, 151. It

was docketed as #FIC 2015-532.

On August 28, 2015, nine days after Savino's request, the department publicly released the aggregate state-wide and district-wide test results on the Smarter Balanced Assessment tests. The results did not identify any individual students. R., pp. 34-47, p. 151. The commission found that the aggregate district-wide results that were publicly released on August 28, 2015, were unchanged from the results made available solely to superintendents on August 19, 2015. R., p. 151.

Shortly before the hearing before the commission's hearing officer was to commence, the department filed a motion to dismiss, asserting that, pursuant to § 10-10a (e), the requested records were not public records under § 1-210 and that the commission lacked jurisdiction to order disclosure of such records. The hearing officer denied the motion to dismiss but noted that the issue raised in the motion would be addressed at the hearing. R., p. 22. At that hearing, the department renewed its argument that the records requested by Savino on August 19, 2015, were not public records. The department also argued that the actual spreadsheets released on August 28, 2015, did not exist at the time of the request and, alternatively, to the extent that some district-wide aggregate information could be accessed through the student database, it should be considered a "preliminary draft" and exempt from disclosure under the preliminary notes exemption of § 1-210 (b) (1). R., p. 151.

The commission considered the applicability of § 10-10a, which it quoted in part in its

final decision, and construed the phrase "system database of student information" in § 10-10a (e) to refer only to "individual student information." R., p. 153. It concluded that the department had failed to prove that the aggregate district-wide results that they made available to superintendents on August 19, 2015, were part of the "system database of student information" that "shall not be considered a public record" under § 10-10a (e). It therefore rejected the department's claim that the records requested by Savino were exempt under § 10-10a (e). R., p. 153.[2]

The commission found that the department violated the disclosure requirements of General Statutes §§ 1-210 (a) and 1-212 (a) by failing to provide a copy of the record consisting of the aggregate district-wide test results to the complainants at the time it was requested. R., p. 156. It found that a record consisting of the aggregate state-wide test results did not exist on August 19, 2015, but was compiled by the department's chief performance officer and his staff between August 19, 2015, and August 28, 2015. It found that the department did not violate §§ 1-210 (a) and 1-212 (a) with regard to Savino's request for state-wide test results. It ordered that the department "[h]enceforth . . . shall comply with the disclosure requirements in §§ 1-210 (a) and 1-212 (a)." R., p. 156. This appeal followed.

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[2] The commission also considered and rejected a claim that the aggregated data was exempt as a "preliminary draft" under General Statutes §§ 1-210 (b) (1) and 1-210 (e) (1). Because the entire student database is excluded from the scope of § 1-210, and because the department has not renewed its arguments under this exemption on appeal, the court does not address the preliminary draft exemption.

APPLICABLE LAW

This appeal is brought and must be reviewed pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes §§ 4-166 et seq. "Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, the court's ultimate duty is ordinarily only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281, 77 A.3d 121 (2013).

The courts ordinarily afford "deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

The dispute in this case concerns the meaning of § 10-10a, and, in particular, § 10-10a (e), which provides in relevant part: "The system database of student information shall not be

considered a public record for the purposes of section 1-210." Section § 1-210 (a) provides in relevant part that "[e]xcept as provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . shall be public records . . . ."

The department, which is the agency charged with interpreting and applying § 10-10a, construes it to include all data in the student database, including aggregate information. The commission, which is the agency charged with construing § 1-210, construes § 10-10a to exclude aggregate data from the student database. The parties' dispute as to the meaning of the "system database of student information" presents a question of statutory interpretation. Because the interpretation of "system database of student information" presents a question of first impression, the commission's interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time. Accordingly, the deference normally accorded to an agency's interpretation of a statute is not required, and the court must instead apply a plenary review. See *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 298 Conn 717-18 (holding that trial court erred when it improperly reviewed novel issue of statutory interpretation under abuse of discretion standard).

Well-settled principles govern the court's approach to statutory construction. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to

determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 338, 21 A.3d 737 (2011).

Certain additional principles apply in construing our freedom of information act. The court recognizes that the act enshrines the public's right to know what its government is doing. "Our Supreme Court has stated that the [act] expresses a strong legislative policy in favor of the open conduct of government and free public access to government records. . . . The general rule under the act is disclosure." (Internal quotation marks omitted.) *Groton Police Dept.* v. *Freedom of Information Commission*, 104 Conn. App. 150, 155, 931 A.2d 989 (2007).

"Our legislature, however, has balanced this general rule with the need to exempt

certain records from disclosure to the public. . . . [In addition], as provided by the first sentence of § 1-210 (a), the act recognizes that federal law and other state statutes may exclude certain records." (Citations omitted.) Id. Finally, our courts have construed statutes protecting the privacy interests of children in a manner to ensure that the protection is effective. See id., 158-167 (construing General Statutes § 17a-101k to protect confidentiality of information relating to child abuse, regardless of where such information resides).

In this case, General Statutes § 10-10a must be construed against the backdrop of federal law. It is undisputed that the federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, and its implementing regulations restrict the disclosure of information about students by educational agencies that receive federal funding. More specifically, FERPA provides in relevant part: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization," other than in certain specific circumstances and to certain specific persons. 20 U.S.C. § 1232g (b) (1). In 1997, General Statutes § 1-210 was amended to exempt from the scope of FOIA any educational records that are not subject to disclosure under FERPA. See General Statutes § 1-210 (b) (17), enacted in Public Acts 1997, No. 97-293, § 14 (P.A. 97-

293).

While FERPA *restricts* the disclosure of information about students, other federal and state laws *require* the reporting of information about school performance. Before § 10-10a was enacted, for example, the federal Improving America's Schools Act of 1994[3] conditioned the receipt of certain federal funding upon the development of plans for assessing the educational performance of state and local educational agencies and required local educational agencies to publicize to the local community information relating to the academic performance of local schools. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3523, Title I, § 1111 (requiring development of state plans for assessing academic performance); Pub. L. No. 103-382, 108 Stat. 3543, Title 1, § 1116 (a) (3) (requiring public reporting of academic performance for all schools). State law required local and regional boards of education to submit a strategic school profile report for each school in its jurisdiction. See General Statutes (Rev. to 1999) § 10-220 (c).

Since the 1990s, the information required to be made public about school performance has increased. For example, the federal No Child Left Behind Act of 2002, as in effect through December 15, 2015, required states receiving federal funds to develop a state plan for

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[3] The Improving America's Schools Act of 1994 amended the Elementary and Secondary Education Act of 1965 (ESEA). The ESEA was again substantially amended by The No Child Left Behind Act of 2002. The ESEA was most recently and substantially amended by the Every Student Succeeds Act of 2015 (ESSA). ESSA, like the various preceding versions of ESEA, requires detailed reporting of school performance. See generally 20 U.S.C. § 6311 (effective December 15, 2015).

the assessment of student academic achievement; see 20 U.S.C. § 6311 (a) (1); to develop an "accountability" system for assessing school performance; see 20 U.S.C. § 6311 (b) (2); and to publish annually state and local "report cards" that include a wide range of information about school performance. See 20 U.S.C. § 6311 (h) (as in effect prior to December 15, 2015); see also General Statutes § 10-223e (implementing "state-wide accountability plan" in compliance with No Child Left Behind Act); General Statutes § 10-223k (requiring department to publish annually on its Internet website list of schools ranked highest to lowest in accountability score index and to provide information as to how accountability index was calculated). The Every Student Succeeds Act of 2015, which substantially amended the No Child Left Behind Act, similarly requires comprehensive reporting of academic performance data. See 20 U.S.C. § 6311 (h).

The many federal and state laws concerning public education thus attempt to strike a delicate balance between restricting the disclosure of information about students but requiring the disclosure of information about schools. This balance is generally achieved by reporting only aggregated information on student achievement.

The fact that information is aggregated, however, does not mean that it is necessarily disclosable under FERPA. For decades, statisticians have recognized that aggregate data can reveal sufficient information to identify individuals whose data is included if a particular data cell is small. See, e.g., U.S. Dept. of Commerce, Office of Statistical Policy and Standards,

"Statistical Policy Working Paper 2, Report on Statistical Disclosure and Disclosure-Avoidance Techniques," (1978), available at https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/spwp2.pdf (last visited May 12, 2017) (copy contained in the file of this case in the Superior Court clerk's office) (Statistical Policy Working Paper 2). That paper observed: "The problem of statistical disclosure is certainly not a new one. It has long been recognized that any available tabulation of the characteristics of a population is likely to narrow the range of uncertainty about the characteristics of specific individuals known to be members of that population. Recognition of the problem has been heightened by the widespread use of computers and microdata files as well as the increased demand for more detail in statistical releases. The sheer number of characteristics about a given statistical unit in microdata form, which sometimes produce unique configurations, may make identification possible, even though identifiers (such as names, social security numbers, or employer numbers) have been removed." Statistical Policy Working Paper 2, p. 13.

Issues concerning statistical disclosure have long been recognized with respect to FERPA requirements. To address such concerns, the federal Department of Education (federal department) amended the FERPA regulations to provide more guidance to state and local educational agencies concerning the "de-identification" of student records. In the notice of proposed rulemaking with respect to those amendments, the federal department made the following observations: "The Department recognizes that avoiding the risk of disclosure of

identity or individual attributes in statistical information cannot be completely eliminated, at least not without negating the utility of the information, and is always a matter of analyzing and balancing the risk so that the risk of disclosure is very low." Federal Educational Rights and Privacy, 73 Fed. Reg. 15574, 15583 (proposed March 24, 2008) (to be codified at 34 C.F.R. pt. 99). The notice continued: "In regard to numerical or statistical information, several educational agencies and institutions have expressed concern about the public release of information that contains small data sets that may be personally identifiable. We have advised States and schools generally that they may not report publicly on the number of students of specified race, gender, disability, English language proficiency, migrant status, or other condition who failed to graduate, received financial aid, achieved certain test scores, etc., *unless there is a sufficient number of students in the defined category so that personally identifiable information is not released.* Some schools have indicated, for example, that they would not disclose that two Hispanic, female students failed to graduate, even if there are several Hispanic females at the institution, because of the likelihood that the students who failed to graduate could easily be identified in such a small data set." (Emphasis added.) 73 Fed. Reg. 15584.

In the notice of proposed rulemaking, the federal department concluded that "it is not possible to prescribe a single method to apply in every circumstance to minimize the risk of disclosing personally identifiable information." 73 Fed. Reg. 15584. It referred educational

agencies tasked with preparing statistical reports to the recommendations of the Federal Committee on Statistical Methodology's Statistical Working Paper 22[4] for guidance, observing that "educational agencies and institutions may wish to consider current statistical, scientific and technological concepts, and standards when making decisions about analyzing and minimizing the risk of disclosure in statistical information." 73 Fed. Reg. 15584. It identified certain practices in the professional literature on disclosure limitation that could assist entities in developing sound statistical practices, including data suppression techniques such as defining minimum cell sizes and controlled rounding.

When the final amendments to the FERPA regulations were published in December, 2008, the federal department again addressed issues regarding statistical reporting and again advised educational agencies to consult the Federal Committee on Statistical Methodology's Statistical Working Paper 22 for additional guidance. It noted that with regard to the reporting requirements under the No Child Left Behind Act, in particular, "determining the minimum cell size to ensure statistical reliability of information is a completely different analysis than

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[4] See Federal Committee on Statistical Methodology, "Statistical Working Paper 22, Report on Statistical Disclosure Limitation Methodology," (2005), available at https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/spwp22.pdf (last visited May 12, 2017) (copy contained in the file of this case in the Superior Court clerk's office). That the department applies statistical methodologies to satisfy FERPA requirements, while simultaneously meeting its disclosure requirements, can be seen in its Data Suppression Guidelines. See Connecticut State Department of Education, "Data Suppression Guidelines," (2015), available at http://edsight.ct.gov/relatedreports/BDCRE%20Data%20Suppression%20Rules.pdf (last visited May 12, 2017) (copy contained in the file of this case in the Superior Court clerk's office).

that used to determine the appropriate minimum cell size to ensure confidentiality."[5] Federal Educational Rights and Privacy, 73 Fed. Reg. 74806, 74835 (proposed December 9, 2008) (to be codified at 34 C.F.R. pt. 99). It expanded the illustration from the notice of proposed rulemaking as follows: "Simply knowing that one out of 100 Hispanic females failed to graduate does not identify which of the Hispanic females it might be. But suppose this female is an English language learner who is also enrolled in special education classes. The school also publishes tables on participation in special education classes by race, ethnicity, and grade, and tables that include the graduation status of Hispanic females disaggregated in one table by English language proficiency status, and by participation in special education classes in another. Suppose that these three tabulations each show separately that there is one 12th grade Hispanic female enrolled in special education classes, that the one Hispanic female who did not graduate was enrolled in special education classes, and that the one Hispanic female who did not graduate was an English language learner. With this information, the discerning observer knows that the one Hispanic female who failed to graduate is an English language learner and that she was the only 12th grade Hispanic female enrolled in special education classes. Any number of people in the school would be able to identify the Hispanic female

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[5] The regulations implementing the No Child Left Behind Act require educational agencies not to use "disaggregated data for one or more subgroups . . . to report achievement results . . . if the results would reveal personally identifiable information about an individual student." 34 C.F.R. § 200.7 (b) (1). Educational agencies are further required to include in their state plan "appropriate strategies to protect the privacy of individual students in reporting achievement results . . . ." 34 C.F.R. § 200.7 (b) (4).

who did not graduate with these three pieces of information." 73 Fed. Reg. 74835.

In discussing the final regulations, the federal department observed: "[T]he purpose of FERPA is two-fold: to assure that parents and eligible students can access the student's educational records, and to protect their privacy rights by limiting the transferability of their education records without their consent. . . . As such, FERPA is not an open records statute or part of an open records system. The only parties who have a right to obtain access to education records under FERPA are parents and eligible students. Journalists, researchers and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office. Nonetheless, as explained in the preamble to the [notice of proposed rulemaking], 73 FR 15584-15585, we believe that the regulatory standard for defining and removing personally identifiable information from education records establishes an appropriate balance that facilitates school accountability and educational research while preserving the statutory privacy protections in FERPA." 73 Fed. Reg. 74831. "The simple removal of nominal or direct identifiers, such as name and SSN (or other ID number), does not necessarily avoid the release of personally identifiable information." 73 Fed. Reg. 74831.

Under the amended FERPA regulations, "personally identifiable information" is defined to include not only a student's name, address, names of family members, and other indirect identifiers, but also "[o]ther information that, alone or in combination, is linked or

linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. § 99.3. Under the regulations as amended, an educational agency is permitted to release information without the consent of the parent or eligible student only "after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, *whether through single or multiple releases, and taking into account other reasonably available information.*" (Emphasis added.) 34 C.F.R. § 99.31 (b) (1).

FERPA's requirements for the proper handling of statistical records concerning students is so complex that the federal government has established the Privacy Technical Assistance Center as a "'one-stop' resource for education stakeholders to learn about data privacy, confidentiality, and security practices related to student-level longitudinal data systems and other uses of student data." Privacy Technical Assistance Center (PTAC), "Frequently Asked Questions – Disclosure Avoidance," (2015), p. 1, available at http://ptac.ed.gov/sites/default/files/FAQ_Disclosure_Avoidance.pdf (last visited May 12, 2017) (copy contained in the file of this case in the Superior Court clerk's office). PTAC defines "disclosure" as "to permit access to or the release, transfer, or other communication of, [personally identifiable information] by any means. . . . Disclosure can be authorized, such as

when a parent or an eligible student gives written consent to share education records with an authorized party (e.g., a researcher). Disclosure can also be unauthorized or accidental. . . . An accidental disclosure can occur when data released in public aggregate reports are unintentionally presented in a manner that allows individual students to be identified." Id.

PTAC defines "disclosure avoidance" to refer to "the efforts made to reduce the risk of disclosure, such as applying statistical methods to protect [personally identifiable information] in aggregate data tables. These safeguards, often referred to as disclosure avoidance methods, can take many forms (e.g., data suppression, rounding, recoding, etc.)." Id. Additionally, PTAC notes that "organizations disclosing the data in the form of public aggregate reports are responsible for minimizing any such risk while still meeting the disclosure requirements and providing as much useful and transparent information to the public as possible." Id., p. 2.

Although the FERPA regulations were not amended until 2008 to address these and other issues that had arisen in the administration of FERPA, the problems of accidental disclosure that the amendments addressed had been recognized for decades. See Statistical Policy Working Paper 2, supra. The issue of statistical disclosure had also been the subject of advisory opinions from the federal department to state and local educational agencies for years before the amendments were promulgated. For instance, in 2003, responding to an inquiry from the University of Georgia concerning a newspaper's request for certain aggregated information, the director of FERPA's Family Policy Compliance Office advised that FERPA's

prohibition on disclosure of personally identifiable information applied equally to "the disclosure of aggregated information. That is, the FERPA prohibition on disclosure of 'personally identifiable information' allows agencies and institutions to aggregate data and disclose statistical information from education records, without consent, so long as the student's identity is not 'easily traceable.' Just as the removal of names and identification numbers is not always adequate to protect against personal identification with student level data, there are circumstances, such as those described in your letter, in which the aggregation of anonymous or de-identified data into various categories could render personal identity 'easily traceable.' *In those cases, FERPA prohibits disclosure of the information without consent.* This is true whether personal identity is revealed through a single request or through a series or combination of requests that are available to those in possession of the data." (Emphasis in original.) LeRoy S. Rooker, Director, Family Policy Compliance Office, "Letter to Board of Regents re: Open Records Request," (September 25, 2003), available at https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/georgialtr.html (last visited May 12, 2017) (copy contained in the file of this case in the Superior Court clerk's office).

This extended discussion of the mandates of public disclosure and the restrictions on such disclosure provides a necessary backdrop for consideration of General Statutes § 10-10a, which was enacted both to facilitate reporting under state and federal laws and to protect student privacy as required by FERPA.

DISCUSSION

In 2000, the legislature enacted Public Acts 2000, No. 00-187, § 8 (P.A. 00-187), later codified at General Statutes § 10-10a, to require the department to "develop and implement a state-wide public school information system." The stated purpose of this system was to establish "a standardized electronic data collection and reporting protocol that will facilitate compliance with state and federal reporting requirements, improve school-to-school and district-to-district information exchanges, and maintain the confidentiality of individual student and staff data." General Statutes (Rev. to 2001) § 10-10a (a) [now § 10-10a (b)]. The "initial design" of the system was to focus on "student information," but the system was to be designed so that it could later be compatible with "financial, facility, and staff data." See General Statutes (Rev. to 2001) § 10-10a (a).

While mandating the creation of a statewide data system that would collect information about student and school performance, the legislature unambiguously sought to protect the confidentiality of that database. It provided: "The system database of student information shall not be considered a public record for purposes of section 1-210." General Statutes (Rev. to 2001) § 10-10a (b) [now § 10-10a (e)].

At the outset, the court observes that § 10-10a (b) [now § 10-10a (e)] would have been unnecessary if it were intended to protect only individual student information. In 1997, in P.A. 97-293, the legislature had amended § 1-210 to exempt from disclosure "[e]ducational records

which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g." Thus, in 2000, when the legislature mandated the creation of a state-wide public school information system, all individual student data that was protected under FERPA was *already* exempt from disclosure under § 1-210 (b) (17). It is a cardinal maxim of statutory construction that "statutes should not be construed to render any sentence, clause, or phrase superfluous or meaningless." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 543, 93 A.3d 1142 (2014).

Turning to focus on the text of § 10-10a (b) (Rev. to 2001), it is noteworthy that in describing what is not to be considered a public record under § 1-210, the legislature did *not* provide that "personally identifiable student information shall not be a public record," as it easily could have done. Rather, it excluded from the scope of § 1-210 the "system database of student information." It did not define "system database."

"In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . ." General Statutes § 1-1 (a). The common definition of "database" is "a usu. large collection of data organized esp. for rapid search and retrieval"; Merriam-Webster's Collegiate Dictionary (11th Ed. 2012), p. 316; while a "system" may be defined generally as "a regularly interacting or interdependent group of items forming a unified whole" or, more specifically, as a "group of devices or artificial objects or an organization forming a network esp. for distributing something or serving a common purpose,"

such as a computer system. Id., p. 1269. That the legislature chose to exempt the "system database" from the scope of § 1-210, rather than simply exempting "personally identifiable student information," supports the department's argument that the legislature intended to protect the *entire* "system database" – that is, all information contained within the student database, not merely portions of it.

The term "student information" is not defined in § 10-10a. However, its meaning can be inferred from the fourth sentence of General Statutes (Rev. to 2001) § 10-10a (a) [now §10-10a (b)].[6] This sentence is one that the commission read selectively. It provides in relevant part: "The system shall provide for the tracking of the performance of individual students on each of the state-wide mastery examinations under section 10-14n in order to allow the department to compare the progress of the same cohort of students who take each

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[6] General Statutes (Rev. to 2001) § 10-10a (a) provided: "The Department of Education shall develop and implement a state-wide public school information system. The system shall be designed for the purpose of establishing a standardized electronic data collection and reporting protocol that will facilitate compliance with state and federal reporting requirements, improve school-to-school and district-to-district information exchanges, and maintain the confidentiality of individual student and staff data. The initial design shall focus on student information, provided the system shall be created to allow for future compatibility with financial, facility and staff data. The system shall provide for the tracking of the performance of individual students on each of the state-wide mastery examinations under section 10-14n in order to allow the department to compare the progress of the same cohort of students who take each examination and to better analyze school performance for purposes of section 10-223b." Under later amendments, this subsection was denominated § 10-10a (b); the reference to § 10-223b was dropped when § 10-223b was repealed; and a final sentence was added, as follows: "The department shall assign a unique student identifier to each student prior to tracking the performance of a student in the public school information system." See General Statutes (Rev. to 2017) § 10-10a (b).

examination and to better analyze school performance." General Statutes (Rev. to 2017) § 10-10a (b). In the commission's decision, the first portion of the sentence, through "section 10-14n," is underlined. See R., p. 152. This portion of the sentence certainly speaks of tracking the performance of individual students, as the commission emphasized. But the *purpose* of such tracking is stated in the second portion of the sentence, which the commission overlooked. The tracking is to be done "in order to allow the department to compare the progress of the same cohort of students who take each examination and to better analyze school performance." Both "cohort" and "school" speak of aggregated or cumulative information. As used in the context of this statute, a "cohort" is "a group of individuals having a statistical factor (as age or class membership) in common in a demographic study." Merriam-Webster's Collegiate Dictionary (11th Ed. 2012), p. 240. Similarly, the words "school performance" logically refers to the aggregated or cumulative performance on the state-wide mastery tests of all students in a school, viewed over time. The student database was plainly intended to include both individual student information *and* aggregated information about groups of students that would allow the department to measure "school performance."

Another relevant subsection is § 10-10a (c) (1). It was added to § 10-10a in 2010. See Public Acts 2010, No. 10-111, § 3 (P.A. 10-111). Section 10-10a (c) (1) added several types of information to be collected by the state-wide public school information system, which it

broke down into three categories: student information, teacher information, and school and district information. It requires the department to "track and report data" relating to "performance growth" for each of these three categories.

Subsection (c) (1) (A) of § 10-10a addresses the data to be collected about students. It provides: "*In addition to performance on state-wide mastery examinations pursuant to subsection (b) of this section*, data relating to students shall include, but not be limited to, (i) the primary language spoken at the home of a student, (ii) student transcripts, (iii) student attendance and student mobility, (iv) reliable, valid assessments of a student's readiness to enter public school at the kindergarten level, and (v) data collected, if any, from the preschool experience survey, described in section 10-515." (Emphasis added.) Both the original version of § 10-10a (a) and the addition of § 10-10 (c) (1) (A) make it clear that data concerning student performance on mastery examinations is part of the student database. The student database includes not only data about individual students, but data about cohorts of students and school performance.

Other amendments to § 10-10a further support the conclusion that the entire student database is exempt from disclosure under § 1-210. In 2009, the legislature amended § 10-10a to allow educational researchers employed by nonprofit educational organizations to obtain access to data from the system to facilitate longitudinal studies of student performance. See Public Acts 2009, No. 09-241, § 1 (P.A. 09-241). The legislature did not eliminate the section

exempting the student database from § 1-210, but instead amended it by adding specific language allowing access to information to a very specifically identified group. See id. In 2011, the legislature again amended the act to allow superintendents to access the system to obtain information regarding the mastery examinations. See Public Acts 2011, No. 11-136, § 15 (P.A. 11-136) [now codified as General Statutes § 10-10a (i)]. That access, however, was granted "for the limited purpose of determining examination dates, examination scores and levels of student achievement on such examinations for students enrolled in or transferring to the school district of such superintendent." General Statutes (Rev. to 2017) § 10-10a (i). It is reasonable to infer that the information of greatest interest to superintendents is aggregated information that reveals how the schools in the superintendent's district are performing. Even with respect to aggregated information, however, a superintendent is allowed to access only the portion of the student database that relates to his or her own district. This limitation is consistent with FERPA regulations that allow the disclosure of personally identifiable information only to school officials "whom the agency or institution has determined to have legitimate educational interest" in such information. See 34 C.F.R. § 99.31 (a) (1) (i) (A).

The text of § 10-10a expressly exempts from the scope of § 1-210 the "system database of student information." The commission argues that aggregate information is not included within this exception because only personally identifiable information is protected under FERPA. As previously discussed, however, aggregate information can and often does contain

personally identifiable information as that term has been defined and construed under FERPA. Such aggregate data must be properly "de-identified" by use of appropriate statistical methodologies before it can be disclosed to the public or even to superintendents for districts other than their own.

At the hearing before the commission's hearing officer, the department's chief performance officer attempted to explain the issue of statistical disclosure. He explained that the information made available to superintendents on August 19, 2015, was information that related only to each superintendent's own district. R., p. 70. He explained that the aggregate information ultimately published on August 28, 2015, did not exist on August 19, 2015, but was the product of three people, including him, working feverishly to construct all the spreadsheets that were needed to put it out for "public consumption." R., p. 75. He explained that when a district user was granted access to log in to the system database on August 19, that user would be able to see some aggregated information for his or her own district, but it was information the department had received from the vendor that administered the tests. He explained that "the rules that the vendor used in their platform, the aggregate data are a little different from ultimately how we apply the rules consistent with our requirements of the Federal Government, in terms of what are our rules for aggregating data. So, yes, they had a view, but it is not ultimately what we put out there. So it's different." R., p. 86.

The hearing officer indicated that, after hearing the chief performance officer's

testimony, she still did not know what the "statewide public school information system" is and whether the information at issue in the case is contained in that database. R., p. 92. She later stated that "it seems to me that you took data from this, which would be student – individually student identifiable information and you created aggregated information that isn't in that database and does not identify students." R., p. 100. The chief performance officer agreed, but added: "Even when we release aggregate data, I just want to add one other point, we go to great lengths to make sure you cannot arrive at identifiable information even from aggregate data. Examples being . . . if I was to tell you there is one Hispanic student in Grade 3 in this school and their average score is X, somebody could be – could figure it out, so (indiscernible) requires us to apply suppression to protect the privacy of individuals . . . ." R., p. 100.

The hearing officer was confused by what she saw as an apparent contradiction in the department's willingness to disclose aggregated information publicly and its claim that the *entire* database from which such aggregated information is drawn is exempt from disclosure. The commission's brief on appeal reflects the same confusion. It argues that the "anonymous data sought by Savino was the same information that the [department] ultimately made public. The plaintiff cannot claim on one hand that all of the data is confidential, and on the other say that it may disclose what it chooses." Commission's Brief at p.15.

This argument is based on a misunderstanding of both the nature of the database and the breadth of FERPA. The system database of student information was created precisely to

facilitate public reporting of school performance data *required to be disclosed* under federal and state law. The department *must* publish the aggregated school performance data required under federal laws and under state statutes that implement the federal requirements. That information is intended to be public. But the student database itself contains millions of pieces of information about individual students that must not be revealed either directly or indirectly. FERPA protects not only information that *directly* identifies students, but also information that, when combined with other information, allows by *indirect* means the identification of individual students. Failure to have adequate safeguards in place to protect the privacy of individual students can cost the state vital federal funding.

In enacting § 10-10a, the legislature recognized the dual imperatives of privacy protection and public disclosure. The exemption of the entire system database of student information from § 1-210 protects the privacy interest in *both* the information that is directly identified with individual students *and* aggregated information that may not have been tested for avoidance of accidental statistical disclosure. The reports required by federal and state law, which are properly drawn from the database only after careful review to determine that no personally identifiable information remains, serve the public's interest in knowing how schools are performing.

The commission argues that General Statutes § 1-211 (a) requires agencies to provide,

upon request, a copy of any nonexempt data contained in a computer storage system.[7] It argues, in essence, that under § 1-211, any member of the public can, at any time, request any data in the student database that is not *directly* related to an individual student. This, however, is precisely what the legislature sought to avoid in declaring that the "system database of student information is not a public record under section 1-210."[8] Given the high stakes involved in erroneous disclosure of even indirectly identifying information – both to the individual student, whose private information might become public, and to the state, which might lose federal funding – the safest course was to protect the confidentiality of the database itself and to allow the disclosure only of aggregated information that had been properly reviewed for the risk of accidental statistical disclosure.

To be sure, the legislature *could* have written § 10-10a to exempt from disclosure only

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[7] General Statutes § 1-211 (a) provides in relevant part: "Any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such a request, if the agency can reasonably make any such copy or have any such copy made."

[8] The commission's counsel acknowledged, at oral argument, that information that is "not a public record under section 1-210" is also not a public record under § 1-211. It would make no sense to exempt something from disclosure under § 1-210 and to require its disclosure under § 1-211. The commission's position was simply that § 10-10a exempted only information directly related to individual students. The commission did not consider, or did not understand, that aggregated information can contain information that, in conjunction with other available information, makes it possible to identify an individual student.

personally identifiable information contained in the student database. If it had done so, however, every set of aggregate data that anyone might request would have to be reviewed by technical analysts to ensure that proper statistical methods had been applied to avoid accidental statistical disclosure.

To make the student database subject to § 1-210 and § 1-211, limited only by the constraints of FERPA, would impose a potentially enormous drain on the department's human resources. Statistical disclosure avoidance, as the discussion of the FERPA regulations illustrates, is highly technical and requires the exercise of professional judgment. It also requires meticulous attention to accuracy.[9] The testimony at the hearing in this case indicated that the staff available to perform such technical statistical analyses is small. The timing for the production of mandatory reports is tight; examinations taken by all public school children in the state in the spring must be scored, and the test results collected, validated, aggregated, scrutinized for FERPA compliance, and published, before the start of school in September. The potential cost of accidental disclosures is high. To allow any member of the public to seek access to aggregate data within the database at any time could easily interfere with the department's ability to produce the reports it is mandated to provide or result in the accidental statistical disclosure of information that allows individual students to be indirectly identified.

That a concern about the allocation of human resources is one of the factors involved in

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[9] The department's chief performance officer testified at the hearing that "you shouldn't rush data work . . . when I rush analysts, they make mistakes." R., p. 78.

the legislative decision to exempt the entire database from disclosure is evidenced in the legislative history of P.A. 09-241, the amendment that gave nonprofit educational researchers the ability to gain access to data from the student database. As first proposed in 2009, the bill would have allowed access to such data to "public school officials, nonprofit organizations, researchers and educational policymakers." 52 S. Proc., Pt. 12, 2009 Sess., p. 3918. Senate Amendment A, however, restricted the persons eligible to obtain data to nonprofit educational researchers, omitting school officials and educational policymakers. When one legislator asked the reason for allowing access only to nonprofit researchers, the Senate proponent of the bill explained that "the Department didn't want to be . . . deluged with requests from far and wide, and then not be able to, in a timely fashion, present the data, which of course there's great interest in having that data available for people . . . in the September, early-October time frame so that parents could look at it, digest it, and make decisions for their kids." Id., 3919, remarks of Senator Gaffey.

When Senate Amendment A to the 2009 bill reduced the categories of persons who could request access to data, it also increased the length of time the department was given to respond, doubling it from thirty days to sixty days. Compare Substitute Senate Bill No. 1014, 2009 Sess., with Senate Amendment A, LCO No. 7944, to Substitute Senate Bill 1014, 2009 Sess. It may reasonably be inferred that the time for responding was increased because of the department's concern about the strain that such requests could impose on the technical staff

responsible for reviewing the data for FERPA compliance before any data could be released.

The legislative discussion of the 2009 amendment also demonstrates a concern for FERPA compliance. In the House, one representative raised a concern about potential breaches of privacy resulting from the disclosures that would be permitted under the amendment. The House proponent of the bill responded by explaining that "the State Department of Education and schools are all governed by FERPA. They all follow its dictates. There is never, to my knowledge, any information regarding students that would allow someone to identify an individual student that is released to the public. In fact, the data is scrubbed in such a way that if you're looking at a subgroup that has a small enough number of children, sometimes the data is withheld because there's a concern that because of the small size of the subgroup, someone might be able to figure out who an individual child is. So, in short, there are some very high fences around this information to ensure that no child's individual data is ever disclosed. . . . So any data released pursuant to Senate Amendment 'A' would be fully FERPA compliant." 52 H.R. Proc., Pt. 31, 2009 Session, p. 10045-47, remarks of Representative Fleischmann.

For all the reasons discussed above, the court concludes that the commission misconstrued § 10-10a (e) and improperly excluded from its scope aggregate data that is within the student database. Because the entire student database "shall not be considered a public record under section 1-210," the department had no obligation to print out information

from the student database at Savino's request. Moreover, it was prohibited from providing information from the student database to any member of the public until the data had been properly analyzed to ensure that no personally identifiable information would be disclosed through statistical tables.

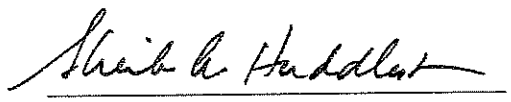
The evidence before the commission established that on August 19, 2015, aggregate information was visible to superintendents only when they logged in to a secure database, and then only for their own districts, not for the districts of other superintendents. R., pp. 70, 85-87. To the extent that the commission found that the aggregate district-wide results that were publicly released on August 28, 2015, were "unchanged" from those that the department released to the superintendents on August 19, 2015, that finding is not supported by substantial evidence in the record. The department's chief performance officer, who is the person responsible for overseeing the collection, research, and reporting of school district accountability measures, testified that the superintendents had a view of aggregate information as it was reported by the vendor of the tests, but it was *not* the district view required by federal regulations for aggregating information. R., pp. 66, 85-86. Although he also testified that he did not make changes *based on comments made by the superintendents*; R., p. 87; that does not negate or contradict his testimony that the data ultimately published on August 28, 2015, was aggregated differently, in compliance with federal regulations, than the raw aggregate data made available to the superintendents on August 19, 2015, when they were able to log in to the

secure student database.

The commission's unsupported factual finding, in any event, is not material to the appeal. Because § 10-10a (e) provides that the system database of student information is not a public record under § 1-210, the complainant below had no right under § 1-210 (or, by logical extension, under § 1-211) to ask the department to print out or otherwise provide a copy of the information that could be seen only by the superintendents by accessing a secure student database.

For the reasons stated above, the department's appeal is sustained.

BY THE COURT,



Sheila A. Huddleston, Judge