IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-1476-2015**
v.	:	
	:	
CHP,	:	**PRE TRIAL MOTIONS**
Defendant	:	

OPINION and ORDER

On February 9, 2016, Defense Counsel filed a "Motion to Dismiss or Compel Discovery". On February 16, 2016, Defense Counsel filed a "Motion pursuant to 18 Pa.C.S. § 3104" and on February 22, 2016, the Commonwealth filed a "Motion to Quash Subpoena". On April 25, 2016, the Court heard argument on the three pretrial motions. Present at the hearing were Defense Counsel, the Commonwealth's Attorney, and N. Randall Sees, Esq. for the East Lycoming School District. At the hearing, Attorney Sees requested that Defense Counsel be ordered to pay his attorney's fees.

Defendant was charged in a criminal information with count one (1): aggravated indecent assault, complainant less than 16 years of age (felony 2)[1]; count two (2): aggravated indecent assault without consent (felony 2)[2]; counts three (3) and four (4): indecent assault (misdemeanor 2)[3]; count five (5): endangering the welfare of children – parent/guardian/other (felony 3)[4]; and count six (6) corruption of minors – sexual offenses (felony 3)[5].

[1] 18 Pa. C.S. § 3125 (a)(8)
[2] 18 Pa. C.S. §3125 (a)(1)
[3] 18 Pa. C.S. § 3126 (a) (1) and (8)
[4] 18 Pa. C.S. § 4304 (a)(1)
[5] 18 Pa. C.S. § 6301 (a)(1)(ii)

The first four counts are charges under Chapter 31, Sexual Offenses in Pennsylvania's crimes and offenses statutory law. In order to submit evidence in a trial under Chapter 31, Sexual Offenses, the moving party must comply with Pennsylvania's Rape Shield Law:

> **§ 3104. Evidence of victim's sexual conduct.**
>
> (a) General rule. --
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> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.
>
> (b) Evidentiary proceedings. --
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> A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a). 18 Pa.C.S. § 3104.

The alleged incidents that are the subject of this criminal action took place sometime between January 1, 2013, and December 31, 2013. At those times, complainant, C P, was 15 and 16 years old (she turned 16 on January 30, 2013). She was living with Defendant, her stepfather, in the beginning of 2013; however, she moved in with her father in April or May of 2013. Affidavit of Probable Cause, 7/30/2015, p. 1 of 2.

On February 1, 2016, Defense Counsel served the Commonwealth with a copy of a Notice of Intent to Serve Subpoena. The subpoena that Defense Counsel would like to serve is a "Subpoena to Produce Document or Things for Discovery Pursuant to Rule 4009.22" to Hughesville High School. Defense Counsel would like the Court to order Hughesville High School to provide "every record about C P, including any and all disciplinary records." The

Commonwealth objected to the subpoena as did the School District who attended the hearing on April 25, 2016, and the Court heard testimony from the School District Counsel as to why it felt it was not legally compelled to provide this information to Defendant. The Commonwealth believes the request is overbroad and that Defense Counsel gave "no explanation as to the relevancy of the requested information as to how it pertains to the proceeding". The Commonwealth cites the "Certain Privileges and Immunities" section 5945 of the Criminal Proceedings section of Title 42.

> § 5945. Confidential communications to school personnel.
>
> (a) General rule. --
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> No guidance counselor, school nurse, school psychologist, or home and school visitor in the public schools or in private or parochial schools or other educational institutions providing elementary or secondary education, including any clerical worker of such schools and institutions, who, while in the course of his professional or clerical duties for a guidance counselor, home and school visitor, school nurse or school psychologist, has acquired information from a student in confidence shall be compelled or allowed: (1) without the consent of the student, if the student is 18 years of age or over; or (2) without the consent of his parent or guardian, if the student is under the age of 18 years; to disclose such information in any legal proceeding, trial, or investigation before any government unit.
>
> …

A black letter reading of the above statute indicates that Ms. P would have to give her permission, as she turned 18 on January 30, 2016, to Hughesville High School to release any confidential communications she may have made to the protected staff members listed in the statute. To the extent school records do not contain confidential communications Ms. P made to protected staff members, they could be produced and confidential portions redacted, or confidential portions could be submitted to the Defense, if Ms. P gives her permission.

The solicitor for the East Lycoming School District cited the Federal Family Educational Rights and Privacy Act, 20 U.S.C.S. § 1232g.(b)(1) for the proposition that the entirety of the

school records are not available to the Defendant. Section 1232g Family educational and privacy rights appears to have as its underlying purpose the denial of federal funds to public and private educational institutions that do not allow parents and students access to their own educational records; part (a); and conversely, withholds funds from educational agencies or institutions who release records when they are not statutorily authorized to do so; part (b). Part (b) governs compliance with judicial orders and subpoenas. Attorney Sees interprets Part **(b)(1)(J)** as allowing the release of educational records only pursuant to a Federal Grand Jury subpoena or for law enforcement purposes; however, Section **(b)(2)(B)** states

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless-- such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency, except when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 note)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required. 20 U.S.C.S. § 1232g.

Pursuant to the above federal statutory authority, this Court is able to order the production of C P's educational records[6]. The Court now looks to whether it will do so in this case. The Commonwealth argued first that the request from Defense Counsel was overbroad and during the hearing, Defense Counsel narrowed down her request to incidents that the Court believes are best described in Defense Counsel's "Motion pursuant to 18 Pa.C.S. § 3104":

3. C P was disciplined at school for using the school computer to enter chat rooms to talk about sexual acts in 2013.
4. C P reported a fellow student for molesting her, but recanted in 2013.

[6] FFERPA 20 U.S.C.S. § 1232g defines "education records" as "…those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 USCS § 1232g.(a)(4)(A).

5. C P used her school computer to engage in conversation with a person in New England in order to engage in sexual conduct with him in 2013.
6. C P stated in chat rooms that she watched pornography.
7. Evidenced intended to be produced at trial are C P's school discipline records, testimony from a teacher who dealt with the parents about her school computer use, documentary evidence of her communications in chat rooms.
8. As a result of C's actions, her Mother attempted to control her computer use, which resulted in a deterioration of the Mother/Daughter relationship to the point that C moved in with her Father and refused to see her Mother, a situation the continues to be present.
9. Said evidence is admissible and relevant because it is alleged that C P brought these false charges to get back at her Mother.

The Superior Court of Pennsylvania, in Commonwealth v. Guy, 454 Super. 582, 686 A.2d. 397 (1996), outlined the procedure the Court must take when the Defense Counsel seeks to submit evidence that on its face would be inadmissible under Pennsylvania's Rape Shield Law. Pennsylvania's Rape Shield Law prohibits the admissibility of evidence regarding the victim's past sexual conduct unless it relates to consensual sexual relations with Defendant. The purpose of the Rape Shield Law is to prevent a trial from shifting its focus away from the culpability of the accused towards the virtue and chastity of the victim. Id. at 587-588. By doing so the, legislature hoped to end the practice of defense attorneys who elected to try the victim instead of defend their client. Id. at 588. But in an effort to reconcile the effect of the Rape Shield Law in excluding evidence with the accused's sixth amendment right to confrontation and cross examination, the Courts have recognized several other instances in which an alleged victim's prior sexual history may be introduced at trial. Specifically, evidence tending to directly exculpate the accused by showing that the alleged victim is biased and thus has a motive to lie, fabricate, or seek retribution is admissible at trial. Id. The appellate courts have developed a detailed procedure that the parties and the trial court must follow prior to admission of the evidence. Initially, a defendant wishing to introduce such evidence must make a specific written proffer to the court, which defendant has done through Counsel's motion.

Next, the trial judge is required to hold an *in camera* hearing to determine whether the evidence is relevant, exculpatory, and necessary to the accused defense. In Commonwealth v. Fernsler, 715 A.2d 435, 439 (Pa. Super. Ct. 1998), the trial court was affirmed in allowing evidence that the sexual assault charges made against him by son were fabricated in exchange for leniency in a juvenile sex offender program that the child victim has been placed in following an earlier sexual assault he made on his sister. The court rejected the Commonwealth's argument that introduction of the evidence would offend the Rape Shield Law. The court applied a three-part test and found that defendant's proffer at the hearing on his motion was sufficient because the evidence he wished to submit was relevant to his defense in that it showed victim's motive to fabricate, it was not merely cumulative of other admissible evidence because it was the only evidence available to give victim a motive to fabricate, and it was more probative than prejudicial because it was being offered to show motive and not simply to attack victim as being sexually promiscuous. The court found that this was a "rare case" where the Confrontation Clause required that the Rape Shield law must bow to the need to permit defendant an opportunity to present genuinely exculpatory evidence.

AND NOW, this 13th day of June, 2016, after hearing the motion to dismiss or compel discovery, motion to quash subpoena and the motion regarding the Rape Shield Law, the following is ORDERED and DIRECTED:

1. The Motion to Dismiss or Compel Discovery is DENIED. The Court finds that the Commonwealth did provide discovery to Defense Counsel. Detective Weber will provide the telephone number he used to contact Tyler Barto to Defense Counsel.

2. The Motion to Quash Subpoena is DENIED. The East Lycoming School District is ORDERED and DIRECTED to provide this Court with C P's school discipline records. It is further ORDERED and DIRECTED that the parents of C P and C P are made aware of this order in accordance with 20 U.S.C.S. § 1232g.(b)(2)(B) so that the parent or student may seek protective action. 34 C.F.R. 99.31(9)(i) and (ii). Confidential information as described in 42 Pa.C.S. § 5945 is to be redacted unless the School District has permission from C P to release the information to this Court, with the understanding that it could potentially be used only in the criminal proceeding that is the subject of this Order. The Court will review the school records *in camera* and make a determination whether the evidence sought to be admitted is (1) relevant to the accused's defense; (2) merely cumulative of evidence otherwise admissible at trial; and (3) more probative than prejudicial. If the Court determines that the discipline records will not be admissible at trial, they will be returned to the East Lycoming School District. If the Court determines that the discipline records will be admissible at trial, they will be furnished to both the Commonwealth and Defense Counsel with a protective order restricting disclosure for the purposes of this criminal proceeding only.

3. Attorney Sees's request that Defense Counsel pay the East Lycoming School District's legal fees is DENIED.

BY THE COURT,

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Nancy L. Butts, President Judge

cc: Mary Kilgus, Esq. Defense Counsel
Melissa Kalaus, Esq. Assistant District Attorney
N. Randall Sees, Esq. Solicitor East Lycoming School District
McNerney Page Vanderlin & Hall