

IN THE CIRCUIT COURT OF THE 17th
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

THE SCHOOL BOARD OF
BROWARD COUNTY

Case Number: 18-014554 (26)
Judge: Henning

Petitioner,

vs.

NIKOLAS CRUZ,

Respondent
_____ /

STATE OF FLORIDA,
Plaintiff,

Case Number: 18001958CF10A
Judge: Scherer

vs.

NIKOLAS JACOB CRUZ,
Defendant.
_____ /

**VERIFIED PETITION TO INVOKE CONTEMPT PROCEEDINGS
AGAINST SUN-SENTINEL COMPANY, LLP,
AND REPORTERS, PAULA MCMAHON AND BRITTANY WALLMAN**

COMES NOW, the School Board of Broward County, Florida, by and through its undersigned attorneys and files this, its Verified Petition to Invoke Contempt Proceedings and, in support thereof, states as follows:

1. Under Florida law, “a refusal to obey any legal order, mandate or decree, made or given by any judge relative to any business of the court, after due notice thereof, is a contempt, punishable accordingly.” *See* § 38.23, Fla. Stat.

2. The criminal and civil courts before whom this issue has been addressed, “may punish contempts against it.” *See* §38.22, Fla. Stat. *See also*, §900.04, Fla. Stat.

3. After receiving public records requests for the subject Report, and being notified of Cruz’s objections to the disclosure of any educational records, the School Board filed a declaratory judgment action so that it could be determined, legally, what portions of the report could be released to the public and what portions needed to be redacted.

4. The Sun-Sentinel actively intervened into that lawsuit and was, and is, a party to the proceedings.

5. In its court filings (Exhibit A, Memorandum in Support of Motion to Intervene) and at the hearing before Judge Henning on July 11, 2018 (Exhibit B, Hearing Transcript), the Sun-Sentinel readily acknowledged that certain information contained in the Report was protected under Florida and federal laws.

6. More specifically, counsel for the Sun Sentinel stated, “. . . we do acknowledge there is HIPPA, there is FERPA, there is a number of statutes in Florida and federally that make certain records confidential.” *See* Exhibit B, p. 10.

7. The Sun Sentinel further asked the Court to only withhold the information necessary to not “run afoul of FERPA, and HIPAA, and the other statutes.” *Id.*, p. 11.

8. The Sun Sentinel readily recognized that the objections to the disclosure of this information were “validly made” under FERPA and HIPAA and counsel more pointedly stated that “to the extent that there are records that fall within that category,

then I would be foolish to say that they shouldn't be exempt. The law is clear on that."

Id., p. 27.

9. Ultimately, Judge Henning issued an order agreeing that much of the report should be redacted in order to comply with both Florida and federal law. *See* Exhibit C, Henning Order dated July 26, 2018. That order applied not only to the School Board and Mr. Cruz, who were the named parties to the case, but also to the Sun Sentinel and the Miami Herald who had intervened in the proceedings. *See* Exhibit D, Order Granting Intervention.

10. Judge Henning's order made abundantly clear what all parties had already agreed upon --- that much of the material in the report that referenced Nikolas Cruz's educational records needed to be redacted pursuant to "the requirements of the Family Educational Rights and Privacy Act 20 USC §1323g, the Health Insurance Portability and Accountability Act [42] USC §1320d, Florida Statutes protecting educational records, student placement records and academic assessment records and material, and confidential exemptions under Florida Statutes §119.07." *See* Exhibit C.

11. Thus, the Sun Sentinel was clearly aware of this order, and within the jurisdiction of the Court.

12. Following the entry of Judge Henning's order, Nikolas Cruz sought further review in the criminal proceeding before Judge Scherer.

13. More specifically, Cruz, through counsel, argued that the release of the subject Report would implicate his right to a fair trial. *See* Exhibit E, Emergency Motion for Protective Order.

14. Judge Scherer heard argument on Friday, August 3, 2018.

15. Counsel for the Sun Sentinel also appeared and argued at this hearing.

16. Judge Scherer ultimately agreed with Judge Henning that **because the critical information pertinent to Nikolas Cruz's personal educational records had been redacted**, it would not impact his right to a fair trial. *See* Exhibit F.

17. Accordingly, Judge Scherer agreed with the redactions and denied the request for a protective order. [A copy of the transcript of this hearing has been requested and will be supplemented to the Court as Exhibit G to this Petition.]

18. After being advised that Nikolas Cruz did not intend to appeal, the School Board uploaded a copy of the redacted report to its website in Portable Document Format (PDF). PDF is a file format that provides an electronic image of text that looks like a printed document and can be viewed, printed, and electronically transmitted.”

19. That evening, the Sun Sentinel published an article authored by Paula McMahon and Brittany Wallman, which detailed **redacted** and admittedly protected portions of the Report. *See* Exhibit H, Sun Sentinel Article.

20. Regardless of how they obtained the unredacted version of the Report, the Sun Sentinel and its reporters, Paula McMahon and Brittany Wallman, were on notice

that: (a) there were court orders in place subject to this Report; and (b) that those orders required the references to Nikolas Cruz's educational records to be redacted.

21. The Sun Sentinel was on notice by virtue of the fact that its legal representative appeared and participated in the hearings related to this issue. Likewise, in their written correspondence to the School Board, reporters Paula McMahon and Brittany Wallman have admitted that they, too, know of the court orders protecting the information they subsequently utilized in their article. *See* Exhibit I (email correspondence).

22. Notwithstanding the Sun Sentinel and its reporters' knowledge of the orders and rulings of both Judge Henning and Judge Scherer, they opted to report, publicly, information that this Court had ordered to be redacted despite agreeing, on the record, that this information was protected by both Florida and federal law.

23. This is a clear violation of Court orders, and constitutes contempt of court.

24. More specifically, the Sun Sentinel, Paula McMahon and Brittany Wallman have engaged in indirect criminal contempt.

25. Pursuant to Florida Rule of Criminal Procedure 3.840, either of the judges to whom this Petition is directed, on her own motion or on affidavit of any person having knowledge of the facts, may issue an order to show cause why the Sun Sentinel and the named reporters should not be held in contempt of court.

26. Contempt is an act which is *calculated* to embarrass, hinder, or obstruct a court in the administration of justice, or which is *calculated* to lessen its authority or dignity. *See, e.g., Haas v. State*, 196 So. 2d 515 (Fla. 2d DCA 2016)(emphasis by court).

27. “Courts and judges have inherent power to punish for contempt. . . to appropriately punish by fine or imprisonment or otherwise, any conduct that in law constitutes an offense against the authority and dignity of a court or judicial officer in the performance of judicial functions. And an appropriate punishment may be imposed by the court or judge whose authority or dignity has been unlawfully assailed.” *Ex parte Earman*, 85 Fla. 297, 95 So. 755 (Fla. 1923).

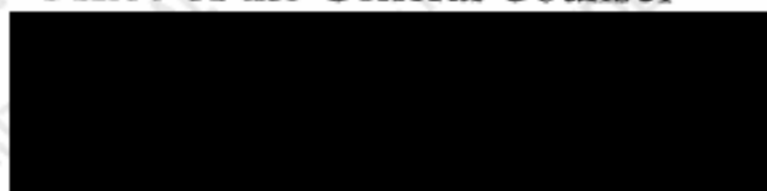
28. The Sun Sentinel and its named reporters clearly had knowledge of, and violated, the written and oral pronouncements made by Judge Henning and Judge Scherer. They conceded that the information was protected and confidential. And they knew that the Public Defender had taken the position that its disclosure would not only violate confidentiality provisions, but that it would impact Nikolas Cruz’s constitutional right to a fair trial. Yet they intentionally disclosed the information.

29. The Sun Sentinel, as a party to the proceedings, is clearly within the jurisdiction of this Court. Likewise, even as non-parties, Paula McMahon and Brittany Wallman can also be subject to indirect criminal contempt proceedings. *See Lindman v. Ellis*, 658 So. 2d 632 (Fla. 2d DCA 1995); *In re Elrod*, 455 So. 2d 1325 (Fla. 4th DCA 1984)(a court can exercise its contempt powers and punish any person interfering with the administration of justice).

30. Respectfully, the School Board submits that Judge Henning and/or Judge Scherer should initiate contempt proceedings (either on their own motion or based on this Verified Petition) against the Sun Sentinel Company, LLC, Paula McMahon and Brittany Wallman and impose proper sanctions as deemed appropriate. *See, e.g., Mayer v. State*, 523 So. 2d 1171 (Fla. 2d DCA 1988)(affirming the adjudication of a newspaper reporter guilty of indirect criminal contempt for reporting about information she obtained at a hearing after being advised not to disclose the information)(also rejecting reporter's argument that once she had the information in the public domain she was free to publish it). *See also, Creative Choice Homes, II, Ltd. v. Keystone Guard Svcs., Inc.*, 127 So. 3d 1144 (Fla. 3d DCA 2014)(citing *Parisi v. Broward Cnty.*, 769 So. 2d 359 (Fla. 2000)(discussing the distinction between criminal and civil contempt and the sanctions available thereunder)).

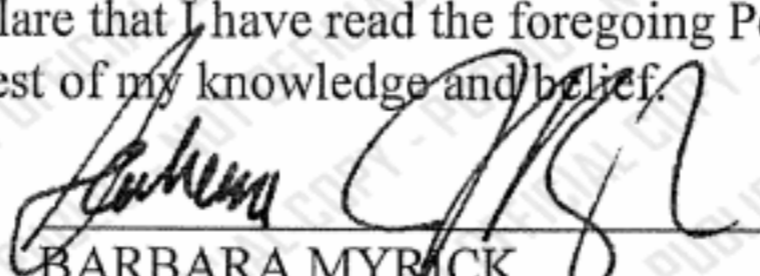
WHEREFORE, the School Board of Broward County wanted to place this Court on notice of these actions, respectfully submits that contempt proceedings and sanctions would be appropriate under the circumstances, and requests such other and further relief as the Court may deem proper.

SCHOOL BOARD OF BROWARD COUNTY
Office of the General Counsel



E-MAIL: pleadings@browardschools.com

Under penalties of perjury, I declare that I have read the foregoing Petition and that the facts stated in it are true to the best of my knowledge and belief.

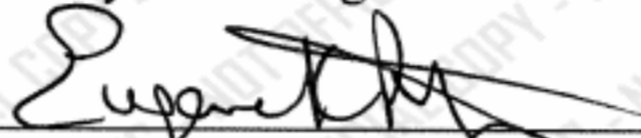

BARBARA MYRICK
FBN: 0496014

HALICZER, PETTIS & SCHWAMM, P.A.




E-MAIL: service@hpslegal.com

Under penalties of perjury, I declare that I have read the foregoing Petition and that the facts stated in it are true to the best of my knowledge and belief.


EUGENE K. PETTIS
FBN: 508454

Under penalties of perjury, I declare that I have read the foregoing Petition and that the facts stated in it are true to the best of my knowledge and belief.


DEBRA POTTER KLAUBER
FBN: 055646

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and parties identified on the Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

Respectfully submitted,

HALICZER PETTIS & SCHWAMM



service@hpslegal.com

A handwritten signature in black ink, appearing to read "Eugene K. Pettis", written over a horizontal line.

EUGENE K. PETTIS

Florida Bar Number: 508454

**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

THE SCHOOL BOARD OF
BROWARD COUNTY,

Petitioner,

v.

NIKOLAS CRUZ,

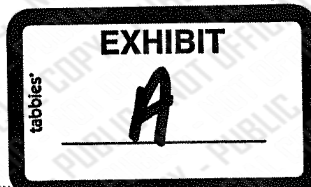
Respondent.

Case No.: CACE18-014554 (26)

**MEMORANDUM OF LAW IN SUPPORT OF NEWS MEDIA'S MOTION TO
INTERVENE AND IN OPPOSITION TO NIKOLAS CRUZ'S REQUEST TO ASSUME
JURISDICTION**

The Miami Herald Media Company and Sun-Sentinel Company, LLC (collectively the "News Media") hereby file this memorandum of law in support of their motion to intervene and in opposition to Nikolas Cruz's request that this matter be transferred to the criminal court overseeing Cruz's prosecution.

As detailed below, Petitioner, the School Board of Broward County ("School Board") filed its Petition for Declaratory Judgment seeking this Court's guidance concerning public release of a report and related materials prepared by an outside consultant. Specifically, the School Board retained Collaborative Educational Network, Inc. ("CEN") to conduct "an independent, comprehensive review" of the district's "policies and procedures in place during [Cruz's] academic journey." The News Media made a public records request for a copy of this report and any drafts. The School Board has indicated in its Petition that it wishes to release the report to the public – but believes it is constrained by various federal and state statutes. Cruz has objected to release, alleging that the criminal court should determine this civil matter. As detailed below, Cruz's request should be denied and the report released after *in camera* review.



FACTUAL BACKGROUND

A. The CEN Report

On March 6, 2018, Broward Schools Superintendent Robert Runcie announced that “to understand the conditions that may have led to [the Marjory Stoneman Douglas (“MSD”) shooting] tragedy” and “consistent with one of the [District’s] three strategic pillars, Continuous Improvement, where we strive to get better in delivering services and achieving best in class outcomes for our children and community,” the School Board retained CEN to, among other things, conduct “an independent, comprehensive review” of the district’s “policies and procedures in place during [Cruz’s] academic journey.” See **Exhibit A** at 2 (a true and correct copy of the minutes from the March 6, 2018 School Board Operational Meeting), attached to News Media’s Motion to Intervene.

Superintendent Runcie also noted that the “quest for such understanding must be done with both transparency and a sense of urgency” and reiterated the School Board’s commitment to preventing future tragedies, noting, “[w]e can and must do what we can to understand the conditions that led to such acts, in hopes of avoiding them in the future as we continue to strive to get better as an organization to serve our students and community to the best of our ability.”

Id. The School Board’s contract with CEN indicates that the overarching purpose of the review was to analyze the “[exceptional student education] ESE program in general and Marjory Stoneman Douglas in particular” and to “identify[] areas of concern and recommendations for future action, as appropriate.” See **Exhibit B**, a true and correct copy of the contract, attached to News Media’s Motion to Intervene.

Clearly, the scope of review indicated a purpose beyond merely reviewing Cruz and how he was handled, and accordingly, the report most certainly contains information regarding

district policy generally and any analyses on institutional failures and how to prevent future shootings—information *not* protected by any exemption to the Public Records Act.

B. The Public Records Request and this Action

On May 30, 2018, and on behalf of the News Media, undersigned counsel made public records requests to the School Board for copies of “any and all draft summaries or reports submitted to Haliczzer Pettis & Schwamm for review from Collaborative Education Network, Inc. per the scope of work outlined in its consulting services agreement dated March 21, 2018.” A true and correct copy of that request is attached as **Exhibit C** to News Media’s Motion to Intervene. The News Media also requested a copy of the final report and its attachments. *Id.* at **Exhibit D**. On June 4, 2018, that request was denied based on the claim that the report contained exemptions restricting access to student education and medical information. The School Board subsequently filed the Petition at issue in this case.

C. Cruz’s Request to Assume Jurisdiction

On June 26, 2018, counsel for Cruz in the criminal case (the Public Defender’s Office) notified this Court of his filing in *State of Florida v. Nikolas Cruz*, Case No. 18-1958CF10A of a “Motion for Protective Order to Enjoin the Release of the Defendant’s School Records and Independent Review of Defendant’s Education Records; and Request to Assume Jurisdiction Over the School Board’s Petition for Declaratory Judgment and Request for Oral Argument.” In the motion, Cruz requests the criminal court to “assume jurisdiction over this declaratory relief action.” *See* Attachment to Notice of Filing at ¶¶ 4, 13. As described in greater detail below, Cruz essentially argues that the release of these records will impact his right to a fair trial and that consequently, the decision should be made in the criminal court.

LEGAL ARGUMENT

This matter is a civil action for a declaratory judgment which should not be transferred to the criminal court overseeing the prosecution of Nikolas Cruz. To do so would contravene both the civil statutory scheme created for declaratory actions, and the administrative orders issued by the Chief Judge. Accordingly, neither this Court nor the criminal court should grant Cruz's request for such extraordinary action. Moreover, Florida public policy favors broad disclosure of public records, and applicable law requires that any non-exempt information contained within the CEN report be released to the public.

I. The Declaratory Judgment Action Should be Heard by this Court.

Florida Statute Section 86.011 grants circuit and county courts jurisdiction to render declaratory judgments. A petition for a declaratory judgment is inherently a civil cause of action, hence why Chapter 86 of the Florida Statutes arises under Title VI, *Civil Practice and Procedure*. The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations. Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 404 (Fla. 1996). "While the existence of an actual controversy is not necessarily a prerequisite to the activation of the court's jurisdiction over a declaratory judgment action, it is clear that there must be a bona fide dispute between contending parties as to a present justiciable issue in order to invoke the declaratory judgment act." Okaloosa Island Leaseholders Ass'n v. Okaloosa Island Auth., 308 So. 2d 120, 122 (Fla. 1st DCA 1975).

Generally, criminal and civil suits serve different purposes, and consequently, no case in Florida indicates any cross-over of jurisdiction just because a criminal and civil case arise from the same incident. In fact, the opposite is true, and courts have explained that what occurs in one

has no effect on the other. For example, in Kirby v. State, 863 So. 2d 238 (Fla. 2003), the State charged the defendant with driving under the influence, and prior to the jury announcing its guilty verdict, the injured victim entered into a settlement agreement with the defendant releasing him from civil liability for the accident. Id. at 241. The State was not a party to the settlement agreement. Id. The Florida Supreme Court held that because civil damages and criminal restitution are distinct remedies and “further distinct societal goals,” “the defendant cannot defeat the trial court’s statutory obligation to impose [criminal] restitution as part of the criminal sanction by virtue of a settlement agreement and release in the civil case.” Id. at 242, 244; see also Yacucci v. Hershey, 549 So. 2d 782, 784 (Fla. 4th DCA 1989) (where the trial court appointed the public defender handling a criminal child abuse case to also handle the civil dependency matter based on the “interdependency and interrelationship of the cases,” the appellate court reversed because public defenders are not authorized for such civil representation).

Similarly here, just because the declaratory judgment action for access to public records is related to the shooting for which Cruz has been criminally charged, does not mean the criminal division should assume jurisdiction over a related civil action. The declaratory action affects the public’s constitutional and statutory access rights and thus serves an entirely different purpose from the criminal prosecution. Moreover, there is no indication that this CEN report is even within the ambit of the criminal investigation.

Cruz argues in his motion that “it would be consistent with judicial economy and effective judicial management given the complexity of this matter and impact of the School Board’s petition on the criminal case to insist that a single judge preside over *all matters* related to this case.” See Attachment to Notice of Filing at ¶ 18 (emphasis added). Under Cruz’s

misguided jurisdictional analysis, any future civil action that somewhat relates to the shooting incident should be transferred to the criminal court. Not only will this create an immense burden on the criminal court and diminish judicial efficiency, but it will also automatically and improperly deem Cruz a party to all civil actions. In this regard, two Broward circuit civil cases involving release of records relating to the shooting already have proceeded without intervention by Cruz. See In re Records of the Dep't of Children & Families, Case No. MH-C-180000491 (61J), and Cable News Network, et al. v. Broward County Sheriff's Office, School Bd. of Broward Cty. & Robert W. Runcie, Case No. CASE18-004429 (09).

First, Cruz relies upon Administrative Order No. 2018-14-Crim, which states that “[a]ll matters *in the case of State of Florida v. Nikolas Jacob Cruz*, Case No.: 18-001958CF10A, excluding the request for warrants, shall be heard by Judge Scherer, Division (FJ).” See Admin. Order 2018-14-Crim (emphasis added), a copy of which is attached as **Exhibit A** to this memorandum. This order unequivocally refers only to matters within the *criminal* case. In this regard, Chief Judge Tuter entered that order only three days after a motion in the criminal case was heard before and decided by Judge Rebollo, instead of Judge Scherer. As Cruz’s counsel well knows, this order was intended to make clear that all matters involving the criminal case should be heard only by Judge Scherer.

Second, Cruz cites to Administrative Order 2018-30-Civ, which provides that “[a]ny and all new *civil actions arising from the February 14, 2018 incident* at Marjory Stoneman Douglas High School shall be assigned by the clerk to the Court of Circuit *Civil Division 26*” and “[a]ny and all open and active *civil actions arising from the February 14, 2018 incident . . . shall be transferred by the Clerk of the Court to Circuit Civil Division 26.*” See Admin Order 2018-30-Civ (emphasis added), a copy of which is attached as **Exhibit B** to this memorandum.

But this order is equally unavailing. Although Cruz asserts that the School Board's petition "directly impacts the criminal court proceedings" because the "release [of] Defendant's school records [] will significantly impair his right to a fair trial," he attempts to evade the application of the civil administrative order by arguing that the "issue of whether to release Defendant's records does not *directly arise out* of the incident at Marjory Stoneman Douglas, but is rather a *collateral issue* to the February 14, 2018 incident. As a result, [Administrative Order 2018-30-Civ] does not govern" BCSD's petition. See Attachment to Notice of Filing at ¶¶ 19-20 (emphasis added).

These arguments make no sense and should be rejected. Chief Judge Tuter entered two separate administrative orders, each expressly delineating between criminal and civil matters related to the shooting. Clearly, Judge Tuter could have entered one administrative order referring any and all matters, whether criminal or civil, to the same division. He chose to keep the divisions separate, as they should be. Here, the School Board is the records custodian of a report prepared to analyze policies and procedures in place at the time of the shooting and to identify ways to increase safety and security – it was never intended as a criminal investigative report. This Court can and should review the report and determine whether, and to what extent, various exemptions may apply under Florida's constitutional and statutory rights of public access.

II. Florida Public Policy Favors Broad Disclosure.

The Florida Constitution provides a broad right to inspect and copy the records of any state or local agency. Specifically, Article I, Section 24(a) of the Florida Constitution grants "[e]very person . . . the right to inspect or copy any public record made or received in connection with the official business of any public body, officer or employee of the state, or persons acting

on their behalf.”

Chapter 119 of the Florida Statutes—the Public Records Act—enforces and furthers this important state policy. Indeed, the first sentence of the law declares that “[i]t is the policy in this state that all state, county and municipal records are open for personal inspection and copying by any person” and that “[p]roviding access to public records is a duty of each agency.” § 119.01(1), Fla. Stat. (2018). The right of access to public records is a “cornerstone of our political culture.” Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 124 (2016) (citation omitted).

This right is not diminished when a state agency contracts with a private entity, as the School Board has done with CEN. See Fla. Stat. § 119.0701(2); see also Fla. Stat. § 287.058(1)(c) (every public agency contract shall include a provision “[a]llowing unilateral cancellation by the agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt from s. 24(a) of Art. I of the State Constitution and s. 119.07(1)”)”; Nat’l Collegiate Athletic Ass’n v. Associated Press, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009) (“a document may qualify as a public record under the statute if it was prepared by a private party, so long as it was ‘received’ by a government agent and used in the transaction of public business”).

Consistent with the Florida Constitution and public policy, the Public Records Act is liberally construed in favor of access to records, and exemptions from disclosure must be narrowly construed so that they remain limited to their stated purpose. See Nat’l Collegiate Athletic Ass’n, 18 So. 3d at 1206; Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775, 779 n.1 (Fla. 4th DCA 1985). If a public record contains some information that is exempt, the

remainder of the record must be produced with the exempt material deleted or redacted. Fla. Stat. § 119.07(1)(d); Tribune Co. v. Cannella, 458 So. 2d 1075, 1078 (Fla. 1984).

Additionally, an agency claiming an exemption bears the burden of proving the right to such an exemption. See Barfield v. Sch. Bd. of Manatee Cty., 135 So. 3d 560, 562 (Fla. 2d DCA 2014); Morris Publ'g Group, LLC v. Fla. Dep't of Educ., 133 So. 3d 957, 960 (Fla. 1st DCA 2013). Any exemption asserted is to be construed narrowly and limited to its stated purpose. Downs v. Austin, 522 So. 2d 931, 933 (Fla. 1st DCA 1988). And finally, “when in doubt the courts should find in favor of disclosure rather than secrecy.” Tribune Co. v. Public Records, 493 So. 2d 480, 483 (Fla. 2d DCA 1986) (citation omitted). In so doing, “[i]t is always the better practice” for a trial court to conduct an *in camera* review. Id. at 484.

It is against this backdrop—a liberal construction in favor of access that quashes evasive devices and favors disclosure when in doubt—that this Court should consider the News Media’s motion to intervene and require the disclosure of the CEN report, or portions thereof.

Here, to the extent any portions of the CEN report implicate the statutory exemptions detailed in Paragraph 13 of the School Board’s Petition, those exemptions must be narrowly construed. For example, Florida and federal law make clear that not all records that relate to student activity qualify as FERPA-protected records. See, e.g., Nat’l Collegiate Athletic Ass’n, 18 So. 3d at 1211 (when personally identifiable information about students is redacted from a record, “it no longer contains ‘information directly related to a student’ and is therefore not an ‘education record’ [protected] under FERPA”); 20 U.S.C. § 1232g(a)(4)(B)(ii) (2018) (records maintained by law enforcement component unit of an educational agency for law enforcement purposes are not FERPA-protected records). Similarly, HIPAA places no disclosure restrictions on de-identified health information. See 45 C.F.R. §§ 164.502(d)(2), 164.514(a).

Moreover, the report itself and any drafts do not by definition qualify as education, student or health records. In this regard, much of the information presumably contained in the report already has been detailed and discussed publicly. See News Media's Notice of Filing, filed concurrently with this memorandum. Accordingly, in the Court's *in camera* review of the CEN report, the News Media respectfully request this Court narrowly construe any applicable exemptions and require release of any non-exempt material. Given that the stated purpose of CEN's review included an analysis of the ESE program in general as well as that of MSD specifically, the report will be central to the ongoing public debate regarding the safety of schools in the wake of this tragedy, and as such, must be disclosed.

CONCLUSION

Cruz's flawed request for the criminal court to assume jurisdiction should be denied. Additionally, this Court should order release of the report at issue (including any drafts) after an *in camera* inspection to determine whether any exemptions apply.

THOMAS & LOCICERO PL

By: /s/ Dana J. McElroy
Dana J. McElroy
Florida Bar No. 0845906



-and-

Mark Caramanica
Florida Bar No. 110581





Attorneys for the News Media

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 2018, I electronically filed the foregoing document with the Clerk of the Court via the E-Portal. I also certify that the foregoing document is being served this day on all counsel of record and parties identified on the Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by the E-Portal or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

By: /s/ Dana J. McElroy
Attorney

EXHIBIT A

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD COUNTY, FLORIDA

Administrative Order No. 2018-14-Crim

**SECOND AMENDED ADMINISTRATIVE ORDER REGARDING *STATE
OF FLORIDA V. NIKOLAS JACOB CRUZ*, CASE NO. 18-001958 CF10A**

- (a) Pursuant to Article V, section 2(d) of the Florida Constitution and section 43.26, Florida Statutes, the Chief Judge of each judicial circuit is charged with the authority and the power to do everything necessary to promote the prompt and efficient administration of justice.
- (b) Florida Rule of Judicial Administration 2.215 (b) (3) states the Chief Judge “shall, considering available resources, ensure the efficient and proper administration of all courts within [this] circuit.”
- (c) The Court finds that the recently filed matter of *State of Florida v. Nikolas Jacob Cruz*, Case Number 18-001958 CF10A is a high-profile case requiring effective judicial management, oversight by a single judge, and the implementation of the Procedures for Special Interest/High Profile Proceedings set forth in Administrative Order 2018-3-Gen Governing Media.
- (d) The above-styled case was assigned to The Honorable Elizabeth Scherer (Circuit Criminal Division FJ) as a result of random assignment by the Clerk of the Courts.
- (e) In accordance with the authority vested in the Chief Judge by Article V, section 2(d) of the Florida Constitution, section 43.26, Florida Statutes, and Florida Rule of Judicial Administration 2.215, it is hereby **ORDERED**:
- (1) The case of *State of Florida v. Nikolas Jacob Cruz*, Case No. 18-001958 CF10A shall not be reassigned to any other judge for any reason except upon the following circumstances: (i) disqualification of the trial judge pursuant to Florida Rule of Judicial Administration 2.330; (ii) *sua sponte* order of recusal by the presiding judge; or (iii) an order from the Chief Judge.

(2) All matters in the case of *State of Florida v. Nikolas Jacob Cruz*, Case No. 18-001958 CF10A, excluding the request for warrants, shall be heard by Judge Scherer, Division (FJ).

(3) In the event Judge Scherer is unavailable, the matter shall be presented to one of Judge Scherer's alternates for resolution, if available. If all of Judge Scherer's alternates are unavailable, the matter shall be presented to the Administrative Judge of the Circuit Criminal Division for resolution. If the Administrative Judge of the Circuit Criminal Division is unavailable, the matter shall be presented to the Chief Judge.

(4) Any law enforcement agency requesting a warrant in this case shall contact the Administrative Judge of the Circuit Criminal Division. The Administrative Judge of the Circuit Criminal Division or his designee shall handle requests for warrants in this case.

(5) The Trial Court Administrator or her designee may implement the Procedures for Special Interest/High Profile Proceedings as set forth in Administrative Order 2018-3-Gen Governing Media.

(6) This Administrative Order supersedes and vacates any administrative order that is in conflict with the provisions stated herein.

(7) This Administrative Order is effective immediately and shall remain in effect until further order of this Court.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 20th day of February 2018 *nunc pro tunc* to February 19, 2018.

/s/ Jack Tuter
Jack Tuter, Chief Judge

EXHIBIT B

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

Administrative Order 2018-30-Civ

**ADMINISTRATIVE ORDER ASSIGNING MARJORY STONEMAN
DOUGLAS HIGH SCHOOL CIVIL CASES**

- (a) Pursuant to Article V, section 2(d) of the Florida Constitution, and section 43.26, Florida Statutes, the chief judge of each judicial circuit is charged with the authority and the power to do everything necessary to promote the prompt and efficient administration of justice.
- (b) Florida Rule of Judicial Administration 2.215(b)(3) states the chief judge “shall, considering available resources, ensure the efficient and proper administration of all courts within [this] circuit.”
- (c) Florida Rule of Judicial Administration 2.215(b)(4), the chief judge is authorized to assign cases to a judge or judges.
- (d) The cases arising from the February 14, 2018 incident at Marjory Stoneman Douglas High School are complex and should be heard by a single judge for judicial economy.
- (e) In accordance with the authority vested in the chief judge by Article V, section 2(d) of the Florida Constitution, section 43.26, Florida Statutes, and Florida Rule of Judicial Administration 2.215, it is hereby **ORDERED**:
- (1) Any and all new civil actions arising from the February 14, 2018 incident at Marjory Stoneman Douglas High School shall be assigned by the Clerk of the Court to Circuit Civil Division 26.
- (2) Any and all open and active civil actions arising from the February 14, 2018 incident at Marjory Stoneman Douglas High School, excluding *Cable News Network, Inc., et al. v. Broward County Sheriff's Office, et al.*, Case No. 18-004429 CACE (09), shall be transferred by the Clerk of the Court to Circuit Civil Division 26.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 18th day of April, 2018.

/s/ Jack Tuter
Jack Tuter, Chief Judge

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 18-014554 (26)

THE SCHOOL BOARD OF BROWARD COUNTY,

Petitioner,

vs.

NIKOLAS CRUZ,

Respondent,

Petitioner's Petition for Declaratory Judgment

AND

Defendant Cruz' Motion for Protective Order to Enjoin the
Release of School Records and Independent Review of Education
Records and Request to Assume Jurisdiction Over the School
Board's Petition for Declaratory Judgment and Request for
Oral Argument

AND

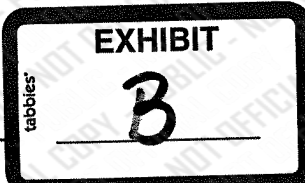
Miami Herald and Sun Sentinel's Motion to Intervene

THIS CAUSE CAME ON TO BE HEARD on Wednesday, July 11, 2018,
commencing at 11:00 a.m. at the Broward County Courthouse,
201 S.E. 6th Street, #WW16150, Fort Lauderdale, Florida,
BEFORE THE HONORABLE PATTI ENGLANDER HENNING.

REPORTED BY:

LEE LYNOTT, CMR, RPR, CSR
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1 APPEARANCES:

2 COUNSEL FOR THE PETITIONER:
3 HALICZER, PETTIS & SCHWAMM, P.A.
4 BY: DEBRA P. KLAUBER, ESQUIRE
5 EUGENE K. PETTIS, ESQUIRE



6 -and-

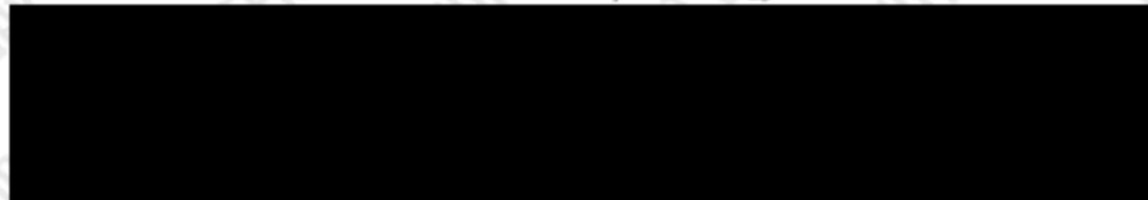
7 SCHOOL BOARD OF BROWARD COUNTY
8 OFFICE OF THE GENERAL COUNSEL
9 BY: BARBARA MYRICK, ESQUIRE



10 COUNSEL FOR SUN SENTINEL & MIAMI HERALD:
11 LAW OFFICE OF THOMAS & LOCICERO, P.A.
12 BY: DANA J. McELROY, ESQUIRE
13 DANIELA ABRATT, ESQUIRE



14 COUNSEL FOR THE RESPONDENT:
15 BROWARD COUNTY PUBLIC DEFENDER'S OFFICE
16 BY: MELISA McNEIL, ESQUIRE
17 GORDON WEEKES, ESQUIRE
18 ERIN VEIT, ESQUIRE
19 DIANE CUDDIHY, ESQUIRE
20 JOSEPH BURKE, ESQUIRE



21 ALSO PRESENT:

22 Steven Klinger, Esquire
23 Joel Silvershein, Esquire

1 THEREUPON,

2 (The following hearing proceedings were had):

3 THE COURT: Good morning, ladies and gentlemen.

4 We're here on Plaintiff's petition for declaratory
5 judgment. I have read through that, I have read through the
6 response of the Public Defender's Office. I'm going to ask
7 everyone to state their names so that we have it on the
8 record and who you are here for.

9 So I've read that and I've also read the request
10 for intervention as well. And if there are any other
11 documents, those have not yet been presented to me. So just
12 tell me if those are there. Why don't we start off with the
13 Plaintiff on this for the School Board and you can announce
14 yourselves.

15 MRS. KLAUBER: Good morning, Your Honor. Debra
16 Klauber from Haliczzer, Pettis & Schwamm on behalf of the
17 School Board. I'm here today with Barbara Myrick, the
18 General Counsel for the School Board of Broward County, and
19 my partner, Eugene Pettis.

20 MRS. MYRICK: Good morning.

21 MR. PETTIS: Good morning.

22 MRS. McELROY: Morning, Your Honor. Dana McElroy
23 with Thomas & LoCicero on behalf of the Intervenors, the
24 Miami Herald and the Sun-Sentinel. I'm here today with my
25 associate, Daniela Abratt.

1 THE COURT: Thank you.

2 MRS. McNEIL: Good morning, Your Honor. Melisa
3 McNeil on behalf of the Broward Public Defender's Office.
4 I'm here with Diane Cuddihy, Erin Veit, Gordon Weekes and
5 Joseph Burke. We represent Mr. Cruz on the criminal matter
6 before Judge Scherer.

7 THE COURT: The State Attorney's Office was noticed
8 of the hearing as well.

9 MR. KLINGER: Yes, we were, Your Honor. Steven
10 Klinger and Joel Silvershein here on behalf of the state.

11 THE COURT: And you have chosen to observe as
12 opposed to participate?

13 MR. KLINGER: At this point, yes, Your Honor.

14 THE COURT: Thank you.

15 MRS. McNEIL: Your Honor, before we begin, may I
16 state something for the record, please?

17 THE COURT: Yes.

18 MRS. McNEIL: I just want the Court to be aware and
19 all parties that Mr. Nikolas Cruz, who is the Respondent in
20 this case, is not present and he is entitled to be present
21 since he is to answer to this motion. And we are speaking on
22 his behalf, but we do object to the fact that he is not
23 present for a civil motion that could directly impact his
24 constitutional rights to due process in his criminal case, as
25 well as his Sixth Amendment right to a fair trial.

1 THE COURT: And you are well aware that in a civil
2 proceeding there is no party that is required to be in the
3 courtroom and that I did make sure that there was
4 representation? Even though I understand that you are not
5 representing him on the civil matter, unless you tell me that
6 you are and I don't know that you can do that, but I did want
7 to make sure that his views were presented here in court but
8 there is no obligation for any party to appear in the court
9 in a civil matter.

10 MRS. McNEIL: Your Honor, we do not represent him
11 on the civil matter. We're his criminal defense team, which
12 would mean that Mr. Cruz is not represented in the civil
13 matter; and he doesn't have the ability to actually travel to
14 this courtroom, because he's in the custody of the Broward
15 Sheriff's Office.

16 THE COURT: Thank you.

17 MRS. KLAUBER: Good morning, Your Honor. I know
18 that you've reviewed the papers and are generally familiar
19 with why we're here. As you know, following the tragic
20 shooting at Marjory Stoneman Douglas on February 14th of this
21 year there has and continues to be public inquiry into the
22 issues surrounding Mr. Cruz, the shooter, including inquiry
23 into his education with the Broward County School Board, his
24 involvement with law enforcement agencies like BSO and the
25 FBI, and the response to the shooting that day.

1 The School Board has currently been put on notice of
2 51 potential claims arising out of this incident and we're
3 only six months out from the shooting. That leaves us
4 another two and a half years for these families to provide
5 notice under the Sovereign Immunity statute.

6 One of the first things that we did on behalf of the
7 School Board was to retain some experts to take a look at
8 this incident from a number of different perspectives.

9 Our law firm retained a consultant to take a look at
10 the educational services that were provided to Mr. Cruz
11 during his time as a student in Broward County's public
12 school system.

13 That consultant has now completed its review and
14 prepared a report which includes, generally speaking, an
15 overview of the applicable law, a summary of the student's
16 educational and other records, and some recommendations to
17 the School Board.

18 The Superintendent has expressed a desire to be
19 transparent with this information that we are being provided
20 and the School Board has also received public records
21 requests for this report, but the Superintendent, the School
22 Board, and I believe the media all fully recognize that there
23 are some protections that apply to this report.

24 We made some preliminary attempts to see if Mr.
25 Cruz, through his criminal attorneys, would be willing to

1 agree to consent to the release of the report, which he has
2 not, and they've objected to the disclosure and that's why
3 we're here. We'd like the Court's guidance as to which
4 portions of the report can be released and which portions are
5 protected, exempt or, otherwise, remain confidential.

6 I have had some preliminary conversations with both
7 Mrs. McElroy for the media intervenors and Mrs. McNeil on
8 behalf of the Public Defender's Office and I'm sure they'll
9 have some things to address with the Court, but I think
10 generally we are all in agreement with what is our proposal:
11 That we provide the report to the Court for an in-camera
12 review so that the Court can redact those portions that
13 directly relate to the educational and other records that are
14 protected under Florida and federal law.

15 I would also submit that that version should first
16 be provided to his counsel so that they have an opportunity
17 to review what the Court intends to provide to the media in
18 response to the public -- or allow us to provide to the
19 media.

20 So, again, I think we all agree that some portion of
21 this report needs to be redacted. I do have a copy of the
22 various statutes that we believe apply so that the Court
23 would have those available, but what we're requesting is a
24 Court Order allowing us to release whatever portions of the
25 report the Court finds are not subject to the protection.

1 Thank you, Judge.

2 THE COURT: What I would like to hear from now is
3 the requested intervenors, because my reading of your motion
4 to intervene is for the report that was done by the School
5 Board as to the review in the future and not requesting any
6 records and indeed admitting that you realized that there are
7 rights and confidentiality rights at this point that Mr. Cruz
8 has.

9 Now, I don't know that you are necessarily at
10 cross-purposes or even appropriately asking for what it is
11 that the School Board is asking for. So that's the
12 difficulty I have with the intervention. You can respond to
13 all, but that's my concern right now. I would like you to
14 answer as to that, because I want to make sure it's
15 specifically as to what it is you're intervening for because,
16 as I said, the request was for the report with redactions as
17 to Mr. Cruz.

18 MRS. McELROY: Yes, Your Honor. Dana McElroy on
19 behalf of the Miami Herald and the Sun-Sentinel. To
20 specifically address your question as to the intervention,
21 does the Court have concerns that we don't have standing to
22 intervene or just moving on to the substance?

23 THE COURT: Well, if you're not interested or have
24 agreed that you're not entitled to what their issue is in
25 here, then I don't know about the motion to intervene.

1 MRS. McELROY: Okay.

2 THE COURT: So that's what it is. They are asking
3 and I thought that they were asking specifically as to the
4 records under FERPA, the placement records that they had and
5 his health records, correct?

6 Am I correct, from the School Board, that that's
7 what your issues are as to only those three?

8 MRS. KLAUBER: There are a number of statutes that
9 potentially apply to this information, Your Honor. But
10 generally speaking, yes, educational records, mental health
11 records.

12 THE COURT: Well, I'm looking at paragraph 13
13 which - if I am incorrect, tell me now - my understanding is
14 that's all that you're asking me to review?

15 MRS. KLAUBER: Correct.

16 THE COURT: Not the report --

17 MRS. KLAUBER: No. No. I'm sorry.

18 THE COURT: -- that the School Board asked for?

19 MRS. KLAUBER: I'm sorry. We are asking Your Honor
20 to review the report to redact references to those things,
21 not the underlying records themselves. Those are not being
22 addressed, those have not been requested by the media and we
23 are not intending to release any underlying educational
24 records, counseling records, anything of the sort.

25 MR. PETTIS: Just the report.

1 MRS. KLAUBER: Just the report.

2 THE COURT: And just those portions of the report
3 that discuss --

4 MRS. KLAUBER: We'd like to release those portions
5 that do not address Mr. Cruz' educational records.

6 MR. PETTIS: And history.

7 MRS. McELROY: Yes. We believe we have standing on
8 behalf of the public as a surrogate under the case law that
9 we've provided. These two particular media companies have
10 made public records requests for the report at issue here and
11 drafts of the report.

12 What we've tried to explain in our memorandum in
13 support is that we are seeking the report. And to the extent
14 that there are records -- We haven't seen the report or the
15 records. So we're arguing in a vacuum in that respect. So
16 there are -- we do acknowledge there is HIPPA, there is
17 FERPA, there is a number of statutes in Florida and federally
18 that make certain records confidential.

19 Our position is, though, that the report itself, to
20 the extent it has attachments that don't come narrowly within
21 the definition; in other words, don't qualify under the
22 exemption: For example, an education record needs to be read
23 narrowly or a medical record.

24 So the report itself, we would request that the
25 Court look at the report and any attachments in that view.

1 In other words, to narrowly, to narrowly apply the exemptions
2 as Article 1, Section 24 and Chapter 119 provide.

3 And so if the report discusses things, that isn't
4 necessarily exempt. And so we would ask that the Court
5 review the report and any drafts and any attachments with an
6 eye to specifically only withholding to the extent that's
7 provided for under a narrow interpretation as is required by
8 Florida law.

9 Secondly the -- And there may be some debate about
10 that and so I think that's perhaps where our position may be
11 broader than the School Board's, I'm not sure, because when I
12 read their petition my impression was that they wanted to be
13 as transparent as possible and release as much as possible
14 without running afoul of FERPA, and HIPPA, and the other
15 statutes.

16 In terms of the -- So we have a direct, "we" being
17 the media intervenors, have a direct interest in this
18 proceeding. In fact, our public records requests may have
19 triggered the dec action, I'm not sure. That's typically
20 what happens sometimes; they beat us to the courthouse on
21 that. And so we definitely have requested the report,
22 drafts, and any attachments to the extent that they aren't
23 otherwise exempt.

24 We don't agree, however, that the Court should allow
25 the defense counsel, who's defense counsel in the criminal

1 case, to review the report and then come to some agreement
2 with the School Board. I may have misunderstood their
3 position, but we believe that the Court should look at the
4 report and decide what portion should be released under
5 Chapter 119, taking into account the other exemptions, and
6 then order that release.

7 We don't think that the Defendant should be able to
8 review the School Board's record and then come in and say,
9 Well, I don't think this should be released or that should be
10 released. And the same argument was made in the criminal
11 court concerning the Defendant's statements, which are a part
12 of discovery in the criminal case.

13 The state attorney - and they can correct me if I'm
14 wrong - has indicated that they will be releasing those under
15 Chapter 119. The Defendant has moved for a protective order.
16 The Court, Judge Scherer, held a preliminary hearing a few
17 weeks back in which she said, I'm going to review all of the
18 statements in their unredacted format and then I will decide
19 from there what should be released and what shouldn't be
20 released. And if I'm incorrect, please let me know, but that
21 was my understanding.

22 And so we definitely believe an in-camera view by
23 this Court is appropriate. We request that. That's
24 absolutely the procedure, but we would request that the Court
25 review the report as it is currently in its current state by

1 the School Board and then make its ruling.

2 I'm just, I'm a little confused as well about the
3 Defendant's position in this case. I don't know if you want
4 me to address the request that this be heard by the criminal
5 court or not at this point.

6 THE COURT: I'm here, so I think that I responded to
7 that. I've asked them to be here and allowed them the
8 opportunity to place themselves in here. I'm obviously aware
9 of the criminal matter that also takes place, but I think
10 that there are specific guidelines as to the civil court that
11 can be handled here.

12 MRS. McELROY: Then our position has been laid out
13 in our memorandum. These records, they were prepared by and
14 are in the hands of the School Board. To the extent there is
15 any in the criminal case, for example, some of the underlying
16 records that may or may not be attached to the report, some
17 of the disciplinary records or the health records, those have
18 been made available by the state in discovery and I'm sure
19 will be the subject of motions moving forward in the criminal
20 case.

21 I would anticipate motions for protective order on
22 fair trial rights, but all of that has to do with records
23 that are in the hands of the State Attorney's Office or
24 otherwise become judicial public records in that case and not
25 reports here that are prepared by the School Board for use by

1 the School Board.

2 So we would request that this Court, under Chapter
3 119 and the dec action, review the report in its unredacted
4 format and then go from there in terms of any rulings.

5 THE COURT: You all wish to be heard?

6 MRS. McELROY: Thank you, Your Honor.

7 MRS. McNEIL: Your Honor, may I address the Court
8 from the table?

9 THE COURT: From wherever you're comfortable.

10 MRS. McNEIL: Thank you for granting the defense
11 team in the criminal matter an opportunity to address the
12 Court, because it is our position that, although this is
13 being heard before a civil judge, whatever remedy that the
14 Court issues will have a direct impact on Mr. Cruz'
15 constitutional rights to a fair trial as well as his due
16 process rights.

17 As the Court may or may not be aware, the state of
18 Florida is seeking the death penalty in this case and one of
19 the reasons why this case is in front of Judge Scherer is
20 because she is death qualified under the Trial Court
21 Administration 2.215(b)10(a), which requires that in order
22 for a judge to sit in a matter involving a death penalty case
23 they must be qualified.

24 And I'm sure that the Court is familiar with this
25 rule, because I've also been advised that you sat many years

1 in a criminal capacity and that you also heard and presided
2 over death penalty cases.

3 So I'm not sure, in light of the fact that whatever
4 is decided here could have an impact on the criminal death
5 penalty case, whether or not the Court has had an opportunity
6 while sitting on the civil bench to re-qualify to preside
7 over matters relating to a capital case. I'm not sure if you
8 have or have not? So, I ask the Court that. If the Court is
9 not inclined to answer, we would just make any objections if
10 the Court is at this present time not qualified to handle
11 issues relating to a capital case.

12 THE COURT: The specific issues as to the death
13 penalty, I have not. I have been on the civil bench for I
14 think it's the last 20 years at this point.

15 MRS. McNEIL: So in light of the fact that, as you
16 know because you have presided over capital cases, judges
17 that preside over capital cases have special training because
18 death is different and there's a higher standard of due
19 process as it relates to death penalty cases, so that's why
20 we stand before Your Honor.

21 Because if this report is released, it would be
22 released through the media which would be the same issues
23 that we're having in the criminal case where we're trying to
24 move for a protective order for Mr. Cruz' confession, we
25 would be dealing with the media trying the case in the public

1 and not in a courtroom. So we deeply believe that the
2 release of any school records at this point would negatively
3 impact his criminal case.

4 As the Court is aware, on June 14th of this year we
5 filed defense's motion objecting to the report that was
6 presented to us by the School Board. On June 1st of 2018
7 they did in fact meet with us. Met with members of the team
8 and asked us if we would in fact consent. We reviewed the
9 report and it was our position that we could not agree to the
10 release of the records.

11 I understand and respect the intention of the School
12 Board and their need for transparency in investigating what
13 happened on February 14th of 2018. However, the
14 Superintendent made a statement to the people of Broward
15 County that he would release this information; and in
16 releasing that information he would violate federal statutes
17 and Florida statutes. The state actually concedes that in
18 their motion.

19 THE COURT: Let me ask you: You're not stating that
20 the report in and of itself in total should not be released?

21 MRS. McNEIL: Actually, I am, Judge.

22 THE COURT: Okay, but that wasn't clear in anything
23 you said.

24 MRS. McNEIL: I'm sorry I didn't make my position
25 clear. The formation of this report is because of the

1 involvement of Nikolas Cruz. I have reviewed the most recent
2 draft of the report, and the statutes and the law that is
3 cited in those reports directly relate to a classification of
4 a student through the Broward County school system. So what
5 statutes his educational plan fall under relates specifically
6 to Nikolas Cruz.

7 So if we cite to the law, then we're essentially
8 telling the community - not a courtroom, right, where we're
9 trying this case on a life-and-death matter - we're telling
10 them these statutes apply to Nikolas Cruz because he received
11 these services through the School Board.

12 So it's our position that even citing the law
13 contained within that memorandum is a violation of the Public
14 Records Act, as well as a violation of FERPA.

15 THE COURT: What's the title of the report?

16 MRS. KLAUBER: It is "An Independent Review of NC's
17 Educational Record."

18 MRS. McNEIL: And if the Court does take --

19 THE COURT: I'm sorry. Excuse me. NC's what?

20 MRS. KLAUBER: "An Independent Review of NC's,"
21 initials, "Educational Record."

22 THE COURT: Okay.

23 MRS. McNEIL: Your Honor, may I continue?

24 THE COURT: You may.

25 MRS. McNEIL: The report itself makes mention

1 several times that this report is for a specific student,
2 meaning Nikolas Cruz. It also references "this student" and
3 "this review."

4 So although I believe the media believes that it's a
5 mixed combination of statutes that perhaps is information
6 that may not be protected by the Public Records Act and FERPA
7 and some information I believe they're conceding may be
8 covered by statute, Florida statute and FERPA, it's our
9 position that everything contained within the 70 pages of
10 this report in its entirety relates to Nikolas Cruz and,
11 therefore, should not be released at all in any portion,
12 because there wouldn't be a report if there wasn't a Nikolas
13 Cruz.

14 As to the request for a petition for declaratory
15 judgment, we would submit to the Court that the purpose of
16 that relief is when there is uncertainty and insecurity with
17 respect to the rights, status, and other equitable or legal
18 relations. Your Honor, I believe that the law is perfectly
19 clear that educational records are exempt from public record
20 and they're also exempt under federal law.

21 So it's the defense's position, on behalf of Mr.
22 Cruz, speaking in the criminal capacity, that none of the 70
23 pages of this report should be released because any
24 references in that report stem from the fact that they're
25 investigating Nikolas Cruz' educational records.

1 May I have a moment, please?

2 THE COURT: Of course.

3 MRS. McNEIL: And we have also asked for a hearing
4 on the same matter before the criminal court. It has not
5 been set down just so the Court is aware.

6 As to the protective order that we filed for Mr.
7 Cruz' statement to law enforcement, we had initially narrowly
8 tailored our requests for redactions, but we have now
9 expanded our request to include the entire statement and that
10 is based on fair trial rights and the fact that there has
11 been an extraordinary amount of media attention in this case.
12 The release of those records would also contribute to the
13 extraordinary media attention that this case has received.

14 And the fact that this case is pending before Judge
15 Scherer could cause the motion -- I'm sorry -- the fact that
16 this motion is pending before Judge Scherer could cause two
17 different judges within the same circuit to have contrary
18 rulings, so that could potentially be an issue.

19 I have nothing else for the Court. Thank you.

20 MRS. KLAUBER: Couple of brief points, Your Honor.
21 First, I'd like to address the fact that we are only seeking
22 the Court's review of the final report that was prepared by
23 the expert, not a draft. It is the School Board's position
24 that the draft is not a public record and that it constitutes
25 work product, because it was prepared pursuant to an

1 agreement with us as counsel involved in a number of civil
2 proceedings.

3 There are no attachments to the report. So for the
4 purposes of today, we're dealing with a final report, not a
5 draft, and there are no attachments to be considered that we
6 need to address or deal with.

7 As I understand it, it seems everyone is in
8 agreement with an in-camera review by the Court. We have no
9 objection to the Public Defender's ability or Mr. Cruz'
10 ability to see what the Court intends or agrees can be
11 released so that they can have an opportunity to appeal it or
12 address it in any way. I think that's the one place where we
13 might be in disagreement with the media.

14 I would agree with the media, however, that this
15 does not need to be heard in the criminal court. I
16 understand that they're trying to have it heard I think on
17 next week sometime there's a hearing in front of the judge,
18 but these are School Board records. These aren't records
19 that are being produced or exchanged in discovery in the
20 criminal proceeding. These are the School Board's records
21 and the Public Defender has already taken the position that
22 the School Board has no standing to seek relief in the
23 criminal court. So we think it was appropriate and that's
24 why we brought it here in the civil court.

25 With respect to the content of the report itself,

1 without getting into any detail of it, there is a detailed
2 discussion of general law and there are portions of statutes
3 that are in the report. We think those are not protected,
4 but we will be guided by the Court's advice on that. There
5 are also some recommendations to the School Board about ways
6 we can improve things based on what we've learned from this
7 tragedy that we would request that don't specifically have
8 anything to do with Mr. Cruz.

9 Again, I've got a copy. If there aren't any
10 objections, I do have a copy for the Court's in-camera
11 inspection that I can provide the Court.

12 THE COURT: Usually at an in-camera inspection the
13 parties have gone and provided me with a redacted -- or any
14 concerns to what was redacted and I review what needs to be
15 redacted as opposed to the entire 70 pages. I would imagine
16 that that would be done in this case.

17 My only concern is what you all believe should not
18 be made public, and for me to review that and make the
19 determination whether the press and the public has a right to
20 have that in weighing Mr. Cruz' rights for his criminal trial
21 as well. So do we have...

22 MR. PETTIS: We tried to have that discussion.

23 MRS. KLAUBER: Well, I think we can do that. We can
24 attempt to do that. I think what the Court will probably
25 receive is a proposal by the School Board and a different

1 proposal by Mr. Cruz, who's objecting to the report in its
2 entirety, but you might have a happy medium where if you're
3 going to do it, this would be accepted by them. We have not
4 gone through that process yet, but we would be happy to work
5 with the Public Defender to do that so we can provide the
6 Court with our suggestions.

7 THE COURT: Because I would imagine -- because I was
8 provided in another case in another civil matter an Agreed
9 Order regarding his Henderson records, that the Order says
10 that the Public Defender was in agreement with what's in that
11 Order.

12 MRS. McNEIL: May I speak to that, Your Honor?

13 THE COURT: Well, no, because I don't intend to do
14 anything with that without a hearing. I was not signing an
15 Agreed Order on that. So I have some concerns, though, as to
16 the issues as to the civil court does have a right to hear
17 things and please sign this Order I've agreed to and the
18 civil court doesn't have a right to hear this because of the
19 criminal matter that's involved.

20 So I'm not really sure as to the Public Defender's
21 position on this or Mr. Cruz' position on this, but that's
22 separate as to what needs to be reviewed. But I do think
23 that rather than handing me a 70-page document and saying,
24 you know, Look at it, the issue for the Court to decide is
25 those issues that you don't think should be provided and for

1 me to make a determination and weighing it as I've stated.

2 I understand the press is concerned about Mr. Cruz
3 having a view of it and that you hinted about. I'm going to
4 ask you to state your position again on that, because I'm not
5 really sure that I understand that that sufficiently. But I
6 would ask in any event that at least the School Board would
7 come to me and not say, Here. Here is the, you know, here is
8 the report; do something with it.

9 I think that you have been asked for records and
10 that you need to say, Okay, Judge. I'd like your, you know,
11 your Order as to what needs to be done on these few things or
12 many things that we have issues or concerns with.

13 MRS. KLAUBER: We'll be happy to do that, Judge.

14 THE COURT: Okay.

15 MRS. McELROY: Your Honor?

16 THE COURT: Yes.

17 MRS. McELROY: May it please the Court. Dana
18 McElroy.

19 A couple of things that I think I've gotten a little
20 confused. It's highly important going forward under Chapter
21 119 and any civil actions to enforce the public's right under
22 Article 1, Section 24, and Chapter 119 that there is likely
23 to be, there already has been one case, and there will be
24 cases going forward on public records matters that involve
25 Nikolas Cruz. Those are civil cases. They do not --

1 If Mr. Cruz wants to come in and represent -- get a
2 civil lawyer, I think he's entitled to do that, but I don't
3 believe the Public Defender's Office has standing. And
4 they've specifically said that they're not here as his civil
5 attorney in this dec action case. I believe he was served,
6 if I'm not incorrect, with a summons. Mr. Cruz needs to
7 either get a civil lawyer or have someone come in on the --

8 The reason that's important is, that in the criminal
9 trial he does have fair trial rights and we will litigate
10 those rights in a criminal trial as to records that are filed
11 in the criminal case, as to records under Chapter 119 that
12 become public records. The test for those records are the
13 Lewis case, the McCrary case.

14 The Court in the criminal case will hear testimony
15 about how it is that the release of judicial public records,
16 either records that come into the criminal case or records
17 that are turned over by the State Attorney's Office or other
18 criminal justice agencies, those are separate issues. That's
19 pre-trial.

20 When we get to the trial we'll have a whole nother
21 set of issues as to what the public's First Amendment rights
22 of access are to the criminal trial and to the underlying
23 proceedings. That's a First Amendment right of access. But
24 those should never be confused with Chapter 119 just because
25 they involve the same subject matter. I think what the

1 Public Defender is saying and perhaps will say in every
2 public records action to come is, that this should be decided
3 by the criminal court because it involves Mr. Cruz and his
4 fair trial rights. That's simply not the case and it's not
5 the law.

6 Chapter 119 is separate. It provides for civil
7 actions. There are often overlaps. We often have overlaps
8 between civil and criminal cases. It happens every day. DCF
9 is sometimes involved. There are often cases. And so to set
10 a precedent that says that Mr. Cruz can come into this 119 or
11 this dec action asserting rights under 119 is in error to do
12 that and shouldn't go that way.

13 Not to say that he can't come in as a litigant and
14 object to the release of educational records that may be a
15 part of the School Board's record, but the reality is the
16 School Board's record here - and the complaint by the way
17 does say "drafts," but I guess that's for another day - the
18 record at issue, the final report, was prepared by the School
19 Board. They are the records custodian. It is subject to
20 Chapter 119 for this Court's review. The fair trial rights
21 are not relevant to this Court's review.

22 THE COURT: Except that when the Court reviews
23 matters under 119 it can take other issues under
24 consideration other than just what's there. And I would
25 think that while the Court is supposed to be blind, it does

1 not put a blind eye to the fact that one of the parties in
2 this case is facing the death penalty on 17 different
3 counts.

4 MRS. McELROY: Well, I would disagree with the Court
5 only to this respect. If you read the case law carefully,
6 the case law under Chapter 119 is 100% clear. I can provide
7 briefing on this, because we deal with it in many, many
8 cases. The Court is not permitted to have policy
9 considerations determine its rulings under 119. Only the
10 legislature and its strict constraints can do so - that's the
11 Wade case, Your Honor - because courts often, as you have
12 suggested, would like to overlay policy.

13 But the way that the case law is developed - and I
14 can provide additional briefing if Your Honor would like - is
15 that policy considerations are absolutely not appropriate
16 under a Chapter 119 request.

17 To allay your concern, however, to the extent that
18 Mr. Cruz' educational records, the actual records - the
19 medical records, the Henderson records, the records - they
20 will be addressed by the criminal court those actual records.
21 That's not what we're talking about here today. We're
22 talking about a 119 record that is either a public record or
23 it's not. And to the extent there may be inconsistent
24 rulings, the same law will apply. In other words --

25 THE COURT: Well, but what you seem to be telling me

1 now is that you believe the entire report either is given to
2 you under 119 or not, and that's not the position you took in
3 your brief.

4 MRS. McELROY: What I have asked for - and we're
5 arguing, again, without having seen the report - the position
6 that I took in the brief --

7 THE COURT: And I'm listening without having seen
8 the report.

9 MRS. McELROY: Yes. The position that I took in the
10 brief is that there are certain exemptions that the School
11 Board has validly made that apply to those specific records
12 under FERPA, under HIPPA. You know, they've provided you
13 with every single one of those statutes and every single one
14 of those statutes says that the particular record that would
15 come within the definition of that statute is confidential
16 and exempt from Article 1, Section 24, and Chapter 119.

17 And so to the extent that there are records that
18 fall within that category, then I would be foolish to say
19 that they shouldn't be exempt. The law is clear on that.

20 Where the law is not so clear is that, for example,
21 in FERPA cases - and we've cited the NCAA case to you so that
22 you can see how courts have addressed this; the First
23 District Court of Appeal, Judge Padovano - where even under
24 FERPA there is some dispute as to what is an education record
25 that would be protected.

1 And so our position is that these statutes exist.
2 And to the extent that when the Court reviews this report
3 that it contains direct or verbatim or -- We thought there
4 were attachments that would have included Mr. Cruz' education
5 records. And so in guessing what it might be, we now know
6 there are no attachments. So I'm assuming that in the report
7 itself there may be some discussion. And to the extent
8 there's discussion or analysis or review that doesn't
9 verbatim quote those records, we would assert that under
10 Chapter 119 and a narrow reading, which is required,
11 narrowly, any exemptions must be narrowly construed and
12 disclosure must be broad. And that's by virtue of Article 1,
13 Section 24, which was passed by the voters in 1992.

14 And so I'm glad I've had the opportunity to clarify,
15 because when we first filed our motion to intervene, we don't
16 know what the report looks like. And now that we know that
17 the only thing that's before this Court is a 70-page final
18 draft, we would ask the Court to review the report in light
19 of the standards that we've provided in terms of what is
20 precisely exempt, precisely and narrowly exempt under any of
21 the cited statutes. And since the report itself does not
22 contain those records, I think the Court has to view it
23 within that paradigm.

24 The records that are in the criminal case, unless
25 I'm not correct, are the actual records themselves. But

1 again, if we were to rule or if this Court were to rule that
2 every 119 action that involves a criminal case can only be
3 heard by the criminal court and/or fair trial rights are at
4 stake, that's just simply not the law.

5 It's been clarified several times, because of course
6 it's intuitively correct. But that's why the Supreme Court
7 on many occasions has ruled that courts determining public
8 records actions are constrained by the language of the
9 exemptions themselves and not by policy considerations.

10 THE COURT: Thank you. Anything further from
11 anybody?

12 MRS. KLAUBER: Nothing here, Your Honor.

13 MR. PETTIS: Is there a timeframe? Do you want to
14 give a timeframe when we can get this to you, Your Honor?

15 THE COURT: Well, what I need - and I need it sooner
16 rather than later, obviously - is for the School Board to
17 provide me with a redacted report and, obviously, with the
18 redactions legible to me so I can see what is being redacted.
19 Sometimes I get them when they're blocking it from me as
20 well.

21 MR. PETTIS: We said it was redacted!

22 THE COURT: That's exactly right. So I need that.

23 I also want specific reasons for the redaction that
24 you have, whether there was a specific statute that you --
25 not just generally these are all referenced. As to each

1 specific redaction that you're making as to why it's
2 requested to be redacted. I think from that I should be able
3 to determine whether I need another hearing on the matter
4 with you all.

5 I think I can allay some concerns in here by also
6 telling you that I don't necessarily believe that what I
7 review - while I also can keep an eye and I do believe that
8 the law allows me and requires me to keep an eye on
9 everything else that may come through for other purposes -
10 that what I look at is different than what the criminal court
11 may be looking at.

12 But what I will do - as I said, I think I should
13 allay some concerns - is to place in an Order that I have
14 that there be five days before there's release so that they
15 can seek relief on any specific matters from the criminal
16 court as opposed to a hearing or anything like that. I would
17 imagine that that is sufficient for you all.

18 MRS. McNEIL: Mrs. Cuddihy?

19 MRS. CUDDIHY: Yes.

20 MRS. McNEIL: Judge, without revealing the content
21 of the report, the title of this report is Independent Review
22 of Nikolas Cruz' Educational Records. So if there were no
23 educational records, there would be no review of his
24 educational records.

25 So it's our position, even though Mrs. McElroy says

1 this is separate and apart from the school records, it's 100%
2 based on Nikolas Cruz' school records and they have in fact
3 been provided to the defense in discovery by the state of
4 Florida. I contacted a member of the state of Florida to
5 verify that they were not going to be releasing these
6 documents and they were exempt from public record and
7 they're, in fact, in agreement with that.

8 So our motion for protective order --

9 THE COURT: I'm sorry. You contacted who?

10 MRS. McNEIL: I actually spoke with Mrs. McCann
11 (phonetic), to verify that --

12 THE COURT: From the State Attorney's Office?

13 MRS. McNEIL: Yes, ma'am.

14 THE COURT: Okay.

15 MRS. McNEIL: So it's our position that the report
16 relies 100% on Nikolas Cruz' educational records, including
17 the statutes that he falls under as an exceptional student,
18 if he in fact does. That's our position.

19 We'll respect any ruling that the Court makes and we
20 appreciate your time.

21 THE COURT: Thank you. When do you think you can
22 get it to me?

23 MRS. KLAUBER: A week from today acceptable to the
24 Court? End of the week?

25 THE COURT: I like giving dates.

1 MRS. KLAUBER: Seven days from today or five working
2 days from today?

3 MRS. McNEIL: Judge, in a matter of full disclosure,
4 we have a hearing before the criminal court judge on the 16th
5 as it relates to a protective order for Mr. Cruz' statement.
6 We have asked that the motion for protective order as it
7 relates to the report and educational records also be heard
8 before her on that date, which is the 16th, which I believe
9 is next Monday.

10 MR. PETTIS: Have we got notice of that? Is that
11 intended to usurp your decision and your review?

12 THE COURT: Well, what I would like now is someone
13 to prepare what I've stated that I want from the School
14 Board, and also, as well that there will be a five-day delay
15 so that they have an opportunity to seek further review from
16 the criminal court.

17 MR. PETTIS: We'll get that to you ASAP. As we get
18 back to the office, we'll send it to counsel and get it to
19 the Court by the end of the day.

20 THE COURT: You said you think you can have it to me
21 by the 18th?

22 MRS. KLAUBER: Correct, Your Honor.

23 MRS. McELROY: May I clarify, Your Honor? Have we
24 been permitted to intervene?

25 THE COURT: Yes, on the basis that you -- Yes.

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MR. PETTIS: Thank you, Your Honor.

MRS. McELROY: Thank you, Your Honor.

MR. McNEIL: Thank you, Your Honor.

(THEREUPON, the hearing concluded at 11:45 a.m.)

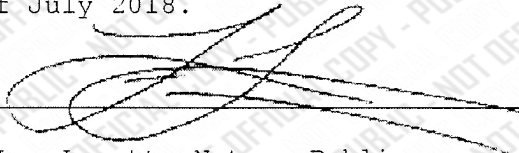
C E R T I F I C A T E

1
2 STATE OF FLORIDA }
3 } ss:
4 COUNTY OF BROWARD }

5 I, Lee Lynott, Certified Court Reporter, Registered
6 Professional Reporter, Certified Merit Reporter and a notary
7 public in and for the aforesaid county and state, do hereby
8 certify that the hearing proceedings were taken by me in
9 machine shorthand and was thereafter reduced to typewritten
10 form by me or under my direction and supervision, that the
11 foregoing transcript is a true and accurate record of the
12 proceedings to the best of my understanding and ability.

13 I FURTHER CERTIFY that I am neither counsel for, related
14 to, nor employed by any of the parties to the action in which
15 this proceeding was taken; and, further, that I am not a
16 relative or employee of any attorney or counsel employed by
17 the parties hereto, nor financially interested, or otherwise,
18 in the outcome of this action; and that I have no contract
19 with the parties, attorneys, or persons with an interest in
20 the action that affects or has a substantial tendency to
21 affect impartiality, that requires me to relinquish control
22 of an original deposition transcription or copies of the
23 transcript attorney, or that requires me to provide any
24 service not made available to all parties to the action.

25 IN WITNESS WHEREOF, I have hereunto subscribed my name
this 11th day of July 2018.



Lee Lynott, Notary Public
Registered Merit Reporter
MY COMMISSION# GG 234909
EXPIRES: July 4, 2022
Bonded Thru Notary Public Underwriters

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

THE SCHOOL BOARD OF BROWARD
COUNTY,

CASE NO. 18-14554 (26)

Plaintiff,

JUDGE: PATTI ENGLANDER HENNING

VS.

COMPLEX CIVIL DIVISION

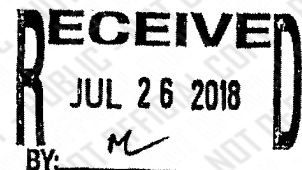
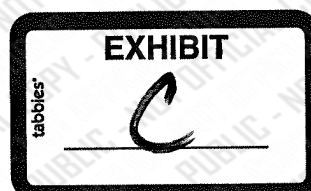
NIKOLAS CRUZ,

Defendant(s).

ORDER ON BROWARD COUNTY SCHOOL BOARD'S
PETITION FOR DECLARATORY JUDGMENT

THIS CAUSE came before the Court on The School Board of Broward County's Petition for Declaratory Judgment as to the release of a report following the shooting at Marjory Stoneman Douglas High School. This matter was previously heard by this Court and all parties with interest therein were given an opportunity to be heard. A preliminary order was entered by this Court on July 12, 2018.

After a full and complete in camera review of the June 16, 2018 "Independent Review of "NC's Educational Record" with suggested redactions by the School Board, and review of the appropriate statutes concerning any privacy of these records as were argued



CASE NO. 18-14554 (26)

by the School Board, Nikolas Cruz through counsel representing him in the criminal matter, and the Miami Herald and Sun Sentinel, the court makes the following findings:

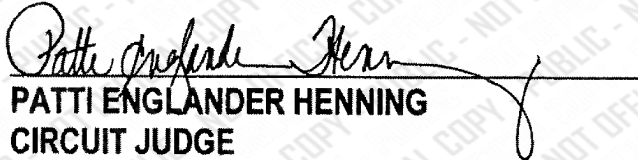
1. The report as redacted by the Broward County School Board is hereby approved to be released with the following exceptions:
 - A) Redactions on page 19 of the report are to be released.
 - B) On page 29 in the first full paragraph, the first two sentences are to be released.
 - C) On page 29, the third full paragraph is to be released.
 - D) On page 31 in the first full paragraph the language beginning with the second sentence is to be released **EXCEPT** the last sentence of the paragraph is to remain redacted.

The Court finds the redacted material is consistent with the requirements of the Family Educational Rights and Privacy Act 20 USC § 1323g, the Health Insurance Portability and Accountability Act USC § 1320d, Florida Statutes protecting educational records, student placement records and academic assessment records and material, and confidential exemptions under Florida Statutes §119.07.

CASE NO. 18-14554 (26)

2. Pursuant to the Court's July 12, 2018 Order, this court hereby stays the effect of this Order for 5 days and accordingly the release of the report for 5 days to allow Mr. Cruz an opportunity to seek additional relief.

DONE AND ORDERED, in Chambers, on this 26 day of July, 2018, in Fort Lauderdale, Broward County, Florida.


PATTI ENGLANDER HENNING
CIRCUIT JUDGE
COMPLEX CIVIL DIVISION

Copies furnished to:

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Elizabeth Scherer, Circuit Judge, escherer@17th.flcourts.org

CCD 72618 ORD 1814554

**** If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator, Room 470, 201 S.E. Sixth Street, Fort Lauderdale, Florida 33301, 954-831-7721 at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711. ****

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

THE SCHOOL BOARD OF
BROWARD COUNTY

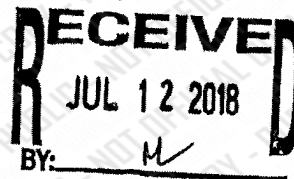
Petitioner,

vs.

NIKOLAS CRUZ,

Respondent.

CASE NO.: 18-014554 (26)



**ORDER ON MOTION TO INTERVENE
AND PETITIONER'S REQUEST FOR IN CAMERA INSPECTION**

THIS CAUSE, having come before the Court on the Petitioner, THE SCHOOL BOARD OF BROWARD COUNTY's, Petition for Declaratory Judgment and its request for this Court to review, in camera, the "Independent Review of NC's Educational Record" (the Report), and the Court having reviewed the materials submitted by the parties and having heard argument of counsel, it is ORDERED AND ADJUDGED as follows:

1. The Motion to Intervene filed by the Miami Herald Media Company and Sun-Sentinel Company, LLC, is GRANTED.
2. This Court finds that the questions raised in this declaratory judgment action -- related to the application of Florida's public records laws to the release of the Report -- is properly before the Court.
3. The School Board is ordered to provide the Court with a proposed redacted (but readable) version of the Report on or before July 18, 2018. The redacted version shall also include the specific reasons or legal basis for the redaction.
4. Upon review of the proposed redacted version of the Report, the Court will determine if another hearing is necessary, or will issue an order.
5. Should this Court order the release of any portion of the Report, it will allow five (5) days before the Report can be released to any third parties in order to allow Mr. Cruz an opportunity to seek additional relief.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida on this 12 day of July, 2018.

Copies furnished:

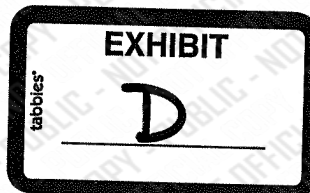
Eugene K. Pettis, Esq.

Melisa McNeill, Esq.

Dana J. McElroy, Esq.

Honorable Elizabeth Scherer, Circuit Judge


HONORABLE PATTI ENGLANDER HENNING
CIRCUIT JUDGE



IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 18-1958CF10A

vs.

NIKOLAS CRUZ
Defendant.

JUDGE: SCHERER

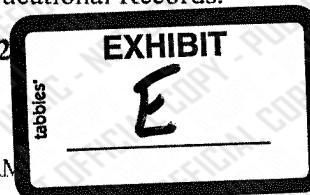
**DEFENDANT'S EMERGENCY¹ MOTION FOR PROTECTIVE ORDER TO ENJOIN
THE RELEASE OF ANY PORTION OF THE INDEPENDENT REVIEW OF "NC'S"
EDUCATION RECORDS (D-11). THIS MOTION SUPERSEDES (D-9).**

COMES NOW the Defendant, NIKOLAS CRUZ, by and through the undersigned attorney, and files this Motion for Protective Order, which supersedes Defendant's D-9 motion, pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure, Florida Statutes §§119.011, 119.071, 1002.22(2)(d) and 1002.221(1), the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16, 21, and 22 of the Florida Constitution. As grounds for this Motion, the Defendant states as follows:

I

1. The Defendant is charged with seventeen counts of murder in the first degree and seventeen counts of attempted murder in the first degree. The State has filed its Notice of Intent to Seek the Death Penalty.
2. The School Board of Broward County initiated a review of Defendant's educational history and support services provided by Broward Schools. The review culminated in a

¹ This motion is an emergency because the civil court allowed the Defendant five days to seek additional relief from its July 26, 2018 order releasing a redacted version of the School Board of Broward County's "Independent Review of N.C.'s Educational Records."



- report formally titled "Independent Review of "NC's" Educational Records" (hereinafter, "Report") the School Board of Broward County intends to release for public inspection.
3. On June 14, 2018, the Defendant through counsel specifically objected to the release of the "Report."
 4. On June 18, 2018, the School Board filed a "Petition for Declaratory Judgment" (hereinafter referred to as "Petition") in the Circuit Civil Division of the Broward County Courts to determine whether any part of the "Report" can be released to the public or whether the information contained in the report should remain confidential.
 5. On July 11, 2018,
 6. On July 26, 2018, the civil court issued its "Order on Broward County School Board's Petition for Declaratory Judgement". The civil court approved the School Board's proposed redactions with a few exceptions and those exceptions were listed in the order.
 7. The civil court the civil court heard arguments from the School Board, counsel representing Nikolas Cruz in the criminal matter and the Miami Herald and Sun Sentinel relating to the "Petition". Nikolas Cruz was not present or represented in the civil proceeding. A preliminary order was entered by the Court on July 12, 2018. The civil court conducted an **in camera** review of the "Report" with suggested redactions by the School Board and reviewed the appropriate statutes concerning privacy of those records. found that the School Board's proposed redactions were consistent with the requirements of the Family Educational Rights and Privacy Act 20 USC § 1323g, the Health Insurance Portability and Accountability Act USC § 1320d, Florida Statutes protecting educational records, student placement records and academic assessment records and material, and confidential exemptions under Florida Statutes §119.07.

8. Importantly, the civil court's order **did not** address the effect the release of the "Report" would have on Mr. Cruz's due process rights or fair trial rights in the criminal case. The civil court stayed the release of the report for five days "to allow Mr. Cruz an opportunity to seek additional relief."
9. The Defendant now seeks a protective order from this Court. It is this Court's responsibility to ensure the Defendant's due process rights to a fair trial. That was not the issue before the civil judge. Judge Henning's ruling was based only on federal and state education laws and Florida's public record law. The civil court's order did not address Defendant's due process rights and whether the release of the report would impact those rights.
10. The release of any portion of the "Report", even with Judge Henning's approved redactions, will significantly impair the Defendant's right to a fair trial before an impartial jury in Broward County.
11. "[T]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 33 (Fla. 1988) quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). The purpose of the Public Records Act "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach Cnty. Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). However, "where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield." *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 380 (Fla. 1987); *McCrary*, 520 So.2d at 34-35. There is no First Amendment right of access to discovery information. See

McCrary, 520 So.2d at 35, relying on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

12. The media has extensively covered this case and has suggested that a number of “red flags,” “warnings” and “cries for help” were overlooked by school administrators and educators. It is essential that this Court take safeguards to ensure that Defendant’s educational history and services received while attending Broward Schools is not litigated in the press.
13. This case has received extensive media coverage frustrating the power of this Court to provide a fair trial before an impartial jury in Broward County or anywhere else. The remedies previously relied upon by courts to limit the impact of adverse pretrial coverage—including granting motions to continue or changing venue—are insufficient and antiquated in light of the national attention on this case and the rise of digital media accessible to every potential juror in the State of Florida. Neither the passage of time, nor a change in venue will make the digital publicity covering this case less accessible or contemporary to potential jurors. This Court must act to ensure that the Defendant receives a fair trial in this case.
14. “[T]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.” *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 33 (Fla. 1988) quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). The purpose of the Public Records Act “is to open public records to allow Florida’s citizens to discover the actions of their government.” *Christy v. Palm Beach Cnty. Sheriff’s Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). However, “where a defendant’s right to a fair

trial conflicts with the public's right of access, it is the right of access which must yield."

Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378, 380 (Fla. 1987); *McCrary*, 520 So.2d at 34-35. There is no First Amendment right of access to discovery information. See *McCrary*, 520 So.2d at 35, relying on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

15. The United States Supreme Court has characterized the right to a fair trial as the most fundamental of all freedoms and one which must be preserved at all costs." *Id.* (citing *Estes v. Texas*, 381 U.S. 532 (1965)). The public's interest and right to transparency through section 119.071(2)(e) is not absolute: "If, as the press urges, chapter 119 was read and applied so as to violate the constitutional separation of powers doctrine or the right to a fair trial, we would be obliged to declare the statute unconstitutional." *McCrary*, 520 So. 2d at 34.

16. "The trial judge is directly and personally responsible for maintaining the dignity and decorum of the courtroom proceedings. The media's interests do not involve issues of fair trial and due process. Rather, the media's interests involve issues of public information, ratings, and financial benefits from coverage of a particular trial. . . . Therefore, the trial judge must be aggressively involved in media management to ensure the constitutionally protected rights of the defendant to a fair trial and the societal right to justice in a properly conducted trial." Hon. Cynthia Stevens Kent (ret.) and Hon. Sharen Wilson, Chapter 4 Media and the Courts, Presiding over a Capital Case: A Benchbook for Judges, <http://www.judges.org/capitalcasesresources/bookpdf/Chapter%204%20Media%20and%20the%20Courts.pdf>.

17. Criminal cases must be tried in court and not the media; the Supreme Court of Florida equipped trial courts with the ability to limit the disclosure of court records with Florida Rule of Judicial Administration 2.420(c)(9)(A) in situations where:

(A) confidentiality is required to:

- (i) prevent serious and imminent threat to the fair, impartial, and orderly administration of justice; . . .
- (iii) protect a compelling governmental interest; . . .
- (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;
- (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law[.]

18. In deciding whether to temporarily restrict public access to discovery material this Court should consider the following:

- (1) A temporary restriction is “necessary to prevent a serious and imminent threat to the administration of justice;
- (2) No alternatives are available, other than change of venue, which would protect a defendant’s right to a fair trial; and
- (3) [A temporary restriction] would be effective in protecting the right of the accused, without being broader than necessary to accomplish this purpose.”

Miami Herald Pub Co. v. Lewis, 426 So.2d 1, 3 (Fla. 1982); *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32, 35 (Fla. 1988) (holding that “the factors set out in *Lewis* are relevant to a finding of cause and should be considered in determining whether public access to a judicial public record should be restricted or deferred.”).

19. In *McCrary*, the trial court temporarily prohibited public release of existing discovery materials after finding that the material was “graphically incriminating, containing materials which might not be admissible at trial...” 520 So.2d at 33. The trial court recognized that there was prior prejudicial publicity surrounding the case and that disclosure would further aggravate the prejudicial publicity; it found that the only measure available, until a jury could be selected and sequestered, “was to cut off the prejudicial publicity at its source before the discovery information became known to the press and public. *Id.* at 35.

20. In upholding this decision, the Florida Supreme Court disagreed with the media’s position that the court was writing a new public record exemption into chapter 119 without authority: the legislature recognized in 119.07(4) that there are occasions where court files containing public records must be closed to the public and that “under the separation of powers doctrine, it is the responsibility of the judicial branch to ensure that parties receive a fair trial.” *Id.* at 34.

21. Similarly, the trial court in *Miami Herald Media Co. v. State*, 218 So.3d 460 (Fla. 3rd DCA 2017), was confronted with a high-profile murder case involving prejudicial pretrial publicity and impactful discovery materials with undetermined admissibility. The Third District Court of Appeals upheld the trial court’s decision to temporarily restrict public access to certain discovery materials in order to ensure the defendant’s rights to a fair trial. *Id.* at 463. In evaluating the decision, the court cited to the circumstances a court should consider in connection with a motion for a change of venue, which include the following:

- (1) when the publicity occurred in relation to the time of the crime and the trial;
- (2) whether the publicity was made up of factual or inflammatory stories;
- (3) whether the publicity favor the prosecution’s side of the story; [and]

(4) the size of the community exposed to the publicity[.]

Id. at 463-4 citing *State v. Knight*, 866 So.2d 1195, 1209 (Fla. 2003).

22. “[E]ach iteration of publicity occurs closer to the ultimate trial of the case.” 218 So.3d at 464. The discovery material temporarily withheld from disclosure were inflammatory. *Id.* Its release could cause potential jurors to prejudge guilt, but the court had not yet decided whether they would be admitted during the trial. *Id.* And finally, although Miami-Dade County is home to approximately 2.6 million residents, neither side “provided...evidence relating to the effects of social media.” *Id.*

23. In support, the court recognized “[C]ertain types of pretrial publicity have a statistically significant prejudicial effect on juries.” *Id.* at 464 citing Margret Tarkington, *Lost in Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 U. Fla. L. Rev. 1873, 1917-18 (2014). These include “a confession of the accused (even if retracted)...inadmissible incriminating evidence, and statements regarding the character of the accused.” *Id.* “Such information has a cumulative effect: the more of it an individual receives, the more likely she is to adjudge the accused guilty.” *Id.*

24. Particularly apposite to this case, the court recognized

“Extraordinary media interest” today is a far cry from pretrial publicity as it existed [in the past]. Social media and the dissemination of inflammatory images and incidents at the speed of light (“going viral” rather than reaching an audience in a 24-hour news cycle) have grown exponentially. This level of media saturation exposes a larger number of prospective jurors to potentially prejudicial information about more upcoming trials than ever before in history, making it more difficult to select impartial jurors for trial and to maintain their impartiality during trial.

Id. at 463 (internal citations omitted).

25. Here, the media coverage is overwhelming. It is routinely referred to as one of the deadliest mass shootings in modern American history. The case has reached the front pages of media outlets since the date of incident, covering the facts of the case, how the surviving victims and their families are coping with the trauma and their advocacy on issues related to the case at the state and national level.
26. The "Report" was prepared based upon a review of the Defendant's educational records made available to Collaborative Educational Networks, Inc. Judge Henning's order dated July 26, 2018 redacts a significant amount of the Defendant's private protected educational information pursuant to legislatively created privileges to educational records.
27. Nonetheless, the "Report" in its entirety, including the non-redacted portions on the verge of release, relies on information from the Defendant's educational records citing specific state and federal statutes governing placement of students within the Broward County school system. Because the "Report" solely concerns the Defendant, and the "Report" is solely based on a review of the Defendant's records, the redacted report through its citation to rules and statutes inevitably discloses information about the Defendant. The "Report" wouldn't cite the statutes and rules if they did not pertain to the Defendant.
28. The Defendant has a pending criminal matter and the media's reporting on any information pertaining to Mr. Cruz is unrelenting. If the "Report" is released subject solely to Judge Henning's redactions the media will immediately disseminate the "Report" to the public and concomitantly provide their own conclusions about the Defendant. However, the information the redacted report conveys explicitly and implicitly to the Defendant's potential jurors through its publication is prejudicial, and this court has not yet determined whether any of it will be admissible in trial.

29. Any portion of the "Report" should not be released until the resolution of the Defendant's criminal case in order to ensure that his constitutional rights to due process and a fair trial are not violated.

IV

30. Finally, heightened standards of due process apply because the Defendant is facing a death sentence. *See Mills v. Maryland*, 486 U.S. 367, 376 (1988) (stating "[i]n reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), *Proffitt v. Wainwright*, 685 F. 2d 1227, 1253 (11th Cir. 1982) (stating "[r]eliability in the factfinding aspect of sentencing has been a cornerstone or [the Supreme Court's death penalty] decisions"), and *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (concluding that the same principles apply to guilt determinations). "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (citing cases). "[D]eath is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

31. Releasing the "Independent Review of "NC's" Educational Record", would violate the Defendant's rights to due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Florida Constitution, a fair trial in the appropriate venue, Broward County, Florida guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 16 and 22 of the Florida Constitution, privacy guaranteed by the Fourth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the Florida Constitution, equal protection or basic rights guaranteed by the Fourteenth Amendment of

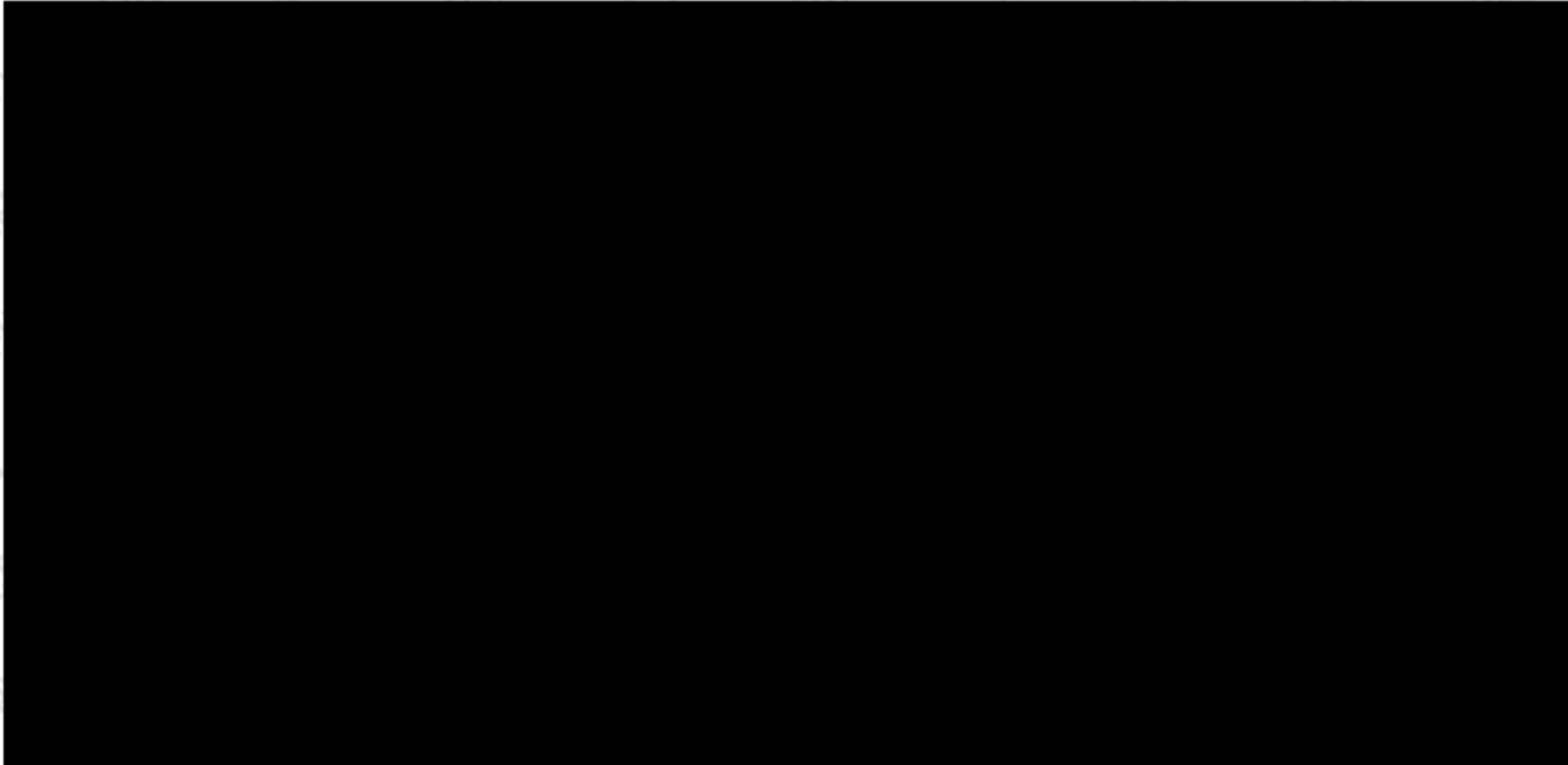
the United States Constitution and Article I, Section 2 of the Florida Constitution, and to be free from cruel and unusual punishment or excessive punishment as guaranteed by the Eighth and Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Florida Constitution.

32. If the court finds otherwise, Defense counsel requests that this Court hear oral argument on the disclosure of any portion of the report and school records that the School Board intends to release.

WHEREFORE the Defendant respectfully requests this Honorable Court grant this amended motion for protective order enjoining the release of the any portion of the "Independent Review of "NC's" Education Records prepared Collaborative Educational Network, Inc. based upon their review of the Defendant's school records and request for oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this motion is being filed in good faith and not for purposes of delay.



HOWARD FINKELSTEIN
Public Defender
17th Judicial Circuit

/s/ Melisa McNeill

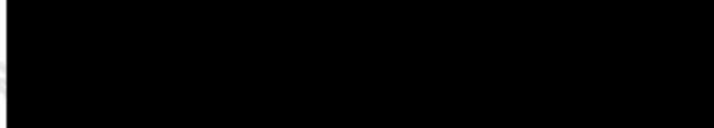
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Diane M. Cuddihy
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Fla. Bar No. 434760



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/s/ Erin Veit

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17th Judicial Circuit in and for Broward County
 In the County Court in and for Broward County

Filed In Open Court,
CLERK OF THE CIRCUIT COURT
JN AUG 03 2018
BY [Signature]

DIVISION:
 Criminal
 Traffic
 Other

ORDER

THE STATE OF FLORIDA VS.

Nikolas Cruz

CASE NUMBER

DEFENDANT

18-1958 CE10A

1-17. murder in the 1^o
CHARGE 18-34. attempt murder in the 1^o

defendants' emergency motion for protective order to enjoin the release of any portion of the independent review of Nikolas Cruzs education records (D-11)" is denied for reasons stated on the record.

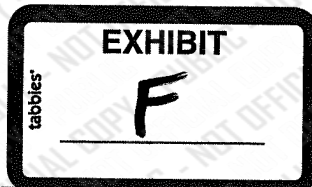
DONE AND ORDERED THIS _____ DAY OF AUG 03 2018 20____, IN

BROWARD COUNTY, FLORIDA.

[Signature]
JUDGE

Elizabeth Scherer

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Here's what Broward schools knew about Parkland shooter — details revealed by mistake



In a report released Friday, the first detailed account emerged of the Parkland shooter's years in the school system, what the school district knew about him and what mistakes were made. Nearly two-thirds of the content was blacked out, but the method the district used to conceal the text failed, and the text became visible when pasted into another computer file.

By **Brittany Wallman and Paula McMahon**
South Florida Sun Sentinel

AUGUST 4, 2018, 9:25 AM

In the year leading up to the mass shooting at Marjory Stoneman Douglas High School, killer Nikolas Cruz was stripped of the therapeutic services disabled students need, leaving him to navigate his schooling as a regular student despite mounds of evidence that he wasn't.

When he asked to return to a special education campus, school officials fumbled his request.

Those conclusions were revealed Friday in a consultant's report commissioned by the Broward public school system. Broward Circuit Judge Elizabeth Scherer ordered that the report be released publicly, but with nearly two-thirds of the content blacked out

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y with the shooter's privacy rights, but the method
xt became visible when pasted into another

computer file.

What emerged was the first detailed account of Cruz's years in the school system, what the school district knew about him and what mistakes were made.

Without directly criticizing the schools, the consultant, the Collaborative Educational Network of Tallahassee, recommended that the district reconsider how cases like Cruz's are handled. The recommendations suggest that Cruz could have been offered more help in his final two years in high school, leading up to the Feb. 14 shooting.

Whether that would have changed the outcome is impossible to know.

The consultant found that the district largely followed the laws, providing special education to the shooter starting when he was 3 years old and had already been kicked out of day care. But "two specific instances were identified," the report says, where school officials did not follow the requirements of Florida statute or federal laws governing students with disabilities.

Those instances:

-- School officials misstated Cruz's options when he was faced with being removed from Marjory Stoneman Douglas High School his junior year, leading him to refuse special education services.

-- When Cruz asked to return to the therapeutic environment of Cross Creek School for special education students, the district "did not follow through," the report reveals.

In part because of the errors, Cruz had no school counseling or other special education services in the 14 months leading up to the shooting on Feb. 14, the report says.

In an interview late Friday night, Broward Schools Superintendent Robert Runcie said that district officials had wanted to release the full report but did not intentionally post it in a way that allowed the blacked-out portions to be read. "I didn't even know that was possible," he said.

Runcie said the redaction of parts of the report was to comply with judges' orders and the defense's objections to the report being made public: "It should not be insinuated or suggested at all that we wanted to redact or hide portions from the public."

He said the purpose of the report was to explain to the public what happened, to fix any problems identified by the experts and to provide better training for staff in the future. The details accidentally revealed do not alter any of the conclusions, Runcie said.

"Nobody ever said this was an average child," Runcie said of Cruz. "The district was the one — out of all the agencies — that was providing some level of service to the child."

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ed special education placement, the district could
h emotional and behavioral disabilities. But the

consultant's report reveals for the first time that Cruz himself requested to return to special education, and his request went nowhere.

Three days after he was forced by the district to withdraw from Marjory Stoneman Douglas High, he purchased an AR-15 rifle. A year after his ejection from Marjory Stoneman Douglas, a school he insisted he would graduate from, he returned and murdered 14 students and three coaches.

Some special education experts have told the South Florida Sun Sentinel that the district should have looked for other ways to help him in his final two years of school, before the shooting. The district treated him like a general education student for his final two years. Cruz left Stoneman Douglas two or three months after giving up his special education services.

The long-awaited analysis largely absolves the district of culpability, minimizing mistakes as "compliance concerns" and noting the analysis was not done "through the lens of hindsight."

"Remembering that throughout the student's school career his ... teams were acting without benefit of foresight regarding the incident that occurred in February 2018, the decisions they made were reasonable given the available information at the time," the consultant concluded. "With few exceptions, the district adhered to [federal law]."

Runcie said the review shows that the district's "systems are appropriate" and that the district worked consistently "to provide an education and ongoing, changing behavioral care for Cruz throughout his time in the Broward school system."

Cruz's attorneys called the report a "whitewash" commissioned by the school district to clear it of responsibility for how it handled Cruz's complex psychological problems.

"I think that the report is an attempt by the school board to absolve itself of any liability or responsibility for all the missed opportunities that they had in this matter," said Gordon Weekes, the chief assistant public defender who is the spokesman for the defense team.

The report does recommend changes, but many are not specific and don't say how the Cruz case brought the weaknesses to light. For example: "Review existing data systems to identify redundancies and inefficiencies and determine the most effective way to integrate multiple systems, maximizing accuracy and shareability across users."

The district paid the Tallahassee-based consultant \$60,000 for the review.

Animal fantasies

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consulted for the report. Roger Cruz died of a heart
ed of pneumonia last November.

But the consultant found that Cruz, by the time he was 3, had already been kicked out of a pre-kindergarten program and was identified as a developmentally delayed student needing special education.

He was aggressive — biting, pinching, scratching and pulling hair. He had trouble communicating and following instructions. And he exhibited “animal fantasies” that led to a parent-teacher conference and the assignment of a family counselor in the home. Despite “high levels of reinforcement,” his aggressive animal-like behaviors “appeared to be unpredictable,” the report says, citing school records.

“It must be noted that in particular, [the student] seems to identify as an animal,” the report says, citing an evaluation completed when Cruz was 5. “He often crawls on the floor or ground, pounces on another student, makes seemingly animal-like growling sounds and grimaces while holding his hands in a paw-like manner.”

He eventually dropped the predatory animal fixation, but his behavior continued to be tinged with physical violence.

The special education designation brought extra care and attention — in-home family counseling, speech therapy, a peer counselor, extra time to do his work, waivers from some testing, continual reviews of his progress and his struggles, meetings with family. But each attempt to transition him to a regular classroom failed. His outbursts and physical aggression in first grade required him to be removed from class at least four of five days, and several times a day on certain days, for example.

His third-grade teacher reported that he was “often sad and pessimistic” and apologized unnecessarily. He needed structure and predictability.

“The results of the evaluation revealed clinically significant levels of hyperactivity, aggression, anxiety, and depression behaviors and feelings at school,” the report states.

Some of the school interventions drew attention to his differentness. He had a harness on the school bus in pre-kindergarten. And at the start of his eighth-grade year, he was placed on “escort only” status at Westglades Middle School in Parkland. He was to be accompanied by a security specialist or staff member wherever he went, including the restroom or when moving from one class to another.

Over the years, his behavior patterns did not change, except to worsen.

Though he didn't want to be in a school for kids with troubles, he excelled when during his eighth-grade year, he was moved back to a full-time special education campus at Cross Creek School, a Pompano Beach school for children with severe emotional and behavioral disorders.

“By all reports the placement at Cross Creek was effective,” the report says.

decided to give him a chance at Marjory Stoneman

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Send him to MSD

He still exhibited emotional and behavioral problems, but in May 2015, during his ninth-grade year, when he was 16, school officials recommended he return to a “mainstream setting,” at least for part of the day.

“Although [the student] has made behavioral progress he continues to lack impulse control. He needs to be monitored while in both the school and neighborhood communities,” a report in March 2015 said.

He would attend Marjory Stoneman Douglas High for ROTC and intensive reading, they decided. In addition, they agreed to “discontinue the behavior intervention plan. During interviews school staff explained that this decision was based on the fact that the target behaviors were no longer in evidence and the plan was no longer needed.”

Behavior intervention plans ensure that everyone dealing with a student knows what sets him off and how to reinforce better behavior.

In January 2016, during his 10th-grade year, he became a full-time student there. Just three weeks later, the Broward Sheriff's Office got a tip that he posted on Instagram that he planned to shoot up a school.

Collaborative Educational Network determined that the decision to send him there was the right one.

“Based on the available evidence, the student's transition to the less restrictive environment of a traditional school campus was appropriate,” the report says. His only discipline that semester was a two-day in-school suspension for “inappropriate comments.” He had a girlfriend, the report says, and still strongly desired to join the military after graduating.

Time to go

As had been the case in the past, his success was short-lived.

He had an emotional meltdown in September of his junior year. And on Nov. 3 that year, a meeting of Stoneman and Cross Creek specialists was convened. Lynda Cruz was present.

With her son not in the room, those in attendance agreed he should return to Cross Creek school. They knew he'd be upset. His mother agreed with the transfer, but she told those in the room that she thought he would reject the idea. It was up to him, they said. He had turned 18 on Sept. 24.

“Upon entering the room and seeing the Cross Creek representatives, the student immediately became upset and verbally aggressive. He refused to sit at the table, angrily repeating that he would not go back to Cross Creek and that he wanted only to stay at Stoneman. He intended to graduate from the school,” the report says, summarizing what those in the meeting said in interviews with the consultant.

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luring the meeting and in their distress at the

Two Cross Creek personnel took him aside and told him his options: He could return to Cross Creek to work on his behavior, he could sue the district to try to reverse the decision, or he could remain at Douglas as a regular student, rejecting all special treatment and services for kids with challenges.

He told them he wasn't going to Cross Creek. Still, he didn't put the decision in writing. Douglas staff nudged him about it and wrote it up for him.

The moment he signed the form, he lost all protections for disabled students under federal law. Though the district knew he needed services and had put in writing just two weeks prior that he "requires access to therapeutic support as needed through-out the school day at this time," they began treating him "in the same way as any general education student."

The consultant said the options laid out for Cruz were incorrect. Cruz could have remained at Douglas with his current rights and services, and the district had the burden of proving he should be transferred to Cross Creek.

The consultant recommended the district review and revise guidelines governing cases like this, including cases where the student doesn't follow through by signing paperwork to revoke special education. Staff should "remain neutral and [be] able to act without either promoting or hindering the revocation" of services, the consultant recommended.

The recommendations also suggest that Cruz wasn't offered help that general education students are entitled to.

The district should review and revise current training, the report says, for when "a student is known to have social/emotional or behavioral needs and therefore, as a general education student, should have access to the counseling and mental health services available to all students through the district's multi-tiered system of supports."

By February, without the extra protections, he was failing most classes and administrators told him it was time to go.

He was referred to Riverside Off Campus Learning Center at Taravella High School, where students work independently online. There is supervision, but there is no one teaching course content, though Cruz struggled with academics his entire life.

"On February 8, 2017, the student withdrew from Stoneman," the report says. "He did not return to the school until the day of the incident, just over one year later," the report says, obliquely referring to the murders.

He was on track to graduate during the time he received special education services, the report says.

After he signed the paperwork to leave special education, he earned only two credits over a year and a half —

ed.

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Two months after he was kicked out of the high school, his mother called to say he had changed his mind. He wanted to return to Cross Creek.

“She said he had come to realize that the only way he would achieve his goal of graduating from high school would be to return to Cross Creek,” the report says.

The district had 15 years of paperwork on Cruz but determined he would have to be evaluated and found eligible for exceptional student education services, a process Douglas High estimated would take six weeks. On that point, the consultant again refrained from criticizing directly, but suggested the district revise its rules in cases where the evidence that the student needs special education is already firmly in place.

Special education specialists at Cross Creek, Stoneman Douglas and at Riverside, where he was a student, all were involved in his request to return to Cross Creek’s special education campus. Ultimately, the administrators at Stoneman Douglas, where he was to re-enroll for a new evaluation, refused to accept him back.

The consultant gave a light touch to the mistake, saying the district had an obligation to respond to the student’s request for special education services within 30 days and “this did not occur.”

Senior year

At the beginning of his senior year in September 2017, back at Riverside school, he was taking a standardized test that, as a general education student, he needed in order to graduate.

The proctor told him his test would be invalidated because he had a cellphone. He became upset, saying, “No, this can’t be.” He shouted “I hate this school!” and threw a chair across the room.

He transferred to another alternative public high school, the Dave Thomas Education Center, where teachers “described him as a quiet, polite student who tried to do well but struggled academically. They made a point to saying that he did not exhibit any of the aggressive or dangerous behaviors reported elsewhere, nor, despite the fact that almost all of his teachers were minorities, did he show any of the racial or ethnic bias they had heard about in the news.”

On Nov. 1, his mother, an advocate throughout his schooling, unexpectedly died.

Staff at Dave Thomas encouraged him to return to the school, but he and his brother Zachary had moved to the Lantana Cascade Mobile Home Park in Palm Beach County to live with a former Parkland neighbor, Roxanne Deschamps. Deschamps kicked him out several weeks later.

In mid-December, after moving in with a Parkland family, he enrolled at another school, the Off Campus Learning Center at Rock Island. He remained there, the report says, until “the incident.”

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From: McMahon, Paula <PMcMahon@sun-sentinel.com>
Sent: Friday, August 03, 2018 11:41 AM
To: Nadine Drew; Cathleen G. Brennan; Tracy A. Clark; Debbie Klauber
Cc: Wallman, Brittany
Subject: Release of school district report on Nikolas Cruz

Hi all,

Paula from the Sun Sentinel here. As you know the judge ruled the report should be made public. The public defender's office told the media outside court that they will not appeal that ruling. Can you please provide us with the report or let us know when you anticipate it will be released?

I am cc-ing my colleague, Brittany Wallman here.

My cell is .

Thank you for your help,
Paula

Paula McMahon
Staff Writer - Sun Sentinel/SunSentinel.com Office: 954-356-4533 Twitter: [@ByPaulaMcMahon](https://twitter.com/ByPaulaMcMahon)

SunSentinel
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Deerfield Beach, Florida, 33442



From: McMahon, Paula <PMcMahon@sun-sentinel.com>
Sent: Friday, August 03, 2018 12:32 PM
To: Nadine Drew; Cathleen G. Brennan; Tracy A. Clark; Debbie Klauber; Requel L. Bell; Theresa V. Coleman
Cc: Wallman, Brittany
Subject: RE: Release of school district report on Nikolas Cruz

Since the redactions are already done and the judge ordered the report should be released, can you please provide it today? The public defender's office said they are not appealing so there is no stay on releasing it.

Thank you so much,
Paula

From: Nadine Drew <nadine.drew@browardschools.com>
Sent: Friday, August 3, 2018 12:30 PM
To: McMahon, Paula <PMcMahon@sun-sentinel.com>; Cathleen G. Brennan <cathleen.brennan@browardschools.com>; Tracy A. Clark <tracy.clark@browardschools.com>; dklauber@hpslegal.com; Requel L. Bell <requel.bell@browardschools.com>; Theresa V. Coleman <theresa.coleman@browardschools.com>
Cc: Wallman, Brittany <BWallman@sun-sentinel.com>
Subject: Re: Release of school district report on Nikolas Cruz

Paula, schools and District offices are closed today, but forwarding your request to our Public Records Office.
Nadine

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From: McMahon, Paula <PMcMahon@sun-sentinel.com>
Sent: Friday, August 3, 2018 11:41:19 AM
To: Nadine Drew; Cathleen G. Brennan; Tracy A. Clark; dklauber@hpslegal.com
Cc: Wallman, Brittany
Subject: Release of school district report on Nikolas Cruz

Hi all,

Paula from the Sun Sentinel here. As you know the judge ruled the report should be made public. The public defender's office told the media outside court that they will not appeal that ruling. Can you please provide us with the report or let us know when you anticipate it will be released?

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Thank you for your help,
Paula

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