DESERT / MOUNTAIN
CHARTER SELPA

Chapter 5: Confidentiality and Student Records

Introduction

Local Education Agencies (LEAs) maintain records on all students but even more so on students in special education. These records are cumulative and follow the entire school history of the child from the time of first enrollment through graduation or at the completion of his/her course of study. The information contained within these files may cover the child's family background, medical information, school disciplinary actions, psychological evaluations, intelligence test scores, grades, individualized education programs (IEPs), standardized test scores, and a wide variety of other sensitive information.

The Desert/Mountain Charter Special Education Local Plan Area (SELPA) recognizes the importance of keeping accurate and comprehensive student records as required by law. Procedures

for maintaining the confidentiality of student records shall be consistent with state and federal law. It is the responsibility of the Charter LEA to ensure the confidentiality, security, and maintenance of those records according to the Individuals with Disabilities Education Act (IDEA) 2004, California Education Code, the Family Educational Rights and Privacy Act (FERPA), and Title 5 of the California Code of Regulations.

The Charter SELPA is not the custodian of student records. Each LEA member of the Charter SELPA will determine procedures governing the identification, description, and security of student records, as well as timely access for authorized persons.

Definitions

> ***California Education Code § 49061(b).*** *"Pupil record" means any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means.*
>
> *"Pupil record" does not include informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. For purposes of this subdivision, "substitute" means a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position.*

Section A – Access to Student Records

Special education records are subject to the same privacy and access right as other Mandatory Interim or Class 2 – Optional Records. Access is permitted only to those involved with the child. Parent requests for review and/or copies of records must follow the established policies and procedures of the Charter LEA. In addition, parents have the right to examine all school records of their child that relate to the identification, assessment, and educational placement of the child. Even though records may be stamped "confidential" or contain sensitive information, the parent or eligible student has full rights of access. Parents have the right to receive copies within five business days of making the request, either orally or in writing. The Charter LEA may charge no more than the actual cost of reproducing the records, but if this cost prevents the parents from exercising their right to receive the copies, the copies shall be reproduced at no cost to the parents. While FERPA is the more comprehensive statute with respect to the protection of student records, the IDEA contains the specific recitation regarding the Charter LEA's duty to safeguard student records.

Many requests for student records require the consent and/or notification of the parent, but some do not. Requests for student records by LEAs or SELPAs within the State of California do not require a parent's signature and must be processed within five days. Requests for student records by County Probation Department or a Juvenile Division via a court order may be processed after attempting to advise the parents and eligible student of the Charter LEA's compliance with the

court order. Any other requests for records must be accompanied by a release of information that has been signed and dated by the parent.

Access to Student Records

> ***California Education Code § 56504****. The parent shall have the right and opportunity to examine all school records of his or her child and to receive copies pursuant to this section and to Section 49065 within five business days after the request is made by the parent, either orally or in writing. The public agency shall comply with a request for school records without unnecessary delay before any meeting regarding an individualized education program or any hearing pursuant to Section 300.121, 300.301, 300.304, or 300.507 of Title 34 of the Code of Federal Regulations or resolution session pursuant to Section 300.510 of Title 34 of the Code of Federal Regulations and in no case more than five business days after the request is made orally or in writing. The parent shall have the right to a response from the public agency to reasonable requests for explanations and interpretations of the records. If a school record includes information on more than one pupil, the parents of those pupils have the right to inspect and review only the information relating to their child or to be informed of that specific information. A public agency shall provide a parent, on request of the parent, a list of the types and locations of school records collected, maintained, or used by the agency. A public agency may charge no more than the actual cost of reproducing the records, but if this cost effectively prevents the parent from exercising the right to receive the copy or copies, the copy or copies shall be reproduced at no cost.*
>
> ***California Education Code § 49060.*** *It is the intent of the Legislature to resolve potential conflicts between California law and the provisions of Public Law 93-380 regarding parental access to, and the confidentiality of, pupil records in order to insure the continuance of federal education funds to public educational institutions within the state, and to revise generally and update the law relating to such records.*

Access Log

This section applies to public agencies that provide educationally-related services to children with disabilities pursuant to Title I of the Government Code, Chapter 26.5 (commencing with Section 7570), and to public agencies that educate children with disabilities in state hospitals, developmental centers, and youth and adult facilities.

This chapter shall have no effect regarding public community colleges, other public or private institutions of higher education, other governmental or private agencies that receive federal education funds unless described herein, or, except for Education Code §§ 49068, 49069, 49076.5(b)(5), private schools.

The provisions of this chapter shall prevail over the provisions of Section 12400 of this code and Chapter 3.5 (commencing with Section 6250) of Division 7 of Title I of the Government Code to the extent that they may pertain to access to student records.

Title 5 of the California Code of Regulations § 431 mandates LEAs to establish procedures to assure the security of student records. The custodian of records shall be responsible for the security of student records and shall ensure that access is limited to authorized persons. An access log will be maintained to record the signatures of those authorized individuals that have had access to student records (Appendix D).

Parents of currently enrolled or former students have an absolute right to access any and all student records related to their children that are maintained by LEAs or private schools. The editing or withholding of any such records, except as provided for in this chapter, is prohibited. Each Charter LEA should adopt procedures for granting parents copies of their child's records or time to inspect and review them during regular school hours. Access to parents shall be provided no later than five business days following the date of the request. Procedures shall include the notification to the parent of the location of all official student records, if not centrally located, and the availability of qualified certificated personnel to interpret records if requested. Per FERPA, access to student records and information shall not be denied to a parent because he or she is not the child's custodial parent.

> ***California Education Code § 49069.*** *Parents of currently enrolled or former pupils have an absolute right to access to any and all pupil records related to their children that are maintained by school districts or private schools. The editing or withholding of any of those records, except as provided for in this chapter, is prohibited.*
>
> *Each school district shall adopt procedures for the granting of requests by parents for copies of all pupil records pursuant to Section 49065, or to inspect and review records during regular school hours, provided that the requested access shall be granted no later than five business days following the date of the request. Procedures shall include the notification to the parent of the location of all official pupil records if not centrally located and the availability of qualified certificated personnel to interpret records if requested.*

The following persons or agencies shall have access to student records:

- Natural parents, adoptive parents, or legal guardians of children younger than age 18. Upon request, qualified certificated staff will be available to interpret the records (*Education Code § 49069*);

- A child who reaches the age of 18 or attends a postsecondary school; he/she alone shall exercise these rights and grant consent for the release of records (*Education Code § 49061*); and

- Individuals so authorized in compliance with a court order (*Education Code § 49077*). If lawfully possible, the Charter LEA shall first give the parent or adult student three days notice, indicating who is requesting and what records they wish to examine (*Title 5 of the California Code of Regulations § 435*).

The following persons or agencies shall have access to those particular records that are relevant to the legitimate educational interests of the requester:

- Natural parents, adoptive parents, or legal guardians of a dependent child age 18 or older (*Education Code § 49076*);
- Children 16 years of age or older or who have completed the 10th grade (*Education Code § 49076*);
- School officials and employees (*Education Code § 49076*);
- Children who are married even if younger than 18 years of age;
- Approved state and federal officials for audit purposes; and
- Certain law enforcement agencies for purposes listed in Education Code and federal law.

Those granted access are prohibited from releasing information to another person or agency without written permission from the parent or child age 18 or older (*Education Code § 49076*). The Charter LEA SELPA form D/M 63 - Authorization for Use and/or Disclosure of Information, can be used to release information (*Appendix C*).

Persons, agencies, or organizations not afforded access rights may be granted access only through written permission of the adult student or parent (*Education Code § 49075*).

Access logs are considered a part of the Mandatory Interim file and are maintained within each individual student file. This file is typically located in the front of the student file and may either be stapled to the inside cover or located in the front of the file. For those employees of the Charter LEA who have routine access to student files, a list of their names and positions should be clearly posted on the filing cabinet where the files are securely stored. When those not listed review student records, the reviewer is required to state the purpose for the review and sign and date the access log in the student's file.

> ***California Education Code § 49064.*** *A log or record shall be maintained for each pupil's record which lists all persons, agencies, or organizations requesting or receiving information from the record and the legitimate interests therefor. Such listing need not include:*
>
> *(a) Parents or pupils to whom access is granted pursuant to Section 49069 or paragraph (6) of subdivision (a) of Section 49076;*
>
> *(b) Parties to whom directory information is released pursuant to Section 49073;*
>
> *(c) Parties to whom written consent has been executed by the parent pursuant to Section 49075; or*
>
> *(d) School officials or employees having legitimate educational interest pursuant to paragraph (1) of subdivision (a) of Section 49076.*

The log or record shall be open to inspection only by a parent and the school official, or his designee, responsible for the maintenance of pupil records, and to the Comptroller General of the United States, the Secretary of Health, Education, and Welfare, and administrative head of an education agency as defined in Public Law 93-380, and state educational authorities as a means of auditing the operation of the system.

The LEA will not permit access to any student records without written parental permission except as follows:

(a) Charter LEA officials and employees who have a legitimate educational interest including a school system where the child intends to enroll;

(b) Certain state and federal officials for audit purposes;

(c) Certain law enforcement agencies for purposes listed in Education Code and federal law;

(d) A child 16 years of age or older, having completed the 10th grade who requests access;

(e) Children who are married even if younger than18 years of age; and

(f) Charter SELPA employees.

The Charter LEA may release information from the child's records for the following:

(a) In cases of emergency when the knowledge of such information is necessary to protect the health and safety of the child and/or others;

(b) To determine the child's eligibility for financial aid;

(c) To accrediting organizations to the extent necessary to their function;

(d) In cooperation with organizations conducting studies and research that do not permit the personal identification of children or their parents by persons not connected with the research, and provided that their personally identifiable information is destroyed when no longer needed; and

(e) To officials and employees of private schools or school systems in which the child is enrolled or intends to enroll.

Regardless of whether actual test protocols are kept in Charter LEA files or in the Charter LEA psychologist personal files, if they are used and cited in the preparation of any disseminated report, they will constitute official school records for legal purposes and are governed in accordance with California Education Code. Copies of protocols may be provided to the parent upon request.

E-mail communications that both 1) contain personally identifiable information directly related to the child, and 2) are maintained by the Charter LEA, qualify as a student record. An e-mail must satisfy these two prongs as defined in IDEA and Title 34 of the Code of Federal Regulations § 99.3. If the Charter LEA prints a hardcopy of the e-mail and it is placed in the child's permanent file, then it is a student record (*Appendix B*).

Section B – Confidentiality of Records

Confidentiality

All student files are confidential and should be stored in a locked and secured location. Access is permitted only to those involved with the child. Parents are to be informed of all files on their child and the location of those files. In addition, the parents have the right to review their child's file and to receive a copy of the file within five days of their request. While FERPA is the more comprehensive statute with respect to the protection of student records, the IDEA contains the specific recitation regarding the LEA's duty to safeguard student records.

> ***Title 34 of the Code of Federal Regulations § 300.623 Safeguards.*** *(a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction stages.*
>
> *(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.*
>
> *(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Section 300.123 and C.F.R. Part 99.*
>
> *(d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.*

All IDEA procedural safeguards shall be established and maintained. A custodian of records must be appointed by each Charter LEA to ensure the confidentiality of any personally identifiable student information. The custodian of records is responsible for ensuring that files are not easily accessible to the public. Records of access are maintained for individual files, which include the name of the party, date, and purpose of access.

Section C – Transfer of Records

When a child moves from one LEA to another, records shall be transferred in accordance with state and federal law. Federal law requires the LEA from which the child moves to notify the parent of the transfer of records along with the parent's right to review, challenge, and/or receive a copy of the transferred record. California law specifies that the LEA which receives the child shall be responsible for the notification. Procedurally, both requirements can be met if the LEA provides an annual notification to the parents of every student which specifies that records will be

transferred and outlines the other rights cited above. This notice should be provided to all parents each fall and to the parents of every new student upon enrollment (*Appendix A*).

California schools are not required to obtain parent permission to forward records. In fact, LEAs are required to forward records to any California school of new or intended enrollment within five days of the receipt of the request. Records cannot be withheld for nonpayment of fees or fines (*Education Code § 49068*).

Mandatory permanent student records must be forwarded to all LEAs. The original, or a copy, must be retained by the sending LEA. Mandatory Interim student records must be forwarded to California public schools and may be forwarded to any other LEA. Permitted student records may be forwarded at the discretion of the custodian of the records. Private schools in California are required to forward Mandatory Permanent student records.

If an agency or person provides a written report for the LEA's information, it becomes a part of the student's record and, as such, is available to the parent even though it may be marked "confidential." Technically, it becomes a part of the record only when it is filed or maintained. The custodian of records should give serious consideration to the educational value of sensitive information before routinely including it as a student record. As alternatives, the report may be summarized in a more useful form, it may be returned for revision, or it may be rejected and destroyed before it becomes a record.

Section D – Correction or Removal of Information; Challenging Content of Records

> ***California Education Code § 49070.*** *"Following an inspection and review of a pupil's records, the parent or guardian of a pupil or former pupil of a school district may challenge the content of any pupil record."*

Parents have the right, on request, to receive a list of the types and locations of education records collected, maintained, and used by the educational agency. Parents may challenge the content of the student's record if they believe the information in education records collected, maintained, or used is inaccurate, misleading, or in violation of the privacy or other rights of the child. This right to challenge becomes the sole right of the child when he/she turns 18 or attends a postsecondary institution. The request to remove or amend the content of the student record must be made in writing.

A written request to the custodian of records is made to correct or remove information from a child's record which the parent alleges to be any of the following:

- Inaccurate;
- An unsubstantiated personal conclusion or inference;
- A conclusion or inference outside of the observer's area of competence;

- Not based on the personal observation of a named person with the time and place of the observation noted;
- Misleading; and/or
- In violation of the privacy or other rights of the child.

Within 30 days of receiving the request, the Charter LEA custodian of records or designee shall meet with the parent/child and with the employee (if still employed) who recorded the information in question. The Charter LEA shall then decide whether to sustain the allegations and amend the records as requested or deny the allegations. If the allegations are sustained, the Charter LEA shall order the correction or removal and destruction of the information.

If the Charter LEA disagrees with the request to amend the records, the parent/child may submit a written appeal within 30 days to the Charter LEA Governing Board. Within 30 days of receiving the written appeal, the Charter LEA Governing Board shall meet in closed session with the parent/child and the employee (if still employed) who recorded the information in question. The Charter LEA Governing Board shall then decide whether or not to sustain or deny the allegations. If the Charter LEA Governing Board sustains any or all of the allegations, it shall order the Charter LEA to immediately correct or remove and destroy the information in question. The decision of the Charter LEA Governing Board is final. The records of the Charter LEA Governing Board proceedings shall be maintained in a confidential manner for one year, after which they will be destroyed, unless the parent initiates legal proceedings within the prescribed period relative to the disputed information.

If the final decision of the Charter LEA Governing Board is unfavorable to the parent or if the parent accepts an unfavorable decision by the board, the parent shall have the right to submit a written statement commenting on the record or explaining any reasons the parent disagrees with the decision of the Charter LEA or the Charter LEA Governing Board. This explanation shall be included in the records of the child for as long as the record or contested portion is maintained by the Charter LEA. If the records of the child, or contested portion, is given by the agency to any party, the explanation must also be given to the party.

In order to avoid potential challenges, it is recommended that Charter LEA staff receive training that alerts them to the requirements of privacy and access laws. To the degree that a statement describes a child's behavior, the statement can withstand challenges. Ambiguous terms should be avoided, and staff members should restrict their comments to areas of training. In addition, only those observations that have educational relevancy should be recorded. Statements describing unrelated family incidents or unsubstantiated claims are inappropriate for a child's record.

The Charter LEA shall notify parents at the beginning of each school year of the availability of the above procedures for challenging student records (*Education Code § 49063*).

Section E – Record Classification and Destruction of Student Records

All Charter LEA records are classified as continuing records until such time as their usefulness ceases. While they are continuing records, their destruction is governed by a rather complicated set of guidelines. Certain items are specifically excluded from destruction restrictions.

> ***Title 5 of the California Code of Regulations § 16025.*** *All records not classified as Class 1 – Permanent or Class 2 – Optional shall be classified as Class 3 – Disposable, including but not limited to detail records relating to:*
>
> *(a) Records Basic to Audit, including those relating to attendance, average daily attendance, or a business or financial transaction (purchase orders, invoices, warrants, ledger sheets, cancelled checks and stubs, student body and cafeteria fund records, etc.) and detail records used in the preparation of any other report. Teachers' registers may be classified as Class 3 – Disposable only if all information required in Section 432 is retained in other records or if the General Record pages are removed from the register and are classified as Class 1 – Permanent.*
>
> *(b) Periodic Reports, including daily, weekly, and monthly reports, bulletins and instructions.*

Other student-related records are defined within three categories: 1) Mandatory Permanent Pupil Records, 2) Mandatory Interim Pupil Records, and 3) Permitted Records (*Title 5 of the California Code of Regulations § 432*).

Classification and Retention

(1) Mandatory Permanent or Class 1 – Permanent Records are student records which schools have been directed to compile by statute. LEAs are required to maintain indefinitely all mandatory permanent student records or an exact copy thereof for every child who has enrolled in a school program within the LEA. The mandatory permanent student record or a copy thereof shall be forwarded by the sending LEA upon request of the public or private school in which the child has enrolled or intends to enroll (*Title 5 of the California Code of Regulations §§ 16023, 432, 437, and 438*).

(2) Mandatory Interim or Class 2 – Optional Records are student records which schools are required to compile and maintain for stipulated periods of time and are then destroyed when their usefulness ceases (Class 3 – Disposable Records). The Charter LEA is responsible for the classification subject to Charter LEA Governing Board approval. If Mandatory Interim records are classified as Class 3 – Disposable Records, they are to be destroyed in accordance with Title 5 of the California Code of Regulations § 437 (*Title 5 of the California Code of Regulations §§ 16027, 432, 437, and 438*).

(3) Permitted Records or Class 3- Disposable Records are student records which LEAs may maintain for appropriate educational purposes. Class 3 records may be destroyed whenever their usefulness ceases. However, if a child transfers, graduates, or otherwise terminates attendance, such records shall be held six months and then destroyed. The method of destruction shall assure that records are not available to possible public inspection in the process of destruction (*Title 5 of the California Code of Regulations §§ 16027, 432, 437, and 438*).

Most California special education records are classified by California law as Class 2 – Optional or Mandatory Interim records. These are records which schools are required to compile and maintain until the child leaves the LEA, or until their "usefulness ceases." At that time, such records may be reclassified as Class 3 – Disposable Records. This could occur only after a transfer or withdrawal from a special education program. While Class 3 documents may be destroyed after the third school year following the point at which usefulness has ceased (*Title 5 of the California Code of Regulations § 16027*), the San Bernardino County Superintendent of Schools (SBCSS) Policy and the Participation Agreement of the Local Plan requires maintenance of special education records and accounts including property, personal, and financial records for **five years** after their usefulness ceases. Such records, as related to special education, may include: special education forms, access logs, health records, special education test protocols, assessment reports, case studies, and authorizations.

An important exception applies to those records that were used in assessment for a special education candidate who does not become a special education student. In such cases, the records are Permitted Records or Class 3 – Disposable Records and can be destroyed whenever their usefulness ceases.

Any standardized test results more than three-years old are identified under state regulations as Class 3 – Disposable Records which may be destroyed during the third school year after the school year in which they are originated (*Title 5 of the California Code of Regulations §§ 432 and 16027*).

Under IDEA 2004, the Charter LEA must inform the parent when personally-identifiable records are no longer needed to provide educational services to a child. At that time, or at parent request, the child's records may be destroyed. The notice should include the items that are no longer needed and a timeline for destruction or parent retrieval of the information. This option is given to ensure that nonessential information regarding the child's behavior, performance, and abilities are not kept after they are no longer necessary for educational purposes. Under law, however, a permanent record of the child's name, address, phone number, his/her grades, attendance records, classes attended, grade-level completed, and year completed may be maintained without time limitation.

A destruction notice should be sent out five years after the records cease to be of value for educational purposes.

Section F – Maintenance of Special Education Records

Location of Special Education Records

Special education records are defined by FERPA, Title 34 of the Code of Federal Regulations § 99.3, as "education records." FERPA requires that all education records must be kept confidential and that access to education records be restricted to education officials and teachers who are employees of the LEA and who have a legitimate educational interest in the child. The IDEA also indicates that access to special education records is restricted to education officials with the responsibility to meet the requirements of special education law. Additionally, a record must be kept of all parties obtaining access to special education records *(Title 34 of the Code of Federal Regulations § 300.614*) and that education agencies must provide to parents, on request, a list of the types and locations of education records (*Title 34 of the Code of Federal Regulations § 300.616*).

It is the Charter SELPA's policy to ensure the protection of the confidentiality of any personally-identifiable data collected or maintained on a child with a disability while ensuring access to those legitimate educational providers who require access to such records in order to provide appropriate services to the child.

Although Charter LEAs may find it advisable and more practical to keep special education records in a central location because of the uniqueness of special education confidentiality requirements, Charter LEAs have the option to store such records in a separate location from the child's cumulative records. *Title 5 of the California Code of Regulations § 433(b)* states:

> *"Records for each individual pupil shall be maintained in a central file at the school attended by the pupil, or when records are maintained in different locations, a notation in the central file as to where such other records may be found is required."*

Charter LEAs that elect to store special education records in a separate location from the cumulative file must place a notice or flag in the child's cumulative record that indicates additional special education records may also be found in a different location. This requirement is supported in the 1995 U.S. Department of Education (USDOE) Letter to Copenhaver whereby USDOE concluded that:

> *"FERPA does not generally address what education records a school may or may not maintain or where the school maintains such records. Thus, under FERPA a school would not be prohibited from placing a notice in the student's cumulative records which states that the student receives special education services and that another file exists in another office."*

Purging IQ Information from Student Records

According to Judge Peckham's 1986 decision on Larry P. regarding the prohibition of IQ testing of African-American children, IQ scores from any source cannot become part of the child's school records. The California Department of Education (CDE) issued a directive (Campbell, 1987) on how to dispose of Larry P. records generated prior to September 1986 as follows:

> *Before an African-American student that is receiving special education services is re-evaluated for special education or transfers to a new district, all prior records*

of IQ scores, or references to information from IQ tests, should be permanently sealed. The records are to be opened only for litigation purposes, official state or federal audits, or upon parent request. The parent shall be given copies of the sealed records upon request. The sealed records shall be maintained for a period of five years.

Prior to sealing the records of these students, the parents shall be notified that the records will be sealed because of a court decision which prohibits the use of intelligence tests for African-American students for any purpose related to special education. Additionally, prior to sealing the records, a qualified professional should identify appropriate data to be copied and purged of all IQ scores or references to information from IQ tests. The remaining data should then be transferred to the student's current record. In no case shall the IQ test information be made available to the IEP team for any purpose.

Since the prohibition from using IQ tests with African-American children applies only to LEAs in California, it is often the case that records of African-American children received from out-of-state LEAs and/or from other agencies may contain IQ test information. Therefore, under these circumstances, the Charter SELPA recommends that Charter LEAs take the following steps to purge IQ information from a student record:

1. Review the case file to determine if prohibited information is contained therein, removing any prohibited protocols and all assessment reports which contain IQ information;

2. Copy the original report(s) and on the copy, extricate the following information:

    a. Any reference to a test instrument that yields an IQ score or standard score that is an indication of cognitive functioning;

    b. Any test data summary scores from the test instrument(s); and

    c. Any commentary in the report that discusses the student's performance on the test instrument(s).

3. Make a copy of the purged report to place in the child's records and destroy the copy that was used to extricate the information;

4. Notify the parent that the child's original report and any relevant protocols will be sealed;

5. Seal the purged records and a copy of the parent notification in an envelope. Mark the outside of the envelope with the child's name, destruction date of five years from the date the records were purged, and instructions that the envelope is only to be opened for purposes of litigation, official state or federal audits, or upon parent request; and

6. Add the child's name to the Charter LEA's master list of student records from which reports have been purged based upon the Larry P. ruling.

APPENDIX A: 1995 U. S. Department of Education Letter to Copenhaver

ELECTRONIC TRANSFER OF RECORDS

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

Mr. John Copenhaver
Director
Mountain Plains Regional Resource Center
Utah State University
1780 North Research Parkway, Suite 112
Logan, Utah 84321

Dear Mr. Copenhaver:

This is in response to your April 4, 1995, inquiry regarding requirements related to special education records. Your letter, which you addressed to Dr. Tom Hehir, Office of Special Education Programs, was forwarded to this Office for response on June 28, 1995, because we administer the Family Educational Rights and Privacy Act (FERPA), which relates to your concerns.

You ask in your letter whether it is "permissible to transfer special education student records by fax or computer networks." In this regard, you state:

> It is not uncommon to see special education student records transferred from one agency to another via fax or computer networking.

You also ask whether it is permissible to include notices that a student is receiving special education services in a student's cumulative file. You state:

> Many school districts insert a notice in the student's cumulative file indicating there is a separate special education file located in another office.

FERPA generally protects parents' and students' privacy interests in "education records." The term "education records" is defined as those records which contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 "Education records." FERPA applies to all education records, including the records of students who receive special education services.

FERPA does not generally address what education records a school may or may not maintain or where the school maintains such records. Thus, under FERPA, a school would not be prohibited from placing a notice in a student's cumulative records which states that the student receives special education services and that another file exists in another office.

With regard to your question regarding the transfer of education records, FERPA generally requires that a parent or eligible student[1] provide written consent prior to the disclosure of personally identifiable information from education records, except in certain specified circumstances. 34 CFR §§ 99.30 and 99.31. For instance, prior written consent is not necessary when the disclosure is to a school official within the educational agency or institution with legitimate educational interest or when the disclosure is to a school in which the student is seeking or intending to enroll. See 34.CFR § 99.31(a) (1). and (2). For a list of the circumstances under which nonconsensual disclosures may be made, please refer to § 99.31 of the enclosed regulations.

FERPA does not generally address the manner in which education records may be disclosed. While on its face FERPA does not prohibit the transfer of education records to authorized parties by whatever means a school chooses, a school should take into consideration the potential for nonconsensual disclosures of education records resulting from a particular type of transfer. While we believe that the likelihood of an improper disclosure of education records that would result from transferring information to other school officials within an educational agency or institution by facsimile or internal computer network is minimal, it is the responsibility of each school to determine what precautions are necessary to protect education records in compliance with FERPA.

I trust that the above information is responsive to your inquiry. In addition to the regulations, enclosed are a model student records policy and a model annual notification of rights to parents. Should you have additional questions regarding this matter of FERPA in general, please do not hesitate to contact this Office directly. Our current address and telephone number are:

Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605
(202) 260-3887

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

[1] All rights afforded parents under FERPA transfer to the student when the student becomes an "eligible student." The term "eligible student" means a student who has reached 18 years of age of is attending an institution of postsecondary education.

APPENDIX B: Emails are not Educational Records if They Are "Not Printed and Placed" in a Student's File

S.A.

v.

Tulare County Office of Education

United States District Court, E.D. California

CASE NO. CV F 08-1215 LJO GSA. (E.D. Cal. Sep. 24, 2009)

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (Docs. 59, 60)

LAWRENCE O'NEILL, Magistrate Judge

INTRODUCTION

*1 Defendant California Department of Education ("DOE") and plaintiff S.A. ("Student") filed cross-motions for summary judgment on Student's claim that defendant Tulare County Office of Education ("TCOE") failed to produce educational records properly and California DOE erroneously ruled that TCOE properly produced the records. In addition, TCOE objected to Student's attorneys' fees request. The parties' motions pose the following questions of law: (1) Are emails "education records" and, if so, in what form must a public school produce emails to comply with the procedural safeguards of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1232g(a)(4)(A) and 34 C.F.R. § 300.613?; and (2) Is Student entitled to an award of attorney's fees and, if so, in what amount? Having considered the parties arguments, this Court rules in favor of California DOE and against Student to find that California DOE correctly concluded that emails that were not maintained in Student's permanent file by TCOE were not "education records" within the meaning of the IDEA. The Court further finds that Student is entitled to a partial award of attorneys' fees for Student's limited successful representation in the compliance complaint, and awards Student $2,791.27 in attorneys' fees and costs.

UNDISPUTED FACTS

Student is a 10-year old boy who is eligible for, and has received, special education services due to his autism and speech and language delay. Student and his parents live within the Exeter Union Elementary School District, which is a part of the Tulare County Special Education Local Plan Area. TCOE acts as the administrative head of the Special Education Local Plan Area.

Student's Request For Records

On July 10, 2007, Student sent a letter to TCOE requesting "a copy of any and all electronic mail sent or received by the Department concerning or personally identifying" Student. Administrative Record ("AR") at 90.1 TCOE responded to Student on July 17, 2007, indicating that it received Student's request and was "currently in the process of checking all emails with a variety of staff members, some of whom are on vacation." AR at 92. TCOE indicated that it would provide the requested information by July 27, 2007 and notified Student that he would be charged 5 cents per page for each copy provided and that Student was expected to provide payment prior to mailing. Id. Student responded with a July 23, 2007 letter that reads in pertinent part:

> FN1. For the sake of clarity, this Court will select one citation for those documents that are duplicated multiple times in the administrative record and declarations.

We look forward to your production of documents on July 27, 2007, and further request that you provide the email documents in their native file format rather than printed pages. Therefore, please provide electronic copies of the requested e-mails in the electronic version used to prepare the document.

AR at 94. In a July 25, 2007 response, TCOE sent Student hard copies of emails that had been printed and placed in Student's permanent file. TCOE advised Student that "pursuant to your correspondence dated July 23, 2007 requesting that the emails be sent electronically, the enclosed emails could not be sent electronically as they have been purged and are made only available as hard copies within the file." AR at 96. (emphasis added). Student's mother sent an email to TCOE, to request again that TCOE forward all electronic records pertaining to Student as emails or placed on a compact disc in native file format. AR at 86, 98. TCOE did not respond to this request.

Compliance Complaint

*2 On February 6, 2008, Student filed a compliance complaint with California DOE to allege two causes of action against TCOE: (1) failure to provide a full and complete copy of all emails concerning or personally identifying Student pursuant to its obligation under California Code of Education § 56504; and (2) unlawful destruction of Student's records without parental notification or consent in violation of 34 C.F.R. § 300.624(a) when it unilaterally "purged" original electronic files. AR at 79-85.

In its April 1, 2008 Compliance Complaint Report, amended on April 24, 2008, California DOE found that TCOE was in compliance in count one, but out of compliance in count two. As to count one, California DOE concluded:

> The COE failed to meet the requirements of EC Section 56504. The e-mails regarding the student requested by the Complainant are considered pupil records in hard copy format and subject to the requirement of EC Section 56504 and required to be provided within five business days upon receipt of the request. The Complainant's request was dated July 10, 2007, and the COE's letter to the Complainant stated that they would be providing the documents on July 27, 2009. **The COE is out of compliance.**

AR at 31, 39 (emphasis in original). As to count two, California DOE concluded:

> The COE provided hard copies of the student's records. The Complainant acknowledged receiving a "stack of documents containing e-mails with dates ranging from 2006 through 2007." The COE is not required to notify the Complainant before purging e-mails related to the student as the e-mails are not considered "educational" records" that are "maintained" by the educational agency under 34 CFR Section 99.6. **The COE is in compliance.**

AR at 32, 40 (emphasis in original).

Student filed a request for clarification and reconsideration of California DOE's Compliance Complaint Report. AR at 4-7. In the request for clarification and reconsideration, Student asked whether California DOE determined all records requested by Student were produced. In addition, Student sought reconsideration to determine whether TCOE had destroyed requested records and to declare that TCOE was out of compliance for failing to inform Student's parents that Student's records were to be purged. In response to Student's request for clarification and reconsideration, California DOE issued a report that found no inconsistencies with its prior findings. AR at 1.

On August 22, 2008, Student sent a letter to TCOE demanding attorneys fees for the successful claims in the Compliance Complaint. Declaration of Drew Massey ("Massey Decl."), Exhibit I.

PROCEDURAL HISTORY

Student initiated this action on August 15, 2008, and proceeds on his first amended complaint ("FAC") to allege: (1) A first cause of action against TCOE, claiming that TCOE failed to provide Student's complete "education record" in violation of federal and state law by failing to provide all emails regarding Student and destroying them without parental notification or consent in violation of 34 C.F.R. § 300.624; (2) A second cause of action against California DOE to: (a) reverse California DOE's findings that emails are not "education records" to be maintained by the educational agency and that TCOE was in compliance; and (b) require California DOE to take "appropriate corrective actions"; and (3) A third cause of action against TCOE to reimburse attorney fees not less than $5,462.64 for "successful prosecution of the compliance complaint." The FAC seeks: (1) Reversal of California DOE's decision; (2) Findings that TCOE violated federal and state laws by failing to produce emails that were Student's "education records" to be "maintained" under 34 C.F.R. § 99.3; (3) An order that TCOE provide Student's existing records which should have been produced pursuant to Student's initial July 10, 2007 request; (4) An order that TCOE notify parents when it intends to destroy Student's "education records"; and (5) An award of $5,462.64 attorney fees for "successful prosecution of the compliance complaint."

*3 On August 19, 2009, Student and California DOE filed cross-motions for summary judgment of Student's claims (Docs. 59, 60). On the same day, TCOE filed a "Motion to Object to Plaintiff's Demand for Attorneys' Fees in the Amount of Not Less than $5,462.64." (Doc. 63). California DOE and TCOE opposed Student's motion on August 28, 2009. Student opposed California DOE's and TCOE's motions on the same day. California DOE filed a response on September 3, 2009. Student replied on September 4, 2009. TCOE replied on September 8, 2009. Having considered the parties arguments, the administrative record, the declarations, and the judicially-noticeable facts, this Court finds these motions suitable for a decision without a hearing. Accordingly, this

Court VACATES the September 24, 2009 motion hearing, pursuant to Local Rule 78-280(h) and issues the following order.

DISCUSSION

Summary Judgment Standards

On summary judgment, a court must decide whether there is a "genuine issue as to any material fact." Fed.R.Civ.P. 56(c); see also, *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970). A party seeking summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing of sufficient evidence to establish an essential element of the nonmoving party's claim, and on which the non-moving party bears the burden of proof at trial. *Id.* at 322. "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the material on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production shifts and the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed.R.Civ.P. 56(e)).

To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968); *T.W. Elec. Serv.*, 809 F.2d at 631. The nonmoving party must "go beyond the pleadings and by her own affidavits, or by depositions, answer to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Fed.R.Civ.P. 56(e) requires a party opposing summary judgment to "set out specific facts showing that there is a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." "In the absence of specific facts, as opposed to allegations, showing the existence of a genuine issue for trial, a properly supported summary judgment motion will be granted." *Nilsson, Robbins, et al. v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988).

Failure to Provide Email Records In Electronic Format

*4 The parties agree that TCOE must provide Student with "education records," pursuant to the IDEA, 20 U.S.C. § 1232g(a)(4)(A) and 34 C.F.R. § 300.613, and California Education Code section 56504. The parties further agree that an email may qualify as an "education record" and that for an email that is an education record, a school district must comply with state and federal statutes and regulations related to the procedures for education records. The parties dispute, however, to what extent email an qualifies as an "education record." In addition, the parties dispute the format in which TCOE must provide an email "education record."

Student maintains that all emails that specifically identify him, whether printed or in electronic format, are "education records." Because they are "education records," Student contends, TCOE must notify parents and gain their consent prior to destroying any emails that specifically identify Student. In addition, Student contends that TCOE must provide emails in their native file format for inspection.

California DOE does not dispute that emails that qualify as "education records" must be provided to parents upon request, and parents are entitled to notification and consent before such emails are destroyed. California DOE asserts, however, that not all emails that personally identify Student are "education records." California DOE argues that only those emails that personally identify a student and are "maintained" by the educational agency are "education records" pursuant to the IDEA. California DOE contends that TCOE only "maintains" those emails that are printed out and placed in Student's permanent file and that TCOE maintains no emails in electronic format. Accordingly, California DOE concludes that TCOE properly produced Student's education records, because TCOE provided all emails that personally identified Student and were maintained in Student's file. In addition, California DOE contends that TCOE properly provided the email education records in the format they were maintained — in this instance, in hard-copy format — and is not required to maintain electronic documents in their native file format.

Student replies that all emails are "maintained" in TCOE's electronic mail system, and are maintained in the inboxes of the recipients. Student contends that all emails can be located on TCOE's electronic storage system through the use of information technology, even those emails that were previously deleted. Based on this premise, Student contends that TCOE must produce all emails that personally identify Student. In addition, Student asserts that because emails are "maintained" on TCOE computers, TCOE must produce emails in the native file format for inspection.

The Court begins its analysis with the statute. The IDEA specifies that an "education record" is the type of record defined in the regulations implementing the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. 300.611(b). In turn, FERPA defines "education records" as those:

*5 records, files, documents, and other materials which —

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); 34C.F.R. § 300.613(b). The term "education record" does not include, inter alia, "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i); see also, 34 C.F.R. § 99.3 (education records do not include those records "that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except as a temporary substitute for the maker of the record.").

The plain language of the statute and regulation that define "education records" is consistent with California DOE's interpretation that only those emails that both are maintained by the educational

institution and personally identify Student are educational records. The statute, 20 U.S.C. § 1232g(a)(4)(A), and the regulation, 34 C.F.R. § 99.3, include the conjunction "and" between the two requirements. As conjunctive phrases, the statute and regulation require an email to satisfy both prongs to be an education record. Thus, an email is an education record only if it both contains information related to the student and is maintained by the educational agency. Conversely, an email that is not maintained by the educational agency is not an education record.

Student asserts that "e-mails, whether printed and in hard copy or in electronic format, which specifically reference him are `educational [sic] records' and must be provided pursuant to the IDEA's regulations." Student's Memo., 5. Student's position erroneously ignores the statutory requirement that an email must be also be maintained. Thus, emails, whether in hard copy or in electronic format, may be education records so long as the educational institution maintains them.

In his interpretation of the statute, and in this motion, Student seeks to compel TCOE to maintain all emails that identify him. This position is not supported by the plain language of the statute or regulations, and places the proverbial cart before the horse. The definition of an education record does not direct an educational agency to maintain a record that identifies Student. Contrary to Student's assertion, and as discussed above, only a record that, *inter alia*, is maintained by the educational institution meets the definition of an education record. Student points to no provision that requires an educational institution to maintain an email — or any other record — based solely on the fact that it contains personally identifiable information about a student.2 Accordingly, Student's unpersuasive interpretation of the statute is untenable. As set forth above, an email is an education record only if it personally identifies Student and is maintained by the educational institution.

> FN2. Educational institutions and agencies are required to maintain certain records. For example, FERPA and the IDEA require educational institutions to maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student. 34 C.F.R. § 99.32(a)(1); 34 C.F.R. § 300.614. Other regulations require an educational agency to maintain a student's final grades, attendance records, and applicable health records.

*6 The parties dispute whether emails containing information that personally identifies Student were "maintained" by TCOE. Student argues that TCOE "maintains" all email documents that are kept in a central email server or that exist in the individual email inboxes of TCOE staff. California DOE points out that Student asserts that TCOE maintains emails in a central email server and individual email inboxes "without substantiation." California DOE, Opp., 4. California DOE argues that Student "cannot state that the emails were in fact maintained. This is a factual issue that must be established without dispute in order for this court to consider it in making any determination regarding the application of the law." *Id*. In addition, California DOE submits that TCOE "maintained" only those emails that were printed out and placed in a Student's file in hard-copy format. Neither party attempts to define the term "maintain" through statute, regulation or case law.

In *Owasso Indep. Sch. Dist. No I-011 v. Falvo*, 534 U.S. 426 (2002), the United States Supreme Court interpreted the definition of the word "maintain" under FERPA. In ruling that peer-graded

assignments are not "maintained" as education records within the meaning of FERPA, the Court reasoned:

The ordinary meaning of the word "maintain" is "to keep in existence or continuance; preserve; retain." Random House Dictionary of the English Language 1160 (2d ed. 1987). Even assuming the teacher's grade book is an education record — a point the parties contest and one we do not decide here — the score on a student-graded assignment is not "contained therein," § 1232g(b)(1), until the teacher records it. The teacher does not maintain the grades while students correct their peers' assignments or call out their own marks. Nor do the student graders maintain the grades within the meaning of § 1232g(a)(4)(a). The word "maintain" suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled. The student grades only handle assignments for a few moments as the teacher calls out the answers. It is fanciful to say they maintain the papers in the same way the registrar maintains a student's folder in a permanent file.

Owasso, 534 U.S. at 432-33 (emphasis added). The Court further considered the meaning of the term "maintain" within the context of the overall statutory scheme:

FERPA, for example, requires educational institutions to "maintain a record, kept with the education records of each student." § 1232g(b)(4)(A). This record must list those who have requested access to a student's education records and their reasons for doing so. Ibid. The record of access "shall be available only to parents, [and] to the school official and his assistants who are responsible for the custody of such records." Ibid.

Under the Court of Appeals' broad interpretation of education records, every teacher would have an obligation to keep a separate record of access for each student's assignments. Indeed, by that court's logic, even students who grade their own papers would bear the burden of maintaining records of access until they turned in the assignments. We doubt Congress would have imposed such a weighty administrative burden on every teacher, and certainly it would not have extended the mandate to students.

Also FERPA requires "a record" of access for each pupil. This single record must be kept "with the education records." This suggests Congress contemplated that *education records would be kept in one place with a single record of access.* By describing a "school official" and "his assistants" as the personnel responsible for the custody of the records, *FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms.*

Id. at 434-45 (emphasis added).

In applying these considerations to the instant case, the Court finds that California DOE correctly determined that emails that are not in Student's permanent file are not "maintained" by TCOE. Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student's assertion — that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained "in the same way the registrar maintains a student's folder in a permanent file" — is "fanciful." *Owasso*, 534 U.S. at 433. Like individual assignments that are handled by many

student graders, emails may appear in the inboxes of many individuals at the educational institution. FERPA does not contemplate that education records are maintained in numerous places. As the Court set forth above, "Congress contemplated that education records would be kept *in one place with a single record of access." Id.* at 434 (emphasis added). Thus, California DOE's position that emails that are printed and placed in Student's file are "maintained" is accordant with the case law interpreting the meaning of FERPA and the IDEA. *Id.* ("The word `maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database.").

This analysis applies to Student's second claim against TCOE in the compliance complaint. Student argued that TCOE unlawfully "purged" emails without the notice and consent of Student's parents. Pursuant to 34 C.F.R. § 300.624, TCOE "must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide services to the child." Student's argument that TCOE maintained emails electronically is unsubstantiated. In addition, Student's argument that TCOE "maintains" emails in inboxes and TCOE's server also fails. Accordingly, Student has failed to demonstrate that TCOE purged any emails that personally identify Student and that was maintained by TCOE.

Pursuant to the applicable statute and regulation, TCOE was required to provide for inspection only those emails that personally identify Student and are maintained by TCOE. Student offers no evidence that TCOE failed to provide for inspection emails that were maintained in Student's file. Student admits that TCOE provided a "stack" of emails from 2006 and 2007 that were printed out and kept in Student's file. Moreover, the evidence that TCOE maintains Student's records in hard copy in Student's permanent file is not controverted. Student provides no evidence that TCOE maintains records electronically.3 Because TCOE was obligated to provide for inspection education records, see, 34 C.F.R. § 300.613, and the evidence supports California DOE's position that TCOE provided Student with the emails that TCOE maintained, this Court upholds California DOE's conclusion that TCOE was compliant with the applicable state and federal education laws. Accordingly, Student's first and second claims fail, and California DOE is entitled to summary judgment in its favor.

> FN3. This interpretation does not preclude or prohibit an educational institution from maintaining education records on an electronic database; however, questions related to electronic maintenance of records are inapplicable to the instant case. The non-controverted evidence demonstrates that TCOE only maintains records in hard-copy format. Thus, the Court does not reach the question of whether an educational institution should provide electronic records in their native file format if they are maintained electronically.

Attorneys Fees

Introduction

*8 Next, Student moves for summary judgment on its claim against TCOE for attorneys fees. Student contends that he is entitled to recover attorneys fees for the successful prosecution of the compliance complaint filed with the California DOE. Pursuant to 20 U.S.C. 1415(i)(3)(B)(1), this

Court "in its discretion, may award reasonable attorney's fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability." Successful plaintiffs are entitled to attorneys' fees and costs attributable to an administrative proceeding. *McSomebodies v. Burlingame Elementary Sch. Dist.*, 897 F.2d 974 (9th Cir. 1989).

Student submits that he incurred $5,582.54 in attorneys fees and costs for the successful prosecution of the compliance complaint. This total, according to the billing sheet submitted as Exhibit J to the Massey Declaration, is the sum of: (1) 3.1 hours by Timothy A. Adams ("Mr. Adams") at an hourly rate of $225; (2) 25.6 hours worked by Jenna Leyton ("Ms. Leyton") at an hourly rate of $175; (3) .4 hours of work by a person with the initials "SAT," who charged an hourly rate of $175; and (4) costs for postage, legal research, and copies in the amount of $335.04.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Riverside v. Rivera*, 477 U.S. 561, 568 (1986) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). "This figure, commonly referred to as the `lodestar,' is presumed to be the reasonable fee." *Id.* To support the lodestar calculation, the prevailing plaintiff must submit documentary evidence detailing the number of hours spent and how it determined the hourly rate requested. *Hensley*, 461 U.S. at 433. After the Court calculates the lodestar, and in rare and exceptional cases, the Court may adjust the lodestar . . . based on factors not subsumed in the initial calculation of the lodestar." *Van Gerwen*, 214 F.3d at 1045; but see, 20 U.S.C. § 1415(i)(3)(C) (lodestar fee may not be increased for claims under the IDEA).

Hourly Rate

The Court begins its analysis by determining a reasonable hourly fee. Attorney's fees are to be calculated "based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(i)(3)(C); see also, *Blum v. Stenson*, 12 *12 465 U.S. 886, 895 (1984). The relevant community is the forum in which the district court sits. *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991); see also, *Barjon v. Dalton*, 132 F.3d 496 (9th Cir. 1997) (applying the prevailing rate for the Sacramento community to an attorney whose practice was based in San Francisco). This Court sits in the Eastern District of California, Fresno division. Thus, the relevant community is Fresno, California. "[T]he established standard when determining a reasonable hourly rate is the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).

*9 To set forth and substantiate the hourly rates charged, Student submits declarations of Mr. Adams, Heather S. Zakson ("Ms. Zakson"), Shannyn C. Riba ("Ms. Riba"), and Elizabeth F. Eubanks ("Ms. Eubanks"). Mr. Adams, an attorney with eight years of experience who has prosecuted over 100 compliance complaints, charged an hourly rate of $225. Ms. Leyton, an attorney with one-year of legal experience, and the person who performed the bulk of the work in this matter, charged an hourly rate of $175. Ms. Zakson, an attorney with six years of experience in education law, charges $300 per hour. Ms. Riba and Ms. Eubanks, both attorneys with one year of experience, charge $275 per hour. Each attorney submits that their hourly rates are either at or below the prevailing rate for the legal community. In opposition, TCOE submits a declaration by Nicole Misner, who declares that the prevailing hourly rate for an eight-year attorney in special

education litigation is $250. Based on the aforementioned declarations, and considering that Mr. Adams charged below the prevailing community rate as established by TCOE, this Court finds that the hourly rates of $225 for Mr. Adams and $175 for Ms. Leyton are reasonable.

Hours Expended

Next, the Court considers the reasonableness of the hours expended. "In determining the appropriate lodestar amount, the district court may exclude from the fee request any hours that are `excessive, redundant, or otherwise unnecessary.'" *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir. 2007) (quoting *Hensley*, 461 U.S. 424, 434). As set forth above, Student's attorneys expended a total of 29.1 hours to litigate the compliance complaint. TCOE does not set forth any serious arguments to contend that the hours expended are excessive, redundant or unnecessary. Accordingly, this Court finds that 29.1 total hours is a reasonable amount of hours to prosecute the compliance complaint.

Lodestar Adjustment

Pursuant to the statute, this Court may not increase the attorneys' fee award that is calculated according to the lodestar. 20 U.S.C. § 1415(i)(3)(C) ("No bonus or multiplier may be used in calculating the fees awarded under this subsection). This Court has discretion, however, to adjust the lodestar calculation downward. The "most critical factor" in determining the reasonableness of a fee award under 20 U.S.C. § 1415(i)(3)(B) "is the degree of success obtained." *Linda T. V. Rice Lake Area Sch. Dist.*, 417 F.3d 704, 708 (7th Cir. 2005) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). Parents of a disabled child will be awarded only such attorneys fees as pertained to the successful portion of the petition. *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 160-61 (3rd Cir. 1994). If "a plaintiff has achieved only partial or limited success, the product of hours expended on litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensely*, 461 U.S. at 436; see also, *Aguirre v. L.A. Uni. Sch. Dist.*, 461 F.3d 1114 (9th Cir. 2006) (ruling that Hensely degree-of-success standard applies to IDEA cases). "A reduced award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 416 U.S. at 440.

10* As set forth above, Student was successful in one of the two counts asserted against TCOE. California DOE found TCOE out of compliance with California Code of Education section 56504, which provides parents of students with disabilities the "right and opportunity to examine all school records of [their] child and to receive copies . . . within five business days after the request is made by the parent, either orally or in writing." As a public education agency, TCOE "must comply with a request for school records without delay . . . and in no case more than five business days after the request is made orally or in writing." Cal. Educ. Code section 56504.

Student was unsuccessful on the bulk of his arguments raised in the February 6, 2008 compliance complaint. Student's compliance complaint alleged two causes of action against TCOE: (1) failure to provide a full and complete copy of all emails concerning or personally identifying Student pursuant to its obligation under California Code of Education § 56504; and (2) unlawful destruction of Student's records without parental notification or consent in violation of 34 C.F.R. § 300.624(a) when it unilaterally "purged" original electronic files. In his first cause of action, Student argued that TCOE failed to provide all emails that personally identified Student. California

DOE found that TCOE was under no obligation to provide all emails — only those that were "educational records" because they were "maintained." California DOE's position on this matter led to its decision that TCOE was in compliance on Student's second cause of action; namely, that TCOE was under no obligation to notify Student's parents prior to purging emails that were not part of Student's file, because they were not educational records.

Student argues that he should recover the full amount of his attorneys' fees, because the issues arose out of a common core of facts. As set forth above, however, the Court does not consider whether the claims arose out of a common core of facts only. When claims arise out of a common core of facts, this Court considers the level of success obtained. See, *McCown*, 550 F.3d at 923. "The reasonableness of the fee is determined primarily by reference to the level of success achieved by the plaintiff." *Id*. at 922 (citing *Hensley*, 461 U.S. at 436). In its review of this motion, this Court must consider "the relationship between the amount of the fee awarded and the results obtained." *Hensley*, 461 U.S. at 437.

In the compliance complaint and resulting order on Student's motion for reconsideration, Student's "victory clearly fell short of his goal; therefore, it is unreasonable to grant his attorneys more than a comparable portion of the fees and costs requested." *McCown*, 550 F.3d at 925. Though this Court "need not be so mechanical as to divide the amount of fees and costs requested by the number of claims . . . the district court should take into account [Student's] limited success when determining a reasonable award." *Id*. Here, the Court finds that a reasonable award based on Student's limited success is 50% of the total fees and costs. Accordingly, this Court awards Student an award of $2,791.27 in attorneys' fees and costs for his partially-successful compliance complaint.

Student's first cause of action against TCOE

*11 The parties contemplated that Student's claims would be resolved on motion for summary judgment. While Student and California DOE moved for summary judgment, TCOE failed to move for summary judgment on its behalf. TCOE's inexplicable failure to abide by the February 25, 2009 Scheduling Order has placed the posture of this case in a unique procedural position. In his first cause of action, against TCOE, Student claims that TCOE failed to provide Student's complete "education record" in violation of federal and state law by failing to provide all emails regarding Student and destroying them without parental notification or consent in violation of 34 C.F.R. § 300.624. Though this Court denies Student's summary judgment motion on Student's first cause of action, this Court cannot enter judgement in TCOE's favor without an outstanding request to do so.

For the reasons stated herein, this Court upheld California DOE's Compliance Compliant Report decision to find that TCOE was not required to provide Student with emails that TCOE maintained and Student provided no evidence that TCOE destroyed education records without parental notification or content. This Court's conclusions regarding Student's second cause of action against California DOE necessarily affect Student's first cause of action against TCOE. Accordingly, this Court is inclined to enter summary judgment against Student on his first cause of action against TCOE. See *Celotex Corp.*, 477 U.S. at 326 ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence."). In its conclusion and order below, this Court

shall allow Student an opportunity to oppose this Court's entry of summary judgment against him on his first cause of action against TCOE.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DENIES Student's summary judgment motion on his first claim against TCOE and second claim against California DOE;

2. GRANTS summary judgment in favor of California DOE and against Student on Student's second claim against California DOE;

3. GRANTS in part summary adjudication in favor of Student and against TCOE on Student's third claim for attorneys fees;

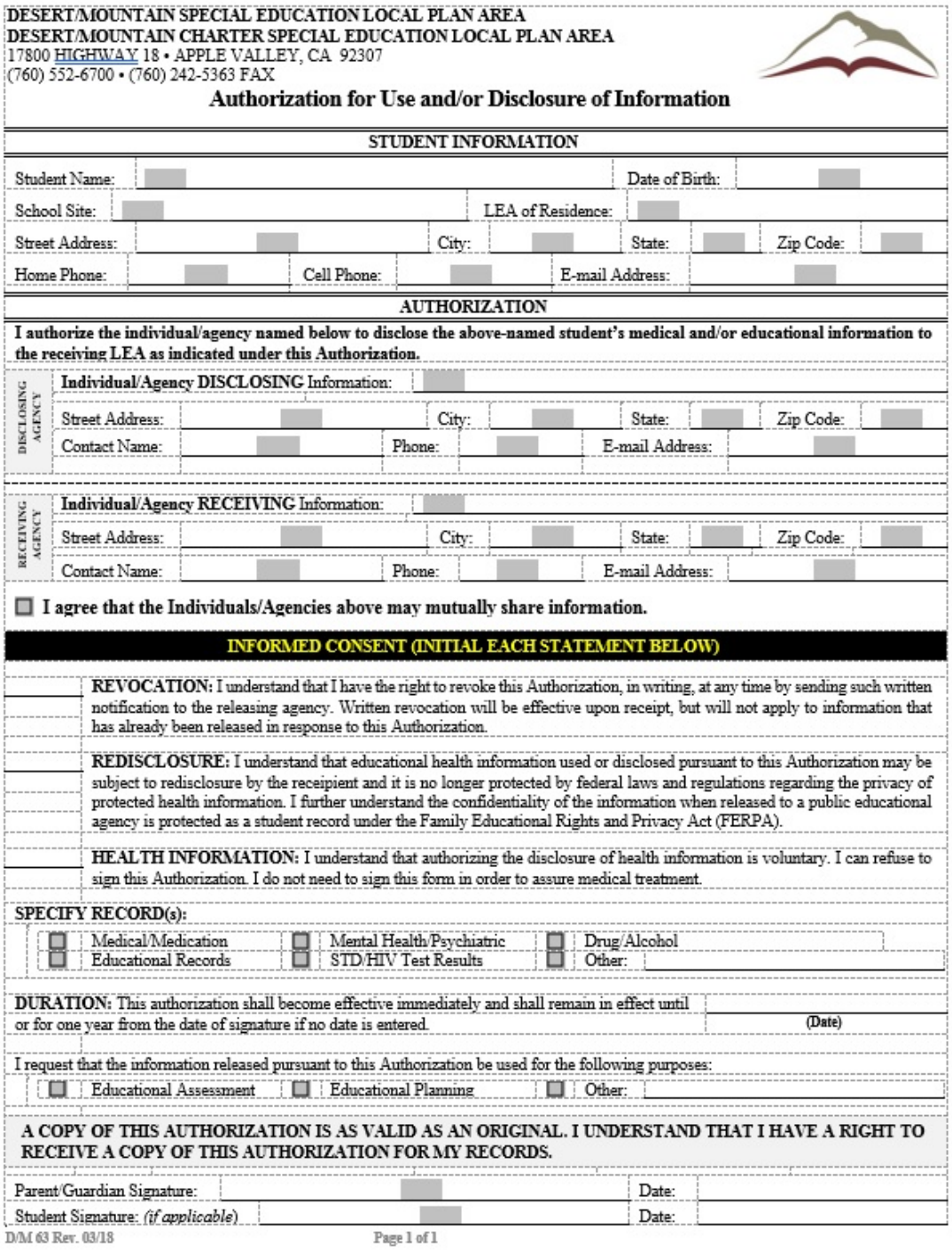
4. AWARDS Student $2,791.27 in attorneys' fees and costs for his partially-successful compliance complaint against TCOE; and

5. ORDERS Student to show cause, no later than October 5, 2009, why judgment should not be entered in favor of TCOE and against Student on Student's first cause of action.

IT IS SO ORDERED.

E.D.Cal.,2009.
S.A. ex rel. L.A. v. Tulare County Office of Educ
Slip Copy, 2009 WL 3126322 (E.D.Cal.)

APPENDIX C: SELPA Form D/M 63 – Authorization for Use and/or Disclosure of Information



DESERT/MOUNTAIN SPECIAL EDUCATION LOCAL PLAN AREA
DESERT/MOUNTAIN CHARTER SPECIAL EDUCATION LOCAL PLAN AREA
17800 HIGHWAY 18 • APPLE VALLEY, CA 92307
(760) 552-6700 • (760) 242-5363 FAX

Authorization for Use and/or Disclosure of Information

STUDENT INFORMATION

Student Name: | Date of Birth:
School Site: | LEA of Residence:
Street Address: | City: | State: | Zip Code:
Home Phone: | Cell Phone: | E-mail Address:

AUTHORIZATION

I authorize the individual/agency named below to disclose the above-named student's medical and/or educational information to the receiving LEA as indicated under this Authorization.

DISCLOSING AGENCY

Individual/Agency DISCLOSING Information:
Street Address: | City: | State: | Zip Code:
Contact Name: | Phone: | E-mail Address:

RECEIVING AGENCY

Individual/Agency RECEIVING Information:
Street Address: | City: | State: | Zip Code:
Contact Name: | Phone: | E-mail Address:

☐ **I agree that the Individuals/Agencies above may mutually share information.**

INFORMED CONSENT (INITIAL EACH STATEMENT BELOW)

_____ **REVOCATION:** I understand that I have the right to revoke this Authorization, in writing, at any time by sending such written notification to the releasing agency. Written revocation will be effective upon receipt, but will not apply to information that has already been released in response to this Authorization.

_____ **REDISCLOSURE:** I understand that educational health information used or disclosed pursuant to this Authorization may be subject to redisclosure by the receipient and it is no longer protected by federal laws and regulations regarding the privacy of protected health information. I further understand the confidentiality of the information when released to a public educational agency is protected as a student record under the Family Educational Rights and Privacy Act (FERPA).

_____ **HEALTH INFORMATION:** I understand that authorizing the disclosure of health information is voluntary. I can refuse to sign this Authorization. I do not need to sign this form in order to assure medical treatment.

SPECIFY RECORD(s):

☐ Medical/Medication ☐ Mental Health/Psychiatric ☐ Drug/Alcohol
☐ Educational Records ☐ STD/HIV Test Results ☐ Other:

DURATION: This authorization shall become effective immediately and shall remain in effect until _____ (Date)
or for one year from the date of signature if no date is entered.

I request that the information released pursuant to this Authorization be used for the following purposes:

☐ Educational Assessment ☐ Educational Planning ☐ Other:

A COPY OF THIS AUTHORIZATION IS AS VALID AS AN ORIGINAL. I UNDERSTAND THAT I HAVE A RIGHT TO RECEIVE A COPY OF THIS AUTHORIZATION FOR MY RECORDS.

Parent/Guardian Signature: | Date:
Student Signature: *(if applicable)* | Date:

D/M 63 Rev. 03/18 Page 1 of 1

APPENDIX D: SELPA Form D/M 76 – Log of Access and Requests for Access to Student's Records

Page 1 of 2

DESERT/MOUNTAIN SPECIAL EDUCATION LOCAL PLAN AREA
DESERT/MOUNTAIN CHARTER SPECIAL EDUCATION LOCAL PLAN AREA
17800 HIGHWAY 18 • APPLE VALLEY, CA 92307
(760) 552-6700 • (760) 242-5363 FAX

Log of Access and Requests for Access to Student's Records

STUDENT INFORMATION

Student Name: _____ Date of Birth: _____ Gender: ☐ Male ☐ Female

School Site: _____

District of Attendance: _____

CONFIDENTIAL: THIS LOG IS AVAILABLE FOR REVIEW BY THE CUSTODIAN OF RECORDS OR DESIGNEE AND THE PARENT OR ELIGIBLE STUDENT. IT IS TO BE FORWARDED (SEALED) TO THE CALIFORNIA PUBLIC SCHOOL OF NEW ATTENDANCE. IT MAY BE FORWARDED TO OTHER SCHOOLS.

Directions: This form is to be completed and placed in a student's file whenever a request is made for specific information (other than directory information) about a student.

Legitimate requests by school district personnel need not be recorded, nor do requests from parents or students, nor those disclosures authorized in writing by a parent or eligible student.

All other requests, including those authorized by law, that do not require permission for access, shall be recorded. Subsequent requests should be added to this log.

Requests for Information from a Student's Record(s)

Person/Agency	Information Requested	Reason	Date of Request	Date of Compliance (note if not provided)	Person Providing Information
FOLD HERE					
AND SEAL					

D/M 76 Rev. 09/14 Page 1 of 2

Log of Access and Requests for Access to Student's Records

Student Name:		**Date of Birth:**	

Pursuant to Educational Code § 49064, this record lists persons, agencies, or organizations requesting or receiving information from the attached student record and the legitimate interests therefore. The listing does not include:

- Parents or students to whom access is granted pursuant to Education Code § 49069 or paragraph (6) of subdivision (a) of Education Code § 49076;
- Parties to whom directory information is released pursuant to Education Code § 49073;
- Parties to whom written consent has been executed by the parent pursuant to Education Code § 49075;
- School officials or employees having a legitimate educational interest pursuant to paragraph (1) of subdivision (a) of Education Code § 49076.

This log is open to inspection only by a parent and the school official, or his/her designee, responsible for the maintenance of student records, and to the Comptroller General of the United States, the Secretary of Health, Education, and Welfare, and the administrative head of an education agency as defined in Public Law 93-380, and the state educational authorities as a means of auditing the operation of the system.

All persons having legitimate access to this record agree to not release information to a third party without appropriate written parent consent.

Person Completing Form:		Title:	
Agency (if applicable):			
Date Record Accessed:			

Purpose for Accessing Student Record(s):

This form shall be completed for each access entry and placed in the above named student's confidential file that was accessed in an envelope labeled, **"Notice of Released of Student Information. For reading only by parents/school officials with legitimate educational interests in the records and others specified in Education Code § 49064."**

D/M 76 Rev. 09/14 Page 2 of 2