**MISSOURI SMORGASBORD**

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE LAW JUDGE TRAINING
THURSDAY, SEPTEMBER 19, 2019

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## I. INTRODUCTION

The Hearing Commissioners identified various issues for further review and discussion during the training program. This outline is intended to address some of those issues.

## II. EDUCATION RECORDS

A. *Washoe County Sch. Dist.*, 114 LRP 25728 (SEA NV 2014).

The parent of a student with autism requested to inspect and review copies of email communications regarding the student's roller skating observation prior to a scheduled IEP team meeting. The school district, however, printed and delivered the emails to the parent several days after the IEP team meeting. The parent filed a State complaint.

The Nevada Department Education (NDE) determined that the school district never "maintained" the requested emails. Rather, the emails only existed in electronic form and were never printed. The NDE further determined that emails are maintained as education records only when they are kept in a filing cabinet in a records room at the school, saved on a permanent secure database, or printed and placed in a student's file. Because the emails in question where never saved or printed, the NDE concluded that the school district had not violated FERPA or the IDEA when it did not comply with the parent's inspection request.

B. *Letter to Anonymous*, 115 LRP 33158 (FPCO 2015).

There is no obligation on the part of the school district to notify a parent of a district's compliance with a subpoena received from the parent's former spouse with joint custody seeking their children's education records.

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C. *Washoe County Sch. Dist.*, 115 LRP 34836 (SEA NV 2015).

Overwhelmed by the perceived volume of the student's school file, a parent requested copies of the entire file but the school district declined to make the copies. Instead, the school district provided the parent with an unlimited amount of time and sessions to review the student's records and assigned two record officers to assist the parent in making copies of individual records and to answer the parent's questions. The parent filed a State complaint.

The NDE determined that a district is not required to provide the parent copies of the student's records except under limited circumstances (i.e., where the failure to provide the copies would effectively prevent the parent from exercising the right to inspect and review the records).

D. *Letter to Flores*, 115 LRP 39433 (FPCO 2015).

Providing a parent with an exact, electronic copy of an education record does not obligate the school district to make the original of that document available to the parent upon request.

FERPA does not prescribe the particular length of time a school district is required to maintain education records.

E. *Letter to Anonymous*, 115 LRP 40689 (FPCO 2015).

The fact that the parent requested access to all of her child's education records from the past three school years, including all records related to her child's IEP, but believed she received only incomplete records, was not enough to sustained a FERPA complaint investigation absent the parent providing evidence that she specifically asked for the records that she identified as missing in her initial request or in a follow-up request. The FPCO opined that, when a parent makes a blanket request for records, s/he should submit a follow-up request clarifying the additional records s/he believes exist but were not provided.

F. *Letter to Anonymous*, 115 LRP 40693 (FPCO 2015).

A school district has no obligation to comply with a standing request by a parent for access to education records. FERPA only requires that the school district comply with each individual request for access.

G. ***So What?*** Both FERPA and the IDEA grant parents the right to inspect their child's education records. An email may qualify as an education record. IDEA refers the reader to FERPA for the definition of an

education record.[1] FERPA defines an education record as "records, files, documents, and other materials which … contain information directly related to a student … and … are maintained by an educational agency or institution or by a person acting for such agency or institution.[2] 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.[3]

An email, therefore, is an education record only if it includes information specific to the student and is maintained by the district.[4]

In *Washoe*, the NDE determined that an email that exists only in electronic form in a teacher's inbox is not considered "maintained" by a school district. However, with today's electronic advancements, including cloud computing, central servers, and the like, the rationale in *Washoe* is not easily adaptable across district lines. When the issue comes up in hearing, it is, therefore, crucial to understand the particulars of what is an education record and how electronic communications are maintained by the school district.

Moreover, though a school district might shield itself from having to provide access to an email to a parent under FERPA or the IDEA because the school district deems the email as not being an education record or it not being maintained, a determination that is subject to review by an IDEA hearing officer, a parent may still compel its production through a subpoena or public records request. In other words, in restricting access to legitimate education records like emails under the guise that there are not education records or maintained by the school district, the school district may very well go from the lion's den to a pack of wolves.

## II. DISCOVERY

A. Other than the five-business day rule and the right to examine educational records, the IDEA does not provide for prehearing discovery.[5] The IDEA,

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[1] *See* 34 C.F.R. § 300.611(b).

[2] 20 U.S.C. § 1232(g)(a)(4)(A).

[3] 34 C.F.R. § 99.3.

[4] *Owasso Independent Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002).

[5] *Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist.*, 655 F. Supp. 2d 794, 53 IDELR 79 (N.D. Ohio 2009) *aff'd* 113 LRP 45715 (6th Cir. 2011) (unpublished). *See also Hupp v. Switzerland of Ohio Local Sch. Dist.*, 51 IDELR 131 (S.D. Oh. 2008) (holding that the parent is not entitled to information about all students within the LEA's borders who received special education services); *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010) (holding that IDEA hearings do not provide for the sort of extensive discovery that often occurs in litigation).

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however, does not prohibit or require the use of discovery proceedings and the nature and extent of discovery methods used are matters left to discretion of the hearing officer, subject to State or local rules and procedures.[6]

B. Allow discovery in limited circumstances and only when *necessary* for proper presentation or preparation of a party's case subject to limitations in the event of privileges or harassment. The hearing timeline is a factor to weigh when considering limited discovery.

C. A school district may request the opportunity to conduct further assessments of the student. In addition to the factors relating to allowing discovery generally, as noted immediately above, the hearing officer must consider, among other things, what assessments the school district has done already, why it claims to need additional assessments, and the parent's reason for objecting (e.g., harm to the student, possible delay of the hearing, etc.).

## III. INTERPLAY BETWEEN STATE COMPLAINTS AND IDEA HEARINGS

A. The IDEA regulations require that each State establish a procedure for the filing of complaints (i.e., alleged violations of the IDEA). 34 C.F.R. §§ 300.151 through 300.153.

B. A complaint must be filed within one year of the alleged event, and must be decided within 60 days of the complaint having been filed. 34 C.F.R. §§ 300.152(a) and 300.153(c). Monetary reimbursement, compensatory services and other corrective action can be provided if it is determined that FAPE was denied. 34 C.F.R. § 300.151(b).

C. A parent may utilize either or both of the complaint or hearing processes. *Memorandum to Chief State School Officers*, 34 IDELR 264 (OSEP 2000). If an issue has already been decided in a due process hearing, then that decision should prevail over a complaint investigation of the same issue. 34 C.F.R. § 300.152(c)(2)(i). If the parents have commenced both processes, any part of the complaint that is being addressed in the due process hearing may be held in abeyance pending conclusion of the hearing. 34 C.F.R. § 300.152(c)(1). However, any issue in the complaint that is not part of the due process hearing, must be resolved within 60 days. *Id.*

D. An SEA in its procedures regarding complaints must provide that an school district has the opportunity to respond to a complaint, including

[6] *Letter to Stadler*, 24 IDELR 973 (OSEP 1996). *But see S.T. v. Sch Bd. of Seminole County*, 783 So.2d 1231, 34 IDELR 230 (Dist. Ct. App. 2001) (holding that in the absence of State law, the hearing officer lacked authority to order discovery).

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a proposal to resolve it and, if the parent consents, the opportunity to resolve the complaint through mediation or some other means, with the 60-day time limitation being automatically extended upon agreement of the parties. 34 C.F.R. § 300.152(a)(3).

E. Hearing Officers may hear issues that were previously the subject of a State complaint.[7]

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**THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. IN USING THIS OUTLINE, THE PRESENTER IS NOT RENDERING LEGAL ADVICE TO THE PARTICIPANTS.**

[7] *See*, *e.g.*, *Grand Rapids Pub. Sch. v. P.C.*, 47 IDELR 7 (W.D. Mich. 2004) ("[T]he IDEA is better read to permit more process (a due process hearing following a separate investigation) as opposed to less process (the investigation foreclosing a later statutorily referenced due process hearing)."); *Lewis Cass Intermediate Sch. Dist. v. M.K.*, 290 F. Supp. 2d 832, 40 IDELR 8 (W.D. Mich. 2003) (concurring with the hearing officer that "complaint issues" are within the jurisdiction of the hearing officer); *Donlan v. Wells Ogunquit Cmty. Sch. Dist.*, 226 F. Supp. 2d 261, 37 IDELR 274 (D. Me. 2002) (agreeing with the hearing officer that the State complaint investigator's findings were not binding on the hearing officer); *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act*, 61 IDELR 232, Question B-32 (OSEP 2013) (suggesting that issues still in dispute may be the subject of a due process hearing); *Letter to Douglas*, 35 IDELR 278 (OSEP 2001); *Letter to Chief State Sch. Officers*, 34 IDELR 264 (OSEP 2000). *Cf. Virginia Office of Protection and Advocacy v. Virginia*, 262 F. Supp. 2d 648, 109 LRP 199 (E.D. Va. 2003) (no private right of action to challenge State complaint determination).

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