

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

Petitioner,

v.

NOVATO UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2007110515

**ORDER DENYING STUDENT'S
MOTION TO ENFORCE PRODUCTION
OF RECORDS**

Administrative Law Judge (ALJ) Judith A. Kopec conducted a prehearing conference by telephone on February 25, 2008. Michael Zatopa, attorney, represented Student. Jan E. Tomsy, attorney, represented Novato Unified School District (District).

On February 14, 2008, Student filed a motion to enforce his right to receive his pupil records. On February 20, 2008, District filed its opposition to the motion. After considering the parties' submissions, and discussion and argument at the prehearing conference, the Office of Administrative Hearings (OAH) determined that although District did not respond timely to Student's request for records, it did provide his pupil records that it was able locate. Based on information disclosed during the prehearing conference, Student was permitted an opportunity to file a motion requesting additional records. On March 3, 2008, Student timely filed a motion to enforce production of email correspondence between his parents and District staff. On March 4, 2008, Student filed an addendum to his motion. On March 20, 2008, District timely filed its opposition to Student's motion.

APPLICABLE LAW

A parent has the right to examine all school records of his or her child and to receive copies within five business days after a parent requests them. (Ed. Code, § 56504.) A school district must comply with a request for school records without unnecessary delay before any meeting regarding an individualized education program, a due process hearing, or a resolution session, and in no case more than five business days after the request was made. (*Ibid.*) Due process hearing rights include the right to examine pupil records. (Ed. Code, § 56501, subd. (b)(3).)

Education Code section 56504 does not define a school record. However, a pupil record is defined as “any item of information directly related to an identifiable pupil, . . . which 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, file, microfilm or other means.” (Ed. Code, § 49061, subd. (b).) A pupil record does not include “informal notes related to a pupil compiled by a school officer or employee which remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute.” (*Ibid.*) A substitute is defined as a person who performs, on a temporary basis, the duties of the individual who made the notes. (*Ibid.*) A substitute does not include a person who permanently succeeds the individual who made the notes in that individual’s position. (*Ibid.*)

A school district must maintain pupil records as provided in regulations promulgated by the California Department of Education (CDE). (Ed. Code, § 49062.) There are three categories of pupil records: mandatory permanent pupil records, mandatory interim pupil records, and permitted pupil records. (Cal. Code Regs., tit. 5, §§ 430, subd. (d)(1)-(3), 432, subd.(b).) A school district must retain a pupil record consistent with the retention rules governing each category. (Cal. Code Regs., tit. 5, § 437.)

DISCUSSION

Student requests that OAH compel the production of copies of email correspondence that District maintains as pupil records, or, in the alternative, require District to produce evidence concerning the manner and timing of the destruction of the records, and verification that the records cannot be recovered. District contends that it is not required to maintain email correspondence related to Student and, because of this, any email correspondence is not a student record. District also claims that if the email correspondence is a student record, it was not compelled to retain those records.

In his complaint, Student alleges that he was eligible for special education services as a student with an emotional disturbance. He challenges District’s denial of eligibility due to its determination that Student’s disability did not adversely impact his educational performance. Student asserts in his motion that his parents communicated via email with his teachers concerning his difficulties, but this email correspondence was not provided in response to his request for records. It is likely that this email correspondence would assist Student with his due process hearing.

During the prehearing conference, Student was encouraged to support specific factual evidence supporting his request. The only evidence he submitted appear to be copies of emails between J.L. and Father and between T.L. and Father. Student did not submit a declaration or other reliable evidence explaining what these documents were, their significance, or any information concerning the nature and extent of his parents’ email correspondence with his teachers. On this basis alone, Student’s motion may be denied.

Moreover, Student has not shown that any email correspondence between his parents and teachers constituted pupil records required to be provided to him. Email correspondence between Student's parents and teachers meets the first requirement of a student record, because it consists of items of information directly related to an identifiable student. However, there is no basis to find that this email correspondence is either maintained by District, or required to be maintained by an employee in the performance of his or her duties. Because of this, Student has not shown that District was required to provide the documents he seeks. Therefore, Student's request that District be ordered to produce the email correspondence is denied.

Student also requests an order requiring District to produce evidence concerning the manner and timing of the destruction of the email correspondence and verification that the records cannot be recovered from District's computer system. Student's request is based on his contention that District improperly destroyed the email messages. OAH's jurisdiction is limited and does not extend to enforcement of CDE's regulations concerning the retention of pupil records. Accordingly, this request is also denied.

Order

1. Student's request to enforce production of email correspondence between his parents and District staff is denied.
2. Student's request District to produce evidence concerning the manner and timing of the destruction of the records, and verification that the records cannot be recovered, is denied.

Dated: April 4, 2008

JUDITH A. KOPEC
Administrative Law Judge
Office of Administrative Hearings