

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of:)
)
REDACTED (Student),)
)
) DE DP #24-17
v.)
)
REDACTED School District (School District))
)

Hearing Panel Members:

Melissa L. Rhoads, Esq., Panel Chairperson
Vicki McGinley, Ph.D., Educator Panelist
Paul King, Layperson Panelist

Representatives:

Lawrence Lee Wentz, counsel for Student
Allyson M. Britton, Esq., counsel for School District

DECISION & ORDER

I. PRELIMINARY MATTERS

Student REDACT (hereinafter “Student”) through Student’s REDACTED (hereinafter “Parent”) filed a Due Process Complaint against REDACTED School District (hereinafter “District”) on February 16, 2024. By written agreement, the resolution meeting was waived by the Parties on February 16, 2024.

The Parties and Panel Members convened for a Pre-Hearing Conference on March 1, 2024 via Zoom. A Pre-Hearing Order was issued on March 5, 2024 and is incorporated herein by reference.

District filed a Motion to Dismiss on March 12, 2024. Student filed a Response in Opposition to the Motion to Dismiss and a Motion for Partial Judgment on the Pleadings on March 6, 2024. District filed a Reply and Response to Student’s Motion on March 12, 2024. An Order denying the Motions was issued on March 15, 2024.

The Hearing was conducted via Zoom over one-half day on March 25, 2024. Witness testimony was given by REDACTED Chief Information Officer; REDACTED Director of Special Services, and REDACTED, Student’s REDACTED (hereinafter also referred to as “Parent”). Student’s exhibits and the District’s exhibits were moved into the record.

The Panel finds the testimony given by each witness to be credible. Testimony provided by each witness has been given the appropriate weight as determined by the Panel.

The Panel is in receipt of written closing arguments submitted by the Parties. The Panel accepts those arguments that are in accordance with the findings of fact and conclusions of law set forth below. To the extent any argument is inconsistent with this Panel’s findings, it has been rejected. Only arguments and factual findings necessary to properly determine the matter at issue in this proceeding are discussed below, with irrelevant or unnecessary arguments and facts omitted as much as possible.

II. ISSUE PRESENTED

1. Whether emails are included in the definition of educational records under the Individuals with Disabilities Education Act (IDEA) and Delaware special education regulations, 14 DE *Admin C.* §922, *et. seq.* and whether Student has been denied

FAPE *solely* because of the District's failure and delay in providing Student's emails in response to Parent's request for all educational records.

III. FINDINGS OF FACT

The Hearing Panel makes the following findings of fact¹:

1. REDACTED has been an educator in Delaware for 17 years.²
2. REDACTED testified that the District provided Parent with the education records maintained by the District in response to Parent's request.³
3. REDACTED testified that the District uses data education platforms including Powerschool, Eschool, and Data Service Center, which categorize data by student.⁴
4. To collect education records., REDACTED and REDACTED staff went into those data education platforms and retrieved the particular student's education records.⁵
5. The District provided those education records (783 pages), as well as Student's physical files, which include the cumulative file and nurse records.⁶
6. REDACTED testified about the various documents that are located within the above-referenced education data platforms.⁷
7. There are times when an email is printed and intentionally, physically placed into a student's file.⁸

¹ References to the record shall be reflected as follows: Student # for Student's exhibits and District # for District's exhibits (if any) . Reference to the transcript shall be designated as Tr. # to reflect the page(s) upon which the testimony can be found in the transcript.

² Tr. 24.

³ Tr. 24-27.

⁴ Tr. 28.

⁵ Tr. 27.

⁶ Tr. 27-30, 135; District Ex. 2, 3.

⁷ Tr. 31-34, 61-62.

⁸ Tr. 29, 52-53.

8. Only those specific emails would be education records, because they are maintained by the District.⁹
9. There are no emails maintained in the Student's file.¹⁰
10. REDACTED testified that emails are not considered educational records because an email of one staff member does not reflect the decision of the Student's IEP team.
11. Decisions concerning a student are made by the IEP team and are documented in a Prior Written Notice, which is a part of the student's education records.¹¹
12. REDACTED has been employed by the District for 15 years.¹²
13. REDACTED has been the District's Chief Information Officer for the past 5 years.¹³
14. REDACTED testified regarding the District's access to the education data systems referenced above.¹⁴
15. REDACTED explained that the email system used by the District is maintained by the State of Delaware, Department of Technology ("DTI"), not the District.¹⁵
16. REDACTED, REDACTED of Student testified. Parent's testified to having requested Student's education records (including specifically "emails") in order to advocate for Student effectively.¹⁶
17. Parent raised a number of issues via REDACTED testimony including: REDACTED request for an independent educational evaluation of Student, transportation, implementation of Student's IEP and concerns over whether it was being followed and

⁹ Tr. 52-53.

¹⁰ Tr. 31, 138. District Ex. 4.

¹¹ Tr. 34-35.

¹² Tr. 89.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Tr. 92.

¹⁶ Tr. 125, 133-134.

whether it provided Student with FAPE, paraprofessional assistance, and speech services.¹⁷

18. Despite testimony concerning this myriad of issues, Parent confirmed that the only alleged deprivation of FAPE before the Hearing Panel in this case relates to the delay and failure to provide emails.¹⁸

IV. APPLICABLE LEGAL STANDARD

FAPE

It is well settled that, upon finding a student in its district is under the auspices of a disability, that student has a substantive right to – and the public school district shall provide – a free and appropriate education (“FAPE”). *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017). Under IDEA, a procedural violation that does not result in a loss of educational opportunity does not constitute a denial of FAPE. *See C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2021); *D.S. v. Bayonne Bd. of Education*, No. 08-4739, 602 F.3d 533, 564-67 (2d Cir. 2010).

EDUCATION RECORDS

Courts in the Third Circuit have interpreted the definition of education records consistent with the holding in *Tulare v. S.A. v. Tulare Cty. Office of Education*, No. 08-1215, 2009 WL 3126322 (E.D. Cal., Sept. 24, 2009). Third Circuit Courts have held that the definition of “education records” under IDEA is analogous to the definition under FERPA; therefore,

¹⁷ Tr. 118-134, 143-148.

¹⁸ Tr. 149.

emails are not educational records unless the emails both contain information related to the student and are “maintained” in the student’s file by the school district.

In *E.D. by and through T.D. v. Colonial School District*, the Court held that “a procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district’s failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.” In order to determine whether Plaintiffs were deprived of their procedural rights, we must first define “education record.” According to the regulations implementing the IDEA, the definition of an educational record under the IDEA is analogous to the definition found in the Family Educational Rights and Privacy Act (FERPA). 34 C.F.R. §300.611(b). FERPA defines education records” as “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. 20 U.S.C. §1231g(a)(4)(A). The Court explained, “Unless [the District] kept copies of e-mails related to REDACT as part of its record filing system with the intention of maintaining them, we cannot reach the conclusion that every e-mail which mentions [the student] is a bona fide education record within the statutory definition.” The email at issue in this case was an email from the Director of Pupil Services to the learning support teacher and the school psychologist concerning retention of the student in REDACTED grade because of lack of progress. “These e-mails appear to be casual discussions, not records maintained by [the District]. Since these e-mails do not qualify as education records to which [the parents] are guaranteed a right of access, there was no violation of their procedural rights prior to the due process hearing.” 2017 WL 1207919, at *10 (E.D. Pa. March 31, 2017).

In *Doe v. Rutgers, State Univ. of New Jersey*, a business graduate student made a request

for emails. The Court held that emails are no education records under FERPA. 2022 WL 1617581, at *4 (D. N.J. May 20, 2022). This decision was affirmed on appeal by the United States Court of Appeal for the Third Circuit. *Doe v. Rutgers*, 2023 WL 2239399 (3d. Cir. February 27, 2023).

V. DISCUSSION

As stated above, Courts in our Third Circuit have held that the definition of “education records” under IDEA is analogous to the definition under FERPA; therefore, emails are not education records unless the emails *both* contain information related to the student **and** are “maintained” in the student’s file by the school district. (emphasis added) *E.D. by and through T.D. v. Colonial School District.*” 2017 WL 1207919, at *10 (E.D. Pa. March 31, 2017).

Following the law and interpretation of the Third Circuit, the Hearing Panel finds that emails that are not maintained by the District are not education records, and therefore not subject to review and inspection by Parent pursuant to the IDEA or FERPA. There are times when an email is printed and intentionally, physically placed into a student’s file.¹⁹ The District agreed that those specific emails would be education records, because they are maintained in the Student’s file by the District.²⁰ REDACTED testified that no such printed emails were saved to Student’s file in the present matter.²¹ As a result, the District has provided Parent Student’s education records. There can be no FAPE violation stemming from delay in or failure to produce emails, since the emails in question are not education records.

¹⁹Tr. 29, 52-53.

²⁰ *Id.*

²¹ Tr. 31. District Ex. 4.

ORDER

For the reasons stated above, the Hearing Panel concludes that the emails in question are not education records pursuant to the IDEA and Delaware special education regulations, because they are not maintained in the Student's file by the District. Therefore, there is no FAPE deprivation due to any alleged delay in or failure to produce said emails. As a result, all relief requested by Student's Due Process Complaint hereby denied.

The Hearing Panel specifically notes that Student may very well have a cognizable claim for a substantive FAPE violation for reasons²² that were not the subject of the present Due Process Complaint brought before this Hearing Panel; however, the Hearing Panel is limited to addressing only the specific issue brought before it.

IT IS SO ORDERED.

DATE: April 17, 2024

NOTICE OF RIGHT TO APPEAL

The decision of the Hearing Panel is a final Order unless a party seeks judicial review. Any party aggrieved by the Hearing Panel's decision has the right to seek judicial review in the U.S. District Court or the Delaware Family Court within ninety (90) days of the date of this written decision, as provided in 20 U.S.C. §1415(i)(2) and 14 *Del. C.* §3142.

²² As stated above, Parent raised a number of issues via REDACTED testimony including: REDACTED request for an independent educational evaluation of Student, transportation, implementation of Student's IEP and concerns over whether it was being followed and whether it provided Student with FAPE, paraprofessional assistance, and speech services. Tr. 118-134, 143-148.

/s/ Melissa L. Rhoads, Esq.
Melissa L. Rhoads, Esq., Panel Chair

/s/Vicki A. McGinley
Vicki A. McGinley, Ph.D., Educator Panelist

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