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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

Matthew Oskowis, individually and on behalf of E.O.,

Plaintiff,

v.

Sedona Oak Creek Unified School District No. 9,

Defendant.

No. CV-14-08166-PCT-JAT

**ORDER**

Pending before the Court is Plaintiff's Motion to Prohibit Spoilage and Preserve Evidence (Doc. 15). The Court now rules on the motion.

## I. Background

Plaintiff Matthew Oskowis filed this action seeking judicial review of an administrative decision concerning his minor child, E.O. Plaintiff originally filed four due process complaints against Defendant pursuant to the Individuals with Disabilities Education Act ("IDEA"). (Doc. 1 at 2-3). The Administrative Law Judge ("ALJ") consolidated these complaints, and issued a decision. (Doc. 1-3 Ex. E). The ALJ concluded that Defendant had denied E.O. a free appropriate public education ("FAPE") with respect to four of the annual goals for E.O. set forth in his Individualized Education Program ("IEP") and awarded ninety hours of compensatory education. (*Id.* at 38-39). The ALJ rejected the balance of Plaintiff's claims. (*Id.* at 39). Plaintiff appeals from this decision. (Doc. 1).

Because this case is a judicial review of an administrative ruling, the parties agreed in their Joint Proposed Case Management Plan that discovery generally did not apply, although Plaintiff claimed that limited discovery could apply for certain purposes. (Doc. 14 at 6-10). However, Plaintiff has now filed the present motion seeking "to prohibit spoilage" and to permit Plaintiff to conduct discovery of certain documents. (Doc. 15).

Plaintiff's basis for his motion is an alleged discrepancy between a document in the administrative record and Plaintiff's own copy of that document. Specifically, Plaintiff takes issue with a "Prior Written Notice" from November 30, 2012 that is part of the administrative record, which Plaintiff attached as Exhibit A to his motion. (Doc. 15-2 at 2). Plaintiff asserts that E.O's teacher e-mailed Plaintiff on November 30, 2012 a "Prior Written Notice" that differs from the copy in the administrative record. (Doc. 15 at 2). Plaintiff has attached this latter document as Exhibit C to his motion. (Doc. 15-2 at 7). Plaintiff believes the Prior Written Notice in the administrative record is the product of Defendant's alteration or fabrication, and this is indicative of the Defendant's fabrication of E.O's education record in general. (Doc. 15 at 2). Exhibits A and C differ substantially in content but are both dated "11/30/2012."

## II. Legal Standard

The IDEA provides that in civil actions for review, the district court "shall receive the records of the administrative proceedings" and "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C). In *Ojai Unified School District v. Jackson*, 4 F.3d 1467 (9th Cir. 1993), the Ninth Circuit Court of Appeals ("Court of Appeals") interpreted the "additional evidence" requirement as granting a district court discretion to supplement the administrative record in limited circumstances. 4 F.3d at 1473.

"The starting point for determining what additional evidence should be received . . . is the record of the administrative proceeding." *Id.* (citation omitted). Reasons to supplement the record include "gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the

administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing." *Id.* However, the district court "must be careful to not allow [additional] evidence to change the character of the hearing from one of review to a trial *de novo*." *Id.*

**III. Analysis**

Plaintiff complains that Defendant controls the creation of E.O.'s educational record and did not present a complete or accurate copy of this educational record to the ALJ. (Doc. 15 at 2-3). Plaintiff asserts that the discrepancy between the Prior Written Notice in the administrative record and what Plaintiff actually received via e-mail casts doubts upon the veracity of the administrative record, justifying discovery. (*Id.* at 3). Plaintiff seeks to convert this discrepancy into expansive discovery, including all IEP meeting notes, all test results, all notes authored by Defendant's personnel pertaining to E.O., all notes from specialists, and all correspondence mentioning E.O. (Doc. 15 at 1).

Defendant denies having a record of the alleged Prior Written Notice attached as Exhibit C to Plaintiff's motion, and avers that it has not modified any records in this case. (Doc. 17 at 10-11). Defendant devotes a substantial portion of its response to arguing that Plaintiff's requested discovery is improper because the documents requested are not education records relevant to this case. (*Id.* at 7-10).

The Court has the discretion to admit additional evidence for its consideration. *See Ojai*, 4 F.3d at 1473. The Court cannot ignore Plaintiff's allegations because if correct, an erroneous administrative record would be a valid basis for the Court to admit additional evidence. However, Plaintiff seeks to use an alleged discrepancy to conduct broad discovery, and the Court is not convinced that Plaintiff has yet made the requisite showing that would justify such an order. In sum, each party either explicitly or implicitly accuses the other of fabricating evidence (or at the least, having an inaccurate record).

Because the basis for Plaintiff's alleged discrepancy is an e-mail sent by E.O.'s teacher using a school e-mail account, the Court will order Defendant to conduct a forensic examination of its electronically-stored data (including computers, e-mail

servers, and backups) to ascertain whether Defendant has a copy of this e-mail. Defendant must either (1) file an affidavit stating, under oath, that it possesses a copy of this e-mail and present a copy of the e-mail and the Prior Written Notice attachment; or (2) file an affidavit stating, under oath, that it has forensically searched all records and data within its possession for this e-mail and it does not have a copy in its possession. If it turns out that E.O.'s teacher actually sent this e-mail, then Plaintiff may refile a request for discovery. Otherwise, the Court sees no basis for permitting additional discovery in this case. The Court recognizes this procedure will place a burden upon Defendant, but believes any burden is slight because the date and time of the e-mail are known, which will facilitate quick searching, and outweighed by the important value of having a complete and accurate administrative record for review. This procedure will also resolve the conflict between the parties as to the completeness of the administrative record in this case.

## IV. Conclusion

For the foregoing reasons,

**IT IS ORDERED** denying Plaintiff's Motion to Prohibit Spoilage and Preserve Evidence (Doc. 15).

**IT IS FURTHER ORDERED** that within twenty days from the date of this Order, Defendant shall conduct a forensic search of all electronic records within its possession for the e-mail and e-mail attachment identified in Exhibits B and C of Plaintiff's Motion at Doc. 15-2. Defendant shall within this time period file an affidavit with the Court that identifies, under penalty of perjury, whether Defendant has a copy of this e-mail and e-mail attachment within its possession. If Defendant has a copy of this e-mail and e-mail attachment within its possession, then Defendant must also attach these documents to its affidavit filed with the Court. If Defendant attests that it does not have a copy of this e-mail and e-mail attachment within its possession, then Defendant's affidavit must list, in detail, the forensic examination steps taken to locate these documents and must also include a statement from a suitably-credentialed third-party

certifying that these steps constituted a diligent search.

Dated this 21st day of April, 2015.

James A. Teilborg
Senior United States District Judge