IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

S.A. a minor by and through her parents, and guardian ad litem, L.A. and M.A.

Plaintiff,

vs.

TULARE COUNTY OFFICE OF EDUCATION and CALIFORNIA DEPARTMENT OF EDUCATION,

Defendants.
_____/

CASE NO. CV F 08-1215 LJO GSA

ORDER ON DEFENDANT'S 28 U.S.C. § 1292(b) MOTION FOR INTERLOCUTORY APPEAL
(Doc. 35)

INTRODUCTION

Defendant Tulare County Office of Education ("Tulare Education") seeks an interlocutory appeal of this Court's orders to deny dismissal of plaintiff S.A.'s ("Student's") claims to reverse decisions of defendant California Department of Education ("CDE") regarding Tulare Education's failure to produce educational records. Student opposes an interlocutory appeal in that Tulare Education fails to establish "required prerequisites for an interlocutory appeal." This Court considered Tulare Education's interlocutory appeal motion on the record[1] and VACATES the February 17, 2009 hearing, pursuant to Local Rule 78-230(h). For the reasons discussed above, this Court DENIES Tulare Education an interlocutory appeal of this Court's orders denying dismissal.

BACKGROUND

Student's Request For Records

Student is a 10-year old boy and has received special education services due to his autism and

[1] On February 9, 2009, CDE's reply (doc. 38) to Student's opposition to CDE's F.R.Civ.P. 12 motion was refiled. This Court considered CDE's reply (doc. 27) shortly after it was filed on December 26, 2008 in connection with CDE's F.R.Civ.P. 12 motion. This Court surmises that CDE's reply (doc. 38) was mistakenly refiled and strikes it as so.

speech and language delay. In summer 2007, Student requested Tulare Education for all email sent or received by Tulare Education "concerning or personally identifying Student." Tulare Education provided limited emails and indicated that older emails had been purged.

In 2008, Student filed a compliance complaint for CDE to order Tulare Education to provide Student's "educational records," including emails and to request a CDE finding that the requested records were destroyed without parental notification or consent if Tulare Education could not produce the educational records. CDE found that Tulare Education was not required to notify parents prior to "purging" emails related to Students on grounds that the emails are not "educational records" to be maintained under 34 C.F.R. § 99.6. In response to Student's request for clarification and reconsideration, CDE issued a report which found no inconsistencies with its prior findings and stated: "Any further disagreement with the report can be appropriately addressed in a court of competent jurisdiction."

Student's Claims

On August 15, 2008, Student filed this action and proceeds on his FAC to allege:

1. A first cause of action that Tulare Education failed to provide Student's complete "educational 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 to: (a) reverse CDE findings that emails are not "educational records" to be maintained by the educational agency and that Tulare Education was in compliance; and (b) require CDE to take "appropriate corrective actions"; and
3. A third cause of action to reimburse attorney fees not less than $5,462.64 for "successful prosecution of the compliance complaint."

The FAC seeks this Court's:

1. Reversal of CDE's decision;
2. Findings that Tulare Education violated federal and state laws to maintain and to provide Student's "educational records" and that emails not produced by Tulare Education were Student's "educational records" to be "maintained" under 34 C.F.R. § 99.6;

3. Order that Tulare Education provide Student's existing records which should have been produced pursuant to an initial July 10, 2007 request;

4. Order that Tulare Education notify parents when it intends to destroy Student's "educational records"; and

5. Award of $5,462.64 attorney fees for "successful prosecution of the compliance complaint."

Denial Of Dismissal Of Student's Claims

CDE and Tulare Education filed separate F.R.Civ.P. 12 motions to dismiss Student's claims for failure to exhaust administrative remedies and as unrecognized under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, et seq. CDE and Tulare Education take the position that Student's claims arise from a "complaint resolution process" ("CRP") which is handled by CDE pursuant to 34 C.F.R. §§ 300.151-300.153. CDE and Tulare Education contend that 34 C.F.R. §§ 300.151-300.153 do not provide for a private action, such as Student's action here. According to CDE and Tulare Education, this Court lacks subject matter jurisdiction due to Student's failure to pursue an administrative remedy provided by the Family and Educational Rights Act ("FERPA") and failure to allege denial of a free appropriate public education ("FAPE") under IDEA. CDE and Tulare Education conclude that no private right of action exists under IDEA regarding CPR procedures provided in the regulations and that CDE "should have primary responsibility for administering the program in question." In sum, CDE and Tulare Education contend that this Court is an improper forum to determine Student's claims.

This Court's January 5 and 6, 2009 orders denied CDE and Tulare Education's separate F.R.Civ.P. 12 motions to dismiss. This Court noted that "CDE and Tulare Education attempt to mischaracterize Student's claim as a FERPA violation or an unexhausted IDEA claim." This Court further noted:

> CDE and Tulare Education point to no binding authority to deny Student a private right of action. In fact, CDE apparently recognized Student's private right of action given its direction in its May 19, 2008 reconsideration report that "[a]ny further disagreement with the report can be appropriately addressed in a court of competent jurisdiction." CDE cannot at the administrative level indicate that a court action is available and later before a court indicate it is not.

Tulare Education disagrees with this Court's determination and argues that IDEA "requires that this matter be handled by the CDE and/or through an administrative due process hearing" in that "Congress did not provide for an appeal to the federal courts for a decision on a complaint to state educational agency."

DISCUSSION

Interlocutory Appeal Certification

Tulare Education asks this Court to certify an interlocutory appeal of the orders denying dismissal in that the orders involve "a controlling question of law as to which there is a substantial ground for difference of opinion." Student responds that Tulare Education fails to satisfy "required prerequisites for an interlocutory appeal."

When an issue is unresolved and interlocutory resolution could materially advance the termination of the litigation, 28 U.S.C. §1292(b) ("section 1292(b)") permits the district court judge to certify the question:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . .

Section 1292(b) provides for interlocutory appeals from otherwise not immediately appealable orders, if conditions specified in the section are met, the district court so certifies, and the court of appeals exercises its discretion to take up the request for review. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74, n. 10, 117 S.Ct. 467 (1996). Section 1292(b) requires a two step application process; step one is before the district court for certification of the order, and step two is before the court of appeals for permission to appeal. The certification is discretionary within the power of the trial judge. S.Repr. 2434, 85th Cong., 2d Sess., 1958, in 1958 U.S. Code Cong. & Admin. News 5255, 5257. Indeed, the appellate court will not consider the appeal absent written certification by the district court. *Credit Suisse v. U.S. District Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997). A party must obtain certification from both the district court and the court of appeals to bring an interlocutory appeal. *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001). As such, this Court has the authority to entertain the petition for certification of an order for interlocutory order because certification

by the district court is the first step in section 1292(b) procedure.

A district court may amend its order to add findings for an interlocutory appeal. F.R.App.P. 5 governs appeals by permission under section1292(b):

> (a) Petition for Permission to Appeal
>
> . . .
>
> (3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement.

If a district court determines to certify an order for interlocutory appeal after the order is initially entered, the proper procedure is to amend the order to contain the required certification. *Haas v. Pittsburgh Nat. Bank*, 627 F.2d 677, 679 n.1 (3d Cir. 1980). A certification order that is not directly framed as an amendment of the original order, however, may be treated as an amendment nonetheless. *Haas*, 627 F.2d at 679 n.1.

Tulare Education requests this Court to amend its orders denying dismissal to permit it to pursue an appeal pursuant to section 1292(b).

Section 1292(b) Requirements

Section 1292(b) requires that "resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten trial." *McFarlin v. Conesco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004). Section 1292(b) imposes three criteria that must be met before a district court may certify an interlocutory appeal: the order must state "(1) that there is a controlling question of law, (2) that there is substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983); 28 U.S.C. §1292(b); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974).

"Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare." *Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 573 (1st Cir. 2004). "Because permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy."

McFarlin, 381 F.3d at 1259. "Congress did not intend 28 U.S.C. § 1292(b) to serve an error-correction function." *Weber v. U.S. Trustee*, 484 F.3d 154, 159, n. 3 (2nd Cir. 2007). Only "exceptional circumstances justify departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S.Ct. 2454 (1978).

This Court next turns to the criteria for a section 1292(b) appeal of its orders denying dismissal.

Controlling Question Of Law

An order is "controlling" if its resolution could materially affect the outcome of the litigation. *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d at 1026 (trial judge's recusal is a collateral issue). Section 1292(b) appeals should be reserved for "situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts." *McFarlin*, 381 F.3d at 1259. "The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of act . . ." *McFarlin*, 381 F.3d at 1259. "The legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law." *McFarlin*, 381 F.3d at 1259.

Tulare Education identifies the controlling question of law as whether IDEA and its regulations provide for a private right of action regarding a CRP to complain of purged records given the "dichotomy" between the IDEA's express provision of a due process hearing and the absence of a CRP appeal process to federal courts. Student notes that the issue is "whether this Court erred in its holding that a complainant can appeal to federal court decisions made under the complaint resolution procedure ("CRP") when the complainant is requesting his educational records held by the local educational agency."

Tulare Education argues that this Court "misapplied" IDEA and it regulations to recognize a plaintiff's right to appeal a CRP to federal court. Tulare Education contends that the issue of an appeal to a CRP to federal court is an issue worthy of the Ninth Circuit Court of Appeals' determination by interlocutory appeal.

Student disagrees that the orders denying dismissal involve a controlling issue of law in that "there is a dispute over the facts." Student notes that "he is not making a FERPA claim but is requesting

his educational records under the IDEA and its implementing regulations." Student points to the "factual dispute" arising from CDE's indication that "further disagreement . . . can be appropriately addressed in a court of competent jurisdiction." Student concludes that the facts are too intertwined with the law to avoid a "pure" legal question for Ninth Circuit determination.

This Court agrees with Student. CDE created a factual issue with its statement: "Any further disagreement with the report can be appropriately addressed in a court of competent jurisdiction." Such factual issue prevented F.R.Civ.P 12 dismissal and prompted this Court's comment that "CDE cannot at the administrative level indicate that a court action is available and later before a court indicate it is not." Factual issues exist as to how CDE and Tulare Education characterized Student's complaint and corresponding treatment of it. CDE's statement indicates that it concluded that Student could proceed to federal court. As such, the record must be delved into beyond's its surface to prevent a section 1992(b) appeal.

Difference Of Opinion

As to a difference of opinion, Tulare Education notes that it and Student "are at diametric odds in their opinions as to whether this Court has jurisdiction." Student responds that Tulare Education fails to cite "conflicting or contradictory legal opinion to prove that this Court's ruling" was erroneous. Student argues that the absence of Ninth Circuit precedent is insufficient to demonstrate a substantial ground for difference of opinion.

"In determining whether to grant review, we should ask if there is substantial dispute about the correctness of any of the pure law premises the district court actually applied in its reasoning leading to the order sought to be appealed." *McFarlin*, 381 F.3d at 1259. When an appellate court is in "complete and unequivocal" agreement with a district court, there is no "substantial ground for difference of opinion." *McFarlin*, 381 F.3d at 1258. "[S]ubstantial ground for difference of opinion does not exist merely because there is a dearth of cases." *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994). In addition, "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate substantial ground for difference of opinion." *In re Flor*, 79 F.3d 281, 284 (2nd Cir. 1996). A district court has a duty "to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial

ground for dispute." *Max Daetwyler Corp. v. Meyer*, 575 F.Supp. 280, 283 (E.D. Pa. 1983).

Tulare Education fails to demonstrate a substantial difference of opinion on the issue of a CRP appeal to federal court. Tulare Education relies on the difference between its and Student's views. An analysis of Tulare Education's arguments does not give rise to a substantial ground for dispute. Although the Ninth Circuit may address ultimately the issue of a CRP appeal to federal court, now is not the time based on existence of factual issues.

Material Advancement

Tulare Education claims that a section 1292(b) appeal in its favor would end this litigation for lack of jurisdiction to materially advance it. Tulare Education argues that the issues of a CRP appeal to federal court involves "expenditure of substantial time, money and effort because should [Tulare Education's] appeal not be certified, the matter will proceed to discovery, likely summary judgment motions, and hearing, after which, the Court's Orders may be appealed." Tulare Education contends that an interlocutory appeal permits the Ninth Circuit "to finally decide the issue."

Student disagrees in that this action may be resolved quickly with limited discovery and summary judgment motions. Student accuses Tulare Education of "delay tactics" and "increasing litigation costs."

A party seeking interlocutory certification must show that an immediate appeal may "materially advance," rather than impede or delay, ultimate termination of the litigation. *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d at 1026. "When litigation will be conducted in substantially the same manner regardless of our decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *White*, 43 F.3d at 378-379.

Tulare Education essentially asks this Court to gamble that this Court's decision is incorrect and that the Ninth Circuit will rule in Tulare Education's favor to correct the error. Tulare Education fails to persuade this Court that a section 1292(b) appeal will materially advance this action. A section 1292(b) appeal would increase chances of delay. There is no assurance that the Ninth Circuit would accept an appeal. If the Ninth Circuit ruled against Tulare Education, there would most likely be a remand to this Court to promote delay. Student correctly notes that the matters in dispute can be resolved expeditiously with limited discovery and a summary judgment motion. An orderly appeal can be taken from an entered judgment.

CONCLUSION AND ORDER

For the reasons discussed above, this Court DENIES Tulare Education a section 1292(b) appeal of the orders denying dismissal and DIRECTS the clerk to strike CDE's reply (doc. 38) as a redundant filing.

IT IS SO ORDERED.

Dated: February 10, 2009

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE