

**COMPLAINT INVESTIGATION
LOCAL EDUCATIONAL AGENCY¹
(#LEA092122)
Report Issued on December 7, 2022**

INTRODUCTION

On September 21, 2022, the Nevada Superintendent of Public Instruction received a State Complaint from a Parent alleging violations by the Local Education Agency (LEA). The allegation in the Complaint was that, with no legitimate reason, LEA violated the Individuals with Disabilities Education Act (IDEA) and Nevada Administrative Code (NAC) §388.289 by disclosing the student's personally identifiable information in a public filing with the United States District Court, District of Nevada (Court) in response to the Parents' and Student's legal action against LEA in the judicial appeal of the State Review Officer's decision.

In accordance with IDEA, 34 C.F.R. §300.520, and NAC §388.195 any right accorded to a parent of a student with a disability under the IDEA transfers to the student when the student attains the age of 18. In response to the Complaint, LEA argued that since the student had reached the age of majority, the adult student's parents did not have standing to file this State Complaint and it should be dismissed on that basis. Unlike the request for a due process hearing (34 C.F.R. §§300.507, 300.532), a State Complaint may be filed by an organization or individual. While the individual filing a State Complaint may be a parent of a student with a disability, the special education complaint system is not limited in that regard. 34 C.F.R. §300.153(a). However, Nevada Department of Education (NDE) did request the Parent provide documentation of the Parent's authorization for continued access to the student's personally identifiable information in order for NDE to release the Complaint Investigation Report or any other personally identifiable information to the Parent in the course of the investigation. The Parent provided the required documentation to NDE.

Since the allegation in the Complaint involved a matter before the Court, the Parent was informed that while corrective action would be ordered if it was determined that LEA violated the requirements of Part B of the IDEA, or Nevada special education laws it was the Court's sole authority to address the controversy before it. Similarly, when it became apparent in the Complaint investigation process, that the respective legal positions of the Complainant and LEA regarding the issue in the State Complaint were integrally related to a motion pending before the Court, NDE set aside the sole issue in this State Complaint until the Court definitively ruled on the motion. Pursuant to IDEA, 34 C.F.R. §300.152(b), due to this exceptional circumstance NDE extended the time limit to conclude its investigation and issue the decision from November 20, 2022 to January 20, 2023 or 30 days after NDE was provided a copy of the Court's ruling, whichever was first.²

On November 7, 2022, LEA notified NDE of the Court's oral ruling on the pending motion and provided the minutes of the proceeding. The Parent and LEA stipulated that the Court did not determine the motion

¹Given NDE's practice of posting Complaint Reports; and the possibility the student/family's identity may be identified with a reasonable certainty if the name of the educational agency was known, out of an abundance of caution the educational agency's name has been redacted from this Complaint Report for reasons of confidentiality. 34 C.F.R. §300.610 et seq.; NAC 388.289.

²While the IDEA does not directly address open State Complaints before NDE relative to a judicial appeal, it does address the State Education Agency's receipt of a State Complaint that is also the subject of a due process hearing and requires the State to set aside any part of the Complaint that is being addressed in the due process hearing until the conclusion of the hearing. 34 C.F.R. 300.152(c). NDE determined this situation was analogous and, in the absence of explicit authority to set aside the State Complaint during the pendency of a judicial matter, permitted an extension to address this exceptional circumstance.

on either the IDEA, or the Family Educational Rights and Privacy Act (FERPA), 34 C.F.R. Part 99.³ Therefore, NDE recommenced the investigation of the State Complaint without further regard of the pending judicial matter with the decision to be issued by December 7, 2022, 30 days after notification of the Court's ruling.

The State Complaint, including all attachments, LEA's denial of all claims, and all documents submitted by LEA in response to the issues in the Complaint were reviewed and considered in their entirety in the investigation of this Complaint. The Findings of Fact cite the source of the information determined necessary to resolve the issues in this Complaint and the original source document, where available, was relied upon.

COMPLAINT ISSUES

The allegation in the Complaint under the jurisdiction of NDE to investigate through the special education complaint process raises the following issue for investigation:

Issue:

Whether LEA complied with the IDEA and NAC, Chapter 388, with regard to the protection of the confidentiality of the student's personally identifiable information, specifically in the disclosure of any personally identifiable information in LEA's September 8, 2022 pleading filed with a Court in response to the Parents' and Student's legal action against LEA.

FINDINGS OF FACT

1. On October 23, 2020, a Hearing Officer issued a Hearing Decision and on November 23, 2020, NDE received the Parent's appeal of the Hearing Decision. The State Review Officer issued the State Review Decision on December 18, 2020. (December 18, 2020 State Review Decision)
2. In a civil action, the Parents and student appealed the State Review Decision to the Court. The relevant pleading at issue in this Complaint is the defendant LEA's Answer and Counterclaim filed with the Court. The Hearing and State Review Decisions, with appendices that included identifying information were attached as exhibits to the LEA's Answer and Counterclaim. The appendices were incorporated by reference in both the Hearing and State Review Decisions and provided extensive personally identifiable information for the neutral identifiers used in the decisions. This personally identifiable information included not only the student's and Parents' names, but the names of the LEA, schools, facilities and personnel and were transmitted to LEA and Parents with these appendices. (Hearing and State Review Decisions)
3. The Parents' and student's filing with the Court (judicial complaint) was a public filing, as was the Answer and Counterclaim. The Parents' and student's judicial complaint and subsequent filings included the name of the educational agency and the Parents' and student's initials. (State Complaint, LEA Answer and Counterclaim)
4. On September 9, 2022, a day after LEA's filing of the Answer and Counterclaim at issue in this case, the Parent asserted that LEA violated both IDEA and FERPA by included the appendices with personally identifiable information in the filing. In response, LEA informed the Parent of the exception under FERPA to produce student education records and information in litigation to defend itself. (September 9, 2022 Email Communications)

³ The Parent relied in part on FERPA, 34 C.F.R. Part 99, in the State Complaint as did LEA in the response to this State Complaint.

5. In the response to the State Complaint, LEA did not dispute that the information in the appendices of the Hearing and State Review Decisions contained personally identifiable information, but did dispute that the personally identifiable information at issue was from the student's education record since the Decisions were not maintained in LEA's "central education file." This central file is contained in two record management systems and is referred to as the student's "legal student record." Notwithstanding this response, LEA did not assert that the Hearing and State Review Decisions were not maintained in some other location in the agency, or by a party acting for the agency or institution. (LEA Response, including Declaration)
6. At the time of the filed pleading at issue in this case, the Court had not received the administrative record of the administrative hearing and review proceedings from NDE. (NDE, Office of Inclusive Education)

CONCLUSIONS OF LAW

In accordance with IDEA and NRS/NAC Chapters 388, the State of Nevada's system of procedural safeguards for students with disabilities includes the right of a parent or a public agency to file a due process complaint on specific matters under these laws. These rights include the right of any party aggrieved by the findings and decision in the hearing to appeal the final hearing decision to NDE for an impartial review. The impartial review is conducted by a State Review Officer and this administrative appeal decision is final unless a party brings a civil action. (Finding of Fact (FOF) #1) 34 C.F.R. §§300.507, 300.514, 300.516; NAC §§388.306, 388.315.

In this case, the Parents and student appealed the State Review Decision to the Court in a public filing and the pleading at issue in this Complaint is the defendant LEA's Answer and Counterclaim filed with the Court. The Hearing and State Review Decisions, with appendices that included identifying information, were attached as exhibits to the LEA's Answer and Counterclaim. (FOFs #2, #3)

In accordance with IDEA, 34 C.F.R. §300.622, parental⁴ consent must be obtained before personally identifiable information⁵ is disclosed to parties (other than specifically designated officials not pertinent to this Complaint) unless the information is contained in education records, and the disclosure is authorized without parental consent under FERPA, 34 C.F.R Part 99. (See also NAC §388.289(1) and (3).) Pursuant to FERPA, 34 C.F.R. §99.31(a)(9)(iii)(A) and (B), the following are explicit authorized conditions under which prior consent would not be required to disclose personally identifiable information from the education record of a student:

(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

In that LEA was defending itself from the Parents' and student's legal action against it, and counterclaiming, these litigation exceptions would apply to this very situation **if** the disclosed personally identifiable

⁴ In this case, given the transfer of rights in accordance with NAC §388.195 and IDEA, 34 C.F.R. §300.520, it was the adult student who was accorded this right.

⁵ LEA does not dispute the information in the appendices of the Hearing and State Review Officer's Decisions is personally identifiable information. (FOFs #4, #5)

information was contained in the student's education records and relevant to the LEA's defense or legal action. Given these limitations, it is necessary to determine whether both conditions were met in order to resolve this State Complaint.

In accordance with IDEA, 34 C.F.R. §300.611(b), education records are the type of records covered under the definition of "education records" in FERPA, 34 C.F.R. Part 99. FERPA, 34 C.F.R. §99.3 defines education records as those records that are directly related to a student; and maintained by an educational agency or institution or by a party acting for the agency or institution. LEA does not dispute the appendices of the Hearing and State Review Officer's Decisions contain personally identifiable information or that the Decisions were directly related to the student and, at the time of the disclosure, cited the litigation exception (FOFs #4, #5) under which prior consent would not be required to disclose personally identifiable information from the education record of a student. Contrarily, in its response to this Complaint, LEA argued that since the Hearing and State Review Decisions were not maintained by LEA in the student's "central education file", they were not education records.

Given this State Complaint and LEA's legal argument in response to the Complaint included reliance on FERPA, 34 C.F.R. Part 99, it is important to note that NDE does not have jurisdiction in this state complaint process over allegations regarding the violation of FERPA. However, both IDEA and NAC, Chapter 388, incorporate or restate the provisions of FERPA in some regard and State Educational Agencies are required under Part B of the IDEA to enforce all Part B requirements through the state complaint system, including those Part B confidentiality of information regulations that restate or paraphrase FERPA requirements. IDEA also includes provisions that are "tailored specifically to the special education environment" that have no counterpart in FERPA or provide protections beyond those provided by FERPA.⁶

Relevant to this State Complaint, one such additional protection in IDEA recognizes that education records may not be maintained by an educational agency in one location/place, but rather in multiple locations: "Each participating agency must provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency." 34 C.F.R. §300.616; NAC, §388.287(6).

In this case, while within their discretion to do so, LEA maintained the Hearing and State Review Decisions directly related to the student in a different location than the LEA's "central education files." (FOFs #2, #5) Notwithstanding the maintenance of the Hearing and State Review Decisions directly related to the student in an alternative location, they remained "education records" as defined under the IDEA.⁷ 34 C.F.R. §300.611(b).

Addressing the second condition of the above cited litigation exceptions (34 C.F.R. §300.622; 34 C.F.R. §99.31(a)(9)), were the Hearing and State Review Decisions with the appendices relevant for LEA to defend itself against the Parents' and student's legal action and proceed with the counterclaim? The appendices in both the Hearing and the State Review Decisions were incorporated by reference in the Decisions and were transmitted to LEA and Parents with these appendices. The appendices provided extensive personally identifiable information defining the neutral identifiers used in the Decisions, including not only the student's and Parents' names, but the names of the LEA, schools, facilities and personnel. (FOF #2) Given the extensive redaction of personally identifiable information in the Decisions in this case, including the names of the parties, it is determined that these Decisions, with the appendices, filed with the Court were

⁶ *Letter to Anderson*, (OSEP March 7, 2008), publicly available at: <https://sites.ed.gov/idea/idea-files/policy-letter-march-7-2008-to-texas-education-agency-general-counsel-david-anderson>

⁷To be clear, an educational agency's maintenance of Hearing and State Review Decisions after deleting any personally identifiable information are not similarly protected. See for example IDEA, 34 C.F.R. §§300.513(d) and 300.514(c) requiring NDE to make the decisions available to the advisory panel and general public after deleting any personally identifiable information.

relevant for LEA to defend/proceed in the legal action.⁸ Further, given the appendices were incorporated by reference in both the Hearing and State Review Decisions and transmitted to LEA and the Parents/student with these appendices (FOF #2), LEA's submission of the Decisions with the appendices also left the Decisions unaltered.

Therefore, LEA complied with the IDEA and NAC, Chapter 388, with regard to the protection of the confidentiality of the student's personally identifiable information, specifically in the authorized disclosure of personally identifiable information in LEA's September 8, 2022 pleading filed with a Court in response to the Parents' and Student's legal action against LEA.

⁸ It is also noted that while the Court would later receive the records of the administrative proceedings (34 C.F.R. §300.514(c)), at the time of the filed pleading at issue in this case, the Court had not yet received them. (FOF #5)