

75 IDELR 185

119 LRP 44391

**D.L. by and through his guardians ad
litem Melissa LAZARO and Oscar
LAZARO, Plaintiff, v. POWAY UNIFIED
SCHOOL DISTRICT, Defendant**

**U.S. District Court, Southern District of
California**

19-CV-0780-GPC-RBB

November 22, 2019

Related Index Numbers

370.040 Evidence

370.045 In General

375.030 In General

Judge / Administrative Officer

GONZALO P. CURIEL

See related decision at 119 LRP 7800

Ruling

The guardians ad litem of a student with an undisclosed disability partially convinced a federal District Court to supplement the administrative record with additional evidence and seal those records. The U.S. District Court, Southern District of California agreed to admit into the record classroom observation notes, progress reports, and the student's work samples. The court declined to admit a 2017 IEP meeting transcript and granted the guardians' request to seal only with respect to the progress reports and work samples.

Meaning

Courts generally will supplement the administrative record with evidence that wasn't available at the time of the hearing but that's relevant and potentially helpful. If placement is at issue, a court is likely to admit evidence that sheds light on the appropriateness of a proposed placement. Here, the guardians sought to introduce classroom observation notes taken at the district's proposed placement and progress reports and work samples from the student's unilateral private placement. The documents were admitted because

they would help the court to determine the appropriateness of the district's and parent's proposed placements.

Case Summary

A District Court agreed to supplement the administrative record with progress reports, work samples, and classroom observation notes relevant to whether a California district offered a sixth-grader with an unidentified disability FAPE and whether the student's unilateral private placement was appropriate. The court granted in part and denied in part their request to supplement the administrative record. The guardians asked the court to admit: 1) classroom observation notes created by a "dyslexia expert" who visited a class at the district's proposed placement; 2) reports and work samples from the student's current private school; and 3) an IEP meeting transcript. U.S. District Judge Gonzalo P. Curiel explained that a court may admit evidence that is relevant and helpful. However, it need not consider evidence that simply embellishes the record or creates a whole new trial. The court found that the observation notes, pertaining to a one-time observation of a single classroom conducted four months after the administrative decision, would provide "some insight into the classroom environment at the [district's] proposed placement." As a result, they would be helpful and relevant, but not so broad as to undercut the administrative process. The court also found that the progress reports and work samples generated at the private school would assist the court in determining whether the private placement was appropriate. As to the IEP meeting transcript, the court observed that the district objected to its admission at the administrative hearing and the hearing officer declined to admit it. "As the Court does not have the benefit of [the district's] briefing on this potentially contentious request, the Court will not now admit the transcript based solely on [the guardians'] papers," Judge Curiel wrote.

Full Text

APPEARANCES:

For D.L., By and Through his Guardians Ad Litem Melissa Lazaro and Oscar Lazaro, Plaintiff: Jennifer L. Varga, LEAD ATTORNEY, San Diego, CA.

For Melissa Lazaro, Oscar Lazaro, Guardian Ad Litem Parties: Jennifer L. Varga, LEAD ATTORNEY, San Diego, CA.

Opinion

Granting in Part and Denying in Part Plaintiff's Motions to Supplement the Record and Seal the Supplement ECF Nos. 26, 28

On November 5, 2019, Plaintiff D.L. (a minor), by and through his guardians ad litem, Melissa and Oscar Lazaro, filed motions seeking to supplement the administrative record and seal that supplement. ECF Nos. 26, 28. Specifically, Plaintiff asks that three distinct documents be added to the record and then sealed: (1) the classroom observation notes of Defendant's proposed placement by Kelli Sandman-Hurley dated June 10, 2019, (ECF No. 27-2); (2) Plaintiff's progress reports and work samples from his current school, Newbridge, (ECF No. 27); (3) a transcript of Plaintiff's Individualized Education Program ("IEP") Program Meeting on September 8, 2017. (ECF No. 27-1.)

Having reviewed Plaintiff's requests, the exhibits, and the applicable law, the Court GRANTS, in part, and DENIES, in part, Plaintiff's requests.

I. Applicable Standards

a. Motions to Supplement the Record

Congress created the Individuals with Disabilities Education Act ("IDEA") to meet the unique needs of disabled children by making available a free and appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA contains various procedural safeguards to assure that schools meet these unique needs. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d

1467, 1469 (9th Cir. 1993). For example, parents may file a complaint with the school district regarding the services provided under their child's IEP and may pursue an administrative hearing if the complaint is unresolved. *Id.* Parents may contest the results of that hearing through a civil action in state or federal court. *Rowley*, 458 U.S. at 176.

In an action brought under 20 U.S.C. § 1415(i)(2)(A), the Court "shall hear additional evidence at the request of a party." The Ninth Circuit has defined permissible, "additional evidence" to 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." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1473 (9th Cir. 1993). In particular, the Ninth Circuit has opined that evidence acquired after a hearing "may shed light" on the reasonableness of a school district's prior decisions. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir.1999).

Nonetheless, a "court need not consider evidence that simply repeats or embellishes evidence taken at the administrative hearing, nor should it admit evidence that changes 'the character of the hearing from one of review to a trial de novo.'" *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 652 F.3d 999, 1004-05 (9th Cir. 2011) (*quoting Ojai*, 4 F.3d at 1473). In sum, "evidence that is non-cumulative, relevant, and otherwise admissible constitutes 'additional evidence' that the district court 'shall' consider pursuant to 20 U.S.C. § 1415(i)(2)(C)(ii)." *Id.*

b. Motions to Seal

There is a presumptive right of public access to court records. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). That right is "based on the need for federal courts, although independent -- indeed, particularly because they are independent -- to have a measure of accountability and for the public to have confidence

in the administration of justice." *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quotations omitted).

Parties seeking to seal documents in a dispositive motion must thus meet the high threshold requiring "compelling reasons" with specific factual findings to support a sealing. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178-80 (9th Cir. 2006) (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003)). The "compelling reasons" test requires showing more than just "good cause." *Id.* This standard applies even if the motion or its attachments were previously filed under seal or protective order. *Id.* at 1179.

The Ninth Circuit has "carved out an exception" to the compelling reasons standard for documents produced in discovery and documents not attached to a dispositive motion. *Foltz*, 331 F.3d at 1135 (citing *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)). To seal such documents, the moving party need only provide "good cause" to show, *San Jose Mercury News, Inc. v. U.S. Dist. Court N. Dist. (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999), that "specific prejudice or harm will result." *Phillips*, 307 F.3d at 1210-11 (citation omitted). "If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary." *Id.* (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

Importantly, however, the Ninth Circuit has interpreted the terms "dispositive" and "non-dispositive" loosely when determining which standard to apply. *Ctr. for Auto Safety*, 809 F.3d at 1098 ("To only apply the compelling reasons test to the narrow category of dispositive motions goes against the long held interest in ensuring the public's understanding of the judicial process and of significant public events.") (quotations omitted). Hence, where the sealed material "is more than tangentially related to the underlying cause of action," the "compelling reasons" standard applies. *Id.* at

1099.

II. Analysis

a. Ms. Sandman-Hurley's Classroom Observation Notes

In his first request, Plaintiff asks that the Court add and seal the observation notes of Defendant's proposed placement by Kelli Sandman-Hurley dated June 10, 2019. (ECF No. 28-1 at 5-6.) Ms. Sandman-Hurley is a "dyslexia expert," and took these classroom observation notes during her visit to a "6th grade resource specialist class at Defendant's site, Meadow Brook Middle School." (*Id.* at 4.) Plaintiff states that the content of this observation is pertinent to whether the proposed placement provides a Free and Appropriate Public Education ("FAPE") under 20 U.S.C. § 1412(a)(1). (*Id.* at 6.) Plaintiff further contends that the observation is not cumulative because it was obtained "four months after the administrative decision had been rendered" and is admissible. (*Id.*)

Here, though the evidence only pertains to a one-time observation of a single classroom, Ms. Sandman-Hurley's notes nonetheless provide some insight into the classroom environment at Plaintiff's proposed placement. Consequently, they are relevant in that they "may be helpful to understanding the school district's earlier actions." *See M.M. v. Lafayette Sch. Dist.*, No. C-10-04223-SI, 2011 U.S. Dist. LEXIS 127465, 2011 WL 5190033 (N.D. Cal. Oct. 31, 2011) (admitting after-acquired psychologist's reading assessment of plaintiff). Ms. Sandman-Hurley's one-page set of notes, moreover, is not so broad in scope as to risk "turn[ing] this proceeding to a de novo review and undercut[ing] the administrative process designed to address the specific issues raised by plaintiff." *W.H. ex rel. B.H. v. Clovis Unified Sch. Dist.*, No. CV-F-08-0374-LJO, 2008 U.S. Dist. LEXIS 99097, 2008 WL 5069711 (E.D. Cal. Nov. 25, 2008) (denying an after-acquired declaration that offered expert-opinion on "several issues," including "on the ultimate issue before the ALJ," and was likely to "open the door to additional

documents").

However, contrary to Plaintiff's cursory motion to seal, this document does not "necessarily include" private information about the Plaintiff -- not "the use of his name," "the specific details of his education program," or any facts as to his schooling. (ECF No. 26-1 at 3.) The document also does not personally identify anyone, including the teacher or other students described in the document. Consequently, because the Public enjoys a presumptive right to access court materials, the Court denies Plaintiff's request to seal this information. *Kamakana*, 447 F. 3d at 1178 (quoting *Nixon*, 435 U.S. at 597 & n.7).

b. The Progress Reports and Work Samples From Newbridge

In his second request, Plaintiff asks that the Court to add and seal approximately 100 pages of "progress reports and works samples from Newbridge." (ECF No. 28-1 at 6-7). Plaintiff asserts that these documents demonstrate Plaintiff's success at his current school, and thus serve to show that "Defendant's program did not provide D.L. with FAPE." (*Id.* at 8.) Again, Plaintiff also asserts that these documents are not cumulative in that they were obtained after Plaintiff's hearing took place in December 2018. (*Id.* at 8.)

Here, the Court agrees with Plaintiff and finds that the "progress reports and work samples" may supplement the record. In *Capistrano Unified Sch. Dist. v. Wartenberg by & Through Wartenberg*, the Ninth Circuit relied, in part, on plaintiff's performance records at his private school to conclude that a "review of the record indicates that the district judge and the hearing officer were correct in finding that the Mardan Center provided an 'appropriate' educational setting for [plaintiff]." 59 F.3d 884, 896 (9th Cir. 1995). Those records were admitted after the hearing by the district court. *Id.* at 890 (noting that the "district judge ... considered additional evidence [including plaintiff's] performance at Mardan subsequent to the hearing officer's decision"). Thus, as in *Capistrano*, admitting this evidence is

appropriate because it is not cumulative and is relevant to the Court's determination of whether Newbridge is an appropriate placement.

This evidence, moreover, mirrors that sealed by the Court in its prior order dated November 1, 2019. (ECF No. 24 at 3-4.) As there, these materials repeatedly reference Plaintiff by his full name, and include his work samples, grades, and performance assessments. Consequently, the Court finds the need to protect Plaintiff's privacy as a juvenile is a sufficiently compelling reason and orders that the "progress reports and works samples from Newbridge" be sealed. See *E.M. v. Poway Unified Sch. Dist.*, No. 19-cv-00689-M-MSB (S.D. Cal. July 29, 2019).

c. The Transcript of Plaintiff's September 8, 2017 IEP Meeting

Lastly, Plaintiff requests that the Court admit a transcript of an IEP meeting dated September 8, 2017. (ECF No. 28-1 at 10-12.) Plaintiff contends that the hearing transcript is "difficult, if not impossible to decipher" because certain portions of the transcript are "indiscernible" due to a mechanical error. (*Id.* at 11 (citing Administrative Record ("AR") at 1557.)) Plaintiff further contends that the transcript is relevant in that it discusses the IEP Team's "involvement of the instructional aid in [Plaintiff's] education," and is not cumulative in that neither the transcript itself, nor a clear transcription of the ALJ's discussion as to the transcript, are in the record. (*Id.* at 11-12.)

Here, the Court notes that, unlike Plaintiff's other two requests, this transcript was the source of some contention below. (AR 1557-58.) Defendant objected to the transcript at the hearing and the ALJ declined to admit it into the record. (*Id.*) Now, Plaintiff asks that the Court admit the transcript on the basis that the original arguments between the parties cannot be accurately deduced given the state of the record. As the Court does not have the benefit of Defendant's briefing on this potentially contentious request, the Court will not now admit the transcript based solely on Plaintiff's papers. Plaintiff may re-file this request

with a hearing date as required under the local rules for any adverse appearances,¹ and the Court will rule on it after hearing full briefing. As such, Plaintiff's request to seal the transcript is also denied as moot.

III. Conclusion

In light of the foregoing reasons, the Court GRANTS, in part, and DENIES, in part, Plaintiff's motions. ECF Nos. 26, 28. The Court ORDERS the following:

1. The Court GRANTS Plaintiff's request to supplement the record with Ms. Sandman-Hurley's classroom observation notes and DENIES Plaintiff's request to seal the notes. ECF No. 27-2.

2. The Court GRANTS Plaintiff's request to supplement the record with, and to seal, the progress reports and work samples from Newbridge. ECF No. 27.

3. The Court DENIES without prejudice Plaintiff's requests to supplement the record with, and to seal, the transcript of Plaintiff's IEP program meeting on September 8, 2017. ECF No. 27-1.

IT IS SO ORDERED.

¹Pursuant to Local Rule 7.1, a Plaintiff cannot file a motion that must be briefed by both parties without first obtaining a hearing date. CivLR 7.1.e.1. Local Rules have the force of law, and a Court may deny a motion for failing to comply with them. *Profl Programs Grp. v. Dep't of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994). Hence, as a precaution, the Court requires that parties always call chambers before filing any motion to ensure compliance with this rule. In the event that a hearing is not necessary, the Court will instruct the party accordingly at that time. The Court exercises its discretion in not applying this rule to Plaintiff's first and second requests given the nature of those documents and the caselaw relevant to their inclusion in the record. *See Lance, Inc. v. Dewco Servs., Inc.*, 422 F.2d 778, 784 (9th Cir. 1970) ("Local Rules are promulgated by District Courts primarily to promote the efficiency of the Court, and that the Court has a large measure of discretion in interpreting and applying them.").

Statutes Cited

20 USC 1415(i)(2)(A)

Cases Cited

458 U.S. 176 I 553 IDELR 656 -- Followed

4 F.3d 1467 I 20 IDELR 354 -- Followed

195 F.3d 1141 I 31 IDELR 130 -- Followed

652 F.3d 999 I 57 IDELR 1 -- Followed

57 IDELR 250 -- Followed