BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
TRACY UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017010024
v.	ORDER FOLLOWING PREHEARING CONFERENCE; ORDERING DISTRICT TO PROVIDE STUDENT EDUCATION RECORDS; GRANTING REQUEST FOR CONTINUANCE; AND SETTING HEARING DATES
PARENT ON BEHALF OF STUDENT.	

On April 4, 2017, a specially-set telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Rodney L. Levin, Attorney at Law, appeared on behalf of Tracy Unified School District. Nicole Hodge Amey, Attorney at Law, appeared on behalf of Parent and Student. The PHC was recorded. The ALJ scheduled the PHC to address whether educational records requested by Student had been received and to address Student's April 3, 2017 Motion to Limit Timelines.

Based upon discussion with the parties, the ALJ issues the following order:

1. Student's Request for Educational Records and Request to Continue Hearing.

Based on the pleadings filed in this matter and as reviewed with the parties during this PHC, Student requested copies of her educational records from Tracy on January 20, 2017. On January 26, 2017, Tracy responded to this request and provided Student with copies of some of her educational records. Student noted that records were missing including requested test protocols.

In Student's March 24, 2017 motion to dismiss Tracy's request for due process hearing, Student identifies numerous records that Student had not yet received including test protocols from the 2010-2011 school year through present. In Tracy's March 28, 2017 opposition to Student's motion to dismiss, Tracy's counsel indicates that relevant test protocols will be produced as evidence at hearing, and that the alleged missing records are unrelated to the hearing issue aside from the recent test protocols underlying its fall 2016 psycho-educational assessment of Student. Tracy's counsel argued that Student had not established that test protocols constitute educational records. Even so, these protocols were emailed to Student's counsel on March 25 and 27, 2017.

During the PHC, Student indicated she has not received all requested records including test protocols for past assessments, school attendance records, service logs, or signed assessment plans. Student acknowledged receipt of the recent test protocols on March 25 and 27, 2017, but indicated that her expert has not had an opportunity to review these records. Tracy's counsel reported that Tracy does not retain past protocols once a new assessment has been completed, and therefore would not be able to produce any further protocols.

Educational Records

To guarantee parents the ability to make informed decisions about their child's education, the Individuals with Disabilities Education Act grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement, and receipt of a free appropriate public education. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) The district must comply with a request to review records without unnecessary delay and before any meeting regarding an individualized education program, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made. (34 C.F.R. § 300.613 (a).) Under California law, the parent shall have the right and opportunity to examine all school records of her child and to receive copies within five business days after the request is made by the parent, either orally or in writing. (Ed. Code, §§ 56043, subd. (n), 56501, subd. (b)(3), 56504.) Parents' due process hearing rights include the right to examine the student's education records. (20 U.S.C. § 1415(b)(1); Ed. Code, § 56501(b)(3).) This access is a hallmark of the procedural protections afforded under the IDEA and a prerequisite to a full and fair administrative hearing.

The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b) [similarly defines pupil record].) The United States Supreme Court in *Owasso Independent School Dist.No.I-011 v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (Owasso), after conducting an analysis of FERPA provisions related to education records, defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." Records are maintained when the agency keeps the records in one place with a single record of access. (*Id*. 534 U.S. 426, 433-434.)

Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ.* (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children's test protocols constitutes a permissible "fair use" pursuant to federal copyright law]; *Letter to Price* (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student's personably identifiable information are

education records and if copyright law conflicts with IDEA's requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].)

Neither the IDEA nor California law provides for prehearing discovery in a due process hearing. Rather, a party to a due process hearing has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subd. (e)(2) and (3).) Further, at least five business days prior to the hearing, the parties have the right to be provided with a copy of all documents and a list of all witnesses and their general area of testimony the parties intend to present at hearing. (Ed. Code, § 56505, subd. (e)(7).)

Student has a right to timely receive copies of her educational records which includes test protocols. Student did not receive all records pursuant to her January 20, 2017 request. Tracy initially failed to provide Student with requested test protocols because it had erroneously determined that these did not constitute educational records. Tracy now maintains that it only has Student's most recent test protocols in its possession. Tracy did not provide Student with the recent protocols until March 25 and 27, 2017, more than two months after the initial request and one week prior to hearing. This delay infringes on Student's ability to meaningfully participate in the due process hearing. Therefore, Tracy is ordered to provide to Student all of her requested education records by April 7, 2017.

Continuance

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

Student established good cause for a continuance. All dates were vacated and the due process hearing shall now be held on April 11 through 13, 2017, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall be held at Tracy's District Office located at 1875 West Lowell Avenue, Tracy, California, 95376. The hearing shall begin at 9:30 a.m., the first day of hearing and at 9:00a.m., all other days, unless otherwise ordered.

2. Notice to Witnesses. The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for

purposes of showing good cause to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

3. Student's April 3, 2017 Motion to Limit Timelines. Student filed a motion to limit timelines with regards to Tracy's issue for hearing. Student clarified that she is pursuing this motion, and that she is seeking an order that Tracy be prohibited from introducing evidence of any events subsequent to December 27, 2016, the date it filed its request for hearing. Tracy shall have until April 6, 2017, to respond to Student's motion. OAH will issue a separate order.

4. Student's Motion for Judicial Notice. On April 3, 2017, Student filed a motion for judicial notice of: (1) her request for due process hearing filed on March 12, 2017, in OAH Case Number 2017030577; and (2) the March 23, 2017 OAH Order Denying Motions to Consolidate and Continue. The ALJ will rule on this request at the time of hearing.

5. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

IT IS SO ORDERED.

DATE: April 4, 2017

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings