BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

MT. DIABLO UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2023010234

OAH CASE NUMBER 2022120477

ORDER DIRECTING DISTRICT TO PRODUCE ADDITIONAL EDUCATION RECORDS

April 28, 2023

On March 13, 2023, the Office of Administrative Hearings, called OAH, issued an Order Granting in Part, Motion to Quash Subpoena made by Mt. Diablo Unified School District, called Mt. Diablo. The Order granted Mt. Diablo's motion to quash Student's subpoena requesting Mt. Diablo produce all weekly reports consisting of narrative portions of the session/service logs from Student's teachers and service providers, which briefly described their sessions with Student, on grounds Student did not demonstrate the relevance or materiality of the requested documents to the issues for hearing, or establish that the documents sought were reasonably necessary for Student to present his case at hearing. However, the Order directed Mt. Diablo to produce to Parent,

pursuant to Education Code sections 56504 and 49061, subdivision (b), all weekly session reports and service logs pertaining to Student prepared by Student's teachers, and providers of occupational therapy and speech and language services, for the period from August 2022 through March 7, 2023, to the extent such documents existed, and were education records as that term is defined by law.

At hearing, Mt. Diablo's attorneys stated on the record that, prior to hearing, Mt. Diablo had produced to Parent all existing education records pertaining to Student. However, Student's one-to-one aide, and speech and language pathology assistant service provider on April 18, 2023 testified that they kept data logs or notes of their daily or weekly sessions with Student and provided those documents to Student's case manager, Courtney Turner, for use in preparing weekly notes provided to Parent with data, graphing and comments concerning Student's performance on goals.

On April 19, 2023, the hearing officer heard argument on whether documents prepared by Student's one-on-one aide, speech and language pathology assistant, and other service providers, and provided to Turner or other supervisors for use in tracking Student's progress on goals were educational records that Mt. Diablo was required to produce to Parent pursuant to Education Code section 56504 and 49061, subdivision (b). Mt. Diablo argued that such documents did not fall within the definition of educational records because Mt. Diablo did not "maintain" them by keeping them with Student's other pupil records in in one place with a single record of access.

Education records under the Individuals with Disabilities in Education Act (20 U.S.C. § 1400 et seq.), or IDEA, are defined by the Family Educational Rights and Privacy Act, called FERPA, to include "records, files, documents, and other materials" that "(i) contain information directly related to a student; and (ii) are maintained by an

educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 300.611(b).)

Pupil or education records do not include records of instructional, supervisory, and administrative personnel that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record." (20 U.S.C. § 1232g(a)(4)(B)(i); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3(b)(1).) The Family Policy Compliance Office within the United States Department of Education, in *Letter to Baker 18* (Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005), clarified that:

> The exception for "sole possession records" is intended to protect "personal notes" used to jog a teacher's memory about a particular matter or event, such as a note reminding the teacher to call a parent or that the student was disruptive during play time. It is not intended to exclude from the definition of "education records" detailed or comprehensive notes that record specific clinical, educational or other services provided to a student, or that record the school official's direct observations or evaluations of student behavior, including the student's success in attaining specified objectives. This is true whether or not the notes are used later to prepare an "official" or "final" progress report or IEP for the student. That is, a parent has a right under FERPA to inspect and review these kinds of detailed or comprehensive notes about a student maintained by a school official and is not required to rely solely on summary conclusions contained only in final or official reports, including a student's IEP.

The Family Policy Compliance Office determined that comprehensive notes of observations and evaluations by a speech therapist, though kept in the sole possession

of the maker, were not used solely as a memory aid and therefore were educational records subject to disclosure, observing that "School officials may not unilaterally remove records from the protections of FERPA through administrative decisions about where certain records are maintained or how they are categorized." (*Ibid*.)

The United States Supreme Court in *Owasso Ind. School District v. Falvo* (2002) 534 U.S. 426 (*Owasso*) determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Court held that the instructional exercise of peer-grading did not implicate a student's privacy rights as the peer-graded class assignment did not constitute an education record. (*Id*. at p. 433.) The Court reasoned that peer-graded papers were not "maintained" by the school or a person acting for the school as that term is used in FERPA's definition of educational records, because they were not kept in a filing cabinet in a records room at the school, or on a permanent secure database, with a single record of access. (*Id*. at pp. 433-434.)

The Court stated its holding was "limited to the narrow point that, assuming a teacher's grade book is an education record, grades on students' papers are not covered by [FERPA] at least until the teacher has recorded them," (*Id*. at p. 427). However, its rationale is sometimes cited for the broad proposition that records regarding a student that are not kept by a registrar or central custodian cannot be education records. This proposition is contrary to the Department of Education's post-*Owasso* determination in *Letter to Baker*, *supra,* that education records include detailed or comprehensive notes that record specific clinical, educational or other services provided to a student, or that record the school official's direct observations or evaluations of student behavior, including the student's success in attaining specified objectives, even if they are not kept by in a central file or database. Also, in 2016, the United States Supreme Court declined to hear a Utah Appellate Court case that interpreted *Owasso* as not requiring a record to

be centrally stored in order to constitute an education record. (*Bryner v. Canyons School Dist.* (Utah Ct. App. 2015) 351 P.3d 852, 859 (*Bryner*), cert. denied (Utah 2016) 366 P.3d 1213 , and cert. denied (2016) 137 S.Ct. 49 [196 L.Ed.2d 53].) Noting that *Owasso* did not address the question of what procedures constituted maintenance of a record once it was in the school's possession, the *Bryner* court determined that a video of a student altercation on campus was an education record.

In addition to *Owasso*, Mt. Diablo cited *BRV, Inc. v. Superior Court* (3d App. Dist. 2006) 143 Cal.App.4th 742 (*BRV*), *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653 (*Tulare*), and OAH's decision in Case number 2014090864 (2015) as supporting its argument that the documents produced by Student's service providers and provided to their superiors for use in tracking and reporting on Student's progress were not education records. These cases are not persuasive, because they are distinguishable from this case, and the determination of the Department of Education in *Letter to Baker 18, supra,* that detailed notes recording services provided to, or observations of, a student are education records. *BRV* concerned an investigative report which, in addition to not being kept in a central location with other education records, was not directly related to the private educational interests of the student and was not something regularly done in the normal course of business. *Tulare* concerned school district e-mails regarding or personally identifying a student that had not been placed in his permanent file. Such emails are distinguishable from the documents at issue here, regularly prepared and forwarded to superiors in the normal course of business to track and prepare notes on Student's progress. OAH's decision in Case number 2014090864 concerned teacher data sheets regarding the student's behaviors and progress on goals, and logs kept by Student's service providers, that were not shared with other personnel.

This Order confirms the hearing officer's order on the record at the hearing on April 19, 2023, directing Mt. Diablo to produce additional education records by uploading to the Case Center evidence database for admission as evidence in this case, any existing documents concerning Student that were prepared in the normal course of business from September 2, 2022 to the filing of Student's complaint on January 10, 2023, by Student's one-to-one aide, speech and language pathology assistant, or other service provider, and forwarded to a superior for use in tracking or reporting on Student's progress on his individualized education program goals. Mt. Diablo was ordered to complete the uploading of documents by close of business on April 28, 2023. At hearing on April 25, 2023, the hearing officer clarified that the order to additional education records to be produced did not include notes concerning Student entered by a service provider into an electronic database for possible use in billing MediCal, where the notes were entered without the service provider knowing whether they would ever be used for billing purposes, and were in fact never used for MediCal billing, or otherwise accessed by any other Mt. Diablo employee for any other purpose, because Parent declined to consent to Mt. Diablo billing MediCal for services.

IT IS SO ORDERED.



Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings