BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: OAKLAND UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017030950 ORDER DENYING MOTION TO DISMISS; GRANTING MOTION TO COMPEL PRODUCTION OF STUDENT RECORDS; AND DENYING MOTION TO CONTINUE WITHOUT PREJUDICE

On March 16, 2017, Oakland filed with the Office of Administrative Hearings a request for due process hearing to defend its December 14, 2016 individualized education program as an offer of a free appropriate public education for Student in the least restrictive environment. Oakland's complaint also identifies as a second issue for hearing, the appropriateness of its underlying November 2016 psycho-educational assessment of Student.

On May 11, 2017, Student filed a Motion to Dismiss Oakland Unified School District's Due Process Hearing Request or, in the alternative, a Motion to Compel Production of School Records and Motion to Continue the hearing. Student's motion is supported by a sworn declaration of her counsel. On May 15, 2017, Oakland filed an opposition to Student's motions supported by a sworn declaration of its counsel. Attached to its opposition is Oakland's April 18, 2017 response to Student's California Department of Education Compliance Complaint (Case No. S-0769-16/17). On May 15, 2017, Student filed a reply.

Motion to Dismiss

APPLICABLE LAW AND DISCUSSION

Pursuant to the purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.), a party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a free appropriate public education to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child,

including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Although OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction, special education law does not provide for a summary judgment procedure, which would require a ruling on the merits of the complaint, prior to an evidentiary hearing. Student failed to provide any legal support for her contention that a failure to produce requested educational records constitutes grounds to dismiss Oakland's due process complaint. Accordingly, Student's motion to dismiss is denied.

Request for Records

On February 20, 2017, Parent requested a complete copy of Student's education records. Oakland asserts it provided Parent with copies of Student's records with the exception of those "which do not meet the definition of pupil records under Federal or California law." On March 7, 2017, Parent informed Oakland that she was additionally requesting all copies of audio recordings of Student's IEP team meetings. That same day, Oakland responded that the IEP team meeting recordings were not maintained by the custodian of records at its central office, so Oakland does not considered them to be part of Student's educational record.

On March 21, 2017, Student's counsel requested a complete copy of Student's educational records. Student's counsel also requested a list of the types and locations of all education records that are collected, maintained, or used by Oakland pursuant to title 34 of the Code of Federal Regulations, section 300.616.

Oakland asserts that on or about March 22, 2017, it sent to Student's counsel the same set of records that it provided to Parent the month prior.[1] After business hours on Friday, May 12, 2017, Oakland's counsel also sent, via electronic correspondence, seven portable document format (pdf) files of Student's education records to Student's counsel. Oakland contends that the records within these electronic files had already been provided to Parent in February 2017 and to her counsel in March 2017. Sometime after March 27, 2017, Student filed a Compliance Complaint with the California Department of Education complaining of Oakland's failure to provide numerous records.

Oakland maintains that it complied with Student's records requests multiple times by providing copies of Student's central file documents within its possession. Oakland asserts it was not responsible for Student prior to the start of the 2016-2017 school year; that it requested records from her prior school, Aspire College Academy in the El Dorado County Special Education Local Plan Area on November 29, 2016; and that it never received a full

[1] On March 27, 2017, someone on behalf of Student's attorney signed the certified mail receipt for these records.

and complete file. According to Oakland, Aspire did not provide the following records from Student's 2014-2015 and 2015-2016 school years: IEP meeting notices; test protocols; procedural safeguards; attendance records; progress reports; report cards; and service logs.

Referencing the unpublished case of *S.A. v. Tulare County Office of Educ.*, (E.D. Cal. Sept. 24, 2009, No. CV F 08-1215 LJO GSA) 2009 WL 3126322, entry of judgment *S.A. v. Tulare County Office of Educ.* (E.D. Cal. October 6, 2009, No. CV F 08-1215 LJO GSA) 2009 WL 3296653, (*S.A.*), and *Owasso Independent School Dist. No. 1-011 v. Falvo*, (2002) 534 U.S. 426, 433 (*Owasso*), Oakland maintains that educational records are only those records maintained by a school district in a permanent file, or those that by law must be kept in a student's permanent file. Oakland argues that Student is requesting documents that do not fall within the definition of education records, including: IEP team meeting audio recordings; rating scales; test protocols; raw behavior data; service logs; records of excused/non-excused absences and tardies; and work samples. Oakland's attorney claims Oakland is not required to produce such records because they are not kept in Student's "regular file." In its response to Student's compliance complaint, Oakland specifically asserts that the following are not educational records: (1) Student's attendance records because Oakland maintains these electronically and does not print them or placed in the student's central file; and (2) Student's report cards because these were given to Parent but were never placed in Student's cumulative file maintained at the school site.[2] Oakland's response to the California Department of Education states that records that are not maintained in a "central file either by the school site, or by the Special Education Custodian of Records … are NOT considered to be a part of the pupil records." Oakland additionally argues that many of the requested records are not relevant to the issues for hearing.

Student asserts that as of May 15, 2017, based on her review of records provided to the extent they are decipherable, she is still missing: Oakland's audio recordings of her IEP team meetings; reports from Oakland IEP team members who were excused from Student's IEP meetings (teacher, occupational therapist, and behaviorist); data collected pursuant to the 2016 behavior intervention plan; rating scales from Oakland's 2016 administration of the Behavior Assessment System for Children and the Autistic Diagnostic Observation System; preschool records; and the following records spanning the 2014-2015 through 2015-2016 school years: all IEP documents; procedural safeguards sent to Parent regarding Student; progress reports; report cards; test protocols; any and all rating scales; attendance records; correspondence such as doctor and parent notes regarding absences and tardies; health and development records; enrollment records; discipline records; emergency behavior reports; services logs; work samples; and emails.

[2] Oakland ignores the Eastern District's directive in *S.A.*, "Educational institutions and agencies are required to maintain certain records. … [R]egulations require an educational agency to maintain a student's final grades, attendance records, and applicable health records." (*S.A.*, *supra*, 2009 WL 3126322 at 5, footnote 2.)

APPLICABLE LAW

Right to Access Education Records

To guarantee parents the ability to make informed decisions about their child's education, the Individuals with Disabilities 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, subd.(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), 56504.)

Definition of Education Records

The IDEA does not have a separate definition of what constitutes "education records," but rather references the definition found in the regulations implementing the Family Educational Rights and Privacy Act of 1974 (FERPA), found at title 20 of the United States Code, section 1232g. The term "education records" as used in the IDEA "means the type of records covered under the definition of 'education records' in 34 CFR part 99." (34 C.F. R. § 300.611(b).) Under FERPA, "education records" is broadly defined to means those records, files, documents, and other materials which contain information directly related to a student; and are maintained by an educational agency or by a person acting for such an agency. (20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3; Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406-01, 12641 (Mar. 12, 1999).)

In 1974, Congress enacted FERPA to ensure students' and parents' rights to access education records and to uphold the privacy of those records. (Pub.L. No. 93–380, Title V, § 513(a) (Aug. 21, 1974) 88 Stat. 571, 572; 120 Cong. Rec. 39862-39866 (1974).) FERPA conditions the receipt of federal funding on an educational agency's ensuring a parent's right to inspect and review her child's educational records and challenge the content of such records; and protecting the confidentiality of such records by preventing their release without parent consent, absent certain enumerated exceptions.[3] (20 U.S.C. § 1232g (a) and (b).) This law governs education records for both general and special education students and its provisions extend to post-secondary institutions.

[3] Permission or consent required of and the rights accorded to parents, transfers to the student upon attaining the age of 18 years or upon attendance at an institution of postsecondary education. (20 U.S.C. § 1232g(d).)

When originally enacted in August 1974, FERPA did not specifically define education records but provided a non-exhaustive list of documents that were to be made available to parents and students. Congress quickly passed the Buckley/Pell Amendment in December 1974 to alleviate confusion by including the current definition. The Amendment defined education records broadly to support the notion that "parents and students should have access to everything in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student." (*Belanger v. Nashua, New Hampshire, School Dist.* (D.N.H. 1994) 856 F.Supp. 40, 49 (*Belanger*) citing 120 Cong. Rec. 39858–39859 (1974).) The sponsors explained,

> An individual should be able to know, review, and challenge all information—with certain limited exceptions—that an institution keeps on him, particularly when the institution may make important decisions affecting his future.... This is especially true when the individual is a minor. Parents need access to such information in order to protect the interest of their child.

(*Ibid*.)

Under FERPA, each education agency shall maintain a record of access, kept with the education records of each student, which shall identify all individuals or entities that have requested or obtained access to a student's records. (20 U.S.C. § 1232g(b)(4)(A).) In California, records for each student shall either be maintained in a central file at the school of attendance, or when records are maintained in different locations, the educational agency shall note in the central file where such other records are located. (Cal. Code Regs., tit. 5, § 433(b); Ed. Code, § 49069 [access procedures shall include notification to the parent of the location of all pupil records if not centrally located].) As such, California specifically anticipates that pupil records will be maintained in various locations.

LEGISLATIVE INTENT

"The two statutes [IDEA and FERPA] serve substantially different purposes. While FERPA's definition of 'education records,' as interpreted by [*Owasso*] is aimed at protecting the integrity and privacy of the central record that follows all students from grade to grade and school to school, the IDEA's 'all records' provision is geared at providing the parents of disabled children with sufficient information to be active, informed participants in the development of their children's IEPs." (*Pollack v. Regional School Unit 75* (D. Me., Apr. 29, 2015, No. 2:13-CV-109-NT) 2015 WL 1947315, at *8 (*Pollack*) [court ordered district to inform student if it withheld any records on the basis of confidentiality after hearing officer found that prehearing subpoena order fully resolved parent's claim] .)

The legislative history of the IDEA suggests that in granting parents an opportunity to examine all records related to their child, Congress intended the phrase "all records," found within title 20 of the United States Code, section 1415(b)(1), to be interpreted broadly. "The phrase 'all records' was added to the IDEA, replacing the phrase 'all relevant records,' to [e]nd [ ] the monopoly of schools on determining the relevance of information about a child

and to require schools to make all records about a child available to the parents." (*Pollack, supra,* 2015 WL 1947315, at *7 citing H.R. Rep. 104–614, at 17 (1996).)

The IDEA's provisions for full parental involvement and requirement that districts provide parents full access to their child's educational records, helps protect the interests of children in need of special education. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891[failure to timely disclose student's records constituted an egregious procedural violation that denied FAPE].) The Ninth Circuit Court of Appeals recently highlighted the need for parent participation at all stages in the development of their child's education program. (*M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 852 F.3d 840.) "Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive." (*Id*. at p. 849.)

LIMITED EXEMPTION FOR RECORDS IN THE SOLE POSSESSION OF THE MAKER

Education records do not include records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute. (20 U.S.C. §1232g(a)(4)(B)(i); Ed. Code, § 49061, subd. (b) [excluding informal notes related to a pupil compiled by school personnel that remain in the sole possession of the maker and are not accessible or revealed except to a temporary substitute].)

Federal regulations further clarify that for a record to be excluded from the definition of an education record pursuant to the "sole possession of the maker" exclusion, that record must be used only as a personal memory aid. (34 C.F.R. § 99.3(b)(1).) As clarified by the United States Department of Education,

> FERPA's sole possession exception is strictly construed to mean 'memory-jogger' type information. For example, a memory-jogger is information that a school official may use as a reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals.

(Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406-01, 12641 (Mar. 12, 1999).)

The Family Policy Compliance Office within the United States Department of Education, in finding that a district had violated FERPA, determined that the sole possession exception was not intended to exclude detailed notes that record direct observations or evaluations of student behavior. (*Letter to Baker* (Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005 [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].) "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 exception for "sole possession records" 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.

(*Letter to Baker* (Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005).) While this letter is not binding authority, it is persuasive, and as an opinion by the administrative agency in charge of enforcing FERPA, it is entitled to deference. (See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., (1984) 467 U.S. 837 ["We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."].)

THE UNITED STATES SUPREME COURT'S *OWASSO* DECISION

The *Owasso* decision is often cited for the broad proposition that records regarding a student that are not maintained by a registrar or central custodian cannot be education records. In *Owasso*, the Supreme Court specifically 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. The Court announced with regards to this decision,

> "The instant holding is 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."

(*Owasso, supra*, 534 U.S. 426, 427.)

In reaching its holding that peer-graded papers were not maintained by the school or a person acting for the school, the Court relied on the ordinary meaning of the word "maintain" as "to keep in existence or continuance; preserve; retain." (*Owasso, supra*, 534 U.S. 426, 433, citing Random House Dictionary of the English Language 1160 (2d ed.1987).) The Court reasoned, "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database." (*Ibid*.) The Court opined that FERPA requirements that educational institutions maintain a record of those who have requested access to a student's education records and their reasons for doing

so, and keep this record of access with the student's education records, "suggest Congress contemplated that education records would be kept in one place with a single record of access." (*Id*. at 434; 20 U.S.C. § 1232g(b)(4)(A).) FERPA conditions federal funding on an institution's compliance with the requirement that it provide parents with a hearing at which they may contest the accuracy of their child's education records. (*Id*. at 435, 20 U.S. C. § 1232g(a)(2).) Given this requirement, the Court held, "It is doubtful Congress would have provided parents with this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes." (*Owasso, supra,* 534 U.S. 426, 435.)

In 2008, the United States Department of Education proposed new regulations to implement the Supreme Court's holding in *Owasso*. These regulations "clarified that peer-graded papers that have not been collected and recorded by a teacher are not considered maintained by an educational agency or institution and, therefore, are not education records under FERPA." (Family Educational Rights and Privacy, 73 Fed. Reg. 15574-01, at p.15574 (Mar. 24, 2008).) Accordingly, education records do not include grades on peer-graded papers before they are collected and recorded by a teacher. (34 C.F.R. § 99.3(b)(6).)

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].) In determining that a video of a student altercation on campus was an education record, the Utah Court reasoned,

> *Owasso* did not address the question of what procedures constitute maintenance once the school is already in possession of a record. Thus, we do not read *Owasso* to impose a strict requirement that records must be kept in a central location such as a filing cabinet to qualify as an education record as defined in FERPA. And we see no basis in the statutory language of FERPA to impose such a strict limitation.

(*Ibid.*)

Varieties of Educational Records

California uses the term "pupil record" which is defined as "any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means." (Ed. Code, § 49061, subd. (b).)[4] A "record" means any information recorded in any way,

[4] "Directory information" includes the pupil's name, address, telephone number, date of birth, email address, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and

including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. (34 C.F.R. § 99.3; See 20 U.S.C. § 1232g(b)(4)(A)[records, files, documents, and other materials].) This broad description of the manner of recordation includes audio recordings such as those made of Student's IEP team meetings.

California State regulations more specifically define pupil record as "information relative to an individual pupil gathered within or without the school system and maintained within the school system, regardless of the physical form in which it is maintained. (Cal. Code Regs., tit. 5, § 430(d).) Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record. (*Ibid*.) The state regulations further define "mandatory permanent pupil records" as those a district is required to compile and maintain in perpetuity; "mandatory interim pupil records" which a district must compile and maintain for a period of time; and "permitted pupil records" which districts may maintain for appropriate educational purposes. (Cal. Code Regs., tit. 5, § 420(d)(1)-(3); see Cal. Code Regs., tit. 5, § 432 listing examples of each type of specified record.)

In California, schools are required to record and maintain student enrollment, attendance, and absence records. (Ed. Code, §§ 44809, 46000; Cal. Code. Regs. tit. 5, §§ 400, 401, 420 [verifiable absences for illness; medical, dental or optometry appointments; quarantine; or attending an immediate family member's funeral are allowable as attendance].) Mandatory interim records include: health information; participation in special education programs; grade reports and progress notes; and results of standardized testing within the preceding three years. (Cal. Code Regs., tit. 5, § 432(b)(2).) Clearly grades are mandatory records which a district must maintain. (*Johnson v. Board of Education* (1986) 179 Cal.App.3d 593, 599 [Education Code section 49066 governs procedures for changing a grade, rather than section 49070 which specifies procedures for changing a record.].) Documents relating to students' grades, evaluations, and academic performance are undoubtedly "education records" within the meaning of FERPA. (*Ragusa v. Malverne Union Free School Dist.* (E.D.N.Y. 2008) 549 F.Supp.2d 288, 293.) Typical of education records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, at pp. 751-754 [finding that an investigative report of a superintendent's alleged misconduct was not an education record].) Permitted pupil records include counselor and teacher ratings; disciplinary data and notices, and reports of behavior patterns; and standardized test results older than three years. (Cal. Code Regs., tit. 5, § 432(b)(3).)

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 (*Newport-Mesa*)[providing parents copies of their children's test

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awards received, and the most recent previous public or private school attended by the pupil. (Ed. Code, § 49061, subd. (c).)

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].) Parents have the right to inspect instructional materials and assessments including teacher's manuals. (Ed. Code, § 49091.10, subd. (a).)

Education records do not include law enforcement records maintained by a law enforcement unit of the educational agency. (20 U.S.C. § 1232g(a)(4)(B)(ii). However, disciplinary records are education records. (Cal. Code Regs., tit. 5, § 432(b)(3).) The Sixth Circuit Court of Appeal in *U.S. v. Miami University* (6th Cir. 2002) 294 F.3d 797, 812 (*Miami*), found student disciplinary records to be protected educational records based on the plain language of FERPA. "Notably, Congress made no content-based judgments with regard to its 'education records' definition." (*Ibid*.) Further, FERPA enumerates several specific situations wherein student discipline records may be released. For instance, the results of disciplinary proceedings may be released to alleged victims of certain crimes (20 U.S.C. § 1232g(b)(6)(A).) This exemption and others "clearly evolve from a base Congressional assumption that student disciplinary records are 'education records' and thereby protected from disclosure." (*Miami, supra,* 294 F.3d 797, 812–13*; Rim of the World Unified School Dist. v. Superior Court* (2002) 104 Cal.App.4th 1393, 1397–98, as modified on denial of rehg. (Jan. 30, 2003) [holding that FERPA preempts California Education Code section 48918 which requires public disclosure of student expulsion records].)

Further, the Department of Education concluded, "Based on the broad definition of 'education records' which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are 'education records' subject to FERPA." (Family Educational Rights and Privacy, 60 Fed. Reg. 3464-01, 3465 (Jan. 17, 1995).) The Department reiterated this in its 2008 regulations, "FERPA permits school officials to disclose any and all education records, including health and disciplinary records, to another institution where the student seeks or intends to enroll." (Family Educational Rights and Privacy, 73 Fed. Reg. 15574-01, 15581 (March 24, 2008).)

The statutory definition of education records protects records that are maintained by a party acting for the agency or institution. (20 U.S.C. 1232g(a)(4)(A)(ii); Family Educational Rights and Privacy, 73 Fed. Reg. 15574-01, 15579 (Mar. 24, 2008).) Records maintained by a party acting for an educational agency that are directly related to a student are education records subject to all FERPA requirements; this includes any new student records created under an outsourcing agreement that are maintained by the outside service provider. (Family Educational Rights and Privacy, 73 Fed. Reg. 15574-01, 15579 (Mar. 24, 2008).) Given these outsourcing provisions and Parent's right to monitor Oakland's compliance with delivering and implementing Student's IEP services, Oakland service logs detailing services provided to Student pursuant to her IEP, constitute education records.

A student's writing sample, daily work, and pretests are not educational records. (*K.C. v. Fulton County Sch. Dist.* (N.D. Ga. June 30, 2006, No. 1:03-CV-3501-TWT) 2006 WL 1868348, p. 10; See *Owasso, supra*, 534 U.S. 426, 435 [peer-graded class assignment is not an educational record].) However, parents and students are not left without access to such documents as most are sent home with the student and those that remain at the school or with the district or teacher, are subject to a subpoena duces tecum, upon a showing of reasonable necessity. (Cal. Code Regs., tit. 5, § 3082(c)(2).)

THE NEW PAPERLESS REALITY

Effective January 2015, California Assembly Bill 1584 amended the Education Code to include a provision reflecting the changing reality of moving to a paperless world. Specifically, educational agencies may, in accord with specific requirements, contract with a third party to provide services, including cloud-based services, for digital storage of pupil records or to provide digital educational software that authorizes the third party to access and store pupil records. (Ed. Code, § 49073.1, subd. (a).) In this context of third party contracts for the digital storage of pupil records, such records are defined as: "any information directly related to a pupil that is maintained by the local educational agency; or any information acquired directly from the pupil through the use of instructional software or applications assigned to the pupil by a teacher or other local educational agency employee." (Ed. Code, § 49073.1, subd. (d)(5)(A).)

ELECTRONIC CORRESPONDENCE

In *S.A*, a student requested electronic copies of all school district emails that identified him, arguing that all such emails are "maintained" in Tulare County Office of Education's electronic mail system, including individual recipient inboxes. In response, Tulare provided copies of emails that related to the student and that had been printed and placed in his permanent file. Referencing the FERPA definition of education record, the federal court for the Eastern District of California held that an email is an education record only if it personally identifies the student and is maintained by the educational institution. (*S.A., supra*, 2009 WL 3126322 at p.5.)

Relying on *Owasso*, the Eastern District found that emails concerning the student that had not been placed in his permanent file were not educational records as defined under FERPA, as they were not "maintained" by the school district; therefore, the district was not required to produce them under a request for student records under the IDEA. (*S.A., supra*, 2009 WL 3126322. at p7.) "Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. (*Ibid*.) Notably, in *S.A*., there was no evidence that Tulare maintained any student records electronically. (*Ibid*.) In a separate footnote, the Eastern District specifies with regards to its holding, "This interpretation does not preclude or prohibit an educational institution from maintaining education records on an electronic database; however, questions related to electronic maintenance of records are inapplicable to the instant case. The non-controverted evidence demonstrates that [Tulare] only maintains records in hard-copy format. Thus, the

Court does not reach the question of whether an educational institution should provide electronic records in their native file format if they are maintained electronically." (*Ibid*.)

DISCUSSION

As a preliminary matter, Student correctly notes that she does not carry the burden to specify the relevance of the requested records.[5] Rather, the law requires Oakland to produce all education records within five business days of the request, and prior to any hearing in this matter. The legislative intent behind and the purpose of the IDEA and FERPA, favor the application of a broad definition of education records. Broadly construing the definition of education records effectuates Parent's and Student's procedural safeguards under the IDEA and ensures the meaningful participation of Parent once fully informed of the content of Student's records.

The world has changed from the days of printed materials and paper files. We are now in an electronic, paperless world as recognized by new court procedures, from electronic filing requirements to regulations regarding digital storage of records. Oakland itself acknowledges this new reality in terms of its electronic maintenance of Student's attendance records. Oakland's arguments that because it maintains Student's attendance records electronically, and does not place her report cards in her cumulative file at the school site, the records of her attendance and grades are not education records, defies logic. Oakland, in essence, argues that it decides what constitutes an education record based on where it chooses to store a particular item. According to Oakland, any record it chooses not to print and place in Students' central file at the school site or her file with the special education custodian of records cannot be considered an education record and, therefore, is not subject to a records request. This is contrary to the law and a misapplication of *Owasso*.

The United States Supreme Court spoke to the requirement that a document related to a student must be *maintained by or on behalf of a district* in order to constitute an education record. "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." (*Owasso, supra*, 534 U.S. 426, 433.) "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms." (*Id*. at 435.) *Owasso* does not require that education records be printed out nor did it dictate a particular method of storage. Such a requirement would allow a school district to unilaterally determine what constitutes an education record based on where that district chooses to store such records. This was not the intent of Congress. Indeed, the definition of

[5] See *Student v. Compton Unified School Distric*t (Super. Ct. L.A. County, 2007, No. BC 363711). Judge Ann I. Jones' Order of Remand to OAH found Compton's failure to produce records resulted in a denial of FAPE and required de novo review following records production.

education records specifically includes those records that are maintained by individuals acting for the educational institution. (20 U.S. C. § 1232g(a)(4)(A)(ii).

Further, the California Education Code and State regulations specifically acknowledge the reality of both a digital world and maintenance of records in multiple locations. When records are maintained in a location other than a central file for the student at their school of attendance, the district shall note in the central file where such other records are located. (Ed. Code., § 49069; Cal. Code. Regs., tit. 5, § 433(b).)

California's Education Code clearly defines a pupil record as any item of information related to Student that is either maintained by Oakland or required to be maintained by an employee in the performance of her duties. (Ed. Code, § 49061, subd. (b).) Oakland is required to maintain records of Student's attendance and grades. (Ed. Code, §§ 44809, 46000; Cal. Code. Regs., tit. 5, §§ 400, 401, 420, 432(b).) As such, Oakland will be ordered to produce these records.

Given FERPA provisions that allow parents and students to challenge the contents of education records in a hearing, it is unlikely that Congress intended for every informal email regarding a student to be treated as an education record. The case at hand is distinguishable from *S.A.* in that Oakland acknowledges in its April 2017 response to Student's Compliance Complaint, a practice of maintaining at least some education records electronically, specifically Student's attendance records. Even so, given Student's failure to specify the nature of the emails sought and the difficulty of establishing that any particular email is maintained as an education record, Oakland will not be ordered to produce unspecified emails in response to Student's records request.

Similarly, Student has not established that her work samples constitute education records. Oakland will not be required to provide these pursuant to Parent's records request.

Oakland's audio recordings of Student's IEP team meetings do constitute education records, and Oakland will be ordered to produce these. This method of recordation is clearly within the federal regulations which include, "handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." (34 C.F.R. § 99.3.) Such audio recordings are an alternate format memorializing the discussions and information considered by the IEP team in devising Student's educational program. These recordings are directly related to Student and were made by and are in the possession of Oakland. As such, they are maintained by Oakland, regardless of where Oakland has chosen to store them, and constitute education records.

Oakland's contention that test protocols are not education records is directly contrary to the holding of *Newport-Mesa* as discussed above. Student's test protocols and rating scales are education records to the extent they are personably identifiable to Student and Oakland will be ordered to produce these.

As discussed above, detailed notes maintained by Oakland or an official on behalf of Oakland, recording services provided to Student or that record observations or evaluations of her behavior, including her progress, whether or not used to prepare a report or IEP does not fall under the sole possession exception as it is not considered a mere memory jogger. (*Letter to Baker*; 64 Fed. Reg. 12406-01, 12641.) Therefore, data recorded by Oakland of Student's behaviors, whether in preparation for a behavior assessment report or a behavior plan, also constitutes an education record. Further, logs prepared by Oakland as to services rendered to Student qualify as education records. This conclusion is additionally supported by the regulations regarding outsourcing services; the fact that education records may be maintained on behalf of a district or by an employee in the performance of her duties; the purpose of service logs which extend beyond a "memory jogger," and Parent's right to monitor and enforce the provision of Student's IEP services. To the extent Oakland's related service providers created logs detailing services rendered to Student, Oakland is required to provide these to Student after redacting the names of any other students, to the extent such logs reference other students.

Based on the legal conclusions detailed above and the analysis herein, the following classes of records, specific to Student, constitute education records which Oakland is required to provide to Parent pursuant to her request: all audio recordings of Student's IEP team meetings; IEP documents; written notes or reports from Oakland's excused IEP team members regarding their input to the IEP team; procedural safeguards sent to Parent regarding Student; Student's preschool records to the extent Oakland has these in its possession; school enrollment records; records of Student's attendance and absences including notes as to excused tardies or absences; report cards, academic and goal progress reports; health records; discipline and behavior records; testing protocols and rating scales; and service logs. Parent has requested, and is to be provided with, all such records from the 2014-2015, 2015-2016, and 2016-2017 school years. Oakland is not required to provide to Parent copies of Student's work samples or emails regarding Student. However, this does not preclude Student from asking for these documents using a subpoena duces tecum.

Despite Oakland's claim to the contrary, its April 2017 letter response to Student's Compliance Complaint does not "constitute evidence" that it complied with Student's records request. Given Oakland's erroneous claims that many classes of records (attendance, grades, test protocols) are not education records, Oakland will be required to make a diligent search and reasonable inquiry in an effort to locate the records requested and ordered to be produced herein, and to produce the specific items ordered herein along with a declaration from one of its employees attesting to the fact that a diligent search and reasonable inquiry was made in an effort to locate the items and that these have been provided to Student's attorney, or that Oakland is unable to provide the item and the reason it cannot. To the extent Oakland contends that certain records are missing because Student's prior school did not provide them, Oakland will need to address this in its declaration, as well as if any records have been destroyed as ordered below.[6] Further, Oakland will need to provide to Student a

[6] No finding is made herein as to whether Oakland's decision to wait three months prior to requesting Student's file from her prior school of attendance was reasonable.

list of the types and locations of all education records that are collected, maintained, or used by Oakland pursuant to title 34 of the Code of Federal Regulations, section 300.616.

Continuance

Student requests a continuance to afford Parent, counsel, and Student's expert an opportunity to review all educational records. Student will be prejudiced if she is not afforded sufficient time to review the records once they are properly produced. As such, she is requesting a 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).)

At the prehearing conference on May 15, 2017, the undersigned ALJ continued all dates in this matter to allow time to rule on Student's pending motions. This matter is currently pending hearing on June 13-15, 2017, with a prehearing conference on June 2, 2017. The undersigned is inclined to grant a further continuance in light of this Order to allow Student sufficient time to receive and review the records that Oakland has been ordered to produce. However, the parties are encouraged to work together to see if they can agree to a continuance date, and submit a joint request for continuance with proposed agreed-upon dates. If they are not able to agree, Student shall file a further motion for continuance with proposed hearing dates in light of this Order.

ORDER

1. Student's request to dismiss Oakland's due process hearing request is denied.

2. Student's motion to compel records is granted as to all records, identifiable o Student, with the exception of work samples and email correspondence. Oakland is ordered to produce the following: (a) all audio recordings of Student's IEP team meetings; (b) IEP documents; (c) written notes or reports from excused IEP team members regarding their input to the IEP team; (d) procedural safeguards sent to Parent regarding Student; (e) Student's preschool records to the extent these are in Oakland's possession; (f) all enrollment records; all records of Student's attendance and absences including notes as to excused tardies or absences; (g) report cards, academic and goal progress reports; (h) health and development records; (i) discipline and behavior records including behavior data and emergency behavior reports; (j) testing protocols including all rating scales; and (k) all

service logs. Parent has requested, and is to be provided with, all such records from the 2014-2015, 2015-2016, and 2016-2017 school years. These records must be provided to Student's counsel no later than 5:00 p.m. on June 1, 2017.

3. Oakland is ordered to prepare and provide to Student's counsel, a declaration under penalty of perjury by one of its employees specifying when it requested Student's prior educational file from Aspire; what it specifically requested; what Oakland received in response and when; what it did not receive; and whether it made any subsequent attempts to obtain further records from Student's education file. Oakland's declaration shall further attest to the fact that Oakland made a diligent search and reasonable inquiry in an effort to locate the specific records ordered to be produced, and that these have been provided to Student's attorney or, for each document or category of documents that Oakland is unable to provide, Oakland shall declare the reason it cannot provide the document. For those documents Oakland declares it is unable to provide, the declaration must state the name and address of anyone believed to have the document, or the date and method of destruction of any document. This declaration must be provided to Student's counsel at the same time as the production of records and not later than 5:00 p.m. on June 1, 2017.

4. Oakland is order to provide Student a list of the types and locations of all education records that are collected, maintained, or used by Oakland supported by a declaration under penalty of perjury of one of its employees responsible for record retention. The list and declaration shall be provided to Student's attorney no later than 5:00 p.m. on June 1, 2017.

5. Student's request for a continuance is denied without prejudice.

DATE: May 24, 2017

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings