BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015080957 ORDER DENYING MOTION TO COMPEL PRODUCTION

On August 21, 2015, Parent on behalf of Student filed a due process hearing request (complaint) naming Long Beach Unified School District.

On September 23, 2015, Student filed a motion for production of educational records. On September 29, 2015, District filed an opposition. On September 29, 2015, Student filed a reply.

APPLICABLE LAW

Parents of children with exceptional needs may request copies of their child's educational records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code § 56504 (Section 56504).) The school district must respond to the request, whether it is made orally or in writing. (*Id.*) This right is one of the procedural safeguards established and maintained by the State in accordance with the Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq.). (Ed. Code, § 56500.1, subd. (a).) The implementing regulations for the IDEA provide that educational agencies must permit parents to inspect and review educational records relating to their children, which expressly includes "[t]he right to have a representative of the parent inspect and review the records." (34 C.F.R. § 300.613(a) and (b)(3).)

The IDEA's procedural safeguards with respect to the provision of a free appropriate public education include the right to be represented by counsel during due process proceedings (20 U.S.C. § 1415 (h)(1).

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act to include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "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).) Education records do not include "records of instructional, supervisory, and administrative personnel…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), see also Ed. Code, § 49061, subd. (b) [which excludes from the definition of "pupil records" any "informal notes related to a pupil...that remain in the sole possession of the maker and are not revealed to any other person except a substitute."].)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo)*, after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their reasons for doing so." (*Falvo, supra,* 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Id*.) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar…" (*Id*. at pp. 434-435.)

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV*), when determining whether the report of an investigation of alleged harassment by a principal was an education record, the Court of Appeal conducted an analysis of the "scant" judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that "the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*Id.* at pp. 751-754.) The Court of Appeal then found that the investigation report, "which was not directly related to the private educational interests of the student," was not an education record, "as the report was not something regularly done in the normal course of business," and "was not the type of report regularly maintained in a central location along with education records…in separate files for each student." (*Id.* at p. 755.)

In *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 (*S.A*.), the district court found that documents such as school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the emails the student requested had not been placed in his permanent file, and were therefore not "maintained" by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

DISCUSSION

Student seeks an order compelling District to produce:

> (1) Copies of any documentation of the facsimiles, emails, phone calls or other communications to [Student's] parent, [Parent], during August and September 2015 regarding transportation for [Student] to his stay-put educational placement, Vista Del Mar;
>
> (2) Copies of any documentation of the facsimiles, emails, phone calls or other communications between Vista Del Mar and/or its staff regarding securing [Student's] educational services at Vista Del Mar for the 2015-2016 school year.

District responded, by letter dated September 16, 2015, stating that it would not treat counsel's letter as a FERPA release, and requiring execution of a separate FERPA release by Parent. District cited to *Letter to Longest*, 213 IDELR 173 (OSEP 1988) and *Letter to Segura*, 113 LRP 7194 (FPCO October 2, 2012) as prohibiting the release of education records without written parent consent.

The parties' extensive arguments and counter-arguments concerning whether counsel may or may not consent on behalf of Student to the release of educational records need not be addressed at this time, because there has been no showing that the requested documents, such as telephone logs and emails, are education records. Of the two categories of documents listed above, the second category is documents between school personnel, which may not be educational records. The first set of documents, communications between the parties themselves, may fall into two categories – educational records which parents are entitled to, or documents otherwise relevant to the dispute, which could be subpoenaed for the due process hearing.

As currently worded, however, the requested records are not limited to records placed in a student's permanent file in the normal course of business, and as such the request is overbroad.

Accordingly, the motion to compel is denied.

IT IS SO ORDERED.

DATE: October 22, 2015

/s/

JUNE R. LEHRMAN
Presiding Administrative Law Judge
Office of Administrative Hearings