BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. VACAVILLE UNIFIED SCHOOL DISTRICT AND SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016031019 ORDER ON WAIVER OF PSYCHOTHERAPIST-PATIENT PRIVILEGE

The parties are currently in hearing on issues raised in Student's first amended complaint, filed on August 11, 2016. The issues raised in Student's first amended complaint include whether Vacaville Unified School District and Sacramento City Unified School District denied Student a free appropriate public education by failing to offer or provide Student an appropriate placement and failing to offer Student appropriate mental health services, among other issues.

At hearing, Student, as well as Sacramento, called Stacie Martinez to testify. Ms. Martinez has been a school counselor at Sierra School in Sacramento for the last three years. Ms. Martinez has been a licensed marriage and family therapist since January 2009. During Ms. Martinez's testimony, Student's counsel questioned Ms. Martinez about an incident at school involving Student. Student's counsel asked Ms. Martinez if she remembered the incident and about the subsequent discussion she had with Student regarding the incident. Ms. Martinez was unwilling to discuss the specifics of her confidential communications with Student, and asserted the psychotherapist-patient privilege. The ALJ requested briefing on the issue before ruling on whether the information sought by Mother on behalf of Student was protected by the psychotherapist-patient privilege, and, if so, whether the privilege could be waived by Mother. Student's counsel submitted timely briefing on the issue. Respondents did not brief the issue.

A psychotherapist is defined as a person who is, or reasonably believed by the patient to be, a person licensed as a marriage and family therapist under the Business and Profession Code. (Evid. Code, § 1010, subd. (e).) The psychotherapist-patient privilege provides that a patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by: (a) the holder of the privilege, (b) a person who is authorized to claim the privilege by the holder of the privilege, or (c) the person who was the psychotherapist at the time of the confidential communication. (Evid. Code, § 1014, subds.

(a)-(c).) The "holder of the privilege" is the patient when he has no guardian or conservator, a guardian or conservator of the patient, or the personal representative of the patient if the patient is deceased. (Evid. Code, § 1013, subds (a)-(c).) The person who was the psychotherapist at the time of the confidential communication cannot claim the privilege if there is no holder of the privilege in existence or if she is otherwise instructed by a person authorized to permit disclosure. (Evid. Code, § 1014, subd. (c).) The psychotherapist who received or made a communication subject to the privilege shall claim the privilege whenever she is present when the communication is sought to be disclosed and is authorized to claim the privilege under Evidence Code section 1014(c). (Evid. Code, § 1015.)

Here, Mother is acting on behalf of Student. Thus far, Student has not appeared at hearing. Mother is seeking to waive the privilege on behalf of Student, as she is the party who filed the hearing to challenge the appropriateness of the mental health services offered by the respondents.

Student has the privilege of preventing another from disclosing a confidential communication between Student and Ms. Martinez, because Ms. Martinez, who was the psychotherapist at the time of the confidential communication, has claimed the privilege. Student is the only holder of the privilege. The evidence has not established whether Student, himself has waived the privilege or has asserted the privilege. Mother is not the holder of the privilege, as she is not the patient, the guardian or conservator of the patient, and not the personal representative of the patient, as the patient is not deceased. (See Evid. Code, § 1013.) Therefore, Mother cannot seek to waive the privilege by asserting she is the holder of the privilege.

However, several exceptions to the psychotherapist-patient privilege exist. Relevant to this matter is the patient-litigant exception. (See Evid. Code, § 1016, subds (a)-(d).) Evidence Code section 1016 provides in relevant part, "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by (a) The patient; [or] (b) any party claiming through or under the patient. . . ."[1] (*Ibid*., see also *San Diego Trolley, Inc. v. Super. Ct.* (2001) 87 Cal.App.4th 1083, 1092 ("Of course the psychotherapist-patient privilege may be waived when the patient voluntarily discloses otherwise confidential information or tenders her mental state as an issue.") A waiver of the privilege that occurs by "virtue of a claim asserted by a patient," 'must be construed not as a complete waiver of the privilege but

[1] Similar language regarding tendering an issue concerning the condition of the patient by "any party claiming through or under the patient" appears as an exception to the physician-patient privilege. (Evid. Code, § 996.) The California Court of Appeal explained that the language derived from rule 27(4) of the Uniform Rules of Evidence, drafted in 1953 by the National Conference of Commissioners on Uniform State Laws, "and is characterized by the California Law Revision Commission as applying to 'a plaintiff in the patient's shoes.'" (*Jones v. Super. Ct* (1981) 119 Cal.App.3d 534, 545 (quoting 6 Cal. Law Revision Com. Rep. (1964) p. 413).)

only as a limited waiver concomitant with the purposes of the exception.'" (*Id*. at p. 1093 (quoting *In re Lifschutz* (1970) 2 Cal.3d 415, 435).)

Mother, through and under Student, has brought a complaint against respondents under 20 U.S.C. § 1415(b)(6), alleging facts and raising issues concerning the mental condition of Student. Mother has stepped in the Student's shoes in this matter. Accordingly, the psychotherapist-patient privilege is waived. Going forward, all parties may be permitted to inquire into confidential communications between Student and Ms. Martinez directly relevant to the nature of the mental condition that Student has tendered in his pleadings.

The California Supreme Court has recognized "the public interest in supporting effective treatment of mental illness and . . . the consequent public importance of safeguarding the confidential character of psychotherapeutic communication." (*People v. Wharton* (1991) 53 Cal.3d 522, 555 (quoting *Tarasoff v. Regents of Univ. of Cal*. (1976) 17 Cal.3d 425, 440.) The Senate Committee on Judiciary commented on the privilege by noting that "Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. [U]nless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make a full disclosure upon which diagnosis and treatment . . . depends." (Sen. Judiciary Com. com., 29B West's Ann. Evid. Code (1995 ed.) § 1014, p.333.)

Even though the privilege is waived, "any disclosure of confidential or private information must be supported by a showing of compelling need and accomplished in a manner which protects, insofar as is practical, the patient's privacy." (*San Diego Trolley, Inc. v. Super. Ct., supra*, 87 Cal.App.4th at p. 1093.) Mother has not yet established a compelling need for the information sought.

On November 8, 2016, the next hearing day, Student's counsel must be prepared to establish a compelling need for the specific information sought from Ms. Martinez about the incident that occurred on January 14, 2016.[2] Specifically, counsel should be prepared to address why the potential harm that may be caused by disclosure of the confidential communications to Mother and the other parties does not outweigh its probative value, especially in light of the possibility that the confidential communications are about Mother.

[2] To the extent that any party intends to inquire into relevant confidential communications between Student and Ms. Martinez that have been deemed waived, the inquiring party must be prepared to establish a compelling need for the information sought before the evidence will be admitted.

Additionally, Student's counsel should be prepared to be heard on whether a compelling need exists for disclosure of the confidential communications when other evidence, such as Ms. Martinez's diagnostic impressions and/or the therapeutic methods, techniques, and interventions she applied during therapy sessions, can be admitted at hearing to meet Student's burden of proof on the relevant issues.

IT IS SO ORDERED.

DATE: November 7, 2016

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DENA COGGINS
Administrative Law Judge
Office of Administrative Hearings