BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENTS ON BEHALF OF STUDENT,

and

CAPISTRANO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023040419

OAH CASE NUMBER 2023010351

ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

SEPTEMBER 25, 2023

On September 12, 2023, Student moved the Office of Administrative Hearings, called OAH, to compel Capistrano Unified School District to produce records Student's attorney originally requested from Capistrano on December 6, 2022. On September 15, 2023, Capistrano opposed Student's motion. On September 18, 2023, Student filed a reply.

On December 6, 2022, Student requested from Capistrano his "pupil records." Student stated the request was made under Education Code section 56504, to be produced within five days. Student also stated the use of the term "pupil records" was intended as defined by Education Code section 49061, subdivision (b), and included a quotation of the statute:

> Any item of information directly related to an identifiable pupil, other than directory information, which 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.

But Student added to the request by stating his request for "pupil records" includes, but is not limited to, a request for the following categories of records:

1. Cumulative or permanent file
2. Correspondence including emails and memoranda
3. Assessment plans and/or referrals for assessment
4. Signed consents for assessments
5. Assessments and/or evaluations (including, without limitation, all protocols, test forms and instructions used by the assessor or examiner)
6. Written evaluations or reports concerning assessments and evaluations, and/or student study team reports
7. Notices of IEP meetings
8. IEP documents (including all addendums thereto, if any)
9. Copies of tape recordings made during IEP meetings
10. Discipline and/or behavior records

11. Enrollment and attendance records
12. Grade and progress reports
13. Medical records
14. Release of information forms
15. School work, including classroom work, homework, tests and examinations
16. Data records, including any summaries of data, regarding progress on goals, behavior intervention and/or support plans
17. Copies of all applicable NPS/NPA Individual Services Contracts as well as applicable Master Contracts
18. All documentation concerning his ABA program including, but not limited to, data program notes, observation notes, meeting notes and log book
19. Meeting notes and agenda or other documentation

Student further requested that if Capistrano contended any document mentioning Student was not a "pupil record," to provide a log of each and every document that was not produced, identifying the date, author, and general subject matter of the "alleged non-pupil record."

Student's motion asserts Capistrano produced some documents in response to the December 6, 2022 request, but other documents expected to exist – such as protocols for assessments Capistrano administered in 2021, among others – were not included in the production. On August 31, 2023, Student again requested Capistrano produce documents responsive to Student's December 6, 2022 request.

On August 22, 2023, Student sent a different records request to Capistrano, and by September 8, 2023, Capistrano produced some records. But Student still wanted some documents he believed were required by the December 6, 2022 request. On September 8, 2023, Student again renewed the request for responsive documents.

Capistrano opposes Student's motion to compel production of documents by admitting there are some documents that meet the definition of "school records" as the term is used in Education Code section 56504 Capistrano had not provided Student and representing it was working diligently to prepare and provide them to Student. But Capistrano argues many of the types of documents Student's December 6, 2022 request specified are not "pupil records" as defined by Education Code section 49061, subdivision (b), and therefore Capistrano was not required to provide copies of them to Parents despite Student's request.

The legislative and regulatory framework of special education due process proceedings accord prehearing access to two types of documents:

- parents have the right to request and receive the pupil's school records within five business days at any time (Ed. Code, § 56504), and
- the parties are entitled to receive copies of all the documents the educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code, § 56505, subd. (e)(7).)

All other categories of documents may be obtained through subpoena duces tecum, for production at the due process hearing. (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2); see 20 U.S.C. § 1415(h); see also Ed. Code, § 56505, subd. (e).)

Education records under the Individuals with Disabilities Education Act, called IDEA, are defined by the federal Family Educational Rights and Privacy Act, called FERPA, 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); 34 C.F.R. § 99.3.)

Pupil or 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); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3.)

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." (*Ibid*.) 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, when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, 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, stating "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 investigative 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. Oct. 6, 2009) 2009 WL 3296653, 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 education records as defined under FERPA. The court, citing *Falvo*, stated Congress contemplated that education records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not "maintained" by the school district, the emails were not education records and the school district was therefore not required to produce them under a request for student records under the IDEA.

Most recently, the Ninth Circuit Court of Appeals affirmed the district court's determination that the school district was not required to turn over emails that were not "maintained" in a physical folder or secure electronic data base. (*Burnett v. San Mateo Foster City School District* (9th Cir. 2018) 739 Fed. Appx. 870, 873.) "The Supreme Court has interpreted the word 'maintain' in FERPA as 'to keep in existence or continuance; preserve; retain' and reasoned that '[t]he 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.*, quoting *Falvo*, *supra*, 534 U.S. at pp. 432-433.)

Here, Capistrano concedes there are some documents Student requested on December 6, 2022, that meet the statutory and regulatory definitions of "pupil records," "school records," or "education records" to which Parents are entitled upon request and that Capistrano did not produce. To the extent it has not already produced them to Student, Capistrano is ordered to produce the documents meeting the statutory and regulatory definitions of "pupil records," "school records," or "education records" requested by Student on December 6, 2022.

Student also requested documents that might not fall within the definitions of "pupil records," "school records," or "education records," such as what Student listed as category 2, "correspondence including emails and memoranda," and every other category of documents Student's December 6, 2022 request specified beyond the first category, Student's "cumulative or permanent file." It is possible documents of the types Student listed in categories 2 through 19 of Student's December 6, 2022 request were placed in Student's single, cumulative or permanent file. Capistrano then must provide Parents copies of them. But Capistrano was not required under Education Code section 56504 to provide Parents copies of any documents meeting the descriptions of Student's categories 2 through 19 that were not placed in Student's single, cumulative or permanent file. Student's motion to compel production of documents is denied as to any documents Student requested on December 6, 2022, that were not in Student's education record.

Further, there is no evidence Student subpoenaed documents Student contends are reasonably necessary to the presentation of his case that are not Student's education records. Therefore, OAH is not compelling production of documents by Capistrano on that basis.

IT IS SO ORDERED.

Kara Hatfield

Kara Hatfield
Administrative Law Judge
Office of Administrative Hearings