ROD UNDERHILL, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

February 13, 2018

Lee van der Voo
InvestigateWest
lee@invw.org (via email only)

Spencer Lewis
Oregon School Board Association
1201 Court Street NE, Suite 400
Salem, Oregon 97301

Re: Petition of Lee van der Voo, on behalf of InvestigateWest, seeking review of redactions made to concussion report records provided by the Gresham-Barlow School District

Dear Ms. van der Voo and Mr. Lewis:

In her public records petition, dated February 2, 2018, petitioner Lee van der Voo, on behalf of InvestigateWest, requests this office to order the Gresham-Barlow School District (the District) to release more complete copies of:

> **all OSAA return-to-participation forms completed in the 2015-2016 and 2016-2017 school years, or their equivalent, with appropriate privacy redactions made.**

Petitioner is engaged in a statewide project on concussion prevention and response protocols by school athletic programs. She has made separate, but substantially identical, public records requests to all 238 of Oregon's school districts. Oregon law requires that student athletes who exhibit signs consistent with a concussion not participate in further athletic events or practices until medically cleared to do so. OAR 581-022-2215. Petitioner seeks not only to audit compliance with this rule, but also to statistically compare different concussion protocols and assess outcomes against existing demographic data for Oregon's school districts.

Petitioner also sought three other categories of records: 1) the identities of coaches in the District; 2) information showing concussion-related training given to the coaches; and 3) an annual compilation of concussion statistics for the 2016-2017 school year. The first two categories are not in dispute here. As to the third, the District did not provide any records to petitioner because, at the time of the request, it states it possessed no responsive record. The District now indicates it has, subsequent to petitioner's request, generated a responsive record and has no objection to providing it.

As to the remaining category, the District provided petitioner with responsive, but heavily redacted, records. This dispute reduces to a disagreement as to what constitutes "personally identifying information" for purposes of the Family Educational Rights and Privacy Act ("FERPA").

DISCUSSION

A. FERPA – ORS 192.502(8)

ORS 192.502(8) exempts from disclosure:

> Any public records or information the disclosure of which is prohibited by federal law or regulations.

FERPA is a federal law that prohibits, among other things, "the release of education records (or personally identifiable information contained therein [...]) of students." 20 U.S.C. § 1232g(b).

"Personally identifiable information," is defined by regulation to include a student's name; the names of a student's parents or other family members; the address of a student or student's family; personal identifiers, such as the student's social security number; and indirect identifiers, such as the student's date of birth. 34 C.F.R. § 99.3. Petitioner does not dispute that any information in these categories may be redacted. However, also included within the definition of "personally identifiable information" is "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." The question before us then is whether or not contextual and procedural information about a head injury, standing alone, could identify a student with "reasonable certainty." We believe, in most cases, that it will not.

The United States Department of Education adopted the above-quoted definition of "personally identifiable information" in 2008 out of concern that its prior definition (that the student identity must be "easily traceable" from the released record to be personally identifiable) "suggested that a fairly low standard applied in protecting education records, i.e., that information was considered personally identifiable only if it was easy to identify the student." 73 Fed. Reg. 74806, 74831 (Dec. 9, 2008). The Department of Education further commented that:

> the agency or institution must make a determination about whether information is personally identifiable information not with regard to what someone with personal knowledge of the relevant circumstances would know, such as the principal who imposed the penalty, but with regard to what a reasonable person in the school or its community would know, i.e., based on local publicity, communications, and other ordinary conditions.

Id.

We interpret this to mean that although a soccer coach, or a teammate present at the same practice, might be able to identify a student who got hit in the face with a soccer ball on a particular date, this, by itself, is insufficient for a "reasonable person in the school community" to identify the student. On the other hand, if the concussion were the result of a big hit in a well-attended football game, or caused a student to leave school for a protracted period, in that case news of such might reasonably be expected to spread throughout the school community as a whole.

The injuries documented in the records we have reviewed do not suggest this level of notoriety. To the extent the circumstances of the injury are described at all, they are variations on "took a ball to the face" or "went helmet to helmet with another player." With one exception none of the records indicate any length of absence from school and the doctor mandated absence from athletic activity is less than a month (much less in most cases).[1] We do not believe that this level of specificity, even when combined with date of injury, date of return to play, and the involved sport could reasonably identify the student to a "reasonable person in the school community."

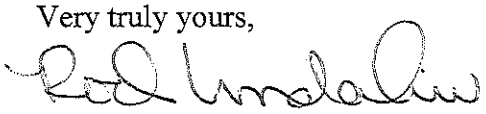
As to all the forms, any information expressly enumerated in 34 C.F.R. § 99.3 must be redacted. As applicable here that will be the student's name, parent's name, sibling's name, date of birth, and home address. On some of the forms the student's grade is indicated; this may also be redacted. Reporting, for example, that a ninth grader on the girls' soccer team sustained a concussion might, depending on the particular population of her age peers on that team, effectively identify the student to the school community in a way that attributing the injury only to a member of the girls' soccer team would not.

Information about the context of the injury, the symptoms observed immediately following the injury, the process followed by the school to address the injury, and the medical professional's determination about the timing and manner of the student's return to athletic activity are not "personally identifiable information" made exempt from disclosure by 20 U.S.C. § 1232g(b) or ORS 192.502(8).[2] We do not foreclose the possibility that contextual information from other similar forms could constitute "personally identifiable information," rather our decision here is based on a thorough review of these particular 51 pages of records.

ORDER

The petition is granted in part and denied in part. Gresham-Barlow School District is ordered to promptly release records redacted consistent with the discussion above. This release is subject to the payment of fees, if any, not to exceed the District's actual costs in producing the records.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon

[1] The one exception is the only injury occurring on 9/29/16 in the records provided to us (pp. 5-6 in our copy). The records are not clear, but could be construed to document a protracted absence from attendance at school (not just participation in athletic activity). The date this student was authorized to return to school may be redacted from the doctor's note in addition to the other information for which this order generally authorizes redaction.

[2] To be clear, a doctor's evaluation and prognosis of a patient would ordinarily be exempt from disclosure as an unreasonable invasion of privacy under ORS 192.502(2). However, in this instance, release of this information cannot invade a person's privacy because the information cannot be connected to a particular person.

Notice to Public Agency

Pursuant to ORS 192.450(2), 192.460, and 192.490(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

18-06