BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

COMPTON UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020060276

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO QUASH SUBPOENA DUCES TECUM

AUGUST 14, 2020

On June 8, 2020, Student filed a request for due process naming Compton Unified School District. On July 22, 2020, an order granting a continuance in this matter was granted scheduling the case for hearing on September 9 and 10, 2020.

On July 29, 2020, Student's attorney issued a subpoena(s) duces tecum on the Custodian of Records for Compton Unified. A copy of the subpoena duces tecum was received by Compton Unified on July 29, 2020. The subpoena duces tecum requires the production of ten categories of documents on August 19, 2020 by sending the records to Student counsel's office address. The subpoenas require the Custodian of Records to produce all documents received or sent by five named staff members between August 1,

2017 and March 31, 2019 that include the name of Student or Parent. It defined "documents" as any writing defined by Evidence Code section 250. The subpoena duces tecum did not include a signed declaration supporting the requested production.

On August 10, 2020, Compton filed a motion to quash the subpoenas on the grounds that the subpoena duces tecum seeks documents which are not reasonably necessary to settle the dispute and impermissibly requires production before the first day of hearing. Compton Unified asserts that Student was provided with records on May 19, 2020, and has since made a public records request which is still pending under legal timelines, requesting some of the same records. Compton Unified argues that the subpoena is overbroad and is an unreasonable violation of the privacy rights of its staff.

On August 12, 2020, Student opposed the motion arguing that Student requested her educational records on May 19, 2020, but Compton Unified did not produce all of them. The subpoena duces tecum seeks those records Compton Unified did not produce. Student argues she had a right to her educational records within five days of the request, that Compton Unified does not deny that the requested records are educational records it maintains, and that it has offered no evidence that the request is unduly burdensome. Student asserts the records requested are reasonably necessary to understand the due process request, and that the people named in the subpoenas were involved in the development of Student's individualized education programs. Student claims she was struggling to make progress but there was no effort to address this issue. Student argues that Compton Unified staff presumably knew about Student's challenges so it is critical to obtain the records to review staff's communications regarding Student, learn how staff described her performance, and determine if staff shared information regarding Student's lack of progress with other staff.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act (20 U.S.C. § 1400 et seq.), or IDEA, has the right to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h); see also Ed. Code, § 56505, subd. (e).)

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH relies by analogy on the relevant portions of the Code of Civil Procedure. Code of Civil Procedure section 1987.1 provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act. (20 U.S.C. § 1400 et seq.) Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum. These regulations specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings. (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].)

While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District,* (9th Cir. 2018) 739 Fed. Appx. 870, 873.) A public agency shall comply with a request for school records without unnecessary delay before any meeting regarding any individualized education program or any hearing and in no case more than five business days after the request is made orally or in writing. (Ed. Code, § 56504.) If a school record includes information on more than one pupil, the parents of those pupils have the right to inspect and review only the information relating to their child or to be informed of that specific information. (*Ibid.*) A public agency shall provide a parent, on request of the parent, a list of the types and locations of school records collected, maintained, or used by the agency. (*Ibid.*) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing five business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

Education records under the IDEA are defined by the Family Educational Rights and Privacy Act, called FERPA, to include "records, files, documents, and other materials" that "(i) contain information directly related to a student; and (ii) 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. § 300.611(b).) 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 District v. Falvo* (2002) 534 U.S. 426 (*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, when determining whether or not an investigative report was an education record, citing *Falvo*, the Court

of Appeal 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 found that the investigative report, "which was not directly related to the private educational interests of the student," was not an education record, because "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* (E.D. Cal. Sept. 24, 2009, No. CV F 08–1215 LJO GSA) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (E.D. Cal. October 6, 2009, No. CV F 08-1215 LJO GSA.) 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 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 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. (2009 WL 3126322, at p. 7.)

In *Burnett v. San Mateo Foster City School District, supra,* relying on *Falvo,* 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. (739 Fed. Appx. at p. 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*, 534 U.S. 426, 432-433.)

EDUCATION RECORDS

Here, except for those documents falling within the category of "education records," Compton Unified correctly argues that special education law does not contain any provision authorizing prehearing discovery. However, Student's education records can be requested at any time pursuant to Education Code section 56504, and must be produced no later than five business days after the request was made, and no showing of reasonable necessity is required.

Neither party adequately addressed whether the documents sought are educational records. Student's assertion that all of the records at issue are education records is conclusory, and Compton Unified failed to address whether any of the documents are education records. Student has not established that all of the requested documents are education records within the meaning of FERPA and Education Code section 49061. Student's subpoena duces tecum is not limited to records that contain information directly related to Student, but rather, requests all documents as that term is broadly defined in Evidence Code section 250 which were received or sent by five staff members between August 1, 2017 and March 31, 2019 that include the name of Student or Parent. There has been no showing that all of the records containing Parent's name during that 20-month period necessarily pertain directly to Student. And, even if the some of the requested records contain information directly related to Student, it has not been demonstrated that all of those records were "maintained" in the Student's file or on a permanent secure electronic data base.

Nevertheless, to the extent the requested records are education records, Compton Unified was required to produce them within no more than five days. Accordingly, Compton Unified is ordered to produce to Student's counsel within five days of the date of this order all education records as defined in Title 20 United States Code section 1232g, Title 34 Code of Federal Regulations part 300.611, and Education Code section 49061.

REASONABLE NECESSITY

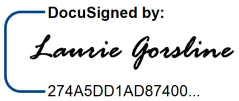
To the extent Student seeks records which are not education records, Student's subpoena duces tecum improperly requests the Custodian of Records for Compton Unified to produce them to Student's counsel on August 19, 2020, well prior to the September 9, 2020 hearing date. A party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. (20 U.S.C. § 1415(h); Ed. Code § 56505, subd. (e).)

In addition, the declaration attached to the subpoena duces tecum fails to demonstrate that the documents are "reasonably necessary" for Student to present his case at hearing. The declaration is not signed and the unsigned declaration contains no information supporting the request for production of each of the requested documents. Although Student attempts to cure this defect in the opposition papers, the papers fall short of making the necessary showing of reasonable necessity for every document sought in that 20-month period. A more particularized showing is required.

ORDER

1. Compton Unified's motion to quash is denied, in part, and granted, in part. To the extent the records subpoenaed are Student's education records, Compton Unified's motion to quash is denied. Compton Unified's motion to quash is otherwise granted.
2. Compton Unified is ordered to produce to Student's counsel within five days of the date of this Order all education records as defined in Title 20 United States Code section 1232g, Title 34 Code of Federal Regulations part 300.611, Education Code section 49061, and the applicable case law interpreting those statutes and regulations.

IT IS SO ORDERED.



Laurie Gorsline

Administrative Law Judge

Office of Administrative Hearings