BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN RAFAEL CITY SCHOOLS.	OAH Case No. 2015070326 ORDER FOLLOWING PREHEARING CONFERENCE AND ORDER GRANTING MOTION TO CONTINUE THIRD DAY OF HEARING AND DENYING MOTION TO COMPEL

On Monday, September 21, 2015, a telephonic prehearing conference was held before Administrative Law Judge Ted Mann, Office of Administrative Hearings. Blanca C. Vaughan, Attorney at Law, appeared on behalf of Student. Jan E. Tomsky, Attorney at Law, appeared on behalf of San Rafael City Schools. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on September 29 and 30, 2015 and October 8, 2015, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 310 Nova Albion Way, San Rafael, California 94903. District has affirmed that the hearing location is ADA-compliant, and accessible to all individuals. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

Prior to the beginning of the hearing, District shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Student's Issues:

1. Whether District denied Student a free appropriate public education by permanently expelling Student since June 12, 2015.

2. Whether District denied Student a FAPE by failing to assess Student in all areas of suspected disability including:

   a. Occupational Therapy;
   b. Speech and Language; and
   c. Social and Emotional, including behavioral and mental health issues.

3. Whether District denied Student a FAPE by failing to provide Student with an appropriate program and services in the:

   a. IEP of February 6, 2014;
   b. IEP of January 28, 2015; and
   c. IEP of May 18, 2015.

4. Whether District denied Student a FAPE by failing to provide Parent with Student's educational records prior to and after June 15, 2015.

5. Whether District denied Student a FAPE by amending the 1/28/15 IEP without notice to Parent or Parent's consent?

6. Whether District denied Student a FAPE by failing to provide Spanish translations to Parent of:

   a. IEPs of 2/6/14, 1/28/15, and 5/18/15;
   b. Notices of IEPs of 2/6/14, 1/28/15, and 5/18/15;
   c. Psychoeducational Assessment Report of 2/4/14; and
   d. Academic Assessment of 2/5/14.

Student's Proposed Resolutions

1. District shall produce, at no charge to Parent, all the following records:

   a. The identity, report, and findings of District's private investigator ;
   b. Copy of the private investigator's video, pictures, and any other media used for his investigation and findings;
   c. All "irrefutable evidence" referenced in Ms. Tomsky's June 12, 2015 letter;

d. All alleged "facts" coming to the attention of District's staff that were mentioned in Ms. Tomsky's letter that form the basis for Student's expulsion;
e. Copy of the letter where [Parent] indicates that she moved to the Nova Albion Way "only since June 8, 2015";
f. Names and titles of District staff who became aware of the above-referenced "facts";
g. Any and all evidence related to the fraud accusations;
h. Any evidence that [Parent] and her minor children resided in Richmond from February 23, 2015 to the present;
i. Any and all evidence in District's possession or control related to District's claims under fraud in the inducement, False Claims Act, California Code of Civil Procedure, Section 128.7; and
j. Evidence that [Parent's] children do not belong in the San Rafael District.

2. Student's cumulative school records, including but not limited to all: evaluations; medical reports and assessments mentioned on the District's Assessments of February 4 and 5, 2014; IEP's, speech logs, health records, cumulative records, standardized test scores, and reports (i.e. Stanford 9, CAT6, etc.), disciplinary records, transcripts, personal attendance records, teacher reports,; notices pursuant to the No Child Left Behind Act; and any and all other records that and directly related to Student and are maintained by the District or by any party acting on behalf of the District.

3. District's shall provide a list of the types and locations of school records collected, maintained, or used by the District and its SELPA.

4. District shall return Student to his general class setting.

5. District shall terminate and clear all suspensions and expulsion hearings.

6. District shall fund independent educational evaluations (IEEs) in all areas of suspected disability, including but not limited to: neuropsychological, mental health assessment, speech and language, and occupational therapy.

7. District shall fund the attendance of the assessors and an advocate of Parent's choice at an IEP meeting within 30 days after completion of all assessments.

8. Psychotherapy with a behavioral component, occupational therapy, and speech and language therapy, as determined by the IEEs.

9. School-based counseling, as determined by the IEEs.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. Student shall have witnesses available in case agreement on a witness list is not reached as discussed, below. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

The parties are ordered to meet and confer by the close of business on September 22, 2015, as to the schedule of witnesses, to coordinate the availability and order of testimony of witnesses, to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled. The parties are also ordered to meet and confer regarding stipulating to Student's residence address.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

At the prehearing conference, neither party requested that a witness testify by telephone at the hearing.

7. Electronic Recording of Hearing.

a. Audio Recording. At the prehearing conference, neither party requested that they be allowed to make an audio recording of the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student is the petitioning party. Accordingly, Student shall present its case-in-chief, followed by District.

9. Motions. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of September 21, 2015.

Motion to Continue Third Day of Hearing

At the prehearing conference, District made a motion to continue the third day of hearing from Thursday, October 1, 2015, to Thursday, October 8, 2015. Student opposed the continuance. District's attorney is not available on the presently scheduled day of hearing, October 1, 2015, as she is presenting at a conference in Washington State on that day, and will not return until Wednesday, October 7, 2015. Student's attorney opposed the continuance on the grounds of unreasonable delay to Student.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance,

OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332 .) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

Here, good cause exists for the continuance of the third day of hearing for one week, because of District's attorney's unavailability due to a professional commitment out of state. Although, continuances are generally disfavored, the short delay of one week is not unreasonable and will not impede the speedy resolution of the due process hearing. District's motion to continue the third day of hearing from Thursday, October 1, 2015, to Thursday, October 8, 2015, is granted.

Motion to Compel Prehearing Production of Documents

At the prehearing conference, Student made a motion to compel prehearing production of records pursuant to a subpoena duces tecum served by Student on District on July 13, 2015.

Student contends the subpoena required District to produce requested documents, including a report by a private investigator regarding Student's residence. Student does not allege that the investigator's report is an educational record for the Student as regularly maintained by the District. Though District did not move to quash the subpoena, District opposes Student's Motion to Compel, arguing that Student is not entitled to prehearing discovery.

Student's due process hearing request (complaint) alleges that Student was denied a FAPE because Student was expelled from District based on lack of residency in District.

The subpoena duces tecum directed to District requested "The District's private investigator report and findings and the name, address, and phone number of District's private investigator." Student's counsel asserts that the records sought are necessary for Student to prepare their case for hearing.

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. (IDEA)). 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].) Although the subpoena form created by the Office of Administrative Hearings has options for production of documents under subpoena, not all of them may apply to special education matters, as OAH has jurisdiction over many types of non-IDEA disputes. While supoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code § 56504), and (ii) 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).)

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (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).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) 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).)

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 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, 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 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. 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 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.

Here, Student sought prehearing production of documents on July 13, 2015, through subpoena to the District. With the exception of "education records," special education law does not contain any provision authorizing prehearing discovery. A party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulations 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).)

Student's education records under FERPA and the Education Code can be requested from District at any time pursuant to Education Code section 56504. When a request for education records is made, the records must then be produced no later than five business days after the request is made and no showing of reasonable necessity is required. However, Student did not attempt to assert at the prehearing conference that that the requested records were educational records. Moreover, the above-referenced cases *of Falvo, BRV*, and *Tulare County Office of Education* underscore the conclusion that the records sought are not educational records. Thus the requested records cannot be subpoenaed in advance of the hearing itself.

Student alleges that the records sought are necessary to prepare for the due process hearing. The standard for issuance of a subpoena duces tecum in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires a specific showing that the requested documents are reasonably necessary for

the requesting party to present a case at hearing. This standard is stricter than the general Administrative Procedures Act standard of "good cause" for issuance of subpoenas duces tecum, adopted from the Code of Civil Procedure. (Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

Student's subpoena duces tecum falls short of demonstrating the stricter standard of reasonable necessity for production of the requested documents. The Motion to Compel, and the underlying subpoena duces tecum, seek documents in order to prepare for the pending hearing, which does not rise to the standard of reasonable necessity. As such, neither the subpoena duces tecum, nor Student's Motion to Compel, have shown that the items sought are reasonably necessary for the Student to prepare for the hearing.

On its face, the issue raised by Student's complaint should be capable of being addressed by documents in Student's educational records or by testimony at hearing. Moreover, the parties are required to exchange documents they intend to rely on at hearing, such that Student will have notice of any District document not otherwise contained in Student's educational records. Lastly, the instant Order does not preclude Student from requesting the production of documents at hearing pursuant to subpoena.

Accordingly, for the reasons set forth above, Student has failed to make a threshold showing that the documents requested in the subpoena duces tecum are reasonably necessary for pre-hearing production. Student's Motion to Compel is denied.

10. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

11. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

12. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. A Spanish language interpreter is required, and Student's request for same is granted. No other requests for accommodation were made at the prehearing conference.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at: http://www.dgs.ca.gov/oah/Home/Accommodations.aspx

14. Hearing Is Closed To the Public. At the request of Student, the hearing will be closed to the public.

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

16. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: September 22, 2015

/s/

TED MANN
Administrative Law Judge
Office of Administrative Hearings