BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

LA MESA-SPRING VALLEY SCHOOL DISTRICT.

OAH CASE NUMBER 2024020642

ORDER GRANTING AND DENYING IN PART MOTION TO QUASH SUBPOENAS DUCES TECUM OF CHRISTY HIMSTREET, CRYSTAL RUSE, SERENA SAAKE, AND JILL WECKERLY

JULY 23, 2024

On February 15, 2024, Student filed a request for due process naming La Mesa-Spring Valley School District, called La Mesa, with the Office of Administrative Hearings, called OAH. On May 30, 2024, OAH granted Student's motion to amend the due process complaint. On July 9, 2024, OAH granted a hearing continuance and the hearing in this case is scheduled to start on July 30, 2024.

On July 12, 2024, La Mesa issued four subpoenas duces tecum to Christy Himstreet, Crystal Ruse, Serena Saake, and Jill Weckerly. La Mesa sent a notice to consumer to Student advising Student of the subpoenas duces tecum directed to Himstreet, Ruse, Saake, and Weckerly. The subpoenas duces tecum requested Himstreet, Ruse, Saake, and Weckerly to produce documents on July 30, 2024, the first day of hearing. The subpoenas duces tecum requests the following three categories of documents:

1. Any and all records and material in your possession pertaining to Student including, but not limited to: reports, notes, records, test data, testing protocols, raw test scores, test results, all materials considered, rejected, and/or otherwise relied upon in making statements, decisions, and/or opinions about Student, related to the issues identified above.
2. Any and all communications pertaining to Student (via email, text, written or otherwise recorded) related to issues identified above, up until the first day of the due process hearing. Requested senders/recipients including, but are not limited to the following, and any others representing or working on behalf of Student:
   - Julia Ada, Larry Bee, Derrick Ada, Mark Lacy, Kim Lacy, or their representatives.
   - Peter Cuevas, Esq., Meagan Nunez, Esq., and/or anyone from the Law Offices of Meagan Nunez.
3. Any and all agreements, retainers, invoices, and/or payment information pertaining to your services, participation in any and all of Student's pending matters, related to any issues identified above.

On July 16, 2024, Student filed a motion to quash the four subpoenas duces tecum on the grounds that 11 days was insufficient time, and an unduly burdensome request for Himstreet, Ruse, Saake, and Weckerly to produce the documents. Student also argued that La Mesa did not demonstrate reasonable necessity and the three categories lacked specificity to enable the subpoenaed party to identify and produce the subpoenaed documents and inappropriately sought prehearing discovery. Further, Student argued the documents that sought communications with attorneys Cuevas and Nunez under category two, requested privileged documents in violation of the work product doctrine.

On July 19, 2024, La Mesa filed an opposition to the motion to quash the four subpoenas duces tecum. La Mesa contends the subpoenaed documents were not prehearing discovery as it sought production on the first day of hearing. Further, the subpoena sought information from the four independent educational evaluators which Student would be calling as witnesses based on their evaluations of Student and therefore, they were relevant and required for La Mesa's hearing preparation. La Mesa articulated in the subpoenas that it needed the documents to understand the opinions of the four independent educational evaluators, and adequately assess their credibility, the strength of their opinions, and evaluate their potential bias necessary to defend its case. La Mesa disagreed that Student's experts, Himstreet's, Ruse's, Saake's, and Weckerly's communications with Student's attorneys Cuevas and Nunez, were privileged or work product protected documents.

At the July 19, 2024, prehearing conference, called PHC, Student represented he intended to call Himstreet, Ruse, and Weckerly as experts to testify at hearing, but would no longer call Saake to testify at hearing. Based on Student's representation, La Mesa withdrew its subpoena to Saake. Further, Student conceded that category one of

the subpoenaed documents were reasonably necessary to the hearing and withdrew his motion to quash category one of the subpoenaed documents to Himstreet, Ruse, and Weckerly. Student's motion to quash categories two and three of the subpoenaed documents to Himstreet, Ruse, and Weckerly is discussed below.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities 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. OAH employs the process set under the California Code of Civil Procedure in ruling on motions to quash, as modified by special education's unique procedures and standards.

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.) 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.)

THE SUBPOENAS DUCES TECUM WERE TIMELY SERVED AND NOT PREHEARING DISCOVERY

Student argued that the subpoenas were unduly burdensome because it gave Himstreet, Ruse, and Weckerly only 11 business days to produce the documents stating that California Code of Civil Procedure section 2020.410 required a longer period. La Mesa issued the subpoena on July 12, 2024, for documents to be produced 18 days later on July 30, 2024, the first date of hearing. Student did not show why 18 days for each of his independent educational assessors to produce a finite number of documents based on their educational evaluation of Student would be unduly burdensome in the context of special education hearings. Because Student made only conclusory arguments without any factual support as to why 18 days was unduly burdensome, it is unpersuasive. La Mesa's subpoenas duces tecum to Himstreet, Ruse, and Weckerly were timely served. Because the documents are to be produced on the first day of hearing, Student's argument that the subpoenas duces tecum inappropriately seek prehearing discovery rings hollow, and is also unpersuasive. The subpoenas duces tecum were timely served and do not constitute inappropriate prehearing discovery.

LA MESA SHOWED THAT CATEGORY TWO OF THE SUBPOENAS DUCES TECUM WAS PARTIALLY REASONABLY NECESSARY

La Mesa did not state in its subpoena duces tecum who Julia Ada, Larry Bee, Derrick Ada, Mark Lacy, Kim Lacy are and how they relate to this case. Therefore, La

Mesa failed to show that the communications Himstreet, Ruse, and Weckerly had with these individuals and their representatives were reasonably necessary to this case. However, the communications with Peter Cuevas, Esq., Meagan Nunez, Esq., and/or anyone from the Law Offices of Meagan Nunez under the second part of category two of the subpoena duces tecum was appropriate as there is no legally recognizable privilege or work product assertions, and Student did not cite any authorities to support his assertion, between Student's attorneys and the experts such attorneys retain. Therefore, Student's motion to quash is granted as to the portion of category two regarding "Derrick Ada, Mark Lacy, Kim Lacy, or their representatives," and denied as to the portion of category two regarding "Peter Cuevas, Esq., Meagan Nunez, Esq., and/or anyone from the Law Offices of Meagan Nunez".

LA MESA SHOWED THAT CATEGORY THREE OF THE SUBPOENAS DUCES TECUM WAS REASONABLY NECESSARY

La Mesa showed that agreements, retainers, invoices and/or payment information to independent educational assessors Himstreet, Ruse, and Weckerly are reasonably necessary to these experts' opinions, credibility, and potential bias. The motion to quash category three of the subpoena duces tecum is denied.

ORDER

1. Student's motion to quash category one in La Mesa's subpoenas duces tecum to Himstreet, Ruse, and Weckerly is moot. Himstreet, Ruse, and Weckerly shall produce the documents described under Request for Production No. 1 in the subpoena duces tecum in its entirety on the first day of hearing, July 30, 2024, to the Administrative Law Judge in this matter.

2. Student's motion to quash category two in La Mesa's subpoena duces tecum to Himstreet, Ruse, and Weckerly is granted as to "Derrick Ada, Mark Lacy, Kim Lacy, or their representatives", and denied as to "Peter Cuevas, Esq., Meagan Nunez, Esq., and/or anyone from the Law Offices of Meagan Nunez." Request for Production No. 2 is modified as follows:

   "Any and all communications pertaining to Student (via email, text, written or otherwise recorded) related to issues identified above, up until the first day of the due process hearing. Requested senders/recipients including, but are not limited to the following, and any others representing or working on behalf of Student, Peter Cuevas, Esq., Meagan Nunez, Esq., and/or anyone from the Law Offices of Meagan Nunez."

3. Himstreet, Ruse, and Weckerly shall produce the documents described under Request for Production No. 2 as to Peter Cuevas, Esq., Meagan Nunez, Esq., and/or anyone from the Law Offices of Meagan Nunez, as modified under Number 2 of this Order, on the first day of hearing, July 30, 2024, to the Administrative Law Judge in this matter.
4. Student's motion to quash category three in La Mesa's subpoena duces tecum to Himstreet, Ruse, and Weckerly is denied. Himstreet, Ruse, and Weckerly shall produce the documents described under Request for Production No. 3 specified in the subpoena duces tecum in its entirety on the first day of hearing, July 30, 2024, to the Administrative Law Judge in this matter.

Sabrina Kong

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings