BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENTS ON BEHALF OF STUDENT,

and

CARMEL UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2022070678

OAH CASE NUMBER 2022060843

ORDER COMPELLING PRODUCTION OF WITNESS CAITLIN CONHEIM'S NOTES VIEWED IN PREPARATION FOR TESTIMONY

SEPTEMBER 26, 2022

On September 22, 2022, Student filed a motion requesting Carmel Unified School District provide Student's attorney the notes witness Caitlin Conheim reviewed to prepare for her September 20, 2022 testimony, or that the witness's testimony about what she observed on three specific dates reflected in the notes she reviewed to prepare for her testimony be stricken from the record. Student cited Evidence Code section 771 for the authority to produce the document or strike the testimony.

On September 23, 2022, Carmel filed written opposition to Student's motion, arguing the Evidence Code does not apply in administrative hearings, the document is not a student educational record of which Student is otherwise entitled to receive a copy, Student failed to use another method to obtain the document such as a subpoena duces tecum, Conheim did not use the writing to refresh her recollection, and it would cause an undue consumption of time because Conheim might be recalled as a witness after her notes are produced.

None of Carmel's arguments is persuasive. Title 5 of the California Code of Regulations, section 3082, states that due process hearings shall not be conducted according to the technical rules of evidence and those related to witnesses. However, every objection Carmel has properly raised has been based in the Evidence Code and the attorneys and Administrative Law Judges routinely rely on the rules of evidence to manage the flow of information presented during a special education due process hearing. The regulations promulgated by the California Department of Education regarding special education due process hearings indicate evidence that falls outside that which would be permitted under strict application of the Evidence Code regarding hearsay testimony may be used in special education due process hearings if it is relevant and "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Cal. Code Regs., tit. 5, § 3082(b).) This regulation does not mean the parties and Administrative Law Judges may not rely on the Evidence Code to present and control evidence in the administrative hearing.

The fact that the notes Conheim took when she observed Student and placed in her personal files, and not in Student's educational record, does not mean Conheim's notes document or documents is or are shielded from production. Conheim was asked if she reviewed any documents to prepare for her testimony. She did not reply that she

reviewed Student's education record, or the exhibits the parties had marked as evidence for the hearing. She stated she reviewed notes she made when or just after she observed Student, which she stored only in her personal files. The notes therefore are a document she reviewed before she testified.

Conheim elected to review the notes in her personal file before testifying. Her testimony suggested no one told her to review anything, and she alone chose to review her notes. It is a fair conclusion Conheim chose to review her notes to refamiliarize herself with details she had observed, or, put another way, to refresh her memory of her observations of Student. She reviewed her notes before her testimony, and it is unreasonable to discount any effect reviewing her notes had on her testimony and, as Carmel asserts, pretend it had none.

Evidence Code section 771, subdivision (a), states, "if a witness, either while testifying or prior thereto, uses a writing to refresh [the witness's] memory with respect to any matter about which [the witness] testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken." Conheim used a writing to refresh her memory, before she testified.

As Student requested during the hearing, and in his written motion, the writing Conheim testified she used to refresh her memory prior to testifying, he is entitled to receive it under Evidence Code section 771, subdivision (a), or to have Conheim's testimony regarding her observations stricken from the record.

Carmel urges neither consequence, because it is possible if the notes are produced Conheim would be recalled as a witness and that would add time to an already lengthy hearing. Carmel asserts Conheim could be recalled "for another day of

testimony." Conheim's complete testimony was taken in approximately one half day and it is hyperbole to suggest additional testimony requested by Student would require "another day." During any additional testimony, the Administrative Law Judge will determine if testimony is cumulative or results in the undue consumption of time.

Carmel additionally argues granting Student's motion will open the flood gates in future cases to the production of the documents witnesses reviewed to prepare for their testimony, "flooding both sides, as well as the OAH, with unnecessary and irrelevant paperwork." This parade of horribles assumes other attorneys will not exercise care in preparing witnesses and, unlike all the other witnesses who testified so far in this matter, will routinely present witnesses who have accessed information the parties would prefer not to share with the other side. This is not a reasonable assumption and does not accord with the usual experience during due process hearings.

Student's motion is GRANTED.

ORDER

No later than 5:00 PM on Tuesday September 27, 2022, Carmel shall provide Student's attorney with a complete copy of the notes Conheim viewed in preparation for her testimony.

Kara Hatfield

Kara Hatfield
Administrative Law Judge
Office of Administrative Hearings