BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CASTRO VALLEY UNIFIED SCHOOL DISTRICT,	OAH Case No. 2018010312 (Primary)
CASTRO VALLEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017120881 ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO QUASH

On December 20, 2017, Castro Valley Unified School District filed with the Office of Administrative Hearings a Request for Due Process Hearing in OAH case number 2017010312 (District's Case), naming Student as respondent. On January 3, 2018, OAH granted the parties' joint request for continuance of the due process hearing to March 20, 21 and 22, 2018.

On January 8, 2018, Parents on behalf of Student filed a Request for Due Process Hearing in OAH case number 2018010312 (Student's Case), naming District as respondent. On January 11, 2018, OAH issued a scheduling order, setting the hearing in Student's Case for March 6, 2018.

On January 11, 2018, Student's counsel sent a subpoena duces tecum to District's counsel by email after business hours on January 11, 2018. The subpoena requested the appearance of Director of Special Education Suzie Williams at Student's counsel law office on January 19, 2018 at 10:00 a.m., unless the witness mailed the requested records to OAH, specifying Student counsel's law office address as the place for production. Student's subpoena sought Ms. Williams' production of all records located in the Special Education Information System, individualized education programs and IEP team meeting recordings, forms and information, the identification of District's investigators retained to investigate Student and/or Student's family, all video and audio surveillance of Student and/or Student's family, invoices and payments to private investigators, test protocols, service/provider logs,

communication logs, transportation, contracts with Haynes Family of Services, and all emails to and referring to Student.

On January 18, 2018, District filed what appear to be identical Motions to Quash Student's Subpoena Duces Tecum in Student's Case and District's Case. District argues that the subpoena sets forth no facts purporting to establish good cause or reasonable necessity for production of the requested records, that the declaration supporting the subpoena is not signed under penalty of perjury, and that the proof of service erroneously states that the subpoena was personally served, is incomplete and unsigned. District contends the subpoena constitutes an impermissible attempt to obtain prehearing discovery, the subpoena failed to provide proper notice or place for production, and was not served within a reasonable time to locate and produce the documents. District claims that the records regarding the alleged audio/video surveillance are irrelevant to the matters at issue.

On January 23, 2018, Student filed opposition to District's motions to quash. Student argues that District has withheld educational records requested by Student on December 12, 2017, the records subpoenaed on January 11, 2018 are necessary for Student to prepare for hearing, and it is unreasonable to expect Student to wait until five days before hearing to receive the documents. District produced some records in response to Student's December 12, 2017 request for documents, but did not produce all of the documents requested. District's counsel agreed to accept service of the subpoena by email. Student maintains that District has had since December 12, 2017 to produce the records and has failed to do so and has attached to the opposition a corrected proof of service. Student contends that all of the records, including the surveillance records, are education records and that District was required to produce the records within five days of Parent's request. Student argues that granting District's motion will force Student to incur additional attorney fees, and that a showing of reasonable necessity is not required.

On January 25, 2018, OAH consolidated Student's Case and District's Case and set the hearing on the consolidated matters on March 20-22, 2018.

APPLICABLE LAW AND DISCUSSION

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, but does not confer the right to prehearing discovery. (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 of Regs., tit. 5, § 3082, subd. (c)(2).) While subpoenas 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 Family Educational Rights and Privacy Act 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); 34 C.F.R. § 99.3.) 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 Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] 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, 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* (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.)

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. 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*.)

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 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.

Here, with the exception of Student's pupil records, District correctly argues that special education law does not contain any provision authorizing prehearing discovery. To the extent Student seeks records which are education records, Student's subpoena duces tecum improperly requests District's compliance with the subpoena by requiring District to produce documents which are not Student's pupil records, by sending the requested documents to the offices of Student's attorney by January 19, 2018, well prior to the March 2018 hearing dates. 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 contrast, Student's education records under FERPA and the Education Code can be requested from District at any time pursuant to Education Code section 56504. Relevance to the issues in a due process hearing are not a prerequisite to District's obligation to produce a Student's pupil records, as that term is defined under the law. Student is correct that when a

request for education records is made, the records must then be produced, regardless of their relevance to the issues in the due process hearing, no later than five business days after the request is made and no showing of reasonable necessity is required.

Although Student claims that all of the records at issue are education records, Student has failed to establish that all of the requested documents are education records within the meaning of FERPA and Education Code section 56504. Student's subpoena is not limited to records about Student, but rather requests all of District's records in SEIS, all IEP's, test protocols, service/provider logs, contracts with Haynes Family of Services, and other forms. There is no question that Education Code section 56504 requires the District to provide parents with certain evaluation materials that pertain directly to their child. (*Newport-Mesa Unified School District v. State of California Department of Education* (C.D. Cal. 2005) 371 F.Supp.2d 1170.). Similarly, Student's IEP's and service logs pertaining to the services provided to Student are arguably pupil records. However, Student has failed to prove that the other records are pupil records as the law define them.

Neither party adequately addressed whether each category of documents sought is an educational record. Conclusory statements that the documents at issue are pupil records are insufficient. Student has failed to establish that audio and video surveillance of Student or his family, or that bills from and payments to private investigators or which identify investigators, fall within the definition of pupil records. Student has failed to discuss *BRV, Inc. v. Superior Court, supra,* or otherwise address whether and how such investigation records are directly related to the private educational interests of Student or whether such documents were something regularly done in the normal course of business, and regularly maintained in a central location along with education records in separate files for each student. Similarly, although the subpoena requested contracts with Haynes Family of Services and emails regarding Student, Student has failed to address *S.A. ex rel. L.A. v. Tulare County Office of Education, supra,* or otherwise make any showing that the requested contracts or email communications are part of Student's permanent file. It is also unclear which documents Student seeks by the requests for "transportation," "forms," and "communication logs," and explain why those documents are pupil records.

Student's claim that District failed to comply with Student's December 12, 2017 educational records request is not addressed by this order. Student did not file a motion to compel production of the documents sought at that time. Nor did Student attach a copy of the December 12, 2017 records request to the opposition, and it appears from the papers that the documents requested in the January 11, 2018 subpoena were not specifically requested on December 12, 2017. Student's declaration also fails to state to whom the December 12, 2017 records request was sent or how it was sent.

Because Student has failed to establish that all of the requested records are "education records," Student's subpoena duces tecum seeking production of such records prior to hearing is improper. However, this order shall not preclude Student from making prehearing requests for production from District of any missing education records as that term is defined by law, or from filing a motion with OAH at least three business days prior to the prehearing

conference compelling District's production of Student's missing pupil records that were requested by Student but not produced by District. To the extent Student seeks documents other than pupil records, this order shall not prohibit Student from serving a subpoena duces tecum with proper notice which seeks production of documents from District on the day the hearing commences supported by an adequate showing of "reasonable necessity." The declaration attached to the subpoena at issue is woefully inadequate. Not only is it unsigned, it does not demonstrate the relevance or materiality of the requested documents to the issues in the complaints, let alone establish that the documents are "reasonably necessary" for Student to present his case or defend District's Case at hearing.

ORDER

1. District's motion to quash is granted except as to Student's IEP's, including all notes, amendments and signature pages to the IEP's, Student's test protocols, and service/provider logs for services regarding Student.

2. District's motion is denied as to Student's IEP's, including all notes, amendments and signature pages to the IEP's, Student's test protocols, and service/provider logs for services regarding Student. District shall, within five business days of the date of this order, produce to Student's counsel all of Student's IEP's, including all notes, amendments and signature pages to the IEP's, Student's test protocols, and all service/provider logs for services regarding Student to the extent they have not been previously produced, and for each document District is unable to produce because it has been lost, destroyed or never existed, District shall provide Student's counsel with a list of such documents and specify whether they have been lost, destroyed or never existed, within five days of the date of this order.

3. This order is made without prejudice to Student making prehearing requests for District's production of education records, or from filing a motion with OAH at least three business days prior to the prehearing conference compelling District's production of Student's missing pupil records that were previously requested by Student but not produced by District.

4. This order is made without prejudice to Student's issuance of subpoena(s) duces tecum for production of documents at hearing.

IT IS SO ORDERED.

DATE: January 25, 2018

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LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings