BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ATWATER ELEMENTARY SCHOOL DISTRICT and MERCED COUNTY OFFICE OF EDUCATION.	OAH CASE NO. 2014010194 ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUM; ORDER RE: PRODUCTION OF VIDEO TAPES

PROCEDURAL BACKGROUND

Student filed a request for due process (complaint) with the Office of Administrative Hearings (OAH) on January 3, 2014. Student alleges that the Atwater Elementary School District (District) and the Merced County Office of Education (MCOE) (collectively referred to here as the Districts) have denied him a free appropriate public education during several school years for a variety of reasons. One of these contentions is that the two school entities have failed to provide Student with safe transportation to and from school. Student contends that in late 2012 he became the victim of bullying during his school bus rides. Student contends that his parents were informed that another student or students on the bus had assaulted him. Parents requested that the District permit them to view video tapes that were taken during the bus rides. The District would not provide Parents the opportunity to view the video tapes.

On January 3, 2014, simultaneous with the filing of his complaint, Student served a subpoena duces tecum (subpoena) on the District's Superintendent. The subpoena requests production of any video tapes of the bus rides taken during October, November, and December, 2012. Student contends that the video tapes are necessary to prove his allegations that the District did not provide him with safe bus transportation. The subpoena was returnable to Student's attorneys on or before January 10, 2014.

On January 21, 2014, the Districts filed a motion to quash the subpoena. The Districts argue that: 1) Student failed to show a reasonable necessity for production of the videos; 2) The Family Educational Rights and Privacy Act (FERPA) prevents the District from producing the videos because children other than Student appear in and can be identified in the videos; and 3) The Districts are only in possession of four of the videos taken during the applicable time frame. The Districts offer to create a written description of what is occurring in the videos and provide this document in lieu of producing the actual videos in order that the privacy of the other children on the bus be protected.

The Districts concede that the video tapes are educational records as defined by FERPA.

On January 23, 2014, Student filed an opposition to the motion to quash. Student reiterates his need for the videos and the fact that he has a right under the Individuals with Disabilities Education Act and state statute to review his educational records. Student further contends that the videos will not provide identifying information about the other children on the bus as defined by FERPA and therefore their privacy rights will not be violated.

On January 29, 2014, the Districts filed a response to Student's opposition to their motion to quash. The Districts reiterated their argument that they contract with a private company for school bus transportation. That company has surveillance cameras on its buses. The private company retains the video tapes for 30 days and then destroys them. The Districts only obtain possession of any of the tapes when a parent informs them of issues with the transportation. The District will then request copies of the bus tapes. In this case, the District only has copies of four tapes taken during the time period in question. The Districts basically argue that they cannot produce what they do not have.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act (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 (SDT) (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).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(b)), which requires:

> A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Special education law does not specifically address motions to quash subpoenas or SDT's. In ruling on such motions, the OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which 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.

Parents may request copies of their child's educational records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code, § 56504.) Education records under the IDEA are defined by 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).)

In addition to the parents' right to copies of educational records within five business days of a request, a party to a due process proceeding is entitled to be served, five business days before the hearing, with copies of all the documents the other party or parties intend to use at the hearing, and a list of all witnesses intended to be called with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).)

DISCUSSION

Reasonable Necessity

The Districts argue that Student has failed to demonstrate reasonable necessity for production of the video tapes. The Districts first argue that Student is requesting pre-hearing discovery by requesting that the tapes be produced more than five days prior to the hearing. The Districts' argument is not persuasive because they have conceded that the tapes are educational records. As stated above, Student's parents are entitled to request copies of Student's educational records at any time and to receive those records within five business days of their request. The reasonable necessity requirement is therefore not applicable to a request for Student's educational records.

The Districts also contend that Student cannot show a reasonable necessity for the records because the Districts have offered to create a document describing the contents of the video tapes. The Districts offer no persuasive argument or support for their contention that it is appropriate for an opposing party to somehow summarize documents to which an opposing party is entitled in lieu of producing the actual evidence.

Finally, assuming Student was required to demonstrate reasonable necessity for production of the video tapes, he has met his burden in that regard. One of the allegations in his complaint is that the Districts denied him a free appropriate public education by failing to provide him with safe bus transportation. The videos in question may support that contention. Student does not otherwise have access to the tapes.

Privacy Rights of the other Children under FERPA

The Districts argue that they cannot produce the tapes because FERPA prevents disclosure of a student's educational records or personally identifiable information from educational records with consent of the student's parents. (34 C.F.R. § 99.3) The Districts contend that the videos in question show other children on the school bus. Since the parents of those children have not consented to the release of the videos, the Districts would be in violation of FERPA by producing the videos to Student.

The Districts' argument is not persuasive. Although there is not a substantial amount of case law or authority addressing the issue of video tapes of students, some support does exist. For example, in the case of *In re: Student with a Disability* (Wyoming State Educational Agency 2010) 16 FAB 5, 112 LRP 49905, the Wyoming State Educational Agency found that video tapes of a student were educational records, and, as such, the school district which video recorded the student violated the parents' right to review their child's educational records by destroying the video tape in question.

In *L.M.P., et al.,* v. *School Board of Broward County* (S.D. Fla. 2009) 53 IDELR 49, 12 FAB 40, 109 LRP 52916, the student contended that the school district was predetermining the scope of services and supports provided to autistic children in the district. The student subpoenaed a list of special education services provided to other children with autism. The school district argued that it could not release information concerning the other children without consent of their parents. The district court disagreed. The court pointed to the fact that FERPA permits the disclosure of otherwise private student information if ordered by the court. (34 C.F.R. § 99.31(a)(9).) The court also cited to previous court cases that have found that private information should be disclosed if it is directly relevant to the claims in the case and crucial to proving the assertions underlying the allegations of the complaint. The court found that it was inappropriate to permit the School Board in the case to hide behind confidentiality objects based upon FERPA or state law. (Citing to *Rios* v. *Read* (E.D.N.Y. 1977) 73 F.R.D. 589 (in view of the significant role of private lawsuits in ending various forms of discrimination in the school system, FERPA should not serve as a cloak for discriminatory practices; *Ragusa* v. *Malverne Union Free Sch. Dist.* (E.D.N.Y. 2008) 549 F.Supp.2d 288,290-291 (where a requesting party demonstrates a genuine need for information that outweighs the privacy interest of students, the disclosure of the information is appropriate.)

Finally, the Family Policy Compliance Office (FPCO), the federal agency charged with hearing complaints under FERPA, found in *Letter re: Magnolia Independent School District* (FPCO 2006) 10 FAP 25, 107 LRP 685, that there were certain circumstances under which video tapes of students should be produced. The school district in that case had denied a request for access to a video tape of a video conference among high school students because the students' parents had not consented to its release. In responding to the issues in the case, the FPCO explained that it did not consider video tapes of routine activities of students riding a school bus to be "directly related to" any particular student. Therefore, those tapes would not be "educational records" under FERPA, even though the students on

the bus might be "personally identifiable." That type of video recording therefore was not protected under FERPA. The FPCO qualified this finding, however, where the video of a school bus ride records a student involved in an assault of another student. In that situation, the video would be considered to be "directly related to" the students involved in the incident. The video would become an educational record of the students involved in the incident. Consent from the parents of the children involved in the incident therefore would be necessary in order to release the recordings.

ORDER

In the instant case, Student contends that he was bullied and assaulted on his bus rides. The video tapes in question may support those contentions. The video tapes are Student's educational records and, as such, Student's parents have a right to review the tapes without a showing of reasonable necessity. If, however, the videos show Student being assaulted by other children on the bus, the children involved in the incident or incidents do have a privacy right under FERPA, as found by the FPCO.

The right of Student's parents to view Student's educational records must therefore be balanced against the right to privacy of any child who may have been involved in bullying or assaulting Student on the bus. The undersigned administrative law judge (ALJ) therefore orders as follows:

1. Within five business days of the issuance of this Order, the Districts shall notify the parents of any child who may have bullied or assaulted Student that the video tape of the incident or incidents has been subpoenaed in a due process case. The District is ordered to refrain from identifying Student or the fact that Student is the petitioner in a due process case.

2. Within 10 business days of the issuance of this Order, the Districts shall provide OAH with a copy of the four video tapes in the Districts' possession for in camera review.

3. If no parent of any other student who appears on the video tapes files an objection to the release of the video tapes by February 17, 2014, the Districts shall immediately provide Student's attorneys with a copy of the four videos, but in no case later than close of business on February 20, 2014.

4. If the parent of any other student who appears on the video tapes files an objection to production of the tapes, the ALJ assigned to the prehearing conference in this case shall decide whether the tapes shall be produced to Student's attorneys.

5. If the video tapes are produced to Student's attorneys, the tapes may not be disseminated or viewed by anyone other than Student's legal representatives, Student's experts, or Student's parents. The tapes may not be used for any proceeding other than the instant due process case.

IT IS SO ORDERED.

Dated: February 3, 2014

/s/
DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings