BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. MONROVIA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017040944 ORDER GRANTING MOTION TO QUASH

On April 20, 2017, Student filed a Request for Due Process Hearing with the Office of Administrative Hearings, naming Monrovia Unified School District as respondent. On April 24, 2017, District's counsel filed a Notice of Representation. On July 14, 2017, pursuant to OAH's order granting Student's motion to amend, Student filed an Amended Request for Due Process Hearing. On August 7, 2017, OAH continued the due process hearing for good cause to October 31, 2017.

On July 27, 2017, Student sent District's counsel a subpoena duces tecum by certified mail, which was received on August 1, 2017. Student's subpoena seeks District's production of records or things described in the subpoena as "[l]imited 30-day access to SchoolLoop.com regarding all communications between [Parent] and all [Student's] teachers…" for the 2015-2016 and 2016-2017 school years. The subpoena requires a return date of August 2, 2017. On August 11, 2017, District filed a Motion to Quash, seeking an order quashing Student's subpoena duces tecum.

District contends the subpoena constitutes an impermissible attempt to obtain prehearing discovery, that internet communications between Parent and teachers are not educational records because documents not contained in a student's permanent file are not maintained by a local educational agency, and that Student seeks unfettered access to a third party's database. District contends the subpoena lacks a sufficient supporting declaration establishing reasonable necessity for production, and that Student was required to personally serve the subpoena. District argues that its Special Education Director contacted School Loop and was told that the data could be produced, but the data could not be read without access to School Loop's propriety software, and that District would have to renew its expired contract with School Loop at a cost of $20,000 to obtain access to the software.

On August 18, 2017, Student filed his Opposition to the Motion to Quash. Student contends that District used SchoolLoop.com for communications between parents and teachers. Student contends that as of June 30, 2017, Parent no longer had access to the SchoolLoop.com website because District terminated its contract with School Loop. School

Loop informed Student's counsel that the data is owned by District and instructed Student to contact District. Student argues that internet communications between Parent and teachers in the School Loop database are educational records. On August 5, 2017, Student agreed to withdraw the subpoena and to instead submit a request for educational records after District's counsel agreed to produce the documents as educational records. On August 8, 2017, Student's counsel sent a letter to District's counsel requesting that District produce within five days all records maintained by School Loop for Student pursuant to Education Code section 56504, but District refused to produce them, claiming it cannot produce the documents in readable form and the documents are not educational records. Student contends that Parent-teacher communications are reasonably necessary to demonstrate District's failure to implement the accommodations in Student's February 2017 individualized education program. Student argues that through School Loop, Parent repeatedly asked for implementation of the IEP accommodations and was told they "were working on it." The School Loop platform was the sole means of communication between Parent and Student's teachers, and these documents are key to proving Student's claim that District failed to implement Student's IEP accommodations.

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] (*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, 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.)

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, Student's subpoena duces tecum provides for District's compliance by sending the requested documents to the offices of Student's attorney by August 2, 2017, well prior to the October 31, 2017 hearing date. With the exception of "education records," District correctly argues that 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 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).)

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 has failed to establish that the requested documents are education records within the meaning of FERPA and Education Code section 56504. Although Student claims that at some point, District's counsel viewed the documents as education records, District now argues that because such records are not part of Student's permanent file that the records are not maintained by District. Student fails to squarely address District's argument, and has not made an adequate showing that the requested internet communications are part of Student's permanent file. Furthermore, the subpoena itself does not seek the production of educational records, but rather, 30-day access to a third-party website operated by a vendor that apparently no longer provides website services to District.

Because Student has failed to establish that requested records are "education records," Student's subpoena duces tecum seeking pre-hearing production of such records is improper. Nevertheless, a subpoena duces tecum seeking production of documents from District or School Loop on the day the hearing commences may be appropriate if the requisite showing of "reasonable necessity" is adequately made in a declaration supporting the subpoena and assuming no other legal bar to production exists. Here, the declaration attached to the subpoena fails to demonstrate the relevance or materiality of the requested documents to the issues in the amended complaint, let alone establishing that the documents are "reasonably necessary" for Student to present his case at hearing. Although Student attempts to cure this defect in his opposition papers, he falls short of making the necessary showing with regard to the communications prior to February 21, 2017. Specifically, Student argues that the Parent-teacher communications are necessary to prove that the February 21, 2017 IEP accommodations were never implemented. However, the subpoena seeks access to all Parent-teacher communications for the 2015-2016 and 2016-2017 school years, and Student has failed to explain how communications in the period prior to February 21, 2017 are reasonable necessary to establish his claim for failure to implement the IEP.

Furthermore, Student is not, as District contends, required to personally serve a subpoena on District' counsel. Although Code of Civil Procedure section 1987 requires personal service of a subpoena on a witness, the service of a subpoena upon any such witness is not required where the witness is a party to the action and written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person. (See, Code of Civ. Proc., §1987, subd. (b) and (c).) Although the manner of service of a subpoena could affect enforceability as to whether sufficient notice for compliance with the subpoena has been provided, District does not make this argument, and District cited no persuasive authority for a blanket rule requiring personal service of a subpoena on a party's attorney of record. Here, the subpoena was properly served on District's counsel of record as set forth in District's notice of representation.

ORDER

1. District's motion to quash is granted.

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

DATE: August 23, 2017

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LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings