BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

OLD ADOBE UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2024080275

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING MOTION TO COMPEL

NOVEMBER 19, 2024

On October 29, 2024 and November 7, 2024, Student's counsel requested Old Adobe to provide "all response to intervention documents . . . and data" related to Student. On November 11, 2024, Old Adobe's counsel responded:

> "You have been provided with all RTI documentation that I have. [Student's] RTI was summarized in his assessment report and in SST meeting notes. The RTI teacher is out on maternity leave. She might have additional information in her personal files that can be shared when she returns."

A series of further emails ensued, arguing about whether responsive documents did or did not exist. On November 12, 2024, Student moved to compel production of

any such documents. Student's motion also sought an expedited ruling because of the pendency of the due process hearing, however that request became moot when the hearing was subsequently continued. On November 14, 2024, Old Adobe filed an opposition to the motion to compel, however that opposition will not be considered because it did not contain a proof of service that Student's counsel had ever been provided with it.

The motion to compel is now granted, to the extent that responsive documents exist that fall within the definition of educational records discussed below. To the extent other relevant documents exist that fall outside that definition, those are not subject to prehearing discovery but may be subpoenaed for the hearing itself.

Education records under the Individuals with Disabilities Education Act are defined by California law and by the federal Family Educational Rights and Privacy Act, also known as FERPA. (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Education records 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).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) 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).)

Parents have the right to examine all such records relating to their child's identification, evaluation, and educational placement. (20 U.S.C. §1415(b)(1).) Each

participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an individualized education program, or any hearing, or resolution session, and in no case more than 45 days after the request has been made. (See 34 C.F.R. § 300.613(a).) The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. § 300.613(b).) All parents have the right to receive copies of all education records within five business days after parents make a request. (Ed. Code, § 56504.)

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.) The Court then found that individual assignments handled by many student graders in their separate classrooms were not student records. (*Id.*)

Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits at least five business days prior to the hearing. The law does not contain any other provisions authorizing pre-hearing discovery. Special education law does not authorize the issuance of subpoenas for pre-hearing discovery purposes, only to compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).) A party to a due process hearing under the IDEA has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).) The hearing officer in a special education due process hearing may issue subpoenas or subpoenas duces tecum upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).)

Here, to the extent that responsive documents exist that meet the legal definition of "education records," parents have the right to examine them within five business days after parents make a request. (20 U.S.C. §1415(b)(1); 34 C.F.R. §300.613(a); Ed. Code, §56504.) To that extent, the motion to compel is granted. Since there is no authority to compel pre-hearing discovery, if responsive documents exist that do not meet the legal definition of "education records," the motion is denied as to them, however such documents are subject to being compelled at the hearing itself through a subpoeana.

ORDER

1. Old Adobe shall produce to Student's counsel within three days of this Order, any response to intervention documents and data related to Student that exist that meet the definition of educational records.

2. The motion is denied with respect to any response to intervention documents and data related to Student that exist that do not meet the definition of educational records.

IT IS SO ORDERED.

June Lehrman

June Lehrman
Administrative Law Judge
Office of Administrative Hearings