

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WESTMINSTER SCHOOL DISTRICT.

OAH CASE NO. 2014120801

ORDER DENYING MOTION TO
COMPEL AND QUASHING
SUBPOENA

On December 12, 2014, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings (OAH), naming Westminster School District (District) as respondent. On December 22, 2014, OAH issued a Scheduling Order scheduling the hearing to begin on February 5, 2014. On January 8, 2015, the parties filed a joint request for continuance of the mediation, pre-hearing conference, and hearing dates. The request was granted by OAH on January 9, 2015, and the hearing was rescheduled to begin on April 1, 2015.

On February 2, 2015, Student filed a Motion to Compel, seeking an order compelling District to comply with a subpoena duces tecum served on January 5, 2015. Student contends the subpoena required District to produce requested e-mail correspondence and other correspondence related to parent's transportation request by no later than January 19, 2015. Student concedes that the requested records are not educational records for the Student as regularly maintained by the District. District filed an opposition to Student's Motion to Compel arguing that Student is not entitled to prehearing discovery.

Student's due process hearing request (complaint) alleges that Student was denied a FAPE because the District only provided station to station transportation for the Student, rather than the door to door transportation requested by Parent for Student.

The SDT directed to District requested "any and all District e-mails and correspondence from or to any District personnel during and/or related to the 2013-2014 and 2014-2015 school years regarding transportation of [Student] to and from school and Parent's door-to-door transportation request including, but not limited to, discussions concerning granting or denying Parent's request." Student's counsel asserts that the records sought are necessary for the Student to prepare their case for hearing and to determine whether the District was acting in good faith in its denial of door to door transportation.

APPLICABLE LAW

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. (IDEA)). 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 (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that “[t]he state hearing shall be conducted in accordance with regulations adopted by the board,” and under that authority the Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum (SDT’s). These regulations specifically disallow the provisions of the Administrative Procedures Act (APA) that provide broader authority for the use of subpoenas in other administrative hearings (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].) Although the subpoena form created by the Office of Administrative Hearings (OAH) has options for production of documents under subpoena, not all of them may apply to special education matters, as OAH has jurisdiction over many types of non-IDEA disputes. While SDT’s 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 federal Family Educational Rights and Privacy Act (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).) 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.) 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).)

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 (*BRV*), 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* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, *aff’d*, *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653 (*S.A.*), 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.

DISCUSSION

Here, Student seeks prehearing production of documents on February 5, 2015 through subpoena to the District. With the exception of “education records,” 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 concedes in its moving papers that the requested records are not educational records. Moreover, the above-referenced cases of *Falvo*, *BRV*, and *Tulare County Office of Education* underscore Student's conclusion that the records sought are not educational records. Thus the requested records cannot be subpoenaed in advance of the hearing itself.

Student also alleges that the records sought are both necessary to prepare for the due process hearing and determinative of District's "good faith" in its offer of transportation services. The standard for issuance of an SDT in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This standard is stricter than the general APA standard of "good cause" for issuance of SDT's, adopted from Code of Civil Procedure, which states that:

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.

(Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

Student's SDT falls far short of demonstrating good cause for production of the documents requested, let alone of establishing the stricter standard of reasonable necessity. First, the SDT seeks documents in order to prepare for the pending hearing, which does not rise to the standard of materiality or reasonable necessity. Second, the attorney declaration accompanying the Motion to Compel states that the documents are sought in order to determine "whether or not the District is acting in good faith toward the Student", rather than material or reasonably necessary to, Student's case. Significantly, the issue in this case is whether the District's offer of transportation services provided a free appropriate public education, not whether the District was acting in "good faith". As such, neither the SDT, nor Student's Motion to Compel have shown that the items sought are reasonably necessary to the issues in this case.

On its face, the issue raised by Student's complaint should be capable of being addressed by documents in Student's educational records or by testimony at hearing. Moreover, the parties are required to exchange documents they intend to rely on at hearing, such that Student will have notice of any District document not otherwise contained in Student's educational records. Lastly, the instant Order does not preclude Student from

requesting at the prehearing conference the production of documents at hearing pursuant to subpoena.

Accordingly, for the reasons set forth above, Student has failed to make a threshold showing that the documents requested in the SDT are reasonably necessary for hearing. Student's Motion to Compel is denied, and the SDT issued by Student on January 5, 2015 is quashed.

ORDER

1. Student's subpoenas duces tecum, dated January 5, 2015, and directed to Westminster School District, is quashed in its entirety.

2. This order is made without prejudice to Student seeking issuance of a subpoena duces tecum for production of records at hearing by the ALJ assigned to hear this matter at the prehearing conference and upon a showing of reasonable necessity.

DATE: February 13, 2015

/s/

TED MANN

Administrative Law Judge

Office of Administrative Hearings