

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

SALINAS UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2024050786

ORDER GRANTING MOTION TO QUASH SUBPOENA

JUNE 17, 2024

On May 20, 2024, Student filed a request for due process with the Office of Administrative Hearings, called OAH, naming Salinas Union High School District, called Salinas. On May 22, 2024, OAH issued a scheduling order with hearing dates for the expedited and non-expedited hearings. The expedited hearing was scheduled to proceed on June 18, 19 and 20, 2024.

On May 22, 2024, Student issued a subpoena to Dan Burns, Salinas' administrator and superintendent, to testify and produce documents on June 18, 2024. Salinas received the subpoena on May 28, 2024. On May 31, 2024, attorneys Roxanna Khan and Erin Frazor filed a notice of representation and became Salinas' attorneys of record.

On June 6, 2024, Student sent another copy of the subpoena to Salinas' attorneys. At the June 10, 2024 prehearing conference, ALJ Paul Kamoroff noted that Salinas would be filing a motion to quash the subpoena.

The subpoena to Burns sought the following categories of testimony and documents:

- Salinas' policies, practices, training materials, presentations, memorandum, or communications referring to Salinas' policy regarding student expulsion and the Individuals with Disabilities Education Act for the 2023-2024 school year;
- Emails, memos, or other written communication between special education director Jennifer Smith and Burns regarding Student's pending psycho-educational assessment in Burns' possession and control; and
- Emails, memos, or other written communications regarding Student's expulsion in light of Salinas' pending special education assessment in Burns' possession or control.

Student's attorney concluded that the testimony and documents sought from Burns was reasonably necessary because of witness credibility, impeachment/rebuttal evidence, and Salinas' failure to complete the pending psychoeducational assessment before expelling Student.

On June 12, 2024, Salinas filed a motion to quash the subpoena on the grounds of improper service and failure to show the subpoena was reasonably necessary. On June 17, 2024, Student opposed the motion arguing Salinas' attorneys' failure to file its motion to quash three business days before the June 10, 2024 prehearing conference, or state the reason why it failed to do so. Further, Student also argued that Burns has

information about Salinas' policy about expelling Students and signed the May 15, 2024 letter expelling Student.

A party to a due process hearing under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.), or IDEA, has the right to present evidence and compel the attendance of witnesses in a special education due process hearing. (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 (order to produce documents or papers upon a showing of reasonable necessity by a party)." (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).)

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 the 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.

In general, there is no right to prehearing discovery in due process proceedings under the IDEA. (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 special education due process hearing. (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. These regulations specifically disallow the provisions of the Administrative Procedures Act 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].)

While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District*, (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing five business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

Education records under the IDEA are defined by the Family Educational Rights and Privacy Act, called FERPA, to include “records, files, documents, and other materials” that “(i) contain information directly related to a student; and (ii) 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. § 300.611(b).) 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 District v. Falvo* (2002) 534 U.S. 426 (*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 was an education record, citing *Falvo*, the Court of Appeal 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 found that the investigative report, "which was not directly related to the private educational interests of the student," was not an education record, because "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.)

In *Burnett v. San Mateo Foster City School District*, *supra*, relying on *Falvo*, the Ninth Circuit Court of Appeals affirmed the district court's determination that the school district was not required to turn over emails that were not "maintained" in a physical folder or secure electronic data base. (739 Fed. Appx. at p. 873.) "The Supreme Court has interpreted the word 'maintain' in FERPA as 'to keep in existence or continuance; preserve; retain' and reasoned that '[t]he word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database.'" (*Ibid.*, quoting *Falvo*, 534 U.S. 426, 432-433.)

A subpoena for the attendance of a witness must also meet the good cause requirement by a factual showing of why the testimony and/or production of records 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.)

APPROPRIATENESS OF SUBPOENA SERVICE

Salinas did not offer any support that Student inappropriately served Salinas on May 22, 2024, before attorneys Khan and Frazor became the attorneys of record for Salinas. Salinas stated that it received the subpoena on May 28, 2024, and its attorneys received a copy of the subpoena on June 6, 2024, after the deadline to file motions, three business days before the June 10, 2024 prehearing conference. When Salinas' attorneys received the subpoena was irrelevant to the issue of whether Salinas was properly served with the subpoena before its attorneys became the attorneys of record. Salinas did not show that Student inappropriately served the subpoena on May 22, 2024.

WHY SALINAS DID NOT FILE THE MOTION TO QUASH BEFORE THE JUNE 10, 2024 PREHEARING CONFERENCE

At the June 10, 2024 prehearing conference, Salinas advised ALJ Kamoroff of its intent to file a motion to quash and ALJ Kamoroff noted Salinas' intent in the Order Following Prehearing Conference. ALJ Kamoroff also stated in the Order Following Prehearing Conference that any motion not filed three business days before the prehearing conference shall include an explanation why it was not timely filed. Although Salinas failed to specifically explain why it did not file the motion to quash three business days before the prehearing conference, the papers filed by the parties demonstrate the reason why Salinas filed its motion late was because its attorneys did not receive the subpoena until June 6, 2024, less than three business days before the June 10, 2024 prehearing conference. This reason is sufficient to explain why Salinas' attorneys did not file the motion to quash three business days before the June 10, 2024 prehearing conference.

REASONABLE NECESSITY FOR THE RECORDS

The subpoena to Burns was defective because Student failed to make the requisite showing of reasonable necessity for Burns' testimony and for each of the three categories of documents requested. The declarations attached to the subpoena were conclusory and fell far short of demonstrating any valid basis for requiring the witness to appear for testimony and/or produce each of the requested category of documents. The conclusory statements that the documents relate to the appropriateness of Salinas' assessments of Student, and that the documents relate to the witness' credibility or used for impeachment or rebuttal, are insufficient to demonstrate "reasonable necessity" absent a more particularized showing for Burns' testimony and for each of the three categories of documents requested.

Student attempts to cure this defect in the opposition papers by explaining that Burns had information and documents about Salinas' policy on special education expulsion and signed Student's expulsion letter. Student's explanation should have been included in the declaration served with the subpoena. While Student might have been able to justify the need for Burns' testimony had the declaration supporting the subpoena included the information offered in the opposition, Student did not include any explanation, let alone, one that satisfied reasonable necessity for requiring Burns to testify and/or produce documents at hearing. Therefore, the subpoena was defective.

The declarations served with the subpoena issued by Student failed to make the requisite showing of reasonable necessity for the requested testimony and documents with a declaration showing the materiality and relevance of the testimony and

documents sought. As such, the subpoena to Burns was defective and cannot be modified to effectuate compliance. Therefore, the motion to quash the Burns' subpoena is granted in its entirety.

IT IS SO ORDERED.

Sabrina Kong

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings