BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

V.

ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, COMPTON UNIFIED SCHOOL DISTRICT, KERN HIGH SCHOOL DISTRICT, LOS ANGELES COUNTY OFFICE OF EDUCATION, LOS ANGELES UNIFIED SCHOOL DISTRICT AND ALAIN LEROY LOCKE COLLEGE ACADEMY.

OAH CASE NUMBER 2020060630

ORDER GRANTING AND DENYING IN PARTS KERN HIGH SCHOOL DISTRICT'S MOTION TO QUASH STUDENT'S DOCUMENT SUBPOENA

NOVEMBER 5, 2020

On June 18, 2020, Student filed a due process complaint with the Office of Administrative Hearings against educational agencies including some of the above-named parties. The Office of Administrative Hearings is called OAH. On August

31, 2020, OAH granted Student's motion to amend the complaint against the above-named parties. On October 16, 2020, OAH continued the hearing dates to November 17, 18, and 19, 2020. On October 30, 2020, Student issued two subpoena(s) duces tecum to Kern High School District: one for the person most knowledgeable to testify at hearing and to produce documents at hearing; and a second one to produce documents at hearing. Kern High School District is called Kern.

On November 3, 2020, Kern filed a motion to quash both subpoenas duces tecum on the grounds that Student did not show reasonable necessity for the subpoenas.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in 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 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 (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).)

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 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 (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. (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 (*Burnett*).) 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,* 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. (*Burnett, supra*, 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.)

DISCUSSION

BOTH SUBPOENAS ARE OVERBROAD AND FAILED TO SHOW REASONABLE NECESSITY

The subpoenas duces tecum directed to Kern are defective because Student failed to make the requisite showing of reasonable necessity. Student contends generally that the requested information in the subpoena duces tecum was needed to support her free appropriate public education claims against Kern and was reasonably calculated to lead to the discovery of admissible evidence. A more particularized showing in the declarations supporting the subpoenas is required to justify the scope of the requests to meet the reasonable necessity standard. Student did not show the materiality and relevance of the documents sought. As such, the subpoenas duces tecum are defective.

FIRST SUBPOENA: DEPARTMENT OF CHILD AND FAMILY SERVICES AND FOSTER YOUTH REQUESTS FOR DOCUMENTS AND PERSON MOST KNOWLEDGEABLE TO TESTIFY AT HEARING

Nothing in the Student's declaration supporting the subpoena duces tecum or the opposition establishes reasonable necessity for requiring the witnesses' testimony or production of any and all records, documents, recordings, or any other things held by, or in Kern's custody concerning Department of Child and Family Service contact or foster liaison involvement with Student, especially after OAH dismissed Issue 13 on October 29, 2020. Therefore, Kern's motion to quash is granted in its entirety as to the subpoena duces tecum requesting documents and testimony concerning the Department of Child and Family Services and foster youth information.

SECOND SUBPOENA: RECORDS AND INFORMATION REQUESTS FOR DOCUMENTS

Student's subpoena duces tecum to Kern seeking the following information is overbroad:

> "Any and all records, documents, recordings, or any other things held by, or in the custody and/or control of Kern High School District concerning (1) outgoing requests for educational records, (2) incoming requests for educational records, and (3) the educational records received, maintained and transferred by KHSD for student KIA MITCHELL (D.O.B. 08/29/2003) during the 2017-2018, 2018-2019 and 2019-2020 school years."

Student is entitled to obtain education records, but the scope of the subpoenaed documents is overbroad and beyond the scope of education records within the meaning

of FERPA and Education Code section 49061. Nothing in the Student's declaration supporting the subpoena duces tecum or the opposition establishes reasonable necessity for the broad categories of information sought by requesting "any and all records, documents, recordings, or any other things". However, this records/information subpoena duces tecum also includes education records to which Student is entitled to obtain. Student's education records can be requested at any time pursuant to Education Code section 56504, or by subpoena without a showing of reasonable necessity.

The portion of the subpoena duces tecum seeking education records at hearing is appropriate; the rest is not and shall be stricken. Therefore, under Section 1987.1 of the Code of Civil Procedure, which provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it, Student's subpoena duces tecum regarding records/information shall be modified as follows:

> "Kern shall produce education records regarding Student within the meaning of FERPA and Education Code section 49061, including outgoing and/or incoming request for educational records on November 17, 2020 to the extent they are not duplicative of the documents Kern already produced to Student under Education Code sections 56504 or 56505 subdivision (e)(7) in connection with Kern's exchange of exhibits five business days before the hearing."

Further, Kern represented that Student issued the same subpoena duces tecum to five other educational agencies which are also parties in this case. Student did not dispute Kern's representation. Therefore, to conserve judicial resources of having OAH rule on potential motions to quash on the same issues, Student shall meet and confer with the other educational agencies also parties in this case to discuss documents and testimony for hearing and attempt to resolve differences consistent with the orders set

forth here. Kern shall also provide OAH with the email of the person who will provide the records so OAH may email instructions to upload the documents to CaseLines.

ORDER

1. Kern's motion to quash Student's subpoenas duces tecum to the person most knowledgeable to testify and produce documents regarding the Department of Child and Family Service and foster youth information is granted in its entirety. No testimony or documents shall be produced under the Department of Child and Family Service or foster youth subpoena duces tecum.

2. Kern's motion to quash Student's subpoenas duces tecum to the person most knowledgeable regarding documents including education records is granted and denied in parts. Kern shall produce the documents modified as follows, by uploading it into CaseLines no later than 9:30 AM on the first day of hearing on November 17, 2020:
   "Kern shall produce education records regarding Student within the meaning of FERPA and Education Code section 49061, including outgoing and/or incoming request for educational records on November 17, 2020 to the extent

they are not duplicative of the documents Kern already produced to Student under Education Code sections 56504 or 56505 subdivision (e)(7) in connection with Kern's exchange of exhibits five business days before the hearing."

Sabrina Kong
Sabrina Kong (Nov 6, 2020 16:20 PST)

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings