BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020090042

ORDER DENYING, IN PART, AND GRANTING, IN PART, MOTION TO QUASH SUBPOENAS DUCES TECUM

OCTOBER 26, 2020

On August 31, 2020, Student filed a request for due process with the Office of Administrative Hearings, called OAH, naming Torrance Unified School District. On September 9, 2020, a scheduling order was issued setting the case for hearing on October 27 through October 29, 2020.

On October 14, 2020, the parties filed their Prehearing Conference Statements. In its Prehearing Conference Statement, Torrance listed 18 witnesses as experts.

On Sunday October 18, 2020, Student's counsel issued 18 subpoenas duces tecum to the same people Torrance listed as experts. The subpoenas duces tecum required the following persons to appear on October 27, 2020 at 9:30 AM and produce

documents at hearing: David Feldman, Suzanne Hutton, Paul Nitake, Ryan Burnett, Adriana Ibanez, Aisha Webb, Natalie Nguyen, Adam Vaccaro, Erin Lahr, Jessica Haugen, Aimee Wall, Kati Hoover, Paul Kim, Crista Gonzalez, Rudy Delana, Mark Roulette, Alison Glaeser, and Melinda Smith. Copies of the subpoena(s) were filed with OAH on October 19, 2020.

For all 18 subpoenas duces tecum, Student's counsel used an outdated form subpoenas duces tecum which called for the witnesses to mail hard copies of the requested documents to the OAH Sacramento office at least five business days prior to October 27, 2020. None of the subpoenas duces tecum attached valid proofs of service, as all are missing the information stating the date each subpoena was served, upon whom it was served, and the method of service used. In addition, the proofs of service were signed by Student's counsel on October 1, 2020, 17 days before the subpoenas were issued, and all the proofs of service refer to the "Request for Due Process Hearing and Mediation" as the document served.

All 18 subpoenas duces tecum require the witnesses to appear and produce at hearing the same nine categories of documents. Specifically, Category 1 requires the witnesses to produce a complete and accurate copy of their resume. Category 2 requires the witnesses to produce all academic transcripts from all schools attended by the witness listed on their resume or curriculum vitae. Category 3 requires the witness to produce copies of all publications and presentations listed in the witness' resume or curriculum vitae. Category 4 requires production of the witness' job application with all supporting documentation and references for the witness' current position and all other positions held within Tustin Unified School District. Category 5 requires production of a complete copy of the witness' Tustin Unified School District personnel file. Category 6 requires the witnesses to produce "any and all records" of the witness' ongoing

professional development including formal training and continuing education on conducting educational assessments, including "schedules, agendas, sign-in sheets, list of participants, handouts, power points, invoices, continuing education certificates, certifications, etc." for the 2017-2018, 2018-2019, and 2019-2020 school years. Category 7 requires the witnesses to produce "any and all reports generated about [Student] all with all underlying original data, testing protocols, notes, and communication containing, referencing, or related to your report." Category 8 requires production of all written notes drafted by the witnesses at any meeting "about and [Student]." Category 9 requires the witnesses to produce "any and all notes, memos, emails, or other communications about, referring to, or relating to [Student] in your possession or control, from 2017 to the present."

On October 19, 2020, a prehearing conference was held. Student explained that some of the subpoenas duces tecum were served by email to the witness' school email addresses except for two of the witnesses, with a courtesy copy to Torrance's counsel. Torrance's counsel stated that she believed that all the individuals to whom the subpoenas duces tecum were directed were Torrance employees, and that Torrance had not agreed to accept service of the subpoenas duces tecum, to which Student's counsel did not demur. Torrance's counsel stated that it contemplated making a motion to quash the 18 subpoenas duces tecum. The parties were ordered to meet and confer to attempt to resolve disputes regarding the subpoenas duces tecum, and Torrance was ordered to file any motion to quash by October 21, 2020 at 4:30 PM and explain why the motion was not filed three business days prior to the PHC. On October 21, 2020, OAH issued an Order Following Prehearing Conference.

On October 21, 2020, Torrance filed a motion to a motion to quash all 18 subpoenas duces tecum regarding on the grounds that they are overbroad, unduly

burdensome, unnecessary, untimely, constitute an impermissible attempt at discovery, and seek documents irrelevant to the issues in this case. Regarding Category 1 regarding all 18 subpoenas, Torrance asserts that OAH should find that request moot because Torrance has already agreed to produce the witness' resumes or curriculum vitae.

Torrance argues Student has failed to make any factual showing as to how any of the requested documents are material and relevant to the issues in the hearing. Torrance asserts that the vague and broad claims that the documents relate to a denial of a free appropriate public education, called FAPE, witness credibility, and impeachment/rebuttal evidence are inadequate. Torrance asserts Student has not established why examination of the witnesses under oath at hearing about the witnesses' resumes/curriculum vitae is insufficient to explore their background. Torrance argues that discovery is not permitted in special education proceedings, that the only records Parents are entitled to inspect is Student's educational file, but that the scope of the subpoenas include documents which are not educational records. Torrance contends that it has already produced Student's educational records, there is no pending dispute that the entire educational file was not produced, and that emails are not part of Student's permanent file. Torrance maintains that there is insufficient time to search for or obtain the requested documents. Regarding transcripts, Torrance contends that the process for obtaining them could take weeks. Torrance asserts that Student has failed to demonstrate any reasonable relationship between the witness' grades, publications or presentations, personnel file, and professional development records, to the issues at hearing, and that examination of the witnesses about these areas at hearing should be sufficient.

On October 23, 2020, Student opposed the motion arguing Student's counsel has agreed to withdraw all the subpoenas duces tecum except for those directed to David Feldman and Suzanne Hutton. Student contends that because these witnesses have been designated as experts, Student needs the documents in order to properly examine the witnesses about their special knowledge, skill, experience, training or education.

Student claims that Feldman has a history of overstating his credentials and exceeding the scope of his authority when interacting with students. Student contends Feldman previously represented in 2006 and 2016 due process hearings that he had a doctorate degree in psychology from Cambridge Graduate School, but his resume states he has a doctorate in philosophy in clinical psychology from Cambridge Graduate School of Psychology. Student has been unable to locate the school where Feldman got his degree or verify his degree. Student contends that documents concerning Feldman's academic credentials and how he presented his qualifications to Torrance is highly relevant to his credibility. Student also contends that Feldman's notes are relevant to his credibility regarding a November 1, 2019 report regarding his treatment of Student, which Student contends was not prepared contemporaneously and Student was unaware existed.

Student argues that Hutton was a special education teacher in charge of the TIDES classroom that Student contends was not appropriate for her. Student argues that no resume has been provided by Hutton, and there is no indication that Hutton has any prior experience or training with students with emotional disturbance, and that she was not trained by the program developers after joining TIDES. Student also asserts that Hutton was disciplined and placed in the TIDES classroom after posting something which Student contends demonstrated a negative attitude toward special needs students, parents and the IEP process. Student contends the requested records are

relevant to meaningfully evaluate Hutton's credibility, bias, education, training and experience.

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. (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.)

TIMLINESS OF THE MOTION TO QUASH

At the prehearing conference and in the Order Following Prehearing Conference, Torrance was ordered to explain as part of any motion to quash why it did not file its motion three business days prior to the prehearing conference. Although Torrance failed to comply with the Order, the papers filed by the parties demonstrate the reason why Torrance filed its the motion late. Specifically, Student did not send the subpoenas to Torrance until Sunday October 18, 2020, less than three days prior to the October 19, 2020 prehearing conference. Accordingly, Torrance had good cause for not filing the motion to quash three business days prior to the prehearing conference.

ALL SUBPOENAS EXCEPT THOSE DIRECTED TO FELDMAN AND HUTTON

In her Opposition, Student has withdrawn all the subpoenas duces tecum except for those directed to Feldman and Hutton. Accordingly, the motion to quash is denied because it is moot with regard to the following subpoenas duces tecum: Paul Nitake, Ryan Burnett, Adriana Ibanez, Aisha Webb, Natalie Nguyen, Adam Vaccaro, Erin Lahr, Jessica Haugen, Aimee Wall, Kati Hoover, Paul Kim, Crista Gonzalez, Rudy Delana, Mark Roulette, Alison Glaeser, and Melinda Smith.

SUBOENAS TO FELDMAN AND HUTTON

FORM OF THE SUBPOENAS DUCES TECUM

Neither party attached copies of the subpoenas duces tecum to their papers, but Student filed copies of them OAH on October 19, 2020. For both the Feldman and Hutton, Student's counsel used an obsolete OAH form subpoena duces tecum from April 2020, rather than the then current form which was updated by OAH in August 2020. The subpoenas duces tecum form Student used improperly called for the

witnesses to mail hard copies of the subpoenaed records in sealed envelopes to the OAH Sacramento office. In contrast, the August 2020 OAH form subpoena duces tecum required the email address of the person subpoenaed and included instructions to the witness to upload the documents using CaseLines. The August 2020 OAH form subpoena duces tecum and procedures were in place and available to the public when Student's complaint was filed on August 31, 2020. Parties and their counsel are required to use current OAH forms and procedures. Because Student failed to use the current form and procedures, the subpoenas duces tecum directed to Feldman and Hutton are defective and improper.

INSUFFICIENT NOTICE TO COMPLY

Code of Civil Procedure section 1987, subdivision (a) requires service of a subpoena on a witness to be made a reasonable time prior to the return date to allow the witness to prepare. Code of Civil Procedure Section 1987, subdivision (c) requires at least 10 days notice for attendance, and 20 days notice for attendance and production of documents, for party-affiliated witnesses. California Code of Civil Procedure section 1985.3, subdivision (d), states that service of a subpoena dues tecum must be made "in sufficient time to allow the witness reasonable time to locate and produce the records or copies thereof." Code of Civil Procedure section 2020.410, subdivision (c) defines sufficient time as "no earlier than 20 days of the issuance, or 15 days after the service" of the subpoena, whichever is later.

Here, Student has failed to provide the witnesses adequate time to respond to the subpoenas duces tecum. The subpoenas were issued on Sunday, October 18, 2020, less than 10 days prior to the hearing. Because they required the witnesses to produce the responsive documents no later than five business days prior to the hearing, this effectively gave the witnesses only two business days to locate and produce the

requested records and only eight days to produce them on the first day of hearing. It is unreasonable to expect that the breadth the documents requested by the subpoenas could be searched for, assembled, or obtained in the time allotted. The subpoenas duces tecum are defective for failure to give adequate notice to the witnesses for compliance with the subpoenas.

CATEGORY 1: RESUME OR CURRICULUM VITAE

Torrance argues that the subpoenas regarding Category 1 are unnecessary because it agreed to produce resumes or curriculum vitae for Feldman and Hutton. Based on examination of the exhibits in CaseLines, Feldman's resume has already been uploaded into CaseLines as Exhibit 24. Although Torrance's Table of Contents for its Exhibits uploaded into CaseLines lists Hutton's resume as Exhibit 40, there is no corresponding Exhibit 40 in the District's Exhibits section of CaseLines.

Accordingly, notwithstanding the other defects with the Feldman subpoena duces tecum, the motion to quash Feldman's subpoena regarding Category 1 is denied because the motion is moot.

Notwithstanding the other defects with the Hutton subpoenas duces tecum, the motion to quash Hutton's subpoena regarding Category 1 is denied. Torrance has voluntarily agreed to produce the Hutton resume or curriculum vitae, but has failed to do so, and OAH already ordered that the parties should produce the resumes and curriculum vitae for all experts, which would include Hutton. Torrance shall produce Hutton's resume or curriculum vitae no later than 9:30 AM on October 27, 2020.

CATEGORIES 2 THROUGH 9: REASONABLE NECESSITY AND OVERBREADTH

The subpoenas duces tecum directed to Feldman and Hutton are defective because Student failed to make the requisite showing of reasonable necessity for each of the requested documents. The declarations attached to the Feldman and Hutton subpoenas fall far short of demonstrating any valid basis for requiring the witness to produce each of the requested documents. The conclusory statements that the documents relate to the appropriateness of Torrance's assessments or offer of FAPE, and that the documents relate to the witness' credibility, competence, and qualifications, or used for impeachment or rebuttal, are insufficient to demonstrate "reasonable necessity" absent a more particularized showing for each document requested.

Torrance is correct that the declarations supporting the subpoenas fail to demonstrate any reasonable relationship between the witness' grades, publications or presentations, and professional development records, to the issues at hearing. Categories 2, 3 and 6 are overbroad. Student attempts to cure this defect in the opposition papers, but this information should have been included in the declarations served with the subpoenas. Because this information was not included in the declarations, the subpoenas are defective. In any event, the opposition papers fall short of making the required showing of reasonable necessity for each document requested. While Student might have been able to justify the need for Feldman's transcripts from Cambridge Graduate School of Psychology had the declaration supporting the subpoena included the information offered in the opposition, Student has failed to justify the necessity for requiring Feldman to produce academic transcripts from any other school attended and has offered no justification at all for requiring Hutton's transcripts. Student will have assess to Feldman and Hutton resumes/curriculum vitae at

hearing and can examine both witnesses about their educational background during the hearing.

Nothing in the declarations or the opposition establishes "reasonable necessity" for requiring the witnesses to produce all publications and presentations on their resume or every record, related to the witness' professional development during the 2017-2018, 2018-2019, and 2019-2020 school years, including all schedules, agendas, sign-in-sheets, lists of participants, handouts, power points, invoices, certifications and certifications, etc. Student's contention in the opposition, but absent from the declaration, that Hutton does not have proper training and experience is insufficient to demonstrate that each of the requested documents is "reasonably necessary" for Student to present her case at hearing. Although Student contends the requested records are relevant to meaningfully evaluate Hutton's credibility, bias, education, training and experience, a more particularized showing in the declarations was required to justify the scope of the request.

Student has offered no adequate justification for requiring the witnesses to produce any of the documents listed in Categories 4 and 5. Both Categories 4 and 5 ask the witnesses to produce documents related to employment at Tustin Unified School District. There has been no proper showing as to how documents related to positions the witnesses may have held at Tustin Unified School District are "reasonably necessary" to the issues for hearing. To the extent Student meant to refer to Torrance rather than Tustin Unified School District, Student should have corrected the subpoenas. As such, the subpoenas cannot be the basis for requiring the witnesses to produce documents related to employment at Torrance. In addition, Student has failed to make the showing necessary for requiring the witnesses to produce all the documents in their personnel files or their job applications and all supporting documentation and references.

Categories 7, 8 and 9 all seek documents regarding Student from the individual witnesses. Torrance argues that all educational records have been produced, and Student does not offer any rebuttal. Even if the some of the requested records contain information directly related to Student, it has not been demonstrated that all the requested records were "maintained" in the Student's file or on a permanent secure electronic data base. Student has not established that the requested documents are education records within the meaning of FERPA and Education Code section 56504.

Having failed to argue or establish the requested records are educational records, Student was required to make a showing of reasonable necessity in the declarations supporting the subpoenas. Student has failed to meet that burden. Student's declarations supporting the subpoenas lack any adequate showing of reasonable necessity for production by the witnesses of every document sought by Categories 7, 8 and 9. Although the opposition raises concerns about a November 5, 2019 Feldman statement detailing his treatment of Student, none of this information is in the declaration supporting the Feldman subpoena, and Student has failed to establish that those concerns support the production of all records sought from Feldman or Hutton. Regarding Category 8, the request is not only unclear because it asks for all written notes "about and [Student]" without any limitation by time. To the extent Student seeks notes about Student, the declarations fail to demonstrate that every note ever written by the witnesses is reasonably necessary to an issue at hearing. Regarding Category 9, Student's declarations also fail to explain why every note, memo, email or other communication about, referring to or relating to Student since 2017 in the witness' possession or control is reasonably necessary to prove Student's case.

In sum, the declarations served with the subpoenas duces tecum issued by Student failed to make the requisite showing of reasonable necessity for the requested

documents with a statement of facts showing the materiality and relevance of the documents sought. As such, the subpoenas are defective. While section 1987.1 of the Code of Civil Procedure, provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it, because the subpoenas contain numerous defects, particularly a defective form and insufficient notice for a hearing beginning on October 27, 2020, the subpoenas to Feldman and Hutton cannot be modified.

ORDER

1. Torrance's motion to quash Student's subpoenas duces tecum to Paul Nitake, Ryan Burnett, Adriana Ibanez, Aisha Webb, Natalie Nguyen, Adam Vaccaro, Erin Lahr, Jessica Haugen, Aimee Wall, Kati Hoover, Paul Kim, Crista Gonzalez, Rudy Delana, Mark Roulette, Alison Glaeser, and Melinda Smith is denied as moot.
2. Torrance's motion to quash Student's subpoenas duces tecum to David Feldman and Suzanne Hutton regarding the documents sought in Category 1 is denied. Torrance shall produce Hutton's resume or curriculum vitae by uploading it into CaseLines no later than 9:30 AM on October 27, 2020.
3. Torrance's motion to quash Student's subpoenas duces tecum to David Feldman and Suzanne Hutton regarding the documents sought in Categories 2 through 9 is granted. The subpoenas for records regarding Categories 2 through 9 to David Feldman and Suzanne Hutton are hereby quashed.

4. Counsel for Torrance shall immediately serve a copy of this order on David Feldman and Suzanne Hutton.

DocuSigned by:
Laurie Gorsline
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Laurie Gorsline

Administrative Law Judge

Office of Administrative Hearings