

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

vs.

FREMONT UNIFIED SCHOOL DISTRICT,

Respondent.

OAH NO. N2006050433

**ORDER DENYING PETITIONER'S
MOTION TO BAR TESTIMONY OF
DR. SUSAN CLARE**

On June 29, 2006, a Prehearing Conference (PHC) convened by telephone before Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH), Special Education Division. Attorneys Mandy Leigh and Emily Berg appeared on behalf of Petitioner Student (Petitioner). Attorney Damara Moore appeared on behalf of Fremont Unified School District (District).

During the PHC, Petitioner raised several objections to the District calling Dr. Susan Clare as a witness, and moved to exclude Dr. Clare as a witness. One of Petitioner's arguments was that permitting Dr. Clare's testimony would violate the Family Educational Rights and Privacy Act (FERPA). After hearing arguments from both sides, the ALJ denied Petitioner's motion and ruled that Dr. Clare could testify.¹ However, the ALJ stated that Petitioner could submit any legal authority in support of her FERPA claim, and the ALJ would review and consider the statutes and case law cited.

On June 30, 2006, OAH received the District's Points and Authorities in Opposition to Excluding the District's Expert Due to FERPA. On July 3, 2006, OAH received Petitioner's List of Authorities in Support of Petitioner's Objection to Review of Documents by Sue Claire [*sic*].

¹ This ruling is memorialized in the PHC order issued by the ALJ on June 30, 2006. Paragraph 7 of that order states: "Dr. Clare will be permitted to testify over Petitioner's objection."

APPLICABLE LAW

California Education Code section 56501, subdivision (a) provides that parents may request a due process hearing when there is a proposal or a refusal to initiate or change the identification, assessment, educational placement or the provision of a free appropriate public education (FAPE) to their child, or when there is a disagreement regarding the availability of a program available for the child, including the question of financial responsibility, as specified in subsection (b) of Section 300.403 of Title 34 of the Code of Federal Regulations.

A party to a due process hearing must provide the other parties to the hearing, at least five business days prior to the hearing, with a list of all witnesses and their general areas of testimony that the parties intend to present at the hearing. (Ed. Code § 56505, subd. (e)(7).) At hearing, any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. (Cal. Code of Regs, tit. 5, § 3082, subd. (b).)

FERPA protects the collection, maintenance and dissemination of student records. (20 U.S.C. § 1232g.) The purposes of FERPA include allowing parents access to their child's education records, and protection of the student's privacy by limiting the transmittal of personally identifying information without the required consent. FERPA includes numerous exceptions allowing for the release of otherwise confidential records, including the release to "other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of a child for whom consent would otherwise be required." (20 U.S.C. § 1232g(b)(1)(A).)

The Office of Special Education Programs (OSEP), in consultation with the U.S. Department of Education's Family Policy Compliance Office (FPCO), has concluded that a due process hearing essentially constitutes an implicit exception to FERPA confidential requirements. (*Letter to Stadler* (OSEP 1996) 23 IDELR 973.) In another policy letter, OSEP explained that FERPA's prior written consent requirement "does not prevent institutions from disclosing education records, or personally identifiable information from education records to outside persons performing professional services as part of the operation of the institution." (*Letter to Diehl* (OSEP 1995) 22 IDELR 734.) OSEP subsequently confirmed that FERPA allowed disclosure of records to an expert witness who was acting as an agent of the local educational agency. (*Letter to Presto* (OSEP 1998) 213 IDELR 121.)

Several judicial and administrative decisions have found that FERPA's confidentiality requirements do not prohibit disclosure of educational records to expert witnesses or other outside advisors for legitimate educational interests, such as a due process hearing. (See, e.g., *Linn-Mar Community Sch. Dist. and Grant Wood Area Education Agency* (SEA IA 2004) 41 IDELR 24; *Fayette County School System* (SEA GA 2004) 41 IDELR 224; *Prins v. Independent School District No. 761* (D.C. MN 1997) 27 IDELR 312.)

DISCUSSION

Petitioner's objection to Dr. Clare's testimony has no merit. First, hypothetically, even if disclosure of educational records to a witness constituted a FERPA violation, there is no requirement that the witness's testimony must be excluded from a due process hearing.² Second, FERPA claims are not within the jurisdiction of due process hearings, and thus OAH has no authority to make any rulings under FERPA. (Ed. Code § 56501, subd. (a).) In any event, OSEP rulings and decisions from other state educational agencies have established that disclosure of educational records for the purpose of an expert witness's testimony in a due process hearing does not constitute a FERPA violation, and does not constitute a basis to prohibit the witness's testimony. Hence, Petitioner's motion is denied, and the ALJ's initial ruling stands.

IT IS SO ORDERED this 5th day of July 2006.

SUZANNE B. BROWN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

² In the present case, the District properly disclosed Dr. Clare as an expert witness in its PHC Statement, and also complied with the witness disclosure requirements in Education Code section 56505, subdivision (e)(7).