

**IN THE DUE PROCESS HEARING OF
KANSAS STATE DEPARTMENT OF EDUCATION**

**Tolga Ulusemre and Xiaolei Xu, on behalf of
A [REDACTED] U [REDACTED] and D [REDACTED] U [REDACTED]
Parents,**

v.

Case No. 24DRP229-001

**Blue Valley U.S.D. 229
Respondent.**

MOTION TO QUASH JULY 21, 2024 SUBPOENA

COMES NOW non-party Tish Holub Taylor, PhD, by and through counsel Anne M. Kindling of Joseph, Hollander & Craft LLC, and objects to the Parents' July 21, 2024 K.S.A. 60-245: Subpoena to Produce Documents, Information or Objects or to Permit Inspection of Premises – Without Testimony (“Subpoena”) and requests the Hearing Officer issue an injunction to quash the Subpoena. In support of this Motion, Dr. Taylor states as follows:

Dr. Taylor is a doctoral-level psychologist licensed by the Kansas Behavioral Sciences Regulatory Board. As a licensed psychologist, she is bound to follow not only Kansas law and the ethical obligations of her profession as well as the federal Health Insurance Portability and Accountability Act and amendments thereto (HIPAA).

On July 21, 2024, at the request of Tolga Ulusemre (“Parent”), the Hearing Officer issued a Subpoena upon Dr. Taylor for the production of the “All the data collection sheets you obtained for a) A [REDACTED] U [REDACTED]’s evaluation that was on 9/29/2023, b) D [REDACTED] U [REDACTED]’s evaluation that was on 8/25/2023.” (*See Exhibit A.*)

The deadline for production was July 31, 2024. Dr. Taylor picked up the subpoena from the post office on August 1, 2024.

This Motion follows, to formally object to the Subpoena and to ask the Hearing Officer to quash the Subpoena, and to order the Parents to proffer in writing the proposed relevance of the records sought to be produced and how the Parent intends to use such records for the Due Process Hearing. In the event the Hearing Officer allows the Subpoena to stand, Dr. Taylor alternatively requests the Hearing Officer to order that the records be sent directly to the Hearing Officer for an *in camera* inspection before requiring production to the Parents and that production to the parents only occur within the confines of a Protective Order.

Also relevant hereto is the fact that the Parents have asserted a malpractice claim against Dr. Taylor seeking damages in connection with Dr. Taylor's evaluations of A.U. and D.U.

Under K.S.A. 60-245, a tribunal "must quash or modify a subpoena that: . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies." K.S.A. 60-245(c)(3)(A)(iii). Here, Parents' Subpoena seeks privileged and confidential documents that ethically cannot be produced.

K.S.A. 74-5301 *et seq.* and associated regulations govern licensed psychologists in Kansas. K.S.A. 74-5323 provides psychologist-client confidentiality with the same sanctity as attorney-client confidentiality, subject to limited exceptions.

HIPAA regulations treat psychotherapy notes different than a patient's medical records and afford them special protection. Psychotherapy notes "contain

particularly sensitive information, [and] they are the personal notes of the therapist, intended to help him or her recall the therapy discussion and are of little or no use to others not involved in the therapy. . . . Information in these notes is not intended to communicate to, or even be seen by, persons other than the therapist.” 65 Fed. Reg. 82623 (Dec. 28, 2000). Unlike other protected health information, HIPAA provides that a patient does not have the right to obtain a copy of his own therapist’s psychotherapy notes. 45 C.F.R. § 164.524(a)(1) (“[A]n individual has a right of access to inspect or obtain a copy of protected health information about the individual in a designated record set, *except for . . . psychotherapy notes . . .*”) (Emphasis added.) Importantly, HHS guidance also specifically provides that a parent does not have a right to access or obtain their child’s psychotherapy notes over the provider’s objection: *Does a parent have a right to receive a copy of psychotherapy notes about a child’s mental health treatment?*, HHS.gov (September 1, 2017), <https://www.hhs.gov/hipaa/for-professionals/faq/2094/does-parent-have-right-receive-copy-psychotherapy-notes-about-childs-mental-health-treatment.html> (noting that “the Privacy Rule does not provide a right for a patient or personal representative to access psychotherapy notes regarding the patient”).

Here, the data collection sheets – better referred to as assessment instruments – requested in the Parents’ Subpoena should be treated the same as psychotherapy notes under HIPAA. The assessment instruments include the following:

- A.U. BASC3 Self-Report SRP-C Child Ages 8-11;
- A.U. NEPSY-II Record Form Ages 5-16;

- A.U. TOPL-2 Examiner Record Booklet Ages 8-18;
- A.U. Conners 4TM Parent Form;
- A.U. Brief 2 Parent Form;
- A.U. BASC3 Parent Rating Scales PRS-C Child Ages 6-11;
- A.U. NICHQ Vanderbilt Assessment Scale – Teacher Informant
- D.U. BASC3 Self-Report SRP-C Child Ages 8-11;
- D.U. NEPSY-II Record Form Ages 5-16;
- D.U. TOPL-2 Examiner Record Booklet Ages 8-18;
- D.U. Conners 4TM Parent Form; and
- D.U. BASC3 Parent Rating Scales PRS-C Child Ages 6-11.

The assessment instruments themselves are subject to copyright laws. With the exception of the Vanderbilt tool, Dr. Taylor pays a fee for the use of these instruments as well as to score the responses. Some of these completed assessment instruments contain Dr. Taylor’s written notes.

The American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (<https://www.apa.org/ethics/code>) contains informative guidance on this topic. Section 9.02 notes that psychologists administer, score, interpret and use assessment instruments whose validity and reliability have been established. Section 9.04 states: “Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law.”

Here, the assessment instruments used by Dr. Taylor in her evaluations of A.U. and D.U. are tools that meet the professional standards of validity and reliability. It is important to recognize, however, that only professionals who are qualified by education, training, licensure, and experience can administer and interpret these assessment instruments. The risk, then, is that producing the assessment instruments to untrained individuals, such as Parents, is (a) meaningless to the untrained individual reviewing the information and (b) poses a significant risk that the data will be misinterpreted or used for an improper purpose by the untrained individual.

Parents have previously sought to obtain copies of the assessment instruments for A.U. and D.U. directly from Dr. Taylor and via the malpractice claim asserted against her, separate from the Subpoena issued in this proceeding. Dr. Taylor has steadfastly refused, adhering to her ethical, professional, and legal obligations. Parents' use of the Hearing Officer's subpoena power here is simply an end-run around what they are unable to obtain directly from Dr. Taylor. There is a legitimate concern that the Parents are simply trying to obtain copies of these reports for purposes of the malpractice claim asserted against Dr. Taylor.

It is also unclear why these assessment instruments would be relevant to the instant proceedings or how they would be used in the proceedings. Dr. Taylor never provided the completed assessment instruments or evaluation reports for A.U. and D.U. to Blue Valley U.S.D. 229 or any of its teachers, counselors, or other personnel. Whatever the dispute is between Parents and Blue Valley U.S.D. 229, the evaluation

reports, as well as the assessment instruments which were administered and interpreted by Dr. Taylor for purposes of completing the evaluation reports, could not have formed any of the basis for Blue Valley U.S.D. 229's actions, as the content of the evaluations and assessment tools was unknown to the district. Therefore, the assessment instruments are irrelevant to the instant proceedings.

Moreover, Dr. Taylor is concerned that the disclosure of these assessment instruments would violate copyright laws since she has paid for the use of the instruments but not for the disclosure of them. Beyond copyright law, there is also a concern that placing these instruments in the public sector could cause them to become less reliable as assessment tools because persons being evaluated could study the forms in advance and manipulate their responses during an evaluation. There is also a risk that disclosure of the assessment tools completed by teachers could result in retaliation.

For all of these reasons, Dr. Taylor asks the Hearing Officer to quash the Subpoena. If, however, the Hearing Officer will not quash the Subpoena, Dr. Taylor requests that the Hearing Officer require Parents to make a proffer of the relevance and admissibility of the documents and/or order any such documents to be submitted first to the Hearing Officer for an *in camera* inspection prior to requiring production to Parents. Should the Hearing Officer determine that release to the Parents is appropriate, then Dr. Taylor requests that production only be pursuant to a Protective Order prohibiting re-disclosure and limiting the use of the documents to

this proceeding as well as allowing redaction of identifying information from which the individual completing the instrument could be re-identified.

WHEREFORE, for the reasons stated herein and for good cause shown, Dr. Taylor respectfully requests the Hearing Officer quash the Parents' Subpoena for the assessment instruments (data collection sheets), or alternatively require a proffer of relevance and *in camera* inspection prior to production, and if production is required the same be subject to a Protective Order and redaction, and for such other and further relief as the Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies this 30th day of August, 2024, the foregoing **Motion to Quash Subpoena** was served via email to:

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