UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SHONITA BLACK,
Plaintiff,

Case No. 1:12-cv-503
Dlott, J.
Litkovitz, M.J.

vs.

SHELIA KYLE-RENO, et al.,
Defendants.

ORDER

This matter is before the Court on plaintiff's Motion to Quash Subpoena to Produce Educational Records (Doc. 37) and supporting memorandum (Doc. 40), and defendant's memorandum in opposition (Doc. 39).

I. Background

Plaintiff brings this action alleging violations of her federal rights and state law claims arising out of the April 2011 termination of her employment as a Guardian ad Litem with the Office of the Hamilton County, Ohio Public Defender. (Doc. 2). On February 4, 2014, defendants issued subpoenas duces tecum pursuant to Fed. R. Civ. P. 45 to non-parties The Ohio State University and Thurgood Marshall School of Law. (Doc. 39, Exhs. 1, 2). Defendants seek the following documents:

> Educational records including but not limited to records relied upon by the university in its admission of Shonita Black such as an ACT or SAT score and/or high school transcripts, records of courses or classes taken by Shonita Black at the university including the grades in any such courses or classes Shonita Black earned and any other document(s) retained by the university which constitutes an educational record.

(*Id.*).

Plaintiff seeks to quash the subpoenas pursuant to Fed. R. Civ. P. 45, arguing that the materials sought by defendants are overbroad and defendants are merely engaged in a "fishing expedition"; the records are irrelevant to her claims because her educational records were not part of the selection process for her job position; the subpoenas request privileged information which plaintiff has not consented to disclose; and the subpoenas do not comply with Rule 45 because plaintiff did not receive proper notice under the Rule.[1] (Doc. 37 at 1).

Defendants contend that plaintiff's lack of consent is not a bar to obtaining the requested documents because the Court can order production of the educational records pursuant to 34 C.F.R. § 99.31(a)(9)(i), which allows an educational institution to disclose "personally identifiable information from an education record of a student" without the student's prior consent in order to comply with a court order or lawfully issued subpoena. Defendants argue that plaintiff's educational records are relevant because plaintiff was terminated for cause, specifically failure to perform her job and incompetence, and her educational records arguably bear on her competence "generally and in the field of law." (Doc. 39 at 4). Defendants further allege that plaintiff's academic records "may lead to discoverable evidence indicative of Plaintiff's competence, intelligence or some other personal characteristic which may lead to discoverable information in this lawsuit." (*Id.*).

II. Motion to quash

Fed. R. Civ. P. 45(d) governs motions to quash subpoenas.[2] The Rule requires that on timely motion, the Court must quash subpoenas requiring "disclosure of privileged or other protected matter, if no exception or waiver applies[.]" Fed. R. Civ. P. 45(d)(3)(A)(iii). Rule

[1]Although plaintiff is a nonparty to the subpoenas, she has standing to challenge the disclosure of information as to which she possesses a claim of privilege or personal right. *See Hendricks v. Total Quality Logistics, LLC,* 275 F.R.D. 251, 253 n.1 (S.D. Ohio 2011). Plaintiff possesses a right of privacy in her educational records under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. *See Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (2002); *Alig-Mielcarek v. Jackson*, 286 F.R.D. 521, 526 (N.D. Ga. 2012).

[2] Rule 45 was amended in 2013. Fed. R. Civ. P. 45(d) contains the provisions formerly contained in subdivision (c).

45(d)(3)(A)(iii) is properly applied here because defendants seek disclosure of "protected matter," *i.e.*, educational records in which plaintiff has a right of privacy. Plaintiff as the movant bears the burden of persuasion on her motion to quash the subpoenas. *See Hendricks,* 275 F.R.D. at 253. *See also Recycled Paper Greetings, Inc. v. Davis,* No. 1:08-mc-13, 2008 WL 440458, at *3 (N.D. Ohio Feb.13, 2008).

Rule 45 does not list irrelevance or overbreadth as reasons for quashing a subpoena. Fed. R. Civ. P. 45(d)(3). However, courts have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26. *Hendricks,* 275 F.R.D. at 253 (quoting *Barrington v. Mortage IT, Inc.,* No. 07-61304, 2007 WL 4370647, at *3 (S.D. Fla. Dec. 10, 2007)).

Discovery under the federal rules is generally broad and liberal:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. . . .

Fed. R. Civ. P. 26(b)(1). Thus, the Court must determine whether the subpoena requests are overly broad or seek irrelevant information under the same standards set forth in Rule 26(b) and Fed. R. Civ. P. 34, which governs requests for production. *Hendricks,* 275 F.R.D. at 253 (citing *Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 591 (D. Kan. 2003)).

Courts have imposed a "significantly heavier burden" on a party requesting the discovery of educational records to show its interests in obtaining the records outweighs "the significant privacy interest of the students." *Alig-Mielcarek*, 286 F.R.D. at 526. Thus, courts have ordered disclosure of educational records when the records are clearly relevant to the claims at issue. *Id.* (citing *Ragusa v. Malverne Union Free School Dist.,* 549 F. Supp.2d 288, 293-94 (E.D.N.Y. 2008) (ordering disclosure where records were deemed relevant as to whether the school's

reasons for denying tenure to the plaintiff teacher were a pretext for age, national origin, and disability discrimination); *Nastasia v. New Fairfield Sch. Dist.,* No. 3:04 CV 925(TPS), 2006 WL 1699599, *1-2 (D. Conn. June 19, 2006) (compelling disclosure of records of complaints similar to those made by the plaintiff where the information was "clearly relevant" to plaintiff's claims and the defendant's burden of production was "minimal"); *Davids v. Cedar Falls Cmty. Sch.,* No. C96–2071, 1998 WL 34112767, *3 (N.D. Iowa Oct. 28, 1998) (allowing disclosure of education records where the records were relevant to whether school "engaged in a practice of disparate discipline of minority and non-minority students"); *Rios v. Read,* 73 F.R.D. 589, 599 (E.D. N.Y. 1977) (students' academic records and test results were relevant where it would be "impossible to prove" the alleged Title VI violations without such records)).

III. The motion to quash is granted

Initially, the Court finds it need not determine whether defendants failed to comply with Rule 45(a)(4)'s notice provision by failing to serve a copy of the subpoenas on plaintiff before serving the subpoenas on the non-party schools. Plaintiff concedes she received notice of the subpoenas by mail on February 7, 2014 (Doc. 40 at 5), which allowed her the opportunity to move to quash the subpoenas. Plaintiff therefore has not been prejudiced by any technical violation of Rule 45, and the Court may address the merits of plaintiff's motion. *See Hendricks,* 275 F.R.D. at 252 (citing *McClendon v. TelOhio Credit Union, Inc.,* 2006 WL 2380601, at *3 (S.D. Ohio Aug. 14, 2006) (court was entitled to look beyond an alleged technical violation of Rule 45's notice provision and address the merits of the issue of whether the subpoenaed information was properly discoverable where plaintiffs were not prejudiced by the violation.)).

The Court finds that plaintiff has carried her burden to show that the motion to quash the subpoenas issued to the two educational institutions must be granted. Plaintiff's undergraduate and law school records are simply not relevant to the determination of whether plaintiff was a

competent employee and whether she was terminated from her job as an Attorney Guardian ad Litem for failure to perform her job. This is not an employment discrimination case alleging a failure to hire where academic records might be relevant. Nor do defendants allege that plaintiff misrepresented her qualifications at the time of hiring, in which case her academic records could likewise be relevant. To the contrary, defendants make no specific allegations to show that plaintiff's educational records may be relevant to this lawsuit. Defendants attempt to draw a possible link between plaintiff's academic performance and her job performance, but plaintiff's level of academic success has no bearing on how well she performed her job for defendants. Moreover, plaintiff's educational records are not likely to lead to the discovery of relevant information pertaining to her job performance and competency. Finally, the Court agrees with plaintiff that defendants' requests for all educational records related to plaintiff that these institutions have in their possession are overbroad. *See, e.g., Hendricks,* 275 F.R.D. at 256 (finding subpoenas to former colleges and universities requesting documents pertaining to "[a]ny and all educational records, including but not limited to: transcripts, teacher evaluations, standardized test results, disciplinary records, absenteeism/tardiness records" should be quashed on both relevancy and overbreadth grounds). For these reasons, the Court determines that defendants are not entitled to plaintiff's educational records sought in the subpoenas.

Accordingly, plaintiff's motion to quash the subpoenas duces tecum seeking her educational records is **GRANTED.**

IT IS SO ORDERED.

Date: 2/20/2014

Karen L. Litkovitz
United States Magistrate Judge