

1 [Attorney Name], SBN []
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7 Attorney for Defendant

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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF [COUNTY]**

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA

13 Plaintiff,

14 vs.

15 [DEFENDANT'S NAME]
16 Defendant

CASE NO. [CASE NUMBER]

**MOTION FOR IN CAMERA REVIEW OF
PUPIL RECORDS; DECLARATION OF
[Attorney Name]**

Date:

Time:

Dept:

Current Trial Date:

Case Filed:

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19 PLEASE TAKE NOTICE that on the above date and time and in the above-designated
20 department, [NAME OF DEFENDANT] (“Defendant”) will move this court for an order
21 requiring Hayward Unified School District to comply with the subpoena duces tecum served in
22 this cause, and attached hereto as Exhibits 1, for pupil records of the alleged victim in this case,
23 John Doe and to bring said records to court for in camera review and, if good cause is found to
24 exist, disclosing relevant portions to the Defense at an appropriate time.

25 This motion is made pursuant to *Education Code* § 49076 on grounds of due process of
26 law and the right to confrontation. It is based on this notice of motion, declaration of Patrick
27 Clancy, attached exhibits and the pleadings and papers in this case.
28

1 This motion will be made on the grounds that good cause exists for in camera review of
2 John Doe’s pupil records as there is a high probability that the requested records contain
3 exculpatory evidence relevant to the central issues in this case, i.e. John Doe’s credibility and/or
4 to cast doubt on and/or rebut any conclusion that John Doe gained knowledge of the alleged
5 sexual acts from Defendant rather than other sources.

6 Dated: March 16, 2022

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Patrick Clancy
Attorney for Defendant

1 I.

2 SUPPORTING FACTS AND CONTENTIONS¹

3 [INSERT SUPPORTING FACTS]

4 PROCEDURAL REQUIREMENTS

5 Generally, Documents and records in the possession of nonparty witnesses, government
6 agencies, members of the press, or other persons or agencies other than agents or employees of
7 the prosecutor are obtainable by subpoena duces tecum. *Pacific Lighting Leasing Co. v. Superior*
8 *Court* (1976) 60 Cal. App. 3d 552, 560, 131 Cal. Rptr. 559; see *People v. Superior Court*
9 (Broderick) (1991) 231 Cal. App. 3d 584, 594, 282 Cal. Rptr. 418 (discovery procedures provided
10 by Proposition 115’s reciprocal discovery scheme (*Penal Code* §§ 1054–1054.7) are not
11 applicable to discovery from third parties).

12 A subpoena duces tecum does not require the party subpoenaed to provide the defendant
13 with a copy of the materials sought, but does require that person or entity to produce the
14 information in court for the defendant’s inspection. *Pacific Lighting Leasing Co. v. Superior*
15 *Court* (1976) 60 Cal. App. 3d 552, 567, 131 Cal. Rptr. 559. If the person or entity subpoenaed
16 asserts a privilege, or relies on a constitutional right, a balance must be struck between the
17 defendant’s right to a fair trial and the rights of the person subpoenaed. In this situation, it is
18 appropriate for the trial court to hold an in-camera hearing to determine whether the defendant
19 should be permitted to view the materials.

20 *Cal. Educ. Code* § 49076 (a) provides: “A school district shall not permit access to pupil
21 records to a person without written parental consent or under judicial order except as set forth in
22 this section and as permitted by Part 99 (commencing with Section 99.1) of Title 34 of the Code
23 of Federal Regulations.”

24 34 CFR 99.31 provides: “(a) An educational agency or institution may disclose personally
25 identifiable information from an education record of a student without the consent required by §

26 ¹ Factual allegations herein are made on information and belief as permitted in motions of this
27 nature. (See *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 CA3d 162, 167;
28 *People v. Schmies* (1996) 44 CA4th 38, 53; *Star Motor Imports, Inc. v. Superior Court* (1979) 88
CA3d 201, 204 (offer of proof sufficient).

1 99.30 [parental or eligible student consent] if the disclosure meets one or more of the following
2 conditions: ...(9)(i) The disclosure is to comply with a judicial order or lawfully issued
3 subpoena.”

4 A trial court determines whether there is good cause to disclose confidential material such
5 as a child’s school records. *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074-1075, 116 Cal.
6 Rptr. 3d 217, 239 P.3d 670.

7 III.

8 GOOD CAUSE EXISTS FOR IN CAMERA REVIEW OF THE REQUESTED PUPIL 9 RECORDS

10 A. In Camera Review is Permitted Upon a Showing of Good Cause

11 In *Pennsylvania v. Ritchie* [(1987) 480 U.S. 39 [94 L.Ed.2d 40] (*Ritchie*), the issue was
12 whether a defendant's rights to confront and cross-examine witnesses and to due process
13 outweighed the state's interest in the confidentiality of its child protective agency’s investigative
14 files. (*Ritchie*, 480 U.S. at pp. 42-43.) The defendant was charged with sexual offenses involving
15 his 13-year-old daughter who had reported the offenses to the police, which turned the matter
16 over to the agency. Serving the agency with a subpoena, the defendant sought to discover the
17 agency's investigative files with respect to his daughter and her accusations as well as the
18 agency's investigative files with respect to a prior child abuse report by an unidentified source.
19 (*Id.* at p. 43.) The agency refused to comply with the subpoena, citing the Pennsylvania statute
20 which made the agency's investigative files confidential. After a hearing in chambers, the trial
21 court denied the defendant’s motion for disclosure of agency’s files. (*Id.* at p. 44.) At trial, the
22 defendant's daughter testified against him and defense counsel thoroughly cross-examined her,
23 without limitation on the scope. The defendant was convicted on all counts. (*Id.* at pp. 44-45.)
24 He appealed, contending that the failure to disclose the agency's files violated his rights to due
25 process and to confront and cross-examine witnesses. (*Id.* at p. 45).

26 [T]he due process clause requires the ‘government’ to give the
27 accused all ‘material’ exculpatory evidence ‘in its possession,’ even
28 where the evidence is otherwise subject to a state privacy privilege,
at least where no clear state policy of ‘absolute’ confidentiality
exists. [Citation.] When the state seeks to protect such privileged

1 items from disclosure, the court must examine them in camera to
2 determine whether they are ‘material’ to guilt or innocence.
3 [Citation.] In *Ritchie*, the high court held that a complete in camera
4 review of confidential records generated by a state agency as part of
5 a molestation investigation was required where the defendant
6 claimed they might undercut the complaining witness's credibility
7 and where state law did not bar their disclosure under all
8 circumstances.

9 *People v. Webb* (1993) 6 Cal.4th 494, 518.

10 In rejecting the state’s argument that disclosure would contravene the state’s interest in
11 confidentiality and the statutorily privileged nature of the agency's files “on the mere speculation
12 that the file ‘might’ have been useful to the defense,” The *Ritchie* Court stated:

13 Although we recognize that the public interest in protecting this
14 type of sensitive information is strong, we do not agree that this
15 interest necessarily prevents disclosure in all circumstances. This is
16 not a case where a state statute grants [the agency] the absolute
17 authority to shield its files from all eyes. [Citation.] Rather, the
18 Pennsylvania law provides that the information shall be disclosed in
19 certain circumstances, including when [the agency] is directed to do
20 so by court order. [Citation.] Given that the Pennsylvania
21 Legislature contemplated some use of [the agency's] records in
22 judicial proceedings, we cannot conclude that the statute prevents
23 all disclosure in criminal prosecutions. In the absence of any
24 apparent state policy to the contrary, we therefore have no reason to
25 believe that relevant information would not be disclosed when a
26 court of competent jurisdiction determines that the information is
27 ‘material’ to the defense of the accused. We therefore affirm the
28 decision of the Pennsylvania Supreme Court to the extent it orders a
remand for further proceedings.

Ritchie, supra, 480 U.S. at pp. 57-58, fns. Omitted.

Education Code section 49076 provides that “[a] school district is not authorized to permit
access to pupil records to any person” with numerous specified exceptions including “under
judicial order.” As in *Ritchie*, “[t]his is not a case where a state statute grants [the school district]
the absolute authority to shield its files from all eyes.” (*Ritchie, supra*, 480 U.S. at p. 57.)

To obtain in camera review of privileged documents a defendant must first establish good
cause for their discovery. *People v. Reber* (1986) 177 Cal.App.3d 523, 531, 223 Cal. Rptr. 139,
disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1124, 65 Cal. Rptr.
2d 1, 938 P.2d 986. “In this context, good cause means a reasonable likelihood that the
documents contain information that is both material and favorable to the defense and that the

1 same or comparable information is not obtainable from nonprivileged sources.”

2 **B. Good Cause Exists for In Camera Review of John Doe’s Pupil Records**

3 In *People v. Daggett* (1990) 225 CA3d 751, the defendant made an offer of proof that the
4 victim had been molested at age five by two older children and that he had pending juvenile
5 charges against him. In finding the trial court had erred in refusing to hold a hearing based on
6 such an offer, the reviewing court stated:

7 A child’s testimony in a molestation case involving oral
8 copulation and sodomy can be given an aura of veracity by his
9 accurate description of the acts. This is because knowledge of such
acts may be unexpected in a child who had not been subjected to
them.

* * *

10 Here Daggett's offer of proof was that he learned from an
11 inspection of the prosecutor’s file Daryl told a mental health worker
and Doctor Slaughter that he had been molested two older children,
12 ages eleven and eight, when he was five years old. This should
13 have been sufficient for the court to have ordered a hearing to
determine whether the acts of prior molestation were sufficiently
14 similar to the acts alleged here. The court erred when it failed to do
so.

15 Similarly, the defense here is informed that, in 2014, Defendant and Asha Charles were
16 called to John’s Does elementary school to meet with principal Naomi Watts and a school
17 psychologist. Defendant and Asha Charles were told that John Doe was touching other students’
18 penises and having them touch his and/or requesting such contact. Thus, it appears likely that
19 John Doe was subjected to acts similar to those he is accusing Defendant of. As recognized in
20 *People v. Daggett, supra*, in light of the inherent dangers of concluding that the source of the
21 alleged victim’s knowledge of the acts complained of was Defendant, the defense should have
22 been allowed to elicit the victim’s prior sexual history to refute it.

23 Defense is also informed that John Doe’s pupil records contain evidence of his dishonesty
24 and duplicity in making these accusations.

25 **C. The Evidence of Character Sought Is Admissible Under Evidence Code § 1101**

26 The prior sexual conduct of the complaining witness, which is evidence of a person’s
27 character or trait of character, is admissible under *Evidence Code* §1101(c) to support or attack
28 his or her credibility. The prohibition stated in subsection (a) of that section applies to character

1 evidence only when it is offered to prove the conduct of a complaining witness on a specified
2 occasion.

3 Here, the Defense seeks to attack the alleged victim’s credibility, and is thus entitled
4 under section 1101(c) to employ evidence of his prior sexual conduct, prior acts of deceit, prior
5 false allegations and prior lying as evidence to attack his credibility.

6 **D. Evidence Code § 1103(c) Does Not Bar Admission of The Alleged Victim's Prior**
7 **Sexual Conduct Because Such Evidence Will Not be Offered to Prove his Consent.**

8 *Evidence Code* §1103(c)(1) states, as a general proposition, that “opinion evidence,
9 reputation evidence, and evidence of specific instances of the complaining witness’s sexual
10 conduct...is not admissible by the defendant in order to prove consent by the complaining
11 witness.” However, §1103 does **not** bar evidence of a victim’s sexual conduct (nor cross-
12 examination of him concerning such conduct) when the evidence is offered to attack her
13 credibility. *Evidence Code* §1103(c)(3) & (4); *People v. Chandler* (1997) 56 CA4th 703, 711;
14 *People v. Blackburn* (1976) 56 CA3d 685, 689-690).

15 Once the defendant makes a sworn offer of proof concerning the relevance of the sexual
16 conduct of the complaining witness to attack his credibility, the protections of §1103 give way to
17 the procedural safeguards of §782. *People v. Rioz* (1984) 161 CA3d 905, 916.

18 **E. Evidence Code § 352 is not a Bar to Admission of the Evidence Sought**

19 Generally, cross examination to test the credibility of a prosecution witness should be
20 given wide latitude. *People v. Belmontes* (1988) 45 Cal.3d 744, 780. “[C]ross-examination is the
21 principle means by which the believability of a witness and the truth of his testimony are tested.”
22 *Farrell L. v. Superior Court* (1988) 203 CA3d 521, 526. Moreover, it is well established that
23 “[i]n sex cases, broad cross-examination of the prosecuting witness on prior sexual experiences,
24 fabrication and sexual fantasy should be allowed.” *People v. Francis* (1970) 5 CA3d 414, 417.

25 In *People v. Reeder* (1978) 82 CA3d 543, 550-551 the court held that “in criminal cases,
26 any evidence that tends to support or rebut the presumptions of innocence is relevant [since] it is
27 fundamental in our system of jurisprudence that all of a defendant's pertinent evidence should be
28 considered by the trier of fact.” Further, even “Evidence Code Section 352 must bow to the due

1 process right of a defendant to a fair trial and to his right to present all relevant evidence of
2 significant probative value to his defense. In *Chambers vs. Mississippi* (1973) 410 U.S. 284, 93
3 S.Ct. 1038, 35 L.Ed.2d 297, it was held that the exclusion of evidence, vital to a defendant's
4 defense, constituted a denial of a fair trial in violation of constitutional due-process
5 requirements.” *Id.* at p. 553.

6 **IV.**

7 **CONCLUSION**

8 It is therefore respectfully requested that the court order an in-camera review of John
9 Doe’s pupil records from HUSD to determine if, in fact, any are relevant, and if so, to disclose
10 them to the defense at an appropriate time.

11 Respectfully submitted,

12 Dated: March 16, 2022

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15 Patrick Clancy
16 Attorney for Defendant
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I, PATRICK E. CLANCY declare:

1. I am an attorney duly licensed to practice law in the State of California. I am a Certified Criminal Law Specialist. I am the attorney for the defendant in this matter. This matter is set for trial on April 13, 2020.

2. I represent [NAME OF DEFENDANT] (“Defendant”) who is accused of
I declare the above under penalty of perjury except as to those matters based upon information and belief and as to those matters, I believe them to be true.

Executed in Pleasant Hill, CA on March 16, 2022.

[Attorney Name], SBN

EXHIBIT LIST

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