BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017060142 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENA DUCES TECUM

PROCEDURAL BACKGROUND

Student filed a request for due process (complaint) with the Office of Administrative Hearings (OAH) on June 2, 2017. Student alleges that Capistrano Unified School District denied him a free appropriate public education during several school years for a variety of reasons. Among Student's contentions is that District did not consider Student's progress at the University of California, Irvine's Child Development School, the private school where Parents later placed him, when making offers of a free appropriate public education to Student. Student also contends that District's offers of placement have not been appropriate because they did not provide the level of support Student receives at the Development School.

The case has been continued twice. The due process hearing is presently scheduled to begin on January 9, 2018.

On December 11, 2017, District served Student with notice of a subpoena duces tecum it intended to serve on the Development School. The subpoena directs the Development School to produce the following: testing protocols and/or reports of standardized measures administered to Student; token system for positive behavior reinforcement utilized for Student; cumulative assessments of Student's behaviors that Development School generates on a weekly basis; testing protocols and/or reports of standardized measures administered to Student related to behavior including but not limited to, rating scales, self-reports, teacher reports, and parent reports; direct behavioral observation data produced and collected by Development School; any and all records relating to social skills training and/or services provided to Student through or by Development School; any and all records relating to other services such as speech and language and occupational therapy provided to Student by or through Development School; any and all records which Development School reviews in weekly treatment meetings to ascertain Student's behavioral and educational progress; all individualized education program and other goals for Student implemented by Development School; all report cards; all academic

and behavioral progress reports; all quarterly reports of Student's academic and behavioral progress; teacher notes; work samples; and any IEP documents created, implemented, or utilized by Development School.

District's declaration in support of the subpoena states that it needs the documents for the proper presentation of its defense in this case as Student's parents unilaterally placed him at Development School after alleging that Student required a program there to meet his needs. District also bases its request for the records on Student's request for reimbursement for the cost of his placement at Development School. District states it has not been otherwise able to obtain the records.

The subpoena is returnable on January 9, 2018, the first day of the hearing, at District's offices, where the hearing is scheduled. The subpoena gives Development School the alternative of sending the requested records to District's attorney's office by January 3, 2018.

Student filed a motion to quash the subpoena on December 13, 2017. Student contends that District is attempting to obtain pre-trial discovery, which is not permitted in due process proceedings in California. Student also contends that the subpoena is overly broad, that District has not demonstrated a reasonable necessity for the requested documents, and seeks documents not relevant to this case.

District filed an opposition to Student's motion on December 18, 2017, which was supported by several declarations. The declarations describe District's unsuccessful efforts to obtain the documents through means other than a subpoena.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act (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).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e).) However, neither the IDEA nor the California Education Code confer a right to prehearing discovery in due process proceedings.

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, which accord prehearing access to only two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code § 56504), and (ii) the parties are entitled to receive copies of all the documents the parties intend to use at hearing, not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)). Neither of these two circumstances envisions subpoenaing documents from a third party prior to a hearing.

Rather, in special education proceedings in California the hearing officer is given the right to issue subpoenas for personal appearances, and for the production of documents upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(b) [adopted into the Administrative Procedures Act at Gov. Code § 11450.20, subd. (a)], which requires:

> A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, the OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which 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.

DISCUSSION

Student first argues that District is attempting to obtain pre-trial discovery because the subpoena gives Development School the option of serving the documents on District's attorney six days before the hearing. District responds that it is optional and that the subpoena is actually returnable the first day of the hearing.

Student's argument is persuasive. There is no right to pre-hearing discovery. The subpoena improperly permits Development School to provide District with the documents prior to the start of the hearing. Should Development School elect that option, District would

in effect be the recipient of pre-hearing discovery. The subpoena is therefore modified to delete the option of serving District's counsel with the requested records.

Student also argues that District has failed to prove reasonable necessity for the documents, that the subpoena is overly broad, and that the records requested are irrelevant to District's defense. Student contends that because he is privately placed at a school not certified as a non-public school by the Department of Education, there is no reason for District to need his records in order to defend against Student's case at hearing.

Student's argument is disingenuous. Student's complaint specifically raises four contentions regarding the Development School: 1) Student requested District place him there; 2) Student required the program that Development School has provided to him and which, allegedly, District's program could not; 3) Student is entitled to reimbursement for Parents' cost of funding his placement at Development School; 4) Student requires placement prospectively at a non-public school offering a similar program to that of Development School. Student has therefore put Development School's program at the core of his allegations. The education he receives there, the needs that Development School can or cannot meet, and the progress Student may or may not have made are all relevant to Student's case and thus relevant to District's defense against Student's issues.

District has demonstrated a reasonable necessity for the records. It has demonstrated that it unsuccessfully attempted to obtain the records through means other than a subpoena. It has demonstrated that the records may be relevant to its case. Student's motion to quash the subpoena duces tecum to Development School is therefore denied to the extent that the subpoena directs Development School to produce the requested records the first day of the hearing.

ORDER

1. Student's motion to quash the subpoena duces tecum to Development School is granted as to the option for Development School to produce the records to District's attorney no later than January 3, 2018. That provision is hereby deleted from the subpoena.

2. Student's motion to quash the subpoena duces tecum is otherwise denied. The portion of the subpoena directing Development School to provide the records on January 9, 2018, the first day of hearing, remains as written as to all records requested. Development School shall produce the documents described in the subpoena duces tecum declaration, on the first day of hearing, January 9, 2018.

3. District shall immediately serve Development School with a copy of this order.

DATE: December 21, 2017

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings