BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. TODAY'S FRESH START CHARTER SCHOOL INGLEWOOD.	OAH Case No. 2018101180 ORDER GRANTING MOTION TO QUASH SUBPOEAN *DUCES TECUM* TO LOS ANGELES UNIFIED SCHOOL DISTRICT

On October 26, 2018, Parent on behalf of Student (Student) filed a request for due process hearing naming Today's Fresh Start Charter School Inglewood as a party. On November 21, 2019, Student filed an amended complaint. Hearing in this case is scheduled to begin April 9, 2019.

On March 4, 2019, Counsel for Today's fresh Start issued a subpoena to Los Angeles Unified School District seeking a range of Student's records. The subpoena required production of copies of the documents on April 2, 2019, to the offices of the charter school's counsel. On March 7, 2019, Student filed a motion to quash Today's Fresh Start's subpoena for records on the grounds that the subpoena seeks improper pre-trial discovery and fails to establish good cause for the production of the records.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act 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).)

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) 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)), 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, 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

Today's Fresh Start argues that the subpoena should not be considered pre-hearing discovery because it seeks records for a hearing. The charter points to its need to disclose documents it intends to introduce at hearing five business days prior to the hearing date as justifying the request that the documents be produced prior to the first day of hearing. The charter also asserts subpoenas *duces tecum* are allowed in administrative proceedings, citing as authority California Government Code section 11450.1 subd. (a). Today's Fresh Start argues that good cause is not required to be articulated in support of the subpoena based on this statute. Finally, the charter asserts that it would have been unable to access the documents any other way as Los Angeles Unified School District requires a subpoena in order for third party to access a student's records.[1]

Student argues that pre-hearing discovery is not allowed in special education cases and furthermore that Today's Fresh Start did not articulate any good cause for seeking the records.

Today's Fresh Start's reliance on California Government Code section 11450.1 subd. (a) as authority for the issuance of the subpoena in question is misplaced. 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].)

[1] The subpoena was accompanied by the required notice to consumer served on Student.

Generally, there are no provisions for pre-hearing discovery under the Individuals with Disabilities in Education Act. (20 U.S.C. § 1400 et seq.) Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "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).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e).) However the statute does not confer the right to prehearing discovery. 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 each intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).) No provision exists for Today's Fresh Start's request to receive records from a third party in advance of the first day of hearing.

Furthermore, the subpoena that was issued failed to comply with the requirement that it be accompanied by a declaration establishing good cause for production of the records. While section 1987.1 of the Code of Civil Procedure, provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it, here, Todays Fresh Start made no statement of the basis for the need for the records or the good cause for them to be produced. As no good cause for production of the records has been established, the subpoena cannot be modified.

ORDER

1. The subpoena for records to Los Angeles Unified School District is hereby quashed.

2. Counsel for Today's Fresh Start Charter School Inglewood shall immediately serve a copy of this order on Los Angeles Unified School District and the school site in question.

IT IS SO ORDERED.

DATE: March 20, 2019

DocuSigned by:
Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings