BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013070215 ORDER GRANTING MOTION TO QUASH SUBPOENA DUCES TECUM

This matter is set for prehearing conference on October 28, 2013 and due process hearing on November 5 through 7, 2013. On September 10, 2013, Student served on the District a subpoena duces tecum (SDT). On September 18, 2013, the District moved to quash the subpoena, and on September 20, 2013, Student filed an opposition.

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 at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).) The hearing officer in a special education due process hearing may issue subpoenas or subpoenas duces tecum (SDTs) upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit.5, § 3082, subd. (c)(2).) However, special education law does not specifically address motions to quash subpoenas or SDTs. In ruling on such motions, OAH relies by analogy on the relevant portions of the California Code of Civil Procedure. Section 1987.1 of that code 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

The SDT Student served on the District requires the production of several categories of records relating to matters mentioned in the District's response to Student's due process complaint. It does not require the appearance of anyone at the due process hearing. Instead, it allows only for production of the documents by sending them to the offices of Student's attorney by September 18, 2013.

The District argues that Student has no right to compel the production of documents before the hearing except as provided by special education law; that the SDT does not make a showing of reasonable necessity for the production of the records; and that inadequate time

was provided to find and produce them. Since the District's first two arguments are well taken, there is no need to address the third.

Prehearing Discovery

California law provides that parents may before a hearing obtain pupil records under Education Code section 56504 and related statutes, and are also entitled to receive, five business days before the hearing, copies of all the documents the district intends to use at the hearing, and a list of all witnesses the district intends to call, with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).) However, a party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights 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).) Both of those subsections relate only to due process hearings, not to any prehearing procedures.

Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to "[a] party to a hearing held pursuant to this section ..." (Ed. Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. 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 Board of Education promulgated section 3082, subdivision (c)(2), of Title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and SDTs for return at hearings.

Accordingly, OAH has repeatedly ruled that a party to a special education due process matter lacks the right to compel production of documents outside this statutory and regulatory scheme. (*Student v. Fremont Unified School Dist.* (Aug. 27, 2008) Cal.Offc.Admin.Hrngs No. 20006050443 (Order Granting Motion to Quash Subpoena Duces Tecum, etc.); see also *Student v. Placentia-Yorba Linda Unified School Dist.* (Dec. 23, 2011) Cal.Offc.Admin.Hrngs No. 2011090432 (Order Quashing Subpoena Duces Tecum); *Student v. Menlo Park City Elem. School Dist.* (April 18, 2011) Cal.Offc.Admin.Hrngs No. 2010120283 (Order Granting in Part and Denying in Part Motion to Quash Subpoena Duces Tecum).) Student's opposition does not mention these decisions or cite any authority for obtaining prehearing discovery in special education due process matters..

Showing of Reasonable Necessity

Student has not set forth on the SDT a showing of reasonable necessity for the subpoena. (Cal. Code Regs., tit. 5, § 3082, subd.(c)(2).) The form declaration required for issuance of the SDT provides space for the declarant to establish that "good cause exists" for the production of the documents sought "by reason of the following facts:" In that space Student merely lists the desired documents.

As the subpoena form requires, a showing of reasonable necessity must be made in the SDT itself, not in a subsequent memorandum on a motion to quash. (See Code Civ. Proc. § 1985, subd. (b)[affidavit showing reasonable cause "shall be served with a subpoena duces tecum . . . "].) Student's declaration fails to meet this requirement.

The District' motion to quash the SDT served on it on September 10, 2013, is granted.

Dated: October 01, 2013

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings