BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017070595
SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2017070835 ORDER DENYING STUDENT'S MOTION TO QUASH SUBPOENA DUCES TECUM TO NEW VISTA SCHOOL

On October 17, 2017, Student filed a motion to quash a subpoena duces tecum, issued by Saddleback Valley Unified School District to New Vista School. Student attached to his motion a copy of the Notice to Consumer pursuant to California Code of Civil Procedure section 1985.3 and the Office of Administrative Hearings Subpoena Duces Tecum that District's attorney served on Student's attorney on October 13, 2017. The subpoena duces tecum demands the appearance of a custodian of records or other qualified witness from New Vista School, along with the requested documents in New Vista School's possession, on the first day of the due process hearing at the place and time the hearing is scheduled to begin.

On October 19, 2017, District filed an opposition to Student's motion to quash.

The parties argued Student's motion during a recorded telephonic prehearing conference on October 23, 2017.

APPLICABLE LAW

Prehearing Discovery in Special Education Due Process Proceedings

There is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities 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).) The California Education Code provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code section 56505, subdivision (a), states 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 states in pertinent part, "The 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)." These regulations specifically disallow the provisions of the Administrative Procedure Act for other administrative hearings, which provide broader authority for the use of subpoenas. (Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].) Special education law does not specifically address whether a subpoena duces tecum may be issued by an attorney.

Since special education law is silent on these topics, and the Administrative Procedure Act does not directly apply, OAH looks to the relevant portions of the Administrative Procedure Act and the California Code of Civil Procedure as guidance. Code of Civil Procedure section 1985, subdivision (c), provides that an attorney of record in an action may sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena. Code of Civil Procedure section 1985.3 provides that anyone who seeks to obtain personal records pertaining to a consumer in connection with a civil action or proceeding must take certain steps to notify the consumer that his or her personal records are being sought, including personal information held by a local governmental agency. (Code Civ. Proc., § 1985.4.) A party subpoenaing confidential third party records in an administrative proceeding must comply with the notice protections of section 1985.3. (*Sehlmeyer v. Dept. of General Services* (1993) 17 Cal.App.4th 1072.) In ruling on a motion to quash a subpoena or subpoena duces tecum, OAH also relies by analogy on the relevant portions of Code of Civil Procedure. Section 1987.1 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. OAH employs this process in ruling on motions to quash, as modified by special education's unique procedures and standards.

Although subpoenas duces tecum are available in special education due process proceedings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only to two types of documents: (i) educational records, which parents have the right to request and receive within five business days at any time (Ed. Code, § 56504), and (ii) all documents which the opposing party intends to present at hearing, which must be provided not less than five business days prior to the hearing (Ed. Code, § 56505, subd. (e)(7)).

Reasonable Necessity for Production

The standard for issuance of a subpoena duces tecum in a special education due process proceeding is "reasonable necessity"[1] (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2)), requiring a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This condition mirrors the requirement of a showing of good cause for a subpoena duces tecum to issue under civil law. (Code Civ. Proc., § 1985, subd (b).)

The good cause requirement is met by a factual showing of why the requested documents 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) 107 Cal.App.2d 75, 77.) A conclusory declaration that the desired documentary evidence is relevant and material is insufficient. (*Id.*, at p. 835.)

Education Records

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA) to include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b); 34 C.F.R. § 99.3.) Pupil or education records do not include "records of instructional, supervisory, and administrative personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(B)(i); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3.)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo)*, after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their

[1] In the entire California Code of Regulations, this is the only use of the term "reasonable necessity."

reasons for doing so." (*Falvo, supra*, 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Id*.) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar . . . ." (*Id*. at pp. 434-435.)

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record, the Court of Appeal conducted an analysis of the "scant" judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that "the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*Id.* at pp. 751-754.) The Court of Appeal then found that the investigative report, "which was not directly related to the private educational interests of the student," was not an education record, "as the report was not something regularly done in the normal course of business," and "was not the type of report regularly maintained in a central location along with education records . . . in separate files for each student." (*Id.* at p. 755.)

In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D. Cal. Sept. 24, 2009) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, the district court found that documents such as school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not "maintained" by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

DISCUSSION

District's subpoena seeks production of "any and all educational records for [Student] from July 17, 2015 to present, including but not limited to: educational and therapy records while at New Vista School, behavior data, discipline records/entries, internal and external communications (including email, letters, phone logs, communication logs) regarding [Student's] behavior and/or educational progress, attendance records, enrollment paperwork, progress reports, assessments, test results, progress on goals, and report cards." The subpoena duces tecum directs New Vista School to produce the documents and the custodian of records or another qualified witness on the first day of hearing at the hearing location at the time the hearing is scheduled to start.

Student argues District has only attempted to allege "good cause" for a subpoena duces tecum and has not established "reasonable necessity" for the subpoenaed documents. Student contends that the request is overbroad because it may include information "unrelated to the issues at hand," which Student narrowly constrains to "whether the District failed to fulfill its child find obligation from July 15, 2015 to present," "whether the District's offer of [free appropriate public education] at the May 26, 2017 [individualized education program] was appropriate," and, regarding only one requested remedy, "whether the New Vista School has the ability to implement Student's IEP." Student also asserts that "the necessary information could be retrieved through other means." Student proposed that District could have the desired information from "reimbursement receipts provided by Student, tuition rate sheets, attendance records, or testimony from New Vista staff." In addition, Student contents the request is duplicative because 1) Student will give District the documents he intends to rely on meet his burden of proof at hearing, and 2) Parents signed a release of information form and District therefore can obtain the education records it wants from New Vista with that form instead of a subpoena duces tecum. Student acknowledged that at the time of District's spring 2017 multi-disciplinary assessment, Parents signed a release of information form authorizing New Vista School to provide District with Student's education record. Student simultaneously argues that District could get for hearing the very things District wants using that six-month-old release because Parents consented to District having Student's educational records, but that District should not be allowed to obtain them through a subpoena duces tecum. Finally, Student mentions in his conclusion that the subpoena duces tecum requests documents that are privileged; however, Student fails to specify what privilege might apply. Student requests that the subpoena duces tecum "be quashed in its entirety."

District's original declaration in support of the subpoena duces tecum attempted to respond to the pre-printed prompt on the form OAH-1 (Rev. 8/10), which states, "The undersigned states that the books, papers, documents and/or other things named below and requested by this subpoena are material to the proper presentation of the case, and good cause exists for their production by reason of the following facts:". District's attorney twice used the language of "good cause," as pre-printed on the form. District's attorney also declared the requested documents "are necessary to establish what New Vista School has provided to [Student] since his enrollment there, which goals or areas of need New Vista School is addressing, and [Student's] educational performance and progress at New Vista School." In its opposition to Student's Motion to Quash, District argues it established "reasonable necessity" for the requested documents, despite its use of the "good cause" language. District contends Student's allegations that District failed to offer Student an appropriate program to address Student's needs in the areas of social skills, social-emotional functioning, executive functioning, fine motor and motor coordination skills, and need for individualized support require consideration of Student's areas of needs. District argues Student's progress in the two years he has attended New Vista School is likely memorialized in the documents District requests and the documents are necessary to establish what Student's unique needs were up to and through the time of the challenged May 2017 IEP. District noted in its written opposition and reiterated during oral argument at the

October 23, 2017 telephonic prehearing conference that Student intends to call many New Vista School witnesses to testify regarding Student's needs, the insufficiency of District's offer, and the appropriateness of New Vista School as a prospective placement for Student. Student's Prehearing Conference Statement designated all the New Vista School employee witnesses as experts. District argues it requires the requested education records to adequately prepare for the New Vista School witnesses' testimony, effectively cross-exam those witnesses, and argue regarding the weight and credibility of their testimony in light of the information documented in Student's education records.

District has demonstrated that what it requested, "any and all educational records," are reasonably necessary to defend this matter and to present its case as to Student's remedy requests, especially prospective placement at New Vista School. District persuasively argues that the ability to conduct effective cross-examination of employees of New Vista School requires that District have access to Student's education records at New Vista. While it is uncertain if the release of information form the Parents signed in connection with the spring 2017 assessments would, at this time, be sufficient to request a copy of Student's New Vista School education records, New Vista School would not be obligated to provide District with Student's education record in response to District's request. A subpoena duces tecum, however, commands New Vista School to provide the requested education records and a witness to authenticate them, and affords District enforcement methods through sanctions and contempt proceedings if New Vista School fails to appear and produce the requested education records.

Student's motion to quash the subpoena duces tecum is denied. The scope of production need not exceed that which is requested in the subpoena duces tecum, specifically Student's "educational records" as that term is defined and interpreted in the relevant law. Further, New Vista School does not need to produce any of Student's education records that it has already provided District in connection with the spring 2017 multi-disciplinary assessment, based upon the release of information form Parents signed.

ORDER

1. Student's motion to quash District's subpoena duces tecum upon New Vista School is denied.

2. New Vista School is not required to produce documents in excess of that which is requested in the subpoena duces tecum, specifically Student's "educational records" as that term is defined and interpreted in the relevant law.

3. New Vista School does not need to produce any of Student's education records that it has already provided District in connection with the spring 2017 multi-disciplinary assessment, based upon the release of information form Parents signed.

4. District shall serve a copy of this order on New Vista School.

IT IS SO ORDERED.

DATE: October 25, 2017

DocuSigned by:
Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings