BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. PANAMA BUENA VISTA UNION SCHOOL DISTRICT AND KERN COUNTY SUPERINTENDENT OF SCHOOLS.	OAH Case No. 2018101020 ORDER GRANTING MOTION TO QUASH SUBPOENA DUCES TECUM

On October 22, 2018, Student filed a Due Process Hearing Request with the Office of Administrative Hearings naming Panama Buena Vista Union School District and Kern County Superintendent of Schools. Student alleges that he resides within the boundaries of Panama, but attended a special day class through the Kern Superintendent and was a client of the Kern Regional Center. Student alleges respondents denied Student a free appropriate public education by predetermining placement and by failing to: provide certain documents to Parent related to the October 2018 individualized educational program team meeting; timely provide Parent with an assessment plan; discuss at IEP team meetings Parent's concerns related to emotional distress; and implement Student's IEP since June 2018.

On October 29, 2018, OAH issued an amended scheduling order setting the due process hearing on December 20, 2018.

On November 20, 2018, Panama issued a subpoena duces tecum directing Kern Regional Center to produce to Panama "by November 30, 2018" records related to the assessment of Student and all related services provided to Student. The subpoena states that the Panama has a due process hearing in this matter on December 20, 2018 and that requested records relate to the assessment of Student and his eligibility for special education and related services under the Individuals with Disabilities Education Act.

On November 27, 2018, the Kern Regional Center contacted Panama's counsel and requested that the subpoena be re-submitted with broader language in order to obtain the records. The same day, Panama served a revised subpoena. It directed Kern Regional Center to produce to Panama by December 4, 2018, the same records requested in the prior subpoena. This subpoena again stated that Panama has a due process hearing in this matter on December 20, 2018, but this time it stated that the records related to the assessment of and provision of services obtained by Student through the Kern Regional Center.

On November 28, 2018, the parties filed a joint request to continue the due process hearing.

On November 29, 2018, Student filed a motion to quash the subpoena served by Panama. Student argues that the subpoena is vague and overbroad. Student contends that the subpoena does not explain how Student's regional center records relate to Student's IDEA claims or how the requested documents relate to Panama's defense. Student maintains his IDEA claims do not involve special education eligibility, and the records sought may include health history thereby intruding on his right to medical privacy.

On November 30, 2018, OAH continued the hearing to February 19, 20 and 21, 2019 pursuant to the parties' joint request.

On December 3, 2018, Panama filed opposition to the motion. Panama argues that the requested records are relevant to the due process issues and that it has established reasonable necessity for the records. Relying on a 2012 OAH order issued in another case, it claims it was permitted to seek the records a reasonable amount of time before the due process hearing. Panama argues that the provisions limiting pre-hearing discovery do not apply to subpoenas directed to third parties. It maintains that reasonable necessity to obtain the requested documents has been established because by seeking placement at and reimbursement for an after school program at Valley Achievement Center, Student has placed at issue the services he is receiving at Valley Achievement Center through the Kern Regional Center. Panama asserts that it seeks all records related to the assessment of and provision of services because it is unaware of the services Student is receiving through his July 19, 2018 individual program plan, and it needs those documents to determine if reimbursement and placement is warranted for Valley Achievement Center.

On December 5, 2018, Panama filed a notice and accompanying affidavit disclosing that on December 5, 2018, its attorneys received a package from the Kern Regional Center which it assumes contains the subpoenaed documents. The package remains unopened pending a ruling on the motion to quash.

APPLICABLE LAW AND DISCUSSION

In general, 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).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings, but does not confer the right to prehearing discovery. (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 of Regs., tit. 5, § 3082, subd. (c)(2).) The law accords prehearing access to 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 educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code, § 56505, subd. (e)(7).)

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 the Code of Civil Procedure. 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.

Here, Panama's subpoena duces tecum requires compliance by sending the requested documents to the offices of its attorneys well before the scheduled hearing dates. Special education law does not contain any provision authorizing this type of prehearing discovery. 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. (20 U.S.C. § 1415(h); Ed. Code § 56505, subd. (e).) Although a student's education records can be requested by a student from a district at any time pursuant to Education Code section 56504, there is no authority which permits a district to compel prehearing production of records held by a third party as attempted here by Panama. Previous OAH orders in other cases may be informational, but are not binding in subsequent cases. Because Panama is not entitled to use a subpoena to obtain prehearing discovery, its subpoena duces tecum seeking production of such records prior to hearing is improper.

In addition, the subpoena duces tecum is overbroad, and neither it nor the revised subpoena is supported by a declaration establishing reasonable necessity. Student is correct that the subpoena decum tecum does not explain how the regional center records relate to Student's IDEA claims or how the requested documents relate to Panama's defense. Conclusory statements that there is a future due process hearing, and that the requested records relate to the assessment of Student and his eligibility for special education and related services under the IDEA, or that the records relate to the assessment of and provision of services obtained through the Kern Regional Center are insufficient. Although Panama persuasively argues in its opposition that Student has put the records pertaining to Valley Achievement Center at issue, this supporting information is not contained in the subpoena duces tecum served on Parent. Moreover, Panama has failed to set forth any justification for records pertaining to anything other than the Valley Achievement Center placement and reimbursement issues. Accordingly, the subpoena duces tecum is improper, and is therefore quashed.

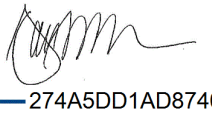
ORDER

1. Student's motion to quash is granted in its entirety.

2. Upon receipt of this Order, Panama's counsel shall return by certified mail to Kern Regional Center the sealed package unopened, and maintain proof of its compliance with this Order.

IT IS SO ORDERED.

DATE: December 10, 2018

DocuSigned by:

274A5DD1AD87400...

LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings