BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: FULLERTON SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2017090443
PARENTS ON BEHALF OF STUDENT, v. FULLERTON SCHOOL DISTRICT.	OAH Case No. 2017060283 ORDER DENYING IN PART AND GRANTING IN PART MOTION TO QUASH SECOND SUBPOENA DUCES TECUM SERVED ON CHILD DEVELOPMENT CENTER

Fullerton School District filed a request for due process (complaint) on June 6, 2017, naming Student. Student filed a complaint on September 11, 2017, naming District. The Office of Administrative Hearings consolidated the two cases on September 15, 2017. Hearing on the consolidated matter began on February 20, 2018.

Student's complaint alleges, in pertinent part, that District denied him a free appropriate public education by failing to provide him with appropriate programming and related services during the time frame at issue in the case. Part of Student's proposed resolution should he prevail on his allegations is a request that District reimburse Parents for the costs they have incurred in placing Student at the Lab School at the University of California, Irvine's Child Development Center.

On January 29 and February 1, 2018, District personally served a subpoena duces tecum on the University of California, Irvine's Child Development School. On February 14, 2018, OAH granted without prejudice Student's motion to quash the subpoena due to procedural deficiencies Student with it. OAH's order stated that the subpoena was, to a great extent, substantively valid.

District served the Child Development Center with a second subpoena on February 14, 2018. The subpoena is valid on its face. Student filed a motion to quash the subpoena on February 16, 2018. District filed an opposition on February 20, 2018.

The second subpoena requests the same documents as did the first, for the period January 1, 2017, to the present. The documents requested, as summarized, are:

1. Any documentation, including electronic communications, referencing or relating to communications regarding Student with Student's parents, representatives, or other educational providers.

2. Any documentation, including electronic communications, referencing the nature and frequency of counseling or other therapeutic services, or other educationally related services provided to Student.

3. Any reports, evaluations, intake reports, discharge reports, screenings, or other tests of Student administered, prepared, or received by the Lab School or any other agency or entity contracted by it or affiliated with it.

4. Any documentation and other materials relating to the Lab School's assessment and provision of educationally related services to Student, including notes, protocols of assessments, data, work samples, videotapes, etc., created by the Lab School or any entity contracted by it or affiliated with it.

5. All reports, assessments, data, protocols, medical reports, notes, or other documentation the Lab School relied on in connection with its evaluations of and service recommendations for Student.

6. Organizational documents that establish the University of California, Irvine's Child Development Center as a public or private school that meets "compulsory attendance requirements and that establishes that said organization is qualified to provide special education and related services to students" with individualized education programs.

Student argues that the subpoena is overly broad, is not supported by reasonable necessity, and is not permitted by the Education Code.

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).) 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, OAH has relied 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's contentions that the subpoena is overly broad and the items requested are irrelevant because witnesses from the Development School are scheduled to testify and he

includes some of the documents in his exhibit binder, are not well-taken. Student's complaint specifically argues that District denied him a free appropriate public education because of deficiencies in the program and services it offered. Student therefore contends Parents needed to place Student at the Child Development School because it could meet his needs where District's IEPs could not. Student also requests reimbursement for Parents' costs incurred for his placement at the Child Development School. Student has therefore put the Child Development School's program at issue in this case. The education he receives there, the needs that the Child Development School was able to meet that District allegedly refused to address, 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. The subpoena is therefore not overly broad.

Student contends that District has not demonstrated reasonable necessity for the documents because Parents have signed a release allowing District to access his educational records at the Child Development Center. Student's argument is somewhat disingenuous because District's subpoena contains a declaration of counsel outlining the previous attempts District made, beginning in August 2017, to obtain a release from Parents for Student's records at the Child Development Center. Parents declined to provide the release until after District served the second subpoena on that entity. There is no evidence that the Child Development Center has since produced the records to District. Additionally, Parents have only agreed to release Student's educational records. Many of the records subpoenaed by District, such as emails and other communications, are not educational records and therefore are not covered by Parents' release of information. District's only means of obtaining the records is through a subpoena.

Further, Student's citation to Education Code section 56329, subdivision (d), is inapposite. Student contends that District is only permitted to observe him at his parentally funded private placement and not permitted to subpoena his records there. First, this section of the Education Code addresses a situation where parents are requesting a district to place their child at a particular non-public school. This section of the Education Code alerts parents to a district's right to observe a child when parents have privately placed a child at a non-public school and are asking their school district to place and fund the child there. Although Parents in this case have requested reimbursement of their costs of placing Student at the Child Development Center, they have not requested that District place Student there through his individualized education program, which is what the Education Code contemplates.

More significant is that the cited section of the Education Code does not in any way limit a school district's right to request or subpoena records concerning a child's placement at a non-public school or at a private school for which a parent is requesting reimbursement of tuition and/or other costs. There is no reference to records requests or to the service of subpoenas in this section of the Education Code. Student offers no authority for his proposition that this subdivision of the Education Code can be read in any way to limit requests or subpoenas duces tecum for records related to a child's placement or education at the non-public school.

However, Student validly raises the privacy concern of other children in District's request for videos taken by the Child Development Center in which Student is present. Student contends that the Family Educational Rights and Privacy Act, known as FERPA, prohibits the production and/or disclosure of the records of other students. FERPA prevents disclosure of a student's educational records or personally identifiable information from educational records without consent of the student's parents. (34 C.F.R. § 99.3) Videos in which other children are present would invade those privacy rights. That portion of District's subpoena duces tecum requesting videos is therefore quashed as to any video in which children other than Student are also present.

ORDER

1. Student's motion to quash the subpoena duces tecum served on the Child Development School is granted only as to videos taken by the Child Development Center in which other children are present along with Student in the video recording.

2. Student's motion to quash is denied as to any other records requested in the subpoena. The Child Development Center must comply with all remaining requests for Student's records, educational or otherwise.

3. District shall immediately serve a copy of this Order on the Child Development School and notify it telephonically as to this order.

4. Child Development Center shall immediately produce the records to the address listed on the subpoena to the extent that it has not already produced records to District.

DATE: February 21, 2018

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