BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017020308
v.	ORDER GRANTING MOTION TO QUASH SUBPOENAS DUCES TECUM AND DENYING MOTIONS FOR SANCTIONS
SAN MATEO UNION HIGH SCHOOL DISTRICT.	

On April 11, 2017, San Mateo Union High School District served Student with copies of three subpoenas duces tecum seeking his personal records and the requisite notices to consumer. San Mateo seeks all of Student's records from (1) St. Ignatius College Preparatory School in San Francisco, which Student attended for the 2014-2015 school year; (2) Elements Wilderness Program in Utah, which he attended from April 2016 through June 2016; and (3) Telos Academy in Utah, a residential treatment center he has been attending since July 2016. The subpoenas call for each of the three custodians of records to appear as a witness on May 9, 2017, the first day of the due process hearing in this matter, at Peninsula High School, a location San Mateo originally proposed for the hearing.[1] The subpoenas include the same declaration in support of the records request. San Mateo used the subpoena form provided by the Office of Administrative Hearings. San Mateo checked box number three on the OAH subpoena form, specifying that the witnesses need not appear if they produce to San Mateo's counsel, at her work email address, the records described in the attached declaration, along with a declaration of custodian of records in compliance with Evidence Code section 1561, by May 8, 2017.

On April 18, 2017, Student filed a motion to quash the three subpoenas duces tecum. In general, Student alleges the following as a basis to quash the subpoenas: there is no prehearing discovery in special education matters; San Mateo's subpoenas cannot summon or command production of records from out-of-state witnesses; San Mateo has failed to meet the required showing of reasonably necessity; and the subpoenas are overly broad and vague. Attached to Student's motion are a declaration of his counsel; copies of the subpoenas duces

[1] The hearing venue was originally set for San Mateo's District Office. On April 11, 2017, San Mateo filed a "Notice of Change of Due Process Hearing Location" seeking to change venue to Peninsula High School. On April 24, 2017, San Mateo filed a "Revised Notice of Change of Due Process Hearing Location" seeking to again change venue to Burlington High School. OAH considers these notices to be motions to change venue and will address this motion at the prehearing conference after hearing from both parties.

tecum and notices to consumer; and correspondence between counsel for the parties. Student additionally seeks sanctions in the form of unspecified attorney fees and costs associated with his motion.[2] Student claims sanctions are warranted as San Mateo had no jurisdictional basis to serve subpoenas on Utah witnesses, which renders the subpoenas frivolous and the refusal to withdraw them an act intending to harass.

On April 21, 2017, San Mateo filed an opposition to Student's motion supported by a declaration of its counsel and numerous attachments. In general, San Mateo asserts that Student's motion is premature; unsupported by evidence or legal authority; not in compliance with California Rule of Court 3.1345(a)(5); and frivolous. San Mateo argues that as of April 21, 2017, it had not yet served the subpoenas duces tecum; that it is not seeking prehearing discovery; and that the jurisdictional basis for issuing the subpoenas duces tecum to Utah witnesses is the Uniform Interstate Deposition and Discovery Act to which both California and Utah are signatories. (Code Civ. Proc., § 2029.100 et seq; Utah Code § 78-17-101 et seq.) San Mateo seeks sanctions for the costs of opposing what it considers to be a procedurally improper and substantively frivolous motion as well as for Student's alleged misrepresentations of the factual and procedural background of this matter.[3] San Mateo seeks sanctions in the amount of $2,320 for 10 hours of work spent drafting the opposition at the hourly rate of $232.00.

APPLICABLE LAW

Subpoenas Duces Tecum

A party to a due process hearing under the Individuals with Disabilities Education Act 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).) California Code of Regulations, title 5, section 3082, subdivision (c)(2) sets forth the right of the parties in a special education hearing to compel the attendance of witnesses. It provides in pertinent part that, "[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)." California Code of Regulations, title 5, section 3089, specifies that the subpoena provisions of the Administrative Procedure Act, found in California Government Code sections 11450.05 to 11450.30, do not apply in special education due process hearing matters. Special education law does not specifically address whether a subpoena duces tecum may be issued by an attorney, or whether or how it may be quashed.

[2] Student is advised that OAH requires that all motions be filed separately as independent pleadings.

[3] San Mateo is advised that OAH requires that all motions be filed as their own separate pleading, rather than combined in an opposition.

Given that special education law is silent on these topics, and that the subpoena provisions of the Administrative Procedures Act do not apply, OAH looks for analogies to the relevant portions of the California Code of Civil Procedure. 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. Further, a subpoena duces tecum must be supported by a declaration under penalty of perjury establishing good cause for production of the records; specifying the exact documents to be produced; and providing in full detail the materiality of the documents to the issues at hearing. (Code Civ. Proc., § 1985, subd. (d).) 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.

Prior to the date specified for production, any consumer who is a party to the action may bring a motion to quash a subpoena duces tecum. (Code Civ. Proc., §1985.3, subd. (g).) The witness shall not be required to produce the requested records after receiving notice of a motion to quash. (*Ibid*.) In ruling on a motion to quash a 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.

A party does not have the right to use a subpoena duces tecum to compel the production of documents prior to a special education due process hearing. In general, there is no right to prehearing discovery in these proceedings. The applicable statutes and regulations securing the rights to present evidence and compel the attendance of witnesses generally relate to the hearing itself. For instance, 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).) Similarly, California law extends the rights to present evidence and compel the attendance of witnesses to "[a] party to a hearing held pursuant to this section ..." (Ed. Code, § 56505, subd. (e).)

California Education code section 56505, subdivision (a) provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board." 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 duces tecum. While such subpoenas are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. This framework accords pre-hearing access in two circumstances: (1) parents have the right to request and receive a student's educational records within five business days of their request (Ed. Code, § 56504); and (2) each party is entitled to receive copies of all the documents the other party intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code, § 56505, subd. (e)(7).)

OAH has ruled many times that a party may not use a subpoena duces tecum to compel pre-hearing discovery. (See, e.g., *Student v. Redwood City Schools Dist. et al.* (OAH, Aug. 10, 2015, No. 2015070264 [Order Granting Reconsideration and Motion to Quash]; *Student v. Los Angeles Unified School Dist.* (OAH, Oct. 1, 2013, No. 2013070215 [Order Granting Motion to Quash Subpoena Duces Tecum]); *Student v. Fremont Unified School Dist.* (OAH, Aug. 27, 2008, No. 2006050443 [Order Granting Motion to Quash Subpoena Duces Tecum, etc.]); see also *Student v. Placentia-Yorba Linda Unified School Dist.* (OAH, Dec. 23, 2011, No. 2011090432 [Order Quashing Subpoena Duces Tecum]; *Student v. Menlo Park City Elem. School Dist.* (OAH, April 18, 2011, No. 2010120283 [Order Granting in Part and Denying in Part Motion to Quash Subpoena Duces Tecum].).)

Sanctions

In certain circumstances, an administrative law judge presiding over a special education proceeding is authorized to shift expenses from one party to another, or to the Office of Administrative Hearings. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

An ALJ presiding over a hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking a contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) "Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit [citations]." (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635.) In addition there must be a showing of improper purpose. (*Ibid.*) A finding of "bad faith" does not require a determination of evil motive. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

DISCUSSION

San Mateo's argument that Student's motion is premature is unpersuasive. Student filed his motion in accord with the Code of Civil Procedure, section 1985.3, subdivision (g)

which authorizes Student, as consumer and a party to this action, to bring a motion to quash prior to the date specified for production. The purpose of the notice to consumer is to alert the consumer to his rights to object to the production of his personal records and to take action to prevent their release. Once he does so, the witness is prohibited from complying with the subpoena duces tecum unless the parties agree to the release or upon order of the court. San Mateo's argument that Student must wait until he learns at some later date, perhaps after the release of his records, that the subpoena duces tecum has been served is illogical. The point of the notice is to alert Student of the need to act quickly if he wishes to prevent the release of his records. The law does not expect Student to wait and risk possible release of his records, nor does it place a burden upon Student to determine if, and when, San Mateo actually issued the noticed subpoenas.

Additionally, San Mateo fails to present any support for is contention that California Rule of Court 3.1345 (a)(5), which pertains to motions to quash the production of documents at depositions, has any applicability to motions to quash subpoenas duces tecum in the context of a federal special education matter and the applicable California regulations. San Mateo's argument that Student's motion fails as it did not include a separate statement setting forth the particular documents at issue and the factual and legal reasons why production should not be compelled is similarly unpersuasive.

The regulations governing this proceeding specifically disallow use of the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings. (Cal. Code Regs., tit. 5, § 3089.) Although the OAH subpoena form has options for production of the records under subpoena, not all of them may apply to special education matters.[4] San Mateo states that it is not seeking prehearing discovery through the subpoenas duces tecum. It goes so far as to accuse Student of making "patently false" claims that it is seeking records to be delivered to its counsel prior to hearing. This accusation is troubling. San Mateo's counsel personally signed the subpoena which has a check mark on the box on the subpoena form that affords each custodian the option of not appearing at hearing so long as they send counsel, at her work email address, a copy of all requested records not later than May 8, 2017.

The subpoenas duces tecum do not require production of the requested documents at the hearing (box number three), but rather allow for each witness, in lieu of personally appearing at hearing on May 9, 2017, to deliver the documents to San Mateo's attorney by May 8, 2017, the day prior to hearing. This indicates that the subpoenas are being used for

[4] At the bottom of the box chosen by San Mateo to instruct production of the subpoenaed records to their attorney on a date prior to hearing, the OAH form has a warning in italics: "*NOTE: This manner of production may not satisfy the requirements of Evidence Code section 1561 for admission at hearing.*" Evidence Code section 1560, subdivision (e) specifically describes as an alternative to the production of business records under seal to the court, having the witness make records available for copying pursuant to the prehearing "deposition subpoena" process described in the Code of Civil Procedure at section 2020.410 et seq. This process is inapplicable to special education matters.

advance discovery not authorized under special education law. There is no authority which allows for the pretrial production sought here. Therefore, the subpoenas duces tecum are improper on their face by requiring production of documents to the attorney in advance of the hearing, instead of requiring production at the hearing as contemplated under the applicable law.

In addition, the standard for issuance of a subpoena duce tecum in this proceeding is "reasonable necessity," which is a stricter standard than that provided under the Administrative Procedures Act. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This standard requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case or mount a defense at hearing. The declaration in support of a subpoena duces tecum must set forth sufficient detail, specific to the legal or factual issues to be adjudicated, to show that the required documents are reasonably necessary.

In the present case, the uniform request is for "any and all records and/or documents relating to Student including, but not limited to, all application and registration forms, educational programs, assessments, therapy notes, billing records, treatment records, medical records, psychological records and school records, including progress reports, teachers' notes, attendance history, and classroom log." So, too, each of the subpoenas contains a conclusory declaration that such records are "material to a proper presentation of this case, and good cause exists for their production" as San Mateo is defending its offer of a free appropriate and public education for Student at hearing. Thus, the declarations provide a generic description of the case, and the requested documents are described in overly broad and general terms. In this regard, the subpoenas are no different from standard discovery requests that are routine in civil litigation. However, such use of subpoenas is neither authorized, nor appropriate in this proceeding. If the production of records could be compelled on a boilerplate recital that they were material and relevant, the reasonable necessity standard would mean almost nothing. San Mateo failed to meet the reasonable necessity standard.

Student's motion for sanctions fails as it does not make the requite showing that San Mateo engaged in bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay. San Mateo asserts that it can issue subpoenas duces tecum to Utah witnesses under the procedures of the Uniform Interstate Deposition and Discovery Act. Whether a Utah witness is properly subpoenaed pursuant to this Act remains to be determined at a future date if San Mateo chooses to re-notice and issue additional subpoenas to out-of-state witnesses in this matter.

San Mateo's motion for sanctions also fails. As detailed above, Student's motion was not frivolous nor did San Mateo establish that Student engaged in bad faith actions or tactics intended to cause unnecessary delay.

ORDER

1. Student's motion to quash the April 11, 2017 subpoenas duces tecum to the custodian of records at St. Ignatius College Preparatory, Elements Wilderness Program and Telos Academy is granted in full.

2. Student's motion for sanctions is denied.

3. San Mateo's motion for sanctions is denied.

DATE: April 27, 2017

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings