BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CARLSBAD UNIFIED SCHOOL DISTRICT,	OAH Case No. 2015030156
CARLSBAD UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2015050233 ORDER GRANTING IN PART AND DENYING IN PART DISTRICT'S MOTION TO QUASH STUDENT'S MAY 7, 2015 SUBPOENA OF DOCUMENTS

On February 27, 2015, Student filed a due process hearing request, naming Carlsbad Unified School District. On April 2, 2015, OAH granted the parties' joint request for a first continuance of the hearing dates to May 18, 2015. On May 6, 2015, District filed a due process hearing request naming Student and a motion to consolidate Student's case with the District's case. On May 7, 2015, Student served District with a subpoena for production of documents by May 21, 2015. At the May 11, 2015 prehearing conference the Administrative Law Judge granted District's Motion to Consolidate and continued the due process hearing dates of the consolidated case from May 18, 2015 to June 29, 30, 2015, July 1, 2 and 7, 2015, upon Student's request for more time to review the District's recently produced documents and to prepare the consolidated case for hearing. On May 11, 2015, Student filed a Motion to Amend the complaint. On May 12, 2015, District filed a Motion to Quash Student's May 7, 2015 Subpoena of Documents. On May 14, 2015, Student filed his opposition to District's Motion to Quash. On May 15, 2015, Student's Motion to Amend was granted and deemed filed as of May 15, 2015.

APPLICABLE LAW AND DISCUSSION

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).)

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).) This condition mirrors the requirement in Code of Civil Procedure section 1985, subdivision (b), which states:

> 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 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.)

Special education law does not specifically address motions to quash subpoenas. In ruling on such motions, OAH relies 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.

To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Parents may request copies of their child's educational records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code § 56504).) 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).) 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).)

In addition to the parents' right to copies of educational records within five business days of a request, a party to a due process proceeding is entitled to be served, five business

days before the hearing, with copies of all the documents the other party or parties intend to use at the hearing, and a list of all witnesses intended to be called with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).)

Here, Student's subpoena did not require the appearance of anyone at the due process hearing. Instead, it allows only for production of the documents by sending them to Student's attorney office by May 21, 2015. At the time Student issued the subpoena, the hearing was set to begin on May 18, 2015. Since then, the hearing has been continued to June 29, 2015. District correctly argues that special education law does not contain any provisions authorizing pre-trial 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. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits at least five business days prior to the hearing, but this provision requires a party to disclose witnesses and exhibits it intends to use during the due process hearing, not all records in its possession. If Student requires specific records for the hearing, a subpoena can be used to compel the production of records on the day the hearing is to commence.

Further, with the exception of report cards and testing results which Student clarified in his opposition to the Motion to Quash (and certain e-mails and documents referencing or impacting the implementation of Student's individualized education program, and/or general education curriculum discussed in the paragraphs below) were educational records, all enumerated items in Student's subpoena were overbroad and beyond the scope of the type of education records contemplated by FERPA and Education Code section 56504. Because the requested records are too broad to be "education records," a subpoena duces tecum asking for production on the day the hearing commences would be proper, were the requisite showing of reasonable necessity properly made and assuming no other legal bar to production. However, Student has failed to make the requisite showing of reasonable necessity with regard to each of the other categories of documents sought by the subpoena. While Student attached a sworn declaration to the subpoena, the declaration does not make an adequate factual showing of why each category of documents is material and relevant to the issues at hearing. Specifically, the declaration attached to the subpoena states the documents are material to the due process hearing because they relate to the scope of testimony anticipated by several witnesses and for Student to meet his burden of proof at hearing, but it is unclear how and which specific category of documents are reasonably necessary to the litigation of any issue at hearing. The subpoena is therefore defective because there is no adequate showing in the declaration supporting the subpoena as to why Student needs each of the other overbroad categories of documents listed in the subpoena at the hearing.

Student's education records under FERPA and the Education Code can be requested from District at any time pursuant to Education Code section 56504. When a request for education records is made, the records must then be produced no later than five business days after the request is made and no showing of reasonable necessity is required. Contrary to

District's assertion that Student is only entitled to education records two years preceding Student's filing of the due process complaint to reflect the two years statute of limitations applied to due process hearings, there is no equivalent statute of limitations applicable to Student's ability to obtain education records under FERPA. However, only the report cards and testing results which Student specifically identified in his opposition to the Motion to Quash, and to the extent the overbroad category of documents listed in the subpoena include any documents directly referencing or impacting the implementation of Student's individualized education program, and/or general education curriculum, appear to fall within the applicable definition of education records under FERPA and the Education Code. Other than noting a request for Student's educational file was made to District, Student fails to specifically or adequately address or explain if and how the other overbroad categories of documents listed in the subpoena fall within the parameters of "education records" entitling Student to production. Notably, District does not address whether any of the documents are education records, with the exception of e-mails which District correctly asserts are only considered educational records if they were specifically maintained by District. However, District did not state whether it maintains any of the e-mails sought by Student.

Accordingly, while the report cards, testing results, and e-mails (to the extent District maintains them) appear to be educational records, Student has failed to establish that the other categories of documents sought are education records within the meaning of FERPA and the Education Code. Based on the evidence presented, District's Motion to Quash is granted with the exception of the following: (1) District shall Student's produce report cards and testing results, including assessments for special education; (2) District shall produce all documents directly referencing or impacting the implementation of Student's individualized education program, and/or general education curriculum; and (3) E-mails to the extent District maintains them. As to whether District maintains e-mails, District shall produce all e-mails it maintains a part of Student's official records file and ascertain the names of all of Student's teachers from February 27, 2013 to May 15, 2015 and ask that they search their e-mails and produce those that referenced Student after conducting a search of his first and last name.

ORDER

1. District's Motion to Quash is granted with the exception of the following: (1) District shall produce report cards and testing results, including assessments for special education; (2) District shall produce all documents directly referencing or impacting the implementation of Student's individualized education program, and/or general education curriculum; and (3) E-mails to the extent District maintains them. As to whether District maintains e-mails, District shall produce all e-mails it maintains a part of Student's official records file and ascertain the names of all of Student's teachers from February 27, 2013 to May 15, 2015 and ask that they search their e-mails and produce those that referenced Student after conducting a search of his first and last name.

2. District shall, within five business days of the date of this order, produce the items referenced in the preceding paragraph.

3. This order is made without prejudice to Student seeking issuance of subpoena(s) for production of documents at the hearing upon the proper showing.

DATE: May 19, 2015

/s/

SABRINA KONG
Administrative Law Judge
Office of Administrative Hearings