BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015070808 ORDER GRANTING DISTRICT'S MOTION TO QUASH

On July 2, 2015, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings, naming Long Beach Unified School District (District) as respondent.

On November 13, 2015, Student served a subpoena duces tecum on District. On December 7, 2015, District filed a Motion to Quash, seeking an order quashing Student's subpoena duces tecum. Student's subpoena requests District's production on the first day of hearing all District's e-mails, correspondence or records from or to any District personnel from September 1, 2013 through April 1, 2014, referring to or discussing Student's: (1) 504 plan; (2) private psychoeducational report dated September 2, 2013, and prepared by Dr. Sandra Smith; (3) academic performance or behavior; (4) home hospital instruction; and (5) areas of suspected disability to be assessed.

District contends the subpoena constitutes an impermissible attempt to obtain prehearing discovery, is vague and overbroad, and seeks documents for which reasonable necessity has not been shown. District claims the subpoena also seeks documents which are not education records, and could be privileged.

On December 8, 2015, Student filed his Opposition to the Motion to Quash. Student states that the subpoena does not seek prehearing production, but production of the documents on the first day of hearing. Student argues that the documents sought are limited in time, relate to specific hearing subject matters, and that if any documents were privileged, a privilege log should be provided. Student also argues that these documents are needed to prove when District had notice of particular facts, whether District acted appropriately, and how District responded. Student concedes that he requested and District produced educational records, and clarifies that the subpoenaed documents are for non-educational record documents.

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).) 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 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).)

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 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.

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 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, Student's subpoena provides for District's compliance by producing the requested documents on the first day of hearing. Contrary to District's contention, Student did not request prehearing discovery. Further, Student is not seeking the production of educational records under FERPA and the Education Code section 56504. Nevertheless, a subpoena seeking production of documents on the day the hearing commences may be appropriate if the requisite showing of reasonable necessity is properly made and assuming no other legal bar to production exists. Here, however, Student has failed to make the requisite showing of reasonable necessity with regard to each category of documents sought by the subpoena. The issues in this case involve District's denial of a free appropriate public education by its failure to assess, provide appropriate services, provide parental input, provide prior written notice of District's refusal to conduct assessments, and provide an independent psycho-educational evaluation in response to Parent's request. While the documents sought relate to the subject matter and time frame in the case, Student falls far

short of demonstrating that the documents are "reasonably necessary" for Student to present his case at hearing. Student asserts that District's notice and appropriate actions are at issue, but failed to show why District's internal correspondence regarding notice and appropriate actions are necessary to the hearing. Ultimately, it is District's actions or inactions which determine whether it provided Student a FAPE, not whether it had correspondence discussing Student's 504 plan, private psychoeducational report, academic performance or behavior, home hospital instruction, or areas of suspected disability. Student failed to make the requisite showing of reasonable necessity for the subpoenaed documents. District's motion to quash is granted.

ORDER

District's motion to quash is granted. District does not need to produce documents in Student's subpoena.

DATE: December 11, 2015

/s/

SABRINA KONG
Administrative Law Judge
Office of Administrative Hearings