BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. VISTA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2019020664 ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUM

On February 19, 2019, Student filed with the Office of Administrative Hearings a request for due process hearing naming Vista Unified School District. On May 13, 2019, Student filed a motion to quash a subpoena duces tecum Vista issued to the custodian of records for Dr. Crystal Bejarano of Brain Learning, Student's expert witness. On May 16, 2019, Vista filed an opposition to the motion.

APPLICABLE LAW

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 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

Vista's subpoena directed the custodian of records for Dr. Bejarano to appear as a witness on May 29, 2019, at Vista Unified School District and produce specified records at hearing. The subpoena further indicates she need not appear personally if she produced the requested records by placing them in an envelope with a declaration; addressed the envelope with the case number, her name, and the date, time and place listed in the subpoena; then placed that envelope in another envelope and mailed the records to OAH. The subpoena also directed the custodian of records to mail a copy of the declaration to the attorney for Vista. The subpoena duces tecum requested specific records, including electronic records, held by Dr. Bejarano regarding Student. The records requested were documents between August 15, 2018, through May 29, 2019, related to an assessment; assessment and evaluation reports; special education documents; observation data; notes and documents regarding observations; assessment and testing data; assessment and test protocols; communication logs; correspondence, including letters and e-mails, between Dr. Bejarano and Parent, Dr. Bejarano and Student's private providers, and Dr. Bejarano and Student's attorney; contracts for service; and billing records.

Student argued in support of his motion to quash the subpoena duces tecum that the subpoena was procedurally defective and the production request in item nine was overbroad and vague and failed to establish the relevance and reasonable necessity of the documents.

Student's first argument, that the subpoena is procedurally defective, is not persuasive. Student argues that because the method of service and the date of service on the unexecuted copy of the subpoena duces tecum is blank that renders the entire subpoena void. Student references the unexecuted copy of the subpoena duces tecum Vista included in the May 3, 2019, notice to consumer, not the executed subpoena duces tecum Vista served by certified mail on May 9, 2019, or the proof of service for the personal service of the subpoena on May 13, 2019. The notice to consumer is intended to provide an opportunity to file a motion to quash a subpoena prior to the issuance of the subpoena. By the very nature of the notice the method and date of service is blank because the subpoena has not yet been served. Vista included a proof of service which shows the subpoena was properly executed and served. Therefore, Student's motion to quash the subpoena in its entirety is denied.

Student's second argument is that the production request in item nine of the subpoena duces tecum is overbroad and vague and fails to establish the relevance and reasonable necessity of the documents. Item nine specifically asks for correspondence, including but not limited to, letters and emails between Dr. Bejarano and Parent; Dr. Bejarano and any of Student's private psychiatrists, psychologists, therapists, providers, and/or physicians; and Dr. Bejarano and Student's attorney.

Student alleges the request would compel Dr. Bejarano to provide confidential information about other students and students who may be mutual clients of Dr. Bejarano and Student's attorney. Vista argues the specific category of records requested is not overly broad or vague. Vista argues that all records requested are under the main category of records held by Dr. Bejarano relating to Student and Vista is not seeking information regarding other students. Student's argument is not persuasive. Vista's exhibit to the subpoena specifically states all the records requested are regarding Student. Simply because Vista did not state correspondence that references Student or Parent by name, initials, or identification number does not mean Vista requested information about any other student.

Student also argues that the request for communications between Dr. Bejarano and any of Student's private psychiatrists, psychologists, therapists, providers, and/or physicians is extremely broad because it does not address communication with a specific person or organization. Vista argues that the request for communications between Dr. Bejarano and Student's private psychiatrists, psychologists, therapists, providers, and/or physicians does not need to list specific persons or organizations as Vista is not aware of Student's private providers, but is aware that Dr. Bejarano communicated with the private providers regarding Student. Student did not provide any legal authority that the subpoena need to identify the specific person or organization. Vista is requesting records regarding Student that Dr. Bejarano used to form the basis her assessment, conclusions, and recommendations. Although Vista may not be aware of the specific names or organizations of Student's private psychiatrists, psychologists, therapists, providers, and/or physicians, Dr. Bejarano will have access to this information if she communicated with any of them regarding Student.

Student argues that Vista did not establish that the content of the emails will be directly relevant to its defense by pointing to a specific issue or defense that the documents would tend to make more or less probable. Vista argues the communications are relevant as Student alleges Vista denied him a free appropriate public education by failing to provide him with educationally related mental health services and he seeks compensatory education in the same area, consequently, communications with Student's private psychiatrists, psychologists, therapists, providers, and/or physicians are necessary for Vista to cross examine Dr. Bejarano regarding her assessment of Student, conclusions, recommendations, and appropriateness of his requested resolutions.

Student argues that Vista did not show the reasonable necessity of the documents because Vista could not describe what it seeks to produce. Student also argues that Vista did not show the reasonable necessity for documents prior to Student's due process filing on February 19, 2019. Vista argues it established the reasonable necessity for the records because in Student's due process complaint he repeatedly references Dr. Bejarano's assessment, and thus it is necessary for Vista to know the information she used to form the basis of her opinion. Vista further argues that Student's psychiatrist diagnosed him with oppositional defiance disorder and depression around September 2018, prior to Student's due process filing, and Dr. Bejarano communicated with Student's psychiatrist to complete her report, and therefore records prior to the date Student filed for due process are necessary.

Student's arguments are not persuasive. Student intends to call Dr. Bejarano as a witness in support of his contention that Vista failed to provide him a FAPE and that he requires compensatory education. Therefore, any records that informed Dr. Bejarano's opinions are relevant to this case, including correspondence with Student's Parent, Student's private psychiatrists, psychologists, therapists, providers, and/or physicians, and Student's attorney. Vista has proved the relevance and reasonable necessity for the records requested in the subpoena duces tecum.

ORDER

Student's motion to quash Vista's May 13, 2019 subpoena duces tecum, directed to the custodian of records for Dr. Crystal Bejarano, is denied.

DATE: May 21, 2019

DocuSigned by:
Linda Johnson
LINDA JOHNSON
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Administrative Law Judge
Office of Administrative Hearings