BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018040056 ORDER GRANTING IN PART AND DENYING IN PART, MOTION TO QUASH SUBPOENA DUCES TECUM

On April 2, 2018, District filed a request for due process hearing, naming Student as the respondent, and stating two issues to be resolved at hearing: 1.Was District's January 31, 2017 Psychoeducational Report appropriate, such that District is not required to provide or fund a neuropsychological independent educational evaluation by Dr. Freeman, or any other private assessor, at public expense; and 2.Did District assess Student in all areas of suspected disability such that District is not required to provide or fund a central auditory processing assessment by Dr. Bea Braun, or any other private assessor?

On June 22, 2018, Parent served a subpoena duces tecum on District, seeking the production of 19 categories of documents.

On June 29, 2018, District moved to quash the subpoena on a number of grounds, concerning both the form and substance of the subpoena. On July 3, 2018, OAH received a response to the Motion from Student.

As explained below, two categories of the 19 categories of documents sought are overbroad. The subpoena is quashed as to those two categories.

The remaining 17 categories of documents appear potentially relevant to the two issues presented. District is ordered to have those categories of documents available at the commencement of the hearing, scheduled to begin on July 10, 2018.

APPLICABLE LAW

The Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) 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 (Ed. Code, § 56505, subd. (e).)

California Code of Regulations, title 5, section 3082, subdivision (c)(2) provides that the hearing officer may issue subpoenas duces tecum upon a showing of reasonable necessity by a party.

The standard for issuance of an SDT in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires a showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing.

Special education law does not specifically address motions to quash subpoenas or SDT's. In ruling on such motions, the 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. OAH employs this process in ruling on motions to quash, as modified by special education's unique procedures and standards.

DISCUSSION

Student has established reasonable necessity for 17 of the 19 categories of documents, all of which concern Student's educational program, performance, unique needs, services provided, and assessments, such that these 17 categories of documents may be specifically pertinent to the two specific issues presented. As to those categories of documents sought, the motion to quash is denied and District is ordered to comply.

District contends that it has already provided Student's educational records. District need not produce any documents that it has already produced as part of Student's educational records. However, the "reasonable necessity" scope of the subpoena is broader than, and is not limited to "educational records" only.[1] Therefore to the extent that responsive documents

[1] Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act 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 maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) 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).)

exist that are not within the limited definition of "educational records" and have not already been produced, District is ordered to comply.

District's technical arguments about the subpoena's form are all rejected. District's first argument is that the subpoena was served improperly by email rather than by personal service. While technically true, it is clear that District is in actual receipt of the subpoena sufficient to put it on notice of the documents being sought.

District's second argument is that the person subpoenaed was not named. It is reasonably clear that the subpoena was directed to District's Director of Special Education whose name, number and email address appears under "contact person" rather than under "person being subpoenaed."

District also argues that special education law does not provide for pre-hearing discovery. The production of records at hearing is, by definition, not "pre-hearing discovery" and that argument is therefore inapposite.

Finally, District argues that the date time and location of the appearance being subpoenaed is not specified. While technically true, it is clear that the subpoena seeks the appearance of the Special Education Director, at the commencement of the hearing, with the requested documents. Therefore the date, time and location are impliedly the first day of hearing, and it is so ordered.

The two categories that appear overbroad are Category 2 and 17. Category 2 seeks "Correspondence including emails and memoranda" but is not specifically enough defined as to dates, parties or subject matter. It does not put District on reasonable notice of what documents are being sought. Category 2 of the subpoena is quashed and District need not comply.

Category 17 seeks "all applicable NSP/NPA individual service contracts as well as applicable master contracts including all documentation with outside therapy agenc[ies]" who provided certain services to Student. No reasonable necessity has been shown for contracts with agencies that provide services. Category 2 of the subpoena is quashed and District need not comply

All other documents requested in categories 1, 3-16, and 18-19 shall be made available by District on the first hearing day.

ORDER

1. The Motion is granted and the Subpoena is quashed as to categories labelled 2 and 17, and District need not comply.

2. As to Categories 1, 3-16, and 18-19, District shall make available responsive documents that have not been previously provided to Student, on the first hearing day.

DATE: July 6, 2018

June Lehrman

JUNE LEHRMAN
Administrative Law Judge
Office of Administrative Hearings