BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017111058
v.	ORDER GRANTING DISTRICT'S MOTION TO QUASH SUBPOENA DUCES TECUM
VISTA UNIFIED SCHOOL DISTRICT.	

PROCEDURAL BACKGROUND

Parent on behalf of Student filed a request for due process with the Office of Administrative Hearings on November 28, 2017, naming Vista Unified School District. On December 18, 2017, Student's attorneys mailed a subpoena duces tecum to District's attorneys. The subpoena directs District's attorneys to produce a copy of a surveillance video tape from Student's middle school, which recorded the November 6, 2017 incident that allegedly was the basis for District's decision to initiate expulsion proceedings against Student. The subpoena directs District's attorneys to produce the tape to Student's attorneys by December 27, 2017.

On December 27, 2017, District filed a motion to quash the subpoena on the following grounds: a) The subpoena seeks confidential records of other students that District is precluded from producing under the Family Educational Rights and Privacy Act; b) There is no notice to consumer; c) The video that is the subject of the subpoena is not relevant to the issues for hearing; d) Student failed to demonstrate reasonable necessity for the video; e) Student failed to provide a reasonable amount of time to comply with the subpoena; f) The proof of service attached to the subpoena is erroneous; g) The subpoena was not issued to the correct individual or entity; and h) The subpoena improperly seeks pre-hearing discovery.

Student did not file an opposition to the motion to quash.

APPLICABLE LAW AND DISCUSSION

No Prehearing Discovery in Special Education Due Process Proceedings

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 (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and 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 and subpoenas duces tecum. These regulations specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings. (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].) 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 only 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 parties intend to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7))

Student's subpoena directs District's attorneys to produce the subpoenaed video tape on December 27, 2017, 15 days prior to the start of the expedited portion of the due process hearing, which is scheduled to begin on January 11, 2018. Student has no statutory right to pre-hearing discovery. Student's subpoena should have been returnable on the first day of hearing. Applicable law, section 1987.1 of the Code of Civil Procedure, provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it. Therefore, had the only defect in the subpoena been its date and place of production, it would have been appropriate to modify Student's subpoena duces tecum to have the subpoenaed documents produced on the first day of the expedited hearing in this case. However, as discussed below, there are several deficiencies in Student's subpoena. Therefore, District's motion to quash is granted.

Other Students' Privacy Rights

District first argues that it cannot produce the tapes because FERPA prevents disclosure of a student's educational records or personally identifiable information from educational records without consent of the student's parents. (34 C.F.R. § 99.3) District contends that the video surveillance tape in question shows other children. Since the parents of those children have not consented to the release of the video, District would be in violation of FERPA by producing the video to Student.

There is limited case law or authority addressing the issue of video tapes of students. The little authority that does exist both supports and opposes District's argument. For example, in the case of *In re: Student with a Disability* (Wyoming State Educational Agency 2010) 112 LRP 49905, the Wyoming State Educational Agency found that video tapes of a student were educational records, and, as such, the school district which video recorded the

student violated the parents' right to review their child's educational records by destroying the video tape in question.

In *L.M.P., et al.,* v. *School Board of Broward County* (S.D. Fla. 2009) 53 IDELR 49, 12 FAB 40, 109 LRP 52916, the student contended that the school district was predetermining the scope of services and supports provided to autistic children in the district. The student subpoenaed a list of special education services provided to other children with autism. The school district argued that it could not release information concerning the other children without consent of their parents. The district court disagreed. The court pointed to the fact that FERPA permits the disclosure of otherwise private student information if ordered by the court. (34 C.F.R. § 99.31(a)(9).) The court also cited to previous court cases that have found that private information should be disclosed if it is directly relevant to the claims in the case and crucial to proving the assertions underlying the allegations of the complaint. The court found that it was inappropriate to permit the School Board in the case to hide behind confidentiality objections based upon FERPA or state law. (Citing to *Rios* v. *Read* (E.D.N.Y. 1977) 73 F.R.D. 589 (in view of the significant role of private lawsuits in ending various forms of discrimination in the school system, FERPA should not serve as a cloak for discriminatory practices; *Ragusa* v. *Malverne Union Free Sch. Dist.* (E.D.N.Y. 2008) 549 F.Supp.2d 288,290-291 (where a requesting party demonstrates a genuine need for information that outweighs the privacy interest of students, the disclosure of the information is appropriate.)

California Attorney General's Opinion No. 01-209 (2001) 84 Ops.CalAtty.Gen.146, cited by District in its motion to quash, does not contradict the above authority. The Attorney General found that the video tape of one student's assault on another was a student record. However, the Opinion finds that, in general, the videos may be produced under subpoena, if a court orders it, or with consent of the parents of all children. The Opinion found, however, that district attorneys were authorized to view the recordings without a subpoena, court order, or parental consent, based on provisions of FERPA and state law not applicable to Student's case.

Therefore, under the preceding authority, Student would be entitled to view the recording if the subpoena were properly issued, if the contents of the tape were relevant to the case, and if District was ordered to produce it.

Lack of Notice to Consumer

District argues that notice to the parents of all other students present in the video was required prior to Student serving its subpoena duces tecum. (Code Civ. Proc., § 1985.3, subds. (a)(1) and (a)(2).) This of course places Student in an untenable situation as he would have no way of knowing which students were present in the video or how to serve their parents with the notice. If the subpoena were otherwise valid, the solution would have been to order District to notify the parents of any child involved in the incident on November 6, 2017, as either a perpetrator or victim, of the subpoena and their right to object to the release

of the video. However, since the subpoena is not valid, as discussed below, there is no need at present for such an order.

Lack of Relevancy

District argues that Student has failed to demonstrate that the video is relevant to the issues in the expedited portion of this case. Student's complaint alleges that District substantively and procedurally denied him a free appropriate public education during the 2016-2017 school year by failing to assess him for special education eligibility when it was requested by the administrator of an organization called Saving Another Man's Child. Student further alleges that District procedurally and substantively denied him a FAPE during the 2017-2018 school year, by: a) failing to assess Student for special education eligibility; b) failing to create or implement a behavior support plan; c) failing to hold a manifestation determination review before moving to expel Student in November 2017; and d) failing to provide alternative education to Student pending his expulsion hearing. OAH has determined that only the last two allegations are subject to an expedited hearing.

Under federal and state special education law, students found eligible for special education are afforded certain rights in disciplinary matters. Among those rights is the right to a determination of whether the student's misconduct "that led to a disciplinary change of placement" was caused by or directly related to a child's disability. (20 U.S.C. § 1415 (k)(1)(E)(I)(II); 34 C.F.R § 300.530; Ed. Code, § 48915.5, subd. (a) and (b).) These protections extend to students not previously identified as eligible for special education services only if the following factors are met: (1) the student has engaged in behavior that violated any rule or code of conduct of the school district and, (2) the school district had knowledge, or is deemed to have had knowledge, that the student was a child with a disability "before the behavior that precipitated the disciplinary action occurred." (20 U.S.C. § 1415 (k)(5)(A).)

The "basis of knowledge" or "deemed" knowledge exists when one or more of the following has occurred: (1) the parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) the parent of the child has requested an evaluation of the child; or (3) the teacher of the child, or other personnel of the local educational agency, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. (20 U.S.C. § 1415 (k)(5)(B); 34 C.F.R. § 300.534(b).)

Therefore, the only issues for the expedited portion of this case are whether District had a basis of knowledge that Student was a child with a disability. If Student proves that District did have a basis of knowledge, then Student will demonstrate that District should have held a manifestation determination review for Student, and possibly should have provided him with an alternative educational setting pending the review. District's basis of knowledge is not determined by the nature of whatever happened on November 6, 2017. Neither is Student's right to a manifestation determination review based on what happened that day. Rather, it is based on what information District had about Student's needs prior to the incident. Student has therefore

failed to demonstrate that the video recording of the November 6, 2017 incident is relevant to the expedited portion of this case.

Lack of a Showing of Reasonable Necessity for the Production of the Video

The standard for issuance of a subpoena duces tecum in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This standard is stricter than the general Administrative Procedures Act standard of "good cause" for issuance of subpoenas duces tecum, adopted from Code of Civil Procedure, which states that:

> 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.

(Code of Civ. Proc., § 1985, subd. (b) [adopted into the Administrative Procedures Act at Gov. Code § 11450.20, subd. (a)].)

Therefore, similar to the relevancy standard, Student must demonstrate that the video is reasonably necessary for the presentation of his expedited issues.

Student's declaration in support of the subpoena duces tecum merely states that the video is material because Student must have "all the evidence that led the District to initiate expulsion proceedings." However, the reasons for the expulsion hearing are not relevant to the expedited portion of this case. The issue, at least for the expedited hearing, is whether District had a basis of knowledge that Student has a disability that would make him eligible for special education. What Student did or did not do on November 6, 2017, does not shed light on whether District had that knowledge prior to the incident and therefore was required to hold a manifestation determination review to determine if Student's conduct on that day was a manifestation of his disability. Student's conduct only becomes relevant if District was required to have held the manifestation review to determine if the conduct was a manifestation of his disability. Student's conclusory statement in the declaration in support of the subpoena duces tecum provides no reasonable necessity for ordering the production of a video recording that is not necessary to the determination of the expedited issues. The declaration further fails to support ordering the production of a video recording where the privacy rights of other students would be at issue.

Other Procedural Deficiencies in the Subpoena

District contends that the subpoena duces tecum is also deficient because insufficient time was given for the production of the video, the proof of service does not show proper

service of the subpoena, and because Student did not serve the subpoena on the proper individual or entity.

Student served the subpoena by certified mail on District on December 18, 2017. District provided documentary evidence that its last day of operation prior to its winter break was December 20, 2017, and that District does not re-open until January 9, 2018. Student's subpoena was returnable no later than December 27, 2017, when District was not in operation. District has persuasively demonstrated that it was not possible to produce the video, even if production were permissible, on the date given by Student.

Additionally, as District points out, the proof of service for the subpoena does not show service on District. Instead, the proof of service indicates the subpoena was served on the Law Office of Meagan Nuñez, Student's attorney of record. The proof of service therefore is invalid.

Furthermore, Student directs the subpoena to District's attorney, rather than District's custodian of records, or other District administrator. District provided a declaration of its attorney attesting to the fact that the video Student subpoenaed was not in possession of its attorney.

Finally, although not alleged by District, the subpoena is also invalid because it is not dated and is not signed by the person issuing the subpoena, in this case Student's attorney.

In conclusion, District's motion to quash Student's subpoena duces tecum for the video recording of the incident of November 6, 2017, that gave rise to District's decision to refer Student for expulsion, is GRANTED. The subpoena is invalid because it constitutes pre-hearing discovery because it was not returnable on the first day of the hearing; because Student failed to demonstrate the relevancy or reasonable necessity for the video; and because the subpoena itself is procedurally invalid for the reasons stated above.

IT IS SO ORDERED.

DATE: January 3, 2018

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings