

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENT ON BEHALF OF STUDENT,

v.

ORO GRANDE SCHOOL DISTRICT.
OAH CASE NUMBER 2021090564

ORDER GRANTING MOTION TO QUASH
SUBPOENA DUCES TECUM

OCTOBER 12, 2021

On September 20, 2021, Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings naming Oro Grande School District, referred to as Oro Grande. The Office of Administrative Hearings is referred to as OAH. On September 20, 2021, a scheduling order was issued scheduling the case for hearing on November 16 through 18, 2021.

On September 28, 2021, Student issued a subpoena duces tecum to Eugene Titus, Secondary Principal at Riverside Prep Middle School. The subpoena duces tecum was served on Titus through his district email. The proof of service does not reflect service on counsel for Oro Grande or state that a copy was sent to OAH as required by

its Information Sheet for Subpoena to Produce Records or Things Under Oath with or without Testimony.

The subpoena duces tecum seeks documents related to alleged physical altercations involving Student on August 23, 2021 and August 24, 2021. The subpoena duces tecum directs Titus to produce the documents on October 13, 2021 and appear for testimony on October 27, 2021. However, the subpoena also indicates Titus is not required to appear at the videoconference hearing.

On October 6, 2021, Oro Grande filed a motion to quash the subpoena on the grounds that the subpoena was improperly served and seeks the production of documents prior to the hearing date. Oro Grande further argues Student failed to make a factual showing that the requested documents are material and relevant to the issues in the due process complaint, and seeks documents potentially invading the privacy rights of other students. Student did not file an opposition to Oro Grande's motion to quash. On October 8, 2021, Student filed a motion to amend and amended complaint. OAH has not yet issued an order on Student's motion to amend.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities Education Act, referred to as IDEA 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 Regs., tit. 5, § 3082, subd. (c)(2).) This requirement

mirrors that required by Code of Civil Procedure section 1985, subdivision (b), which requires:

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 or things 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) Cal. App.2d 71, 77.)

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 the 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.

NO RIGHT TO PREHEARING DISCOVERY

In general, there is no right to prehearing discovery in due process proceedings under the IDEA. (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, except in a limited fashion, as is discussed below. (Ed. Code, § 56505, subd. (e).)

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 by 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. Prehearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District*, (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing five business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

FAILURE TO HAVE SUBPOENA DUCES TECUM RETURNABLE AT THE START OF HEARING AND COMPLY WITH PROCEDURAL REQUIREMENTS

A party to a due process hearing does not have the power to use a subpoena duces tecum to compel the production of documents before hearing. The applicable statutes and regulations securing the right to present evidence and compel the attendance of witnesses all relate to the hearing itself. Student's subpoena duces tecum directs Titus to produce the documents on October 13, 2021, which is prior to the scheduled hearing dates of November 16 through 18, 2021. Student's subpoena is invalid on its face, as it was not returnable on the first day of hearing.

Student's subpoena duces tecum also fails to comply with OAH's requirements for issuance of subpoenas duces tecum. The proper subpoena form and instructions for service are located on OAH's website. Student neglected to obtain consent to serve Titus by electronic mail and to serve a copy of the subpoena duces tecum on Oro Grande's attorney of record. Further, the proof of service does not reflect that a copy of the subpoena duces tecum was filed with OAH. Should Student reissue a subpoena duces tecum, they are advised to follow OAH's guidelines.

Student failed to comply with the procedural requirements for issuing and serving the subpoena duces tecum, and therefore the subpoena is quashed. This Order does not address the substantive issues of whether Student made a showing of

reasonable necessity for the requested documents or whether the subpoena violates the privacy rights of third parties.

ORDER

1. Oro Grande's motion to quash Student's subpoena duces tecum to Eugene Titus, Secondary Principal, Riverside Prep Middle School is granted.
2. This Order is made without prejudice to Student's right to issue an appropriate subpoena duces tecum for production of documents at hearing.

IT IS SO ORDERED.

Jennifer Kelly

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings