BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017110983
v.	ORDER GRANTING IN PART AND DENYING IN PART DISTRICT'S MOTION TO QUASH SUBPOENA DUCES TECUM; MODIFYING SUBPOENA DUCES TECUM
ETIWANDA SCHOOL DISTRICT.	

On November 27, 2017, Parent on behalf of Student filed a request for due process with the Office of Administrative Hearings, naming Etiwanda School District.

On January 16, 2018, Student served District with a subpoena duces tecum. On January 25, 2018, District filed a motion to quash Student's subpoena duces tecum. On January 30, 2018, Student filed an opposition.

The parties argued the motion to quash at the prehearing conference on February 12, 2018, and the undersigned administrative law judge ruled on the motion to quash at that PHC.[1] This order documents the ruling made at the PHC.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act 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 Code of Civil Procedure section 1985, subdivision (b) (Section 1985(b)), which requires that:

[1] At the February 12, 2018 PHC, the categories of documents sought in the subpoena duces tecum, all of which were marked by asterisks, were numbered 1 through 32 for identification purposes.

> 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.) A conclusory declaration that the desired documentary evidence is relevant and material is insufficient. (*Id.*, at p. 835.)

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.

Parents may request copies of their child's educational records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code, § 56504.) Education records under the IDEA are defined by the Federal Education Records 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).)

In addition to parents' right to copies of educational records within five business days of a request in California, a party to a due process proceeding is entitled to be served, five business days before the hearing, with copies of all the documents the other party or parties intend to use at the hearing, and a list of all witnesses intended to be called with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).)

DISCUSSION

Student's complaint alleges that District denied her a free appropriate public education during the 2017-2018 regular school year and 2018 extended school year by failing to appropriately assess Student (particularly her behavioral needs), failing to adequately document Student's behaviors, failing to accurately determine Student's needs, failing to offer appropriate placement and services, and implementing portions of Student's individualized education program offers without parental consent. The complaint specifically contends that District failed to address Student's behaviors on the school bus.

Student's subpoena duces tecum requests all documents possessed by District that are related to Student's educational program for the 2017-2018 school year, from August 2017 through the date of the subpoena. In pertinent part, the documents subpoenaed include all communications including electronic mail, assessments, reports, tests, protocols, notes, data, service logs, lists of District bus drivers and employees who have assessed or serviced Student, enrollment documents, behavior reports, and recordings of Student. The subpoena duces tecum directs District to produce the documents on the first day of the due process hearing, February 20, 2018.

District moves to quash the categories 6, 8-14, 16 and 19-29 of the subpoena duces tecum on the grounds that (i) Student fails to make a showing of reasonable necessity, (ii) the categories are vague and overbroad, and (iii) the requests result in an undue burden on District. Student opposes District's motion by contending that any document referencing Student necessarily provides relevant facts which underlie the issues of Student's due process complaint. At the PHC, Student's counsel also argued that Student wanted to know about and read any District document that mentioned Student or Parent by name.

Student's subpoena duces tecum falls short of demonstrating reasonable necessity for production of the documents requested in categories 8, 10-14, 19-22, and 24-29 and 32. The declaration of Student's counsel attached to the subpoena duces tecum makes conclusory statements that the documents sought are "pertinent and relevant" and "material to this case," but fails to provide detailed support for that conclusion. At the PHC, Student made a showing of reasonable necessity for some categories of documents, but failed to make the requisite showing as to other categories.

At the PHC, Student established a reasonable necessity for production of the documents in categories 6, 9, 16 and 19, as discussed and modified by this order.

Category 6 requests any and all documents "relating to" Student, including those related to observations, meetings, intake, personal and therapy notes and admission documentation. Student could not show a reasonable necessity for production of any and all documents regarding Student in District's possession, some of which might be unrelated to the issues in this proceeding. However, to the extent the correspondence sought in Category 6 is limited to notes, memoranda and other documents relating to observations of Student in a school or bus setting, meetings regarding Student's educational program, intake and therapy notes for related services and admission, District shall produce those documents at hearing. District's motion to quash Category 6 in its entirety is denied, and District shall produce the documents responsive to Category 6 as modified by this order.

Category 8 seeks any logs or notes documenting or referencing telephone calls "relating to" Student between any school or District staff for any reason. Student failed to make a showing of reasonable necessity for such information, and the request is overbroad. A search of telephone logs for Student's school and the entire District, the sum of which would have to be extensively redacted to prevent disclosure of personally identifiable

information regarding other student's families, would be an undue hardship on District. The motion to quash Category 8 is granted.

Categories 9-14 seek any documents "evidencing" correspondence or communications between all or identified individuals "regarding" Student. It is unclear how these categories of documents are different from Category 6, and Categories 10-14 are clearly duplicative of Category 9. Review of unlimited records for any "evidence" of communications generally "regarding" Student is vague, overbroad, and presents an undue hardship on District. However, Student made a showing of reasonable necessity for production of actual written communications between staff and administrators who designed and implemented Student's program, or communicated with Parent regarding that program and Student's behavior on the bus. Accordingly, Category 9 is modified to require District to produce "All correspondence and email communications regarding Student's educational program and transportation on the bus between current and former staff members and employees of District, including teachers, aides, John Golden Elementary school staff and administrators, District special education staff and administrators, and District transportation staff." District's motion to quash Categories 10-14 is granted. District's motion to quash Category 9 is denied, and District shall produce the documents responsive to Category 9 as modified by this order.

Category 16 requests logs showing which District staff and employees accessed Student's medical, educational or other records. Such documents will show which members of Student's individualized education program teams familiarized themselves with this important information on Student, and Student made a showing of reasonable necessity for this information. To the extent the logs may include the names of other students not a party to this matter, District shall redact such personally identifiable information. District's motion to quash Category 16 is denied.

Category 19 broadly requests copies of any and all incident reports and "any and all information" communicated between the District's special education director and any District employee regarding Student and Parent. This request is vague and overbroad. However, Student's behavior is at issue in this proceeding, and Student made a reasonable showing of necessity for production of written incident reports. Accordingly, District shall produce copies of any and all written incidence reports involving Student. District's motion to quash Category 19 is denied, and District shall produce the documents responsive to Category 19 as modified.

Categories 20-29 are duplicative of Category 9. It is an undue burden on District to produce those records multiple times in multiple categories, and Student did not establish any prejudice to Student if the documents sought by Categories 20-29 encompassed those same

documents required to be produced under Category 9. Accordingly, District's motion to quash Categories 20-29 is granted.[2]

At the PHC, Student did not make a showing of reasonable necessity for "any and all information on anyone" who has reviewed Student's records as requested at Category 32. The request is also vague and overly broad. Accordingly, the ALJ *sua sponte* quashed Category 32.

It is worth noting that District's contention that it is not necessary to produce the subpoenaed documents because it has already provided Student with a copy of his educational records lacks merit. District is not required to re-produce copies of documents that it has already provided Student as part of his educational file. However, additional documents that are not educational records may properly be the subject of the subpoena duces tecum. Therefore it was proper for Student to request those items in a subpoena duces tecum. (*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.)

ORDER

1. District's motion to quash Student's subpoena duces tecum is denied in part and granted in part.

2. Categories 8, 10, 11, 12, 13, 14, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 32 of Student's subpoena duces tecum served on District are is quashed.

3. District shall produce the documents requested in Categories 6, 9 and 19 of Student's subpoena duces tecum, as modified by this order.

IT IS SO ORDERED.

DATE: February 14, 2018

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings

[2] Student's repeating of the same document request in multiple requests approaches conduct that is frivolous, in bad faith, and intended to harass, California Code of Regulations, title 1, section 1040, subdivision (a)(2).