BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017070575
v.	ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENA DUCES TECUM
IRVINE UNIFIED SCHOOL DISTRICT.	

On July 14, 2017, Parent on behalf of Student filed a request for due process with the Office of Administrative Hearings, naming Irvine Unified School District. Student's complaint alleges that District denied him a free appropriate public education in individualized education programs dated January 21, 2016, March 1, 2016, April 19, 2016, and November 17, 2016. OAH has granted two requests for continuance of the case, which is now scheduled to begin on January 16, 2018.

On December 27, 2017, Student, through his attorney, served District's attorney with a notice to consumer and a courtesy copy of a subpoena Student intended to serve on an agency called Autism Comprehensive Educational Services, also known as ACES. ACES apparently provided services to Student prior to his aging out of special education eligibility during summer 2017.

District filed a motion to quash the subpoena on January 4, 2018. As grounds for its motion, District contends that the subpoena does not give ACES sufficient time to respond; the subpoena fails to demonstrate reasonable necessity for the documents requested; and the subpoena is overly broad and vague.

Student filed an opposition to the motion to quash on January 5, 2018. Student contends that District does not know whether ACES has enough time to produce the documents. Student further argues that the subpoena is not overly broad or vague, and that the documents requested are relevant to his case.

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 that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(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 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

Insufficient Notice for Production of Documents

Student's subpoena duces tecum directs ACES to produce copies of the following to Student's attorney by no later than January 8, 2018: "Any and all records and data pertaining to [Student's] behavior and social/emotional issues during the 2015-2016, 2016-2017, and 2017-2018 school years, including, but not limited to, behavior logs, data sheets, notes, incident reports, disciplinary records/entries, and internal and external communications (letters, emails, behavior and communication logs)."

District first contends that Student failed to give sufficient time to ACES to produce the documents. District points out that Student waited until less than two weeks prior to the hearing date to serve District with the Notice to Consumer, and that the subpoena provides ACES only about five days to produce the documents. District cites to section 1985.3, subdivision (d) of the Code of Civil Procedure, which states that service of a subpoena duces tecum must be made "in sufficient time to allow the witness reasonable time to locate

and produce the records or copies thereof." Code of Civil Procedure section 2020.410, subdivision (c) defines sufficient time as "no earlier than 20 days of the issuance, or 15 days after the service" of the subpoena, whichever is later. Under these two code sections, Student has not provided ACES with sufficient time to respond to the subpoena.

No Right to Prehearing Discovery

However, there is another significant issue concerning the subpoena, which District did not raise. 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 ACES to produce the subpoenaed records to Student's attorney no later than January 8, 2018, eight days prior to the first day of hearing. 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, the subpoena is modified to change the date of production to January 16, 2018, and the location for production to the hearing location. The documents shall be produced to the Administrative Law Judge hearing this matter. As discussed below, the subpoena will be further modified as to the scope of the documents that ACES must produce.

Reasonable Necessity for the Records

District argues that the subpoena duces tecum should be quashed because it fails to make the requisite showing of reasonable necessity for the requested documents and is overbroad. Student's declaration in support of the subpoena states that the documents requested are "relevant for determining whether the District was aware of the effectiveness of the services provided at the aforementioned IEPs." District contends that is level of awareness of the effectiveness of the services provided by a contracting agency is not at issue in this case. It contends that the only issue is whether the contested IEPs offered Student a FAPE.

District's argument is not persuasive. If District's offers of FAPE in the IEPs at issue in the case included continued services through a contract with ACES, the efficacy of ACES's services may be relevant to Student's allegation that District's IEP offers did not address his needs. In California, an educational placement is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs. tit. 5,§ 3042, subd. (a).) Consequently, documents relevant to Student's related services through ACES may include services logs, behavior logs, incident reports, communications, notes, and other information or data ACES kept or maintained as part of its provision of services to Student. It is premature to determine whether the requested documents are relevant to Student's claims.

Scope of the Subpoena

District contends that the subpoena is overly broad as the subpoena requests documents for time periods not covered by Student's complaint. District's contention that the subpoena is overly broad is well-taken. Student's allegations assert that District failed to provide him a FAPE between January 21, 2016, and November 17, 2016. Information about Student during the 2015-2016 school year and information up to November 17, 2016, is therefore relevant to this case. Student has failed to provide any basis for needing records of services ACES provided to him subsequent to November 17, 2016, the date of the last IEP at issue in this case.

District also asserts that it does not know what Student means by his request for documents concerning his "behavioral and social/emotional issues." However, District is not the party to whom the subpoena is directed. District's motion to quash does not include a declaration from anyone employed by ACES as to whether it understands the type of documents requested. It is fairly clear from the declaration in support of the subpoena that Student seeks all records relating to ACES's provision of services to him, including data, behavior logs, communications, incident reports, and notes. These are Student's records and he is entitled to them, whether the services were provided directly by District, or, as here, through a contract with a third-party provider.

ORDER

1. District's motion to quash Student's subpoena duces tecum is denied as to the requested documents. ACES shall produce the records requested in the subpoena to the extent that they exist as modified in this order.

2. District's motion to quash the subpoena is granted as to the time frame covered by the documents. ACES shall produce any records it has for Student from the beginning of the 2015-2016 school year through November 17, 2016. District's motion to quash is granted as to any records relating to the time period after November 17, 2016.

3. District's motion to quash subpoena duces tecum is granted as to its contention that insufficient time was provided to ACES for production of the documents. Additionally, Student's subpoena duces tecum incorrectly ordered production of the documents on a date prior than the first day of hearing. Student's subpoena duces tecum is modified to change the date and location of production of the documents to the hearing location on the first day of hearing, presently January 16, 2018. If the hearing date is continued, the date of production shall be the first day of the continued hearing.

4. ACES shall deliver Student's records to District's Westwood Training Center, located at 1 Liberty Street, Irvine, California, 92620, at 9:30 a.m. on January 16, 2018.

5. District shall serve ACES immediately with a copy of this order upon receipt of the order.

DATE: January 8, 2018

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