BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGUITO UNION HIGH SCHOOL DISTRICT,	OAH Case No. 2014091018
SAN DIEGUITO UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2014090321 ORDER GRANTING DISTRICT'S MOTION TO QUASH SUBPOENAS DUCES TECUM

The San Dieguito Union High School District filed a due process request on September 5, 2014, naming Student. Student filed a due process request on September 25, 2014, naming District. The Office of Administrative Hearings consolidated the cases in an Order issued on October 13, 2014. The hearing on the consolidated matter is presently set to begin on December 2, 2014.

On September 25, 2014, Student, through her attorney, served subpoenas duces tecum by mail on District school Principal Cara Dolnick and District school psychologist Dr. Maureen Yellen. The subpoenas, with the requested documents, were returnable no later than October 2, 2014, to the offices of Student's attorney.

Both subpoenas requested the same records, to wit: counseling notes from Student's Educationally Related Mental Health Services therapist, April Heinricksen; counseling notes from the school psychologist, Dr. Maureen Yellen; the mental health evaluation report performed by Dr. Backer; and copies of emails between Student's parents and District personnel.

On October 1, 2014, District filed a motion to quash the subpoenas. Student filed on opposition on October 6, 2014.

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 (SDT) (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 SDT's. 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 (FERPA) 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 AND ORDER

District has attached to its motion a copy of the subpoena duces tecum Student served upon it on September 25, 2014. District is asking that the subpoena duces tecum be quashed for several reasons. First, District correctly argues that special education law does not contain any provisions authorizing pre-hearing discovery. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits at least five business days prior to the hearing, but this provision requires a party to disclose witnesses and exhibits it intends to use during the due process hearing, not every single record in its possession. If Student requires specific records, a subpoena duces tecum can be used to compel the production of records on the day the hearing is to commence. At the time Student issued the subpoena duces tecum, the hearing was set to begin on December 2, 2014. The hearing in the now consolidated cases is still set on the same date. Because prehearing discovery is not permitted, the subpoena duces tecum improperly required the documents to be returnable to Student's attorney on October 2, 2014, two months prior to the hearing. The subpoenas should have directed the records to be returnable the first day of the hearing. Because prehearing discovery is not allowed, the subpoenas duces tecum must be quashed.

As stated above, 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. If the only defect in Student's subpoenas was the date upon which they were returnable, an order modifying the subpoena by changing the production date might be appropriate. However, District also correctly contends that Student has not established good cause for the production of the documents. In the section of the subpoena duces tecum that calls for the party making the request to demonstrate good cause for the requested records, Student simply states that the requested items are "critical to Respondent's defense that SDUHSD's proposed IEP is not FAPE for [Student] in the LRE." Student fails to state any specific reason as to why the requested documents are necessary and relevant to her defense of District's case. The subpoenas duces tecum are therefore defective because there is no specific showing of why Student needs the records at hearing.

Further, to the extent that some of the requested records are Student's educational records, they can be requested from District at any time pursuant to FERPA and Education Code section 56504. The records must then be produced no later than five business days after the request is made.

However, some of the records requested in Student's subpoenas do not appear to be the type of educational records contemplated by FERPA and Education Code section 56504. For example, as District points out, emails are not considered educational records if not maintained in Student's file in the normal course of business. (See *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, Counseling notes of the therapists may also not be "educational records" if normally retained by the therapists and not placed in the pupils' files. Therefore, a subpoena duces tecum asking for production of those types of records on the day the hearing commences would be proper, were the statement of good cause properly made, with a showing as to why the records were necessary, assuming there was no other legal bar to production. Here, because the declarations in this case are defective, the subpoenas duces tecum must also be quashed on grounds that the declarations fail to support production of the documents.

District's motion to quash the subpoenas duces tecum issued by Student's counsel on September 25, 2014, to Cara Dolnick and Dr. Maureen Yellen, is granted.[1]

IT IS SO ORDERED.

DATE: October 17, 2014

/s/
DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings

[1] As this Order grants District's motion to quash because pre-trial discovery is not permitted in due process cases in California, and due to the defects in the declarations in support of the subpoenas, it is not necessary to address District's argument that it was given insufficient time to respond to the subpoenas.