BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018030787 ORDER GRANTING MOTION TO QUASH SUBPOENA

Student filed a request for due process (complaint) on March 16, 2018, naming San Diego Unified School District. The Office of Administrative Hearings scheduled hearing on Student's complaint to begin on May 10, 2018. On April 18, 2018, Student promulgated a subpoena to District's Executive Director for Special Education, seeking communications concerning Student. The subpoena was returnable on May 4, 2018, to the office of Student's counsel. On April 18, 2018, OAH granted the parties' joint continuance request made that day, which set the hearing to start on May 30, 2018.

On May 16, 2018, District filed a motion to quash the subpoena, asserting among other grounds, that Student was seeking to conduct discovery by issuing a subpoena returnable before the start of hearing. Because of the nature of the subpoena and the need to resolve the issue before the prehearing conference, this order issues before the running of time for Student's response.[1]

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).)

[1] In future proceedings, District would be well-advised to bring such motions more promptly after receipt of facially-defective subpoenas.

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 (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).)

Prehearing Discovery

California law provides that parents may before a hearing obtain pupil records under Education Code section 56504 and related statutes, and are also entitled to receive, five business days before the hearing, copies of all the documents the district intends to use at the hearing, and a list of all witnesses the district intends to call, with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).) However, a party does not have the power to use a subpoena to compel the production of documents before hearing.

The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights 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).) Both of those subsections relate only to due process hearings, not to any prehearing procedures. Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to "[a] party to a hearing held pursuant to this section ..." (Ed. Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. 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 Board of Education promulgated section 3082, subdivision (c)(2), of Title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and SDTs for return at hearings.

Accordingly, OAH has repeatedly ruled that a party to a special education due process matter lacks the right to compel production of documents outside this statutory and regulatory scheme. (*Student v. Vista Unified School Dist.* (January 22, 2018) OAH Case No. 2017111058 (Order Granting Without Prejudice Motion to Quash Subpoena Duces Tecum); see also *Student v. Fremont Unified School Dist.* (Aug. 27, 2008) OAH Case No. 20006050443 (Order Granting Motion to Quash Subpoena Duces Tecum, etc.); *Student v. Placentia-Yorba Linda Unified School Dist.* (Dec. 23, 2011) OAH Case No. 2011090432 (Order Quashing Subpoena Duces Tecum); *Student v. Menlo Park City Elem. School Dist*.

(April 18, 2011) OAH Case No. 2010120283 (Order Granting in Part and Denying in Part Motion to Quash Subpoena Duces Tecum).)

DISCUSSION

Failure to Have Subpoena Returnable at an Appropriate Place and Time

Student's subpoena is returnable on May 4, 2018, to the offices of Resolve Legal Solutions, and not to the OAH offices in San Diego, the place specified for hearing in this matter. No hearing was ever scheduled for May 4, 2018; hearing was scheduled to begin on May 10, 2018, and was later continued on the same date the subpoena duces tecum was issued to May 30, 2018. The subpoena duces tecum recognizes the fact that it asks for prehearing discovery, as it elsewhere directs the witness to appear for testimony on May 10, 2018, at the San Diego offices of OAH.

A party to a due process hearing in California does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulations securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. There is no right to pre-trial discovery under the Individuals with Disabilities Education Act, the Code of Federal Regulations, or California education statutes or regulations. Student's subpoena is invalid *ab initio* as it was not returnable the first day of hearing, and there is no right to pre-trial discovery.

Accordingly, District's motion to quash is granted.[2]

ORDER

1. District's motion to quash is granted.

2. This order is made without prejudice to Student making a renewed subpoena duces tecum for production of documents at the hearing.

DATE: May 18, 2018

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Chris Butchko
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings

[2] This order does not address any of the other grounds in District's motion to quash.