BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018090697
v.	ORDER DENYING STUDENT'S MOTIONS TO COMPEL PRODUCTION OF PUPIL RECORDS, AND TO CONTINUE HEARING
ANAHEIM ELEMENTARY SCHOOL DISTRICT.	

On September 20, 2018, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings, naming Anaheim Elementary School District. Student is represented by her Parent. OAH set the matter for hearing on November 14, 2018.

On October 2, 2018, Anaheim filed a notice of insufficiency and motion to dismiss Student's complaint. In its October 4, 2018 Order determining the sufficiency of Student's complain, OAH found that Student sufficiently pled the following four issues:

(1) On or around November 1, 2016, did Anaheim deny Parents the opportunity to meaningfully participate in Student's IEP team meeting, by denying Parents the opportunity to ask questions?

(2) On or about November 1, 2016, did Anaheim deny Student speech and occupational therapy services in her Home Hospital placement?

(3) From April 17, 2017 through March 20, 2018, did Anaheim fail to comply with OAH's order in a Decision issued March 13, 2017?

(4) Did Anaheim fail to hold IEP team meetings that Parents requested from November 1, 2016 through June 15, 2018?

OAH found that Student did not sufficiently plead five other issues. OAH gave Student leave to file an amended complaint within 14 days of the Order, but Student did not do so. The above four issues remain the exclusive issues for hearing.

On September 20, 2018, Anaheim's attorneys filed and served a notice they were representing Anaheim, and consented to receive service on behalf of Anaheim at specified mail and email addresses. On October 24, 2018, Anaheim's attorneys filed and served consent to receive service at a specified fax number.

On October 11, 2018, OAH granted the parties' joint request to continue the hearing to December 11-13, 2018.

On November 1, 2018, Student filed in this matter a document captioned "Continuance Requested." Student requested that OAH continue the hearing date in this matter, on grounds that Anaheim has failed to respond to Parent's requests that Anaheim produce: (1) all records created by Anaheim or its attorneys pertaining to Anaheim's representations to Parent in March 2018 that Student's then-legal counsel were not responding to emails and telephone calls seeking to hold meetings, including a section 504 meeting concerning Student; and (2) documents presented by Anaheim during mediation in October, 2018 that were not produced to Student when Student, pursuant to Education Code section 56504, requested copies of all of Student's school records.

Student's request is treated here as a motion to compel Anaheim to produce Student's pupil records, and a motion to continue the hearing in this matter.

The proof of service attached to Student's motions indicates Parent served it on Anaheim's Special Education Director by personal service, mail, fax, or email, but not on Anaheim's attorneys who have appeared in this action and consented to service on behalf of Anaheim. Anaheim has not responded to Student's motion and request.

Student did not include any sworn declaration stating facts supporting a motion to compel Anaheim to produce education records, or a motion to continue the hearing. Student's motion to continue the hearing also did not propose any new hearing dates, or suggest any approximate number of days that the hearing should be continued.

Applicable Law

Parents may request copies of their child's pupil records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code, § 56504.) A pupil record means any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district, or required to be maintained by an employee in the performance of his or her duties, whether recorded by handwriting, print, tapes, film, microfilm, or other means. (Ed. Code, § 49061, subd. (b).) A pupil record does not include informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. (*Ibid.*) "Substitute" means a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position. (*Ibid.*)

A parent does not have to be involved in a due process hearing or other legal proceeding to request their child's pupil records. Such a request is not considered prehearing "discovery," the procedure by which a party in certain types of legal proceedings may obtain evidence from other parties to the proceeding.

The law does not provide any discovery procedures allowing a party to obtain documents that are not defined as pupil records, or any other evidence, prior to the start of the hearing in a due process case. However, each party to a due process hearing does have the right at the hearing to present evidence and compel the attendance of witnesses. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56506, subd. (d)(2) and (3).)[1] Thus, prior to the hearing, a parent or other party may have the hearing officer in a due process case issue subpoenas (order to appear and give testimony at hearing), and subpoenas duces tecum (order to produce document(s) or paper(s)at hearing), if the party making the request shows that the testimony or documents are reasonably necessary. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement is similar to 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 requesting party shows good cause by making 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.)

Continuances are generally disfavored, as the law requires a due process hearing to be conducted, and a decision rendered, within 45 days of receipt of the due process notice, unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) A district's failure to provide copies of a student's pupil records may constitute "good cause" for a continuance of the due process hearing if it prevents the parents from preparing for the hearing.

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[1] Also, no later than five business days prior to the hearing, each party is entitled to receive from the other parties a copy of all documents and a list of all witnesses and their general area of testimony the other parties intend to present at hearing. (Ed. Code, § 56505, subd. (e).)

OAH considers all relevant facts and circumstances, including: the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

OAH's Special Education Handbook, available online at https://www.documents.dgs.ca.gov/oah/SE/Handbook.4.5.18.pdf, or http://www.dgs.ca.gov/oah/SpecialEducation.aspx, describes at pages 41-46 the requirements for a motion seeking an order from OAH. In general, the motion must be filed with OAH and served on all opposing parties. The motion must be supported by testimony or documents submitted through a signed, written statement declaring, under penalty of perjury, that the testimony, or document copies, are true and correct. A party's declaration for a motion for continuance should include: (1) a statement that the party has tried to contact the other parties; (2) a statement and that the other parties do not agree to a continuance, or that the parties cannot agree on dates; (3) the reason for the request; and (4) the requested new date or dates.

Discussion

In this matter, Student's motions to compel Anaheim to produce pupil records, and to continue the hearing, are not supported by testimony or documents submitted under penalty of perjury. The unsworn contentions stated in the motion and request are not evidence on which an order may be based. Student therefore has not provided evidence that may be considered to evaluate whether Student has asked Anaheim to produce pupil records, whether the requested documents qualify as pupil records that Anaheim must produce, and whether the requested documents are material and relevant to Student's issues in this case.

Also, Student included no declaration or evidence that Parent tried to contact Anaheim's attorneys to discuss a continuance, whether Anaheim refused to agree to a continuance, or that the parties could not agree on dates. The request for continuance also does not propose new dates for the hearing.

Finally, the proof of service for Student's motion and request indicates that it was not served on Anaheim's attorneys, who have appeared in the action and consented to receive service on Anaheim's behalf. It is thus unclear whether Anaheim had actual notice of the motion and an opportunity to respond.

ORDER

Student's motions to compel Anaheim to produce pupil records, and to continue the hearing in this matter, are denied. This denial is without prejudice to filing motions that comply with the requirements stated above. Student shall serve any future motions on Anaheim's attorneys of record in this matter.

DATE: November 16, 2018

DocuSigned by:

ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings