BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018090473 ORDER GRANTING DISTRICT'S MOTION TO QUASH SUBPOENA DUCES TECUM

On January 22, 2019, Newport-Mesa Unified School District filed a motion to quash subpoenas duces tecum, issued to it by Parents. On January 25, 2019, Parents filed an opposition to the motion to quash.

APPLICABLE LAW

Prehearing Discovery in Special Education Due Process Proceedings

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 due process hearing. (20 U.S.C. § 1415(h).) The California Education Code 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), states 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 for other administrative hearings that provide broader authority for the use of subpoenas. (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].)

Although subpoenas duces tecum are available in special education due process proceedings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only to two types of documents: (i) educational records, which parents have the right to request and receive within five

business days at any time (Ed. Code § 56504), and (ii) all documents which the opposing party intends to present at hearing, which must be provided not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)).

Reasonable Necessity for Production

The standard for issuance of a subpoena duces tecum in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), requiring a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This standard is stricter than the general Administrative Procedure Act standard of "good cause," adopted from the civil procedure code. That standard requires the moving party to specify by affidavit "the exact matters or things desired to be produced, [and set] forth in full detail the materiality thereof to the issues involved in the case..." (Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

Special education law does not specifically address motions to quash subpoenas. In ruling on such motions, the 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. OAH employs this process in ruling on motions to quash, as modified by special education's unique procedures and standards.

DISCUSSION

The Subpoena

A prehearing conference was held in this matter on January 14, 2019. At the prehearing conference argument was had on a pending motion by Student to quash subpoenas sent to three expert witnesses designated by Student. The motion was denied at the prehearing conference, and a written order explaining and recording the ruling was issued on January 22, 2019. At the prehearing conference, the parties were asked if they were contemplating any other pretrial motions. Neither party anticipated making any pretrial motions.[1]

[1] Saddleback Valley has not complied with section 9 of the January 15, 2019 Order following Prehearing Conference, which required that all motions filed afterwards be accompanied by a declaration setting out why the motion was not filed beforehand. However, as it is obvious why a motion to quash could not be filed before the service of a subpoena and there is correspondingly no possibility that the motion was withheld to gain advantage, the non-compliance will be excused.

On January 18, 2019, four days after the prehearing conference, Student sent a subpoena duces tecum to Saddleback Valley's counsel seeking "any and all records" pertaining to Student in the 2017-2018 and 2018-2019 school years. The subpoena was emailed after normal business hours on Friday, January 18, five calendar days before the hearing was scheduled to begin. Saddleback Valley's counsel stated in a sworn declaration that he received the email at approximately 7:56 p.m. on that Friday night. The following Monday was a state and federal holiday. Saddleback filed this motion to quash at 1:29 pm on Tuesday, January 22, 2019, the day before the start of the hearing.

On January 23, 2019, the first day of this day this hearing, after receipt of Saddleback Valley's motion, Student issued a revised subpoena duces tecum, which limited the requested production to internal and external communications regarding Student's needs during the time period at issue. In discussion of the subpoena on the record at hearing, counsel for Student clarified that the subpoena sought only email correspondence. Student's opposition to the motion to quash, filed on January 25, 2019, does not state that the January 18, 2019 subpoena was withdrawn, but contends that it was "voluntarily limited in scope and reduced any undue demands" upon Saddleback Valley. The new or revised subpoena was not included with Student's moving papers.

Saddleback Valley's Position

Quashing is sought on two grounds. First, Saddleback Valley argues that the subpoena was not timely served. Subpoenas must allow reasonable time for preparation and travel. The subpoena was sent to counsel after business hours on January 18 and requested production on January 23, 2019. Saddleback Valley states that the subpoena was not served upon it, but does not elaborate whether or not there was agreement between the parties to allow service upon counsel. Saddleback Valley contends that the request for production was "wholly unreasonable" because it sought two years of responsive material but allowed at most two business days to gather and produce it. Saddleback Valley has not estimated an amount of time necessary to make the production.

Further, Saddleback Valley argues that the subpoena is unduly burdensome and is intended for harassment. It states that searching for, retrieving, and sorting email correspondence over two years is time consuming, and that the material gathered will have to be reviewed to eliminate personally identifiable information of other students. Saddleback Valley contends that it cannot produce the requested material before the completion of this hearing, and, given the effort required to attempt to comply, the real purpose of the subpoena is to impair Saddleback Valley's defense to this action.

In addition to quashing the subpoena, Saddleback Valley also seeks that the order require an offer of proof under penalty of perjury as to "why Student's counsel waited four full months following its filing for [due] process before serving the [subpoena] one business day before the due process hearing."

Student's Response

Student revised and limited his subpoena after receipt of the motion to quash. He contends that there was an established practice between the parties to effect service by conveyance to counsel. As limited, Student believes that all responsive documents would already have been reviewed by Saddleback Valley and be available for production, and no travel time is needed for production as the parties are present for the hearing.

In response to Saddleback Valley's contention that the true purpose of the subpoena is harassment, Student states that relevant information for a hearing "can come to light through witness interview, and review of documents… includ[ing] exhibits received by a party's counsel only five days prior to the start of hearing," apparently referring to the party's statutory exchange of exhibits prior to hearing.

Student further contends that his subpoena was not untimely because it was made on a similar timeline to Saddleback Valley's subpoenas upon his expert witnesses. He states that those subpoenas were sent "just over one week" before Student sent his, and that the difference between the dates is immaterial

Analysis

Service upon counsel appears to have been accepted by the parties. According to the submitted proofs of service, Student's Prehearing Conference Statement and Peremptory Challenge were both served only upon counsel. Similarly, Saddleback Valley's Prehearing Conference Statement and Opposition to Student's Motion to Quash, as well as the instant Motion to Quash, were served only upon Student's counsel per their proofs of service. Accordingly, the subpoena duces tecum was duly served upon Saddleback Valley.

Saddleback Valley contends that the subpoena was untimely because it was filed after the prehearing conference and after the exchange of documents and allowed only one business day for identification, collection, and production of the responsive documents. There is no set rule for timeliness of service of subpoenas duces tecum, even in civil actions. Subpoenas must be served in time to allow a witness reasonable time for preparation and travel. (Cal. Code Civ. Proc. 1987(a.).) It is not necessarily fatal to the subpoenas that they were served one business day before the start of hearing as long as the request is reasonable. However, any such request must be weighed against the impact upon the orderly administration of the case and the reasonableness of any such late request.

Consideration of equitable factors weighs against Student's requested production. Student's contention that the difficulty of production is trivial because Saddleback Valley has probably already reviewed the responsive materials is unpersuasive. Such presumptions cannot be made. Further, Student does not respond to the practical issues raised in the motion regarding the difficulty of gathering, sorting, and, most particularly, screening responsive documents for reference to others. One day is not a reasonable time to make the requested production. Similarly, the difference in date between Saddleback Valley's

subpoenas issued on or about January 3, 2019, to Student's late-evening January 18th subpoena is not immaterial in light of the hearing's start date of January 23, 2019. Saddleback Valley's subpoenas allowed the responsive parties as many as 12 business days to prepare their production; Student's subpoena allowed one business day. Student's subpoena duces tecum did not allow a reasonable time for preparation of the requested production.

Student contends that he needs the emails to counter Saddleback Valley's argument at hearing that its offer of placement and services constituted FAPE, and that production of the requested documents, as limited, should be ordered. Student should have received Saddleback Valley's exhibit binder not later than Tuesday, January 15, 2019: five business days before the hearing. Student did not produce the subpoena until the end of the week. Student had notice of the documents Saddleback Valley would be using at hearing well before then, and had a listing of Saddleback Valley's tentative exhibits in the prehearing conference statement filed on January 9, 2019. At that point, Student could not reasonably expect that Saddleback Valley would present all emails concerning Student from the past two years as part of its presentation at hearing. Student did not state at the PHC, in response to inquiry by the ALJ, that it was contemplating issuing a subpoena duces tecum. Had it done so, the subpoena's impact upon proceedings here could have been mitigated.

Further, the emails Student seeks are not an extraordinary or unusual class of documents, and certainly are not something whose existence he only gleaned or suspected following the exchange. Student could have subpoenaed them well before the time he did. Student states that the emails are necessary to respond to Saddleback Valley's presentation and for rebuttal, but has not set out how internal communications regarding Student relate to whether or not the IEP team meeting at issue produced an offer of FAPE that had adequate goals, contained sufficient services accommodations, and modifications, and offered an appropriate placement.

The requested documents might, but have not been shown to be likely to, provide material that could be used in rebuttal, but that thin reed must be weighed against the disruption to the hearing by ordering production. Student has not effectively countered Saddleback Valley's argument that such production will take significant time to prepare. Documents will need to be obtained from a range of persons including non-witnesses, the materials must be gathered and sorted, and references to other students must be scrubbed. Such production would probably take longer than the entire duration of this hearing. Weighing the equities of need and difficulty of production, and due consideration of OAH's inherent ability to manage its docket in an orderly fashion, leads to the conclusion that the subpoena duces tecum was generated too late in the prehearing process to justify its enforcement.

ORDER

Saddleback Valley's motion to quash Student's subpoena duces tecum is granted.

DATE: January 27, 2019

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Chris Butchko
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings