BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. FULLERTON SCHOOL DISTRICT,	OAH Case No. 2017090443
FULLERTON SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2017060283 ORDER GRANTING WITHOUT PREJUDICE MOTION TO QUASH SUBPOENA DUCES TECUM

PROCEDURAL BACKGROUND

Fullerton School District filed a request for due process (complaint) on June 6, 2017, naming Student. Student filed a complaint on September 11, 2017, naming District. The Office of Administrative Hearings consolidated the two cases on September 15, 2017. Hearing on the consolidated matter is scheduled to begin on February 20, 2018.

Student's complaint alleges, in pertinent part, that District denied him a free appropriate public education by failing to provide him with appropriate programming and related services during the time frame at issue in the case. Part of Student's proposed resolution should he prevail on his allegations is a request that District reimburse Parents for the costs they have incurred in placing Student at the Lab School at the University of California, Irvine's Child Development Center.

On January 23, 2018, District served Student with notice of a subpoena duces tecum it intended to serve on the Lab School. As summarized below, the subpoena directs the Development School to produce the following, with respect to any records regarding Student for the period January 1, 2017, to the present:

1. Any documentation, including electronic communications, referencing or relating to communications regarding Student with Student's parents, representatives, or other educational providers.

2. Any documentation, including electronic communications, referencing the nature and frequency of counseling or other therapeutic services, or other educationally related services provided to Student.

3. Any reports, evaluations, intake reports, discharge reports, screenings, or other tests of Student administered, prepared, or received by the Lab School or any other agency or entity contracted by it or affiliated with it.

4. Any documentation and other materials relating to the Lab School's assessment and provision of educationally related services to Student, including notes, protocols of assessments, data, work samples, videotapes, etc., created by the Lab School or any entity contracted by it or affiliated with it.

5. All reports, assessments, data, protocols, medical reports, notes, or other documentation the Lab School relied on in connection with its evaluations of and service recommendations for Student.

6. Organizational documents that establish the University of California, Irvine's Child Development Center as a public or private school that meets "compulsory attendance requirements and that establishes that said organization is qualified to provide special education and related services to students" with individualized education programs.

On January 29, 2018, District personally served a "Jane Doe" person with the subpoena at the University of California, Irvine's Child Development School. District also served the Development School's risk management clerk on the same day. On February 1, 2018, District personally served the subpoena on the "PMK" or person most knowledgeable at the University of California, Irvine.

Student filed a motion to quash the subpoena on February 8, 2018. District filed an opposition to the motion to quash on February 9, 2018. Student filed a reply to District's opposition on February 12, 2018. District filed a response to Student's reply, also on February 12, 2018.

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).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e).) However, neither the IDEA nor the California Education Code confer a right to prehearing discovery in due process proceedings.

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)). Neither of these two circumstances envisions subpoenaing documents from a third party prior to a hearing.

Rather, in special education proceedings in California the hearing officer is given the right to issue subpoenas for personal appearances and for the production of documents 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) [adopted into the Administrative Procedures Act at Gov. Code § 11450.20, subd. (a)], 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 has relied 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

Student makes several arguments alleging that the subpoena is invalid and should be quashed. Student argues that District should have directed the subpoena toward a specific person and that there is no proof of service included with the subpoena. The subpoena is only directed to the Child Development School. However, District served the subpoena on the "person most knowledgeable" as well as the school's risk management clerk. It is clear that appropriate persons were properly served.

However, Student is correct that there are other facial deficiencies in the subpoena. First, the subpoena fails to inform the Child Development School of how it is supposed to respond to the subpoena and whether it only needs to produce the documents at District's offices or if a personal appearance by the custodian of records is required. Although District has checked off the box stating that it was serving a subpoena duces tecum "requesting the production of records or things," Box 2 of the subpoena commands a representative of the Child Development School to appear as a witness on February 20, 2018, the first day of the hearing. District was then supposed to clarify whether the representative actually had to appear in person with the records or was only required to either mail the records with an accompanying declaration to the attention of OAH, or to send the records to another address. District failed to check off any of the three alternatives available per the subpoena. There is no way for the custodian of records to know what he or she was supposed to do with the records or whether a personal appearance to testify as a witness was required, as stated in Box 2 of the subpoena. This is a significant deficiency in the subpoena.

Further, the time for production of the records is incorrect. The subpoena directs the custodian of records to appear at 9:00 a.m. on February 20, 2018. However, the hearing in this matter does not begin until 1:30 p.m. that day, four and a half hours after the person responding to the subpoena is required to appear.

Additionally, the declaration in support of the subpoena fails to establish that District is not able to obtain the documents without recourse to a subpoena, for example, by requesting them from Student's parents. Although District's response to Student's reply to District's motion to quash states the efforts District has made, the declaration in support of the subpoena does not reference those attempts. Finally, the declaration at times does not appear to address the issues raised in Student's complaint. For example, the declaration states "the information requested below is relevant to the questions of whether Student is eligible for special education under the IDEIA, and whether Student requires a special education program that includes placement and/or services beyond those offered in his Accommodation Plan . . . ." There is no contention in Student's complaint that District has contested Student's eligibility for special education. Nor does District's response to Student's complaint contend Student is not eligible for special education. Further, neither Student's complaint nor District's response to it make any reference to Student having an accommodation plan. The only references in both pleadings are to Student's individualized education plans. The declaration therefore contains assertions that do not appear to be applicable to Student.

These procedural deficiencies invalidate the subpoena. Student's motion to quash is granted without prejudice to District curing these deficiencies and reissuing the subpoena, returnable on one of the days presently set for hearing.

Although Student's motion to quash is granted based on facial deficiencies with the subpoena, it is worthwhile to note that Student's contentions that the subpoena is overly broad and the items requested are irrelevant because witnesses from the Development School are scheduled to testify and he includes some of the documents in his exhibit binder, are not well-taken. Student's complaint specifically argues that District denied him a free appropriate public education because of deficiencies in the program and services it offered. Student therefore contends Parents needed to place Student at the Child Development School because it could meet his needs where District's IEPs could not. Student also requests reimbursement for Parents' costs incurred for his placement at the Child Development School. Student has therefore put the Child Development School's program at issue in this case. The education he receives there, the needs that the Child Development School was able to meet that District allegedly refused to address, and the progress Student may or may not have made are all relevant to Student's case and thus relevant to District's defense against Student's issues.

ORDER

1. Student's motion to quash the subpoena duces tecum served on the Child Development School is granted without prejudice to District reissuing a subpoena that cures the deficiencies noted in this Order.

2. District shall immediately serve a copy of this Order on the Child Development School and notify it telephonically that it is not required to comply with the subpoena at this time.

DATE: February 14, 2018

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