BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017100459
v.	ORDER GRANTING IN PART AND DENYING IN PART DISTRICT'S MOTION TO QUASH SUBPOENAS
UPLAND UNIFIED SCHOOL DISTRICT.	

PROCEDURAL BACKGROUND

Student filed a request for due process (complaint) with the Office of Administrative Hearings on October 4, 2017, naming Upland Unified School District. Student's complaint raised three issues: 1) Whether District denied him a free appropriate public education in an individualized education program offered on September 19, 2017, after he matriculated to Pioneer Junior High School after having completed sixth grade at Pepper Tree Elementary School, both of which are District schools; 2) Whether District denied him a FAPE since March 22, 2015, by failing to implement several services from Student's January 30, 2014 IEP; and 3) Whether District denied him a FAPE since March 22, 2015, by failing to offer extended school year services. On October 26, 2017, OAH granted District's motion to dismiss the second and third allegations of Student's complaint based on a settlement agreement between the parties in which Student waived all FAPE claims through July 11, 2107.

Student, who is represented by Parent, requested OAH issue subpoenas duces tecum to several District employees. OAH issued the subpoenas, which direct the employees, some of whom work at Pepper Tree, where Student previously attended school, and others who work at Pioneer, his current school, to personally appear on January 10, 2018, the first day of the hearing, and produce records. Student requests copies of records relating to his special education programs at both schools. Student also requests his medical records and the records of other students who receive special education and who allegedly did not receive a FAPE from District.

District filed a motion to quash the subpoenas on December 13, 2017, supported by declarations of District staff. District asserts that 1) The subpoenas were not properly served; 2) Student failed to demonstrate good cause for the production of the documents or the personal appearance of the subpoenaed employees; 3) Student failed to demonstrate reasonable necessity for the documents or that they were relevant to the remaining allegations in his complaint; 4) The document requests are overly broad and vague; and 5) The requests for the records of other students is prohibited by law.

On December 16, 2017, Student filed an opposition to District's motion to quash. Student contends the subpoenas were properly served; that the witnesses are relevant to Student's case because they were part of Student's IEP teams; and the documents requested are relevant to Student's special education needs and thus are needed to prove Student's case at hearing.

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).) 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, 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.

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 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 the parents' right to copies of educational records within five business days of a request, 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

Proper Service of the Subpoenas

Student served the subpoenas by hand-delivering copies to District's offices and leaving them with the office receptionist. District contends that service of subpoenas to District staff, must be done pursuant to Government Code, section 68097.1, subdivision (b). That statute states that the subpoenas must either be personally delivered to the individual who is subpoenaed, or by delivering the subpoenas to the individual's supervisor or the agent designated by the supervisor to receive service of process. District's declarations state that the receptionist with whom Parent left the subpoenas does not fit either of those categories. District also contends that it has informed parent many times that she should serve District's attorney of records with all pleadings, documents, and correspondence, but that Parent has failed to do so. Rather, Parent continues to serve District directly rather than through its attorneys.

District has failed to cite to any authority supporting its argument that its employees are state employees for the purpose of service of subpoenas or other process. However, even if they were, District has not demonstrated any prejudice by Student's alleged improper service. District received the subpoenas as, ultimately, did its attorney. Additionally, many of the records requested are those which Parent would be entitled to through a general request for Student's school records made pursuant to the Education Code. Therefore, District's motion to quash on the grounds of improper service is denied.

Records of Other Students

District contends that the Family Educational Rights and Privacy Act, known as FERPA, prohibits the production and/or disclosure of the records of other students. FERPA prevents disclosure of a student's educational records or personally identifiable information from educational records without consent of the student's parents. (34 C.F.R. § 99.3)

Student's subpoenas to Aaron Dover, Principal of Pioneer Junior High School, to Dionthe Cusimano, Principal of Pepper Tree Elementary School, and to Rochelle Yatomi, Director of Special Education, direct them to produce records that give information about other students who allegedly were denied a FAPE as Student contends he was denied.

District may not produce those records without the consent of each student's parents. Additionally, Student has failed to state any reason why those records are needed for his case. Whether District denied a FAPE to other students attending its schools is not relevant to whether District's offer of FAPE made on September 19, 2017, denied Student a FAPE. District's motion to quash the subpoenas is granted as to any request for the records of other students.

Reasonable Necessity; Good Cause; and Vagueness

The standard for issuance of an SDT in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires 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 Procedures Act standard of "good cause" for issuance of subpoenas duces tecum, adopted from Code of Civil Procedure.

District argues that Student's subpoenas for records fail to demonstrate a reasonable necessity or even good cause for the production of the documents or the personal appearance of the witnesses at hearing and that the requests are vague and overly broad. District points out that it has already provided Parent with Student's records when she requested them.

Student's subpoenas do not include any declaration in support of the documents requested. Other than stating in his opposition that he needs the records, Student gives no explanation as to why each of the records requested is necessary to help him prove his allegation that District's September 19, 2017 IEP denied him a FAPE. Additionally, the subpoenas request items pertaining to Student's education at Pepper Tree and the appearance at hearing of Ms. Cusimano, Principal at Pepper Tree, and Melanie Kirk, one of Student's teachers at Pepper Tree. No issues remain in the complaint relating to Student's education prior to his matriculation from elementary school to junior high school. Student has demonstrated no reasonable necessity for records relating to his education at Pepper Tree or for the testimony of any District staff from Pepper Tree. The subpoenas to Ms. Cusimano and to Ms. Kirk are therefore quashed in their entirety. However, Student may include them in his list of witnesses for hearing in his prehearing conference statement and explain to the ALJ at the prehearing conference why they are necessary witnesses. The Administrative Law Judge assigned to the prehearing conference will decide if their testimony is relevant to the issues remaining in Student's case.

Student's subpoena to Nora Brooks, a special education teacher at Pioneer, requests the following records: 1) All records of special education since Student began attending Pioneer; 2) Evidence that Student is receiving special education at Pioneer; 3) Records of Students transition from Pepper Tree to Pioneer; 4) Evidence of any services Student is receiving at Pioneer, specifically occupational therapy and/or vision therapy; 5) , The IEP of September 19, 2017; 6) Student's academic performance at Pioneer.

The subpoena to Mr. Dover, the Pioneer Principal, requests the following records, in addition to the records for other students, to which Student is not entitled as discussed above: 1) All records since Student entered special education in October 2013; 2) Student's medical records including records of his medications as prescribed by Kaiser Permanente; 3) Evidence as to why Student entered special education in October 2013; 4) Records of Student's transition from elementary school to union high school; 5) Records of the related services Student is receiving at Pioneer.

The subpoena to Ms. Yatomi, District's Director of Special Education, is similar to the request for records in the subpoena to Mr. Dover.

The only remaining issue in Student's complaint is whether District offered him a FAPE in the September 19, 2017 IEP. Student alleges District failed to include annual goals, failed to provide accommodations for state tests; and failed to provide transportation, extended school year, and occupational therapy services.

Although Student's subpoenas fail to meet the requirements of demonstrating reasonable necessity for the records requested since there is no declaration in support of the subpoenas, the necessity for many of the records is inherent in the issues Student has raised in his complaint. However, Student has failed to demonstrate reasonable necessity for his request for records for dating back to October 2013. While evidence of the programming and services Student received the year prior to his attendance at Pioneer may have some relevance to his present due process case, the request for five years of undefined records is overly broad and is vague. Moreover, Student has already received many records pursuant to his records request to District.

Additionally, Student has failed to demonstrate what he means by his request for his medical records. He has failed to explain why District would have his medical records and how they relate to his case. Moreover, Student is only entitled to records that District has not yet produced. Therefore, District shall produce any records relating to Student's education at Pioneer, including any documentary evidence of the special education programing and any related services which Student has received since starting at Pioneer. District shall also produce all of Student's school records, including progress reports and records of receipt of related services, for Student's sixth grade year at Pepper Tree. District is only required to produce records it has not yet provided to Parent.

Student has also failed to demonstrate why he requires the testimony of Ms. Yatomi and Mr. Dover. Neither of these employees was present at the September 19, 2017 IEP team meeting. District's motion to quash the subpoena for their appearance is therefore granted without prejudice. Student may name Ms. Yatomi and Mr. Dover as witnesses for hearing in his prehearing conference statement. The ALJ assigned to the prehearing conference will then decide if their testimony is relevant to the case.

Since Ms. Brooks was a member of Student's IEP team on September 19, 2017, Student has demonstrated that her testimony is relevant to his case. District's motion to quash the subpoena for her appearance at hearing is denied.

ORDER

1. District's motion to quash the subpoenas to Dionthe Cusimano and Melanie Kirk is GRANTED as to the request for records. The subpoena for their personal appearance is granted without prejudice. Student may make an offer of proof at the prehearing conference as to why their testimony is relevant to the remaining issues in his case and the ALJ assigned to the prehearing conference shall decide whether they need to testify.

2. District's motion to quash the subpoena for the appearance at hearing of Aaron Dover and Rochelle Yatomi is GRANTED without prejudice to Student making an offer of proof to the ALJ at the prehearing conference as to why their testimony is necessary.

3. District's motion to quash the subpoenas as to Student's request for the following records is GRANTED:

a. Records of other students.

b. Student's medical records.

c. Student's records from October 2013 to June 2016.

4. District's motion to quash the subpoenas as to Student's request for his records for sixth grade at Pepper Tree and his records since entering Pioneer is GRANTED in part and DENIED in part. District shall provide the following records to the ALJ on the first day of hearing, to the extent District has not already produced the records to Parent:

a. All of Student's educational records since he started attending Pioneer, including progress reports and evidence of receipt of special education programming and related services.

b. All of Student's educational records for Student's sixth grade year, including progress reports and evidence of receipt of related services at Pepper Tree, any IEP documents created during Student's sixth grade year, and any records of IEP team meeting that occurred during Student's sixth grade year.

5. District's motion to quash the subpoena for the personal appearance of Ms. Brooks is denied. District shall produce Ms. Brooks for hearing unless Student withdraws his request for her testimony.

6. Student is ordered to serve all documents and pleadings in this case on District's attorney of record.

DATE: December 26, 2017

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