BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017111058
v.	ORDER GRANTING WITHOUT PREJUDICE MOTION TO QUASH SUBPOENA DUCES TECUM
VISTA UNIFIED SCHOOL DISTRICT.	

PROCEDURAL BACKGROUND

Parent on behalf of Student filed a request for due process (complaint) with the Office of Administrative Hearings on November 28, 2017, naming Vista Unified School District. Based on the allegations in the complaint, OAH set the matter for dual hearings. The expedited hearing began as scheduled on January 11, 2018, on Student's allegation that District should have held a manifestation determination review prior to moving to expel him for violating District's code of student conduct.[1]

The second day of the expedited hearing convened telephonically on January 16, 2018. Student indicated that he intended to serve a subpoena duces tecum on District for records referred to in the testimony of former District Assistant Principal Michele Cain, who testified on January 11, 2018. The parties agreed to continue the expedited hearing to January 26, 2018, to permit Student to subpoena the additional records and to subpoena Ms. Cain to be re-called to testify, and for District to have time to move to quash the subpoenas.

On January 16, 2018, Student's attorneys emailed and sent by certified mail a subpoena duces tecum to District's attorneys. The subpoena directs District's attorneys to produce the following: a) All counseling notes regarding Student from November 2016 to January 2018; b) All documents referencing Student's participation in the Pass AmeriCorps program; and c) The Assertive Discipline Record incident report referenced in CJ Port's January 31, 2017 email for the incident that occurred on January 31st. The subpoena directs District's attorneys to produce the documents by bringing the records "to the location of the hearing scheduled for January 19, 2018."

[1] Student withdrew a second expedited issue prior to the beginning of the expedited hearing.

On January 19, 2018, District filed a motion to quash the subpoena on the following grounds: 1) The subpoena seeks confidential pupil records; 2) The records sought are not maintained by District; 3) The records are not relevant to the expedited issues for hearing; 4) Student has not demonstrated reasonable necessity for the records; 5) Student has not provided a reasonable time for production of the records; and 6) The subpoena was not issued to the correct individual or entity.

Student filed an opposition to the motion to quash on January 19, 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).)

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 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).)

DISCUSSION

Confidentiality of Student's Counseling Records

Student's subpoena duces tecum requests a) All counseling notes regarding Student from November 2016 to January 2018; and b) All documents referencing Student's participation in the Pass AmeriCorps program.

District argues that it cannot disclose counseling records, if they exist, because they are confidential records. District cites to section 49602 of the Education Code that states: "Any information of a personal nature disclosed by a pupil 12 years of age or older in the process of receiving counseling from a school counselor as specified in Section 49600 is confidential. . . . The information shall not become part of the pupil record, as defined in subdivision (b) of Section 49061, without the written consent of the person who disclosed the information." Section 49062 then states that the information shall not be revealed, released, discussed, or referred to, except under several circumstances that do not appear to be present in this case.

Student responds that his attorney, who represents both Student and Student's mother, is entitled to access the information in order to litigate the case.

Student's argument, however, misses the purpose of the section 49602. It is clear that the Education Code is trying to protect the confidentiality of information given by a child over age 12, which the child may not want his or her parent to know, and which information is protected from the parent under California law. Student's attorney represents Student *and* his mother, creating a potential conflict if Student does not wish his counseling information to be disclosed to his mother. Therefore, District's motion to quash the subpoena for Student's counseling notes is granted without prejudice to Student providing a waiver giving consent to the production of the information.

The confidentiality of Student's counseling records does not apply to Student's request for any document referencing his participation in the Pass AmeriCorps program, or to his disciplinary records. However, for the reasons stated below, the motion to quash the subpoena for those records is also granted without prejudice.

Failure to Direct Subpoena to a Proper Party

Student directed his subpoena to District's attorneys. He did not direct it to District, to District's custodian of records, or to any District agent. Student states that he attempted to serve the subpoena on Ms. Cain on January 16, 2018, but was told that Ms. Cain no longer worked for District. Student's recourse was to direct the subpoena to District's custodian of records, or to another person having control of the records, not to District's counsel. District also states in its motion to quash that it does not maintain any Pass AmeriCorps records; rather, those records are maintained by the San Diego County Office of Education. Student contends that District did not provide a declaration stating that it did not have the records and should therefore be ordered to produce them. District, however, cannot produce what it does not have nor is it required to obtain records from an entity that has not been shown to be its agent. In any case, Student directed its subpoena to District's attorneys. District provided a declaration of its attorney stating that the law firm does not have copies of any of the records Student subpoenaed. District's motion to quash is granted without prejudice to Student properly serving the subpoena on the entities that maintain the requested records.

Failure to Have Subpoena Returnable at an Appropriate Place and Time

Student's subpoena is returnable on January 19, 2018, to "the location of the hearing scheduled for January 19, 2018." No hearing in the expedited case was ever scheduled for January 19, 2018. Hearing was scheduled for January 11, 16, and 17, 2018. On January 16, 2018, the undersigned convened a telephonic hearing on the expedited issue. Pursuant to discussion with and agreement of the parties, the expedited hearing was continued to January 26, 2018, to be heard telephonically. The only preceding in this case that was scheduled for January 19, 2018, was the telephonic prehearing conference on the non-expedited issues. On January 19, 2018, at the telephonic prehearing conference, the undersigned granted Student's motion to continue the non-expedited hearing to February 13, 2018. Therefore, District could not comply with the subpoena because there was no hearing held on January 19, 2018, in either portion of this case, to which it could bring the requested records. The subpoena is quashed on this ground as well.

Relevancy or Reasonable Necessity of the Records

District argues that the requested records are neither relevant nor reasonably necessary to Student's expedited issue of whether District had a basis of knowledge that he had a disability prior to the incident that occurred on November 3, 2017, after which District moved to expel Student. District is correct that the subpoena is overbroad to the extent that it requests records for the expedited hearing that were created after November 3, 2017, and its motion to quash is granted as to those records.

However, District's arguments regarding records created on or before November 3, 2017, are not persuasive. Any disciplinary records, counseling records, reasons for Student's referral to Pass AmeriCorps, or participation by Student in Pass AmeriCorps are

potentially relevant to whether District had a basis of knowledge that Student was a child with a disability. As to those records maintained by District, Student has no other means of obtaining them. Student therefore has demonstrated a reasonable necessity for records that potentially support his allegations and to which he has no other means of access. District's motion to quash on the basis of lack of relevancy and/or lack of reasonable necessity, is denied. Should Student properly serve a valid subpoena, including written consent from Student for the release of any counseling records that District may have, District will be required to produce the documents requested.

ORDER

1. District's motion to quash Student's subpoena duces tecum for Student's counseling records is granted without prejudice based on Education Code, section 49602. Student must provide written consent for the release of the counseling documents.

2. District's motion to quash is granted without prejudice as to the entire subpoena duces tecum on the basis that the subpoena was not directed to an entity or person maintaining the documents or having control over them.

3. The subpoena is also quashed without prejudice as to the entire subpoena for failure to direct production of the requested documents to a location or on a date on which hearing in this matter was scheduled, making it impossible for District to comply with the subpoena.

4. District's motion to quash on the grounds that the subpoena is overly broad is granted as to records for the period subsequent to November 3, 2017.

5. District's motion to quash on the basis of lack of relevancy and/or lack of reasonable necessity for the documents is denied.

DATE: January 22, 2018

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Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings