BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

KERN HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2019050672

ORDER DENYING STUDENT'S MOTION TO QUASH SUBPOENA DUCES TECUM

On or about August 2, 2019, Kern High School District served a subpoena duces tecum on Kern Behavioral Health and Recovery Services in Bakersfield, California, seeking records related to Student's mental health and educational needs, including assessments, diagnoses, treatment, or intervention reports or data since August 16, 2017. On August 6, 2019, Student filed a motion to quash the subpoena duces tecum served upon Behavioral Health. Kern filed its opposition to motion to quash on August 12, 2019. The parties argued the motion at the prehearing conference of August 19, 2019.

APPLICABLE LAW

In general, 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 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).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings, but does not confer the right to prehearing discovery. (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 of Regs., tit. 5, § 3082, subd. (c)(2).) The law accords prehearing access to 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 educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code, § 56505, subd. (e)(7).)

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 of that Code 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

Kern High School District's subpoena directs Kern Behavioral Health's custodian of records to personally appear and produce the records at the August 27, 2019 due

process hearing. In the alternative, Kern Behavioral could mail the records, sealed in an envelope, with a proper declaration of custodian of records, in a larger envelope addressed to the Office of Administrative Hearings, care of Kern High School District.

Student's objection to the subpoena duces tecum is twofold. First, Student contends the description of documents may include information regarding other individuals, like family members who participated in therapy sessions, whose mental health is not at issue and therefore protected by federal and state privacy statutes. Here, though, the subpoena's declaration clearly limits the request to documents related to Student. If other individuals are referred to or mentioned in a produced document, these references may be redacted before the document is admitted into evidence. Such a possibility does not mean the subpoena's production description is ambiguous or overbroad. The subpoena duces tecum properly and sufficiently describes the documents to be produced by Behavioral Health.

Second, Student asserts that Kern High School District should use the release previously signed by Parent to obtaining Behavioral Health documents related to Student. However, the affidavit of Kern's counsel stated that Kern presented the release to Behavioral Health and asked for Student's record. Behavioral Health said it provided copies to Parent and that Kern could obtain the documents from Parent. Parent did not provide Kern with Student's Behavioral Health records. Therefore, Kern issued the subpoena. Student could not cite to any law indicating a subpoena duces tecum was inappropriate because of a prior release. Kern appropriately seeks Student's Behavioral Health records by a subpoena duces tecum.

Kern states that the Student's Behavioral Health records are reasonably necessary to its ability to defend Student's assertions that Kern denied Student a FAPE by not finding Student eligible for special education. Student's complaint stated that

Behavioral Health assessed Student and diagnosed her with major depression and unspecified anxiety disorder during the 2017-2018 school year and that Student received private mental health counseling. Student's complaint presented Behavioral Health's findings and services as fundamental to Student's claim that Kern denied her a FAPE. Also, during argument, the parties acknowledged that Student's proposed expert witnesses for the due process hearing reviewed Student's Behavioral Health records in formulating their opinions. If Student presents such evidence at the due process hearing, Kern's access to and use of Student's Behavioral Health records would be a reasonable necessity to rebut and defend Student's claims. Therefore, Kern may request that Behavioral Health records be introduced as evidence to rebut evidence being introduced at the due process hearing.

Student's motion to quash Kern's subpoena duces tecum for Student's Behavioral Health records is denied. Behavioral Health shall comply with the subpoena and such records shall be subject to the terms or conditions set forth in this Order.

ORDER

1. Student's motion to quash the subpoena duces tecum served by Kern upon Kern Behavioral Health and Recovery Services is denied.
2. Kern Behavioral Health and Recovery Services shall produce the records described in the subpoena duces tecum.
3. All documents produced will be held *in camera* by the ALJ.
4. Before release of the documents for review by the parties, the ALJ shall review the documents and redact the identity of other individuals whose information is protected private information.
5. The subpoenaed documents will be released to Kern's attorney for rebuttal purposes, upon a showing at hearing that Student had or will present

documentary or testimonial evidence that renders Kern's ability to use Student's Behavioral Health records to rebut and defend Student's claim a reasonable necessity.

6. Each document offered into evidence by Kern may be subject to objection on any other grounds.
7. Kern is barred from making copies of any document not entered into evidence.
8. All subpoenaed documents not entered into evidence will be retained by the ALJ and destroyed, or sealed, after completion of the hearing.

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DATED: August 19, 2019

Clifford H. Woosley
Administrative Law Judge
Office of Administrative Hearings