BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2014090662 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENA DUCES TECUM; ORDER MODIFYING SUBPOENA DUCES TECUM

BACKGROUND INFORMATION

Student filed a request for due process (complaint) on September 15, 2014, naming the Long Beach Unified School District. Student's complaint alleges that Long Beach agreed to provide him with an independent psycho-educational evaluation on March 18, 2014. Student alleges that Long Beach has failed to contract with the independent assessor chosen by Student, and has yet to provide him with the independent assessment, thereby denying him a free appropriate public education.

On October 1, 2014, Student served a subpoena duces tecum on Long Beach, requesting, in pertinent part, the following items:

1. All emails from or to Long Beach personnel relating to school years 2013-2014 and 2014-2015, regarding the request of Student's parent for an independent educational evaluation.

2. Copies of all Long Beach policies and procedures in effect from Mach 1, 2013, through the present, concerning the policies and procedures regarding qualifications for Long Beach evaluators, fee schedules, and standard contracts with independent evaluators in the area of psycho-educational assessments.

3. Any and all executed contracts between Long Beach and any Long Beach evaluator or any independent evaluator in the area of psycho-educational assessment, in effect from March 1, 2013, to the present.

Student's subpoena directed that Long Beach provide the subpoenaed items to Student's attorney no later than October 22, 2014.

On October 8, 2014, Long Beach filed a motion to quash the subpoena duces tecum. Student filed an opposition to the motion on October 15, 2014.

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 (SDT) (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).)

In addition to parents' right to copies of educational records within five business days of a request in California, 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

Long Beach contends that the subpoena should be quashed for several reasons. First, Long Beach contends that it is not under any obligation to maintain or produce the emails requested by Student. Second, Long Beach contends that its policies and procedures are readily available to Student. Long Beach also contends that Student's requests are overbroad and seek information not relevant to this case.

Long Beach's argument that it is not required to provide emails concerning Student that are not part of his educational file is not persuasive. As correctly pointed out by Student in his opposition, the email records requested in Student's subpoena are not the type of educational records contemplated by FERPA and Education Code section 56504. As Student points out, emails are not considered educational records if not maintained in Student's file in the normal course of business. However, contrary to Long Beach's argument, the case of *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, does not stand for the proposition that emails are not discoverable. Rather, that case, as Student correctly argues, stands for the proposition that emails are not educational records that need to be maintained in student educational files, and therefore the emails do not have to be produced pursuant to a request for a student's educational records. Rather, a subpoena duces tecum asking for production of those types of records on the day the hearing commences is the proper manner of obtaining the records. The emails requested by Student are therefore items properly requested in a subpoena duces tecum.

Long Beach also argues that Student has failed to establish the contents of the emails requested or if they still exist. Here again, Long Beach's contention is unpersuasive. It is not within Student's knowledge to know the content of any email to which he or his family was not a party. Nor is it within Student's knowledge to know whether specific emails were ever written or, if written, are still in existence. Student was therefore not required to establish this information in his declaration in support of the subpoena. Student has established sufficient cause that emails between Long Beach staff concerning the provision of the independent evaluation may be directly related to the allegations of Student's complaint. Therefore, if the requested emails exist, Long Beach is required to produce them, to the extent discussed below.

Long Beach argues that it is not required to produce its policies and procedures because Student's request is overbroad. Student has clarified that he is only requesting policies and procedures concerning the provision of independent psycho-educational evaluations. Those policies and procedures go to the heart of Student's allegation that Long Beach has failed to contract with Student's choice of assessors because she did not meet the criteria set by Long Beach in those policies and procedures. Student's request is not

overbroad. Long Beach also contends that the policies and procedures are available on its website, and are therefore already available to Student. Student has provided two declarations from staff working with his attorneys that state that they were not able to locate any of the policies or procedures on any website associated with Long Beach or the special education local plan area to which it belongs. Long Beach must therefore produce its policies and procedures related to its provision of psycho-educational independent assessments.

The final items requested by Student are all executed contracts between Long Beach and any Long Beach evaluator or any independent evaluator in the area of psycho-education. However, in this case, Student has failed to demonstrate why these contracts are relevant to his case. Whether Long Beach has acted in bad faith is not relevant to the issue of whether it failed to provide Student with a FAPE by not completing the process to fund Student's independent psycho-educational evaluation. Long Beach's motion to quash the subpoena duces tecum as to the requested contracts is granted.

Long Beach correctly states that special education law does not contain any provisions authorizing pre-hearing discovery. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits at least five business days prior to the hearing, but this provision requires a party to disclose witnesses and exhibits it intends to use during the due process hearing, not every single record in its possession. If a student requires specific records, a subpoena duces tecum can be used to compel the production of records on the day the hearing is to commence. The hearing in this matter is set to commence on November 12, 2014. Because prehearing discovery is not permitted, the subpoena duces tecum improperly required the documents to be returnable to Student's attorney on October 22, 2014, three weeks prior to the hearing. The subpoena should have directed the records to be returnable the first day of the hearing.

As stated above, section 1987.1 of the Code of Civil Procedure provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it. Therefore, it is appropriate to modify Student's subpoena duces tecum to have the documents that Long Beach is ordered to produce returnable on the first day of the hearing in this case.

ORDER

1. The motion of Long Beach to quash Student's subpoena duces tecum is granted in part and denied in part.

2. Long Beach is ordered to produce copies of any emails presently in existence to or from any Long Beach personnel concerning the provision of an independent

psycho-educational evaluation to Student, for the 2013-2014 and 2014-2015 school years.[1]

3. Long Beach is ordered to produce copies of all of its policies and procedures concerning the provision of independent psycho-educational evaluations that are or were in effect from March 1, 2013, to the present.

4. Long Beach's motion to quash Student's request for executed contracts between Long Beach and Long Beach evaluators and/or independent evaluators for the provision of psycho-educational evaluations is granted.

5. Student's subpoena is modified to change the date and location of production of the documents to the hearing location on the first day of hearing. If the hearing date is continued, the date of production shall be the first day of the continued hearing.

DATE: October 20, 2014

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings

[1] Student has failed to establish the relevance of emails concerning his eligibility for special education. Student's eligibility is not at issue in this case. Therefore, to the extent that Student's subpoena seeks emails beyond the provision of an independent psycho-educational evaluation, Long Beach's motion to quash is also granted.