BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017120141
v.	ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENA DUCES TECUM; MODIFYING SUBPOENA DUCES TECUM
ETIWANDA SCHOOL DISTRICT.	

On November 30, 2017, Parent on behalf of Student filed a request for due process with the Office of Administrative Hearings, naming Etiwanda School District. Student's complaint alleges that District denied him a free appropriate public education during the 2016-2017 and 2017-2018 school years and extended school years, based upon various grounds.

On December 15, 2017, Student served a subpoena duces tecum on District. District submitted a motion to quash the subpoena duces tecum on December 15, 2017. Student submitted an opposition on December 20, 2017. On December 21, 2017, District replied to the opposition.

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).)

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

Student's subpoena duces tecum requests all documents possessed by District that are related to Student's educational program for the 2017-2018 school year, August 2017 through December 4, 2017. In pertinent part, the subpoenaed documents include all communications, including electronic mail, assessments, reports, tests, protocols, notes, data, service logs, lists of District bus drivers and employees who have assessed or serviced Student, enrollment documents, behavior reports, and recordings of Student. The subpoena duces tecum directed District to provide the subpoenaed items to Student's advocate by December 20, 2017.

District argues that the subpoena duces tecum should be quashed because it fails to make the requisite showing of reasonable necessity for the requested documents and is overbroad. However, the subpoena duces tecum is reasonably limited to documents related

to Student's education from August 2017, to December 4, 2017. Moreover, amongst other issues, Student's complaint alleges that District denied him a FAPE by failing to provide him an appropriate placement during the 2017-2018 school year. In California, an educational placement is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs. tit. 5,§ 3042, subd. (a).) Consequently, documents relevant to Student's educational placement during the 2017-2018 school year may include communications, including electronic mail, assessments, reports, tests, protocols, data, notes, enrolment documents and service logs. In addition, Student alleges that District denied him a FAPE by failing to address behavior problems and to provide an aide for Student while being transported on the school bus. Consequently, a list of Student's bus drivers and employees who serviced Student, behavior reports, and recordings of Student at school, may also be relevant. Therefore, District's argument that the requested documents are not necessary and overbroad for this matter is not persuasive. It is premature to determine whether the requested documents are relevant to Student's claims as Student has not yet had an opportunity to review the documents. District may object to the submission of any document that it believes is not relevant to Student's claims during the hearing.

District's argument that it is prohibited from sharing service logs because that documentation may include the names of other students is also not persuasive, as District may redact documents to avoid releasing the names of pupils who are not a party to this matter.

District's contention that it is not necessary to produce the subpoenaed documents because it has already provided Student a copy of his educational file is similarly not persuasive. District is not required to re-produce copies of documents that it has already provided Student as part of his educational file. However, additional documents that are the subject of the subpoena duces tecum and which are not educational records, such as emails, do not have to be produced as part of Student's request for educational records. Rather, a subpoena duces tecum for those types of records is the proper manner of obtaining the records. Therefore it was proper for Student to request those items in a subpoena duces tecum. (*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.)

Finally, District correctly argues 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 party requires additional 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 January 24, 2018. Because prehearing discovery is not permitted, the subpoena duces tecum improperly required the

documents to be produced to Student's advocate on December 20, 2017, more than one month prior to the hearing. Rather, the subpoena should have directed the records to be produced the first day of the hearing.

Applicable law, 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 subpoenaed documents produced to Student on the first day of the hearing in this case.

ORDER

1. District's motion to quash Student's subpoena duces tecum is denied as to the requested documents.

2. District's motion to quash subpoena duces tecum is granted as to the time and place of production of the requested documents. Student's subpoena duces tecum 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: December 27, 2017

/S/

PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings