BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGUITO UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2018060016 ORDER GRANTING DISTRICT'S MOTION TO QUASH SUBPOENAS DUCES TECUM

On June 19, 2018, Student served unsigned, undated subpoenas duces tecum, directed to: (1) Beth Hergesheimer, school board president San Dieguito Union High School District, (2) Tiffany Hazelwood, special education program supervisor District, and (3) Theresa Kurtz, executive director of North Coastal Consortium for Special Education seeking "all documents, communications, and audio and video records...pertaining to the recent decision to remove Oxbow Academy from District's list of approved Residential Treatment Facilities" and "an explanation of the steering committee" affiliated with District, including member contact information.

On June 26, 2018, District filed a motion to quash Student's SDTs. On June 29, 2018, Student filed an opposition. As discussed below, District's motion to quash is granted, and the subpoenas duces tecum are quashed.

APPLICABLE LAW

No Prehearing Discovery in Special Education Due Process Proceedings

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 (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and

subpoenas duces tecum. These regulations specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].) While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only 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 parties intend to use at hearing, not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)).

The Reasonable Necessity Standard for Subpoena Duces Tecum Production

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 APA standard of "good cause" for issuance of SDT's, adopted from Code of Civil Procedure, which states that:

> 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.

(Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

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. OAH employs this process in ruling on motions to quash, as modified by special education's unique procedures and standards.

The good cause requirement is met by a factual showing of why the requested documents 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) 107 Cal.App.2d 75, 77.) A conclusory declaration that the desired documentary evidence is relevant and material is insufficient. (*Id.*, at p. 835.)

DISCUSSION

On June 19, 2018, Student filed a due process hearing request (complaint) claiming that District had denied Student a free appropriate public education by failing to appropriately assess him, and to offer Student placement in a residential treatment facility for the 2016-2017 and 2017-2018 school years. The hearing is scheduled to begin on July 17, 2018.

On June 19, 2018, Student served unsigned, undated subpoenas duces tecum, directed to the school board president and a special education program supervisor of San Dieguito Union High School District, and to the executive director of North Coastal Consortium for Special Education, seeking: (1) "all documents, communications...pertaining to the recent decision to remove Oxbow Academy from District's list of approved Residential Treatment Facilities," and (2) "an explanation of the steering committee affiliated with [District]" and contact information in the possession of District/Consortium or its "members and affiliates." The subpoenas sought production on June 26, 2018, at the office of Student's counsel. Each subpoena had an attached declaration of necessity signed by Student's counsel, and a proof of service by certified mail.

District moves to quash all three subpoenas duces tecum on the grounds that they (i) were not dated or signed, (ii) sought improper prehearing discovery, (iii) were defectively served, (iv) sought that individuals produce documents in the possession of "members and affiliates," (v) sought documents not reasonably necessary to Student's case, and (iv) that the categories were impermissibly vague and overbroad

No Identified Issuer or Date of Issuance

Each of the subpoenas duces tecum lacked both a date of issuance and the signature of the official authorizing issuance. These are fatal defects that warrant granting District's motion to quash all three subpoenas duces tecum.

Student's response cites California law permitting attorneys to sign and issue subpoenas. (Cal. Code of Civ. Proc., § 1985, subd. (c).) However, none of the subpoenas duces tecum were signed or dated by anyone. The signature of Student's counsel on an attached declaration of necessity is insufficient to identify Student's counsel as the issuer of the subpoenas.

Date of Production Not Permitted

Student has no right to prehearing discovery in this special education due process proceeding (beyond a parental request for educational records and the exchange of evidence five days prior to hearing, discussed above). California special education law does not mandate production of records pursuant to a subpoena duces tecum at any date or time prior to the first day of hearing. Student's subpoenas required production on June 26, 2018, which

is almost one month prior to the scheduled hearing date of July 17, 2018, and so the subpoenas duces tecum must be quashed as seeking prehearing discovery.

Defective Proof of Service

The proof of service on each subpoena indicates that the subpoenas were served to the office of Student's counsel. Service on Student's own counsel is a fatal defect and will support quashing each of the three subpoenas duces tecum.

The documents attached to Student's response, including unauthenticated postal annex invoices and return receipts signed by unidentified individuals other than the addressees, are not supported by a sworn declaration. They are not admissible or persuasive evidence of service, and are contrary to the executed proofs of service attached to the subpoenas duces tecum.

Student cites no authority permitting OAH to exercise personal jurisdiction over an individual served with process by certified mail. Student's counsel is admonished that, in the future, should she seek to enforce a subpoena duces tecum, she should be prepared to cite legal authority establishing that OAH acquires personal jurisdiction over a subpoenaed person when service is effectuated by certified mail (particularly where that mail is accepted by an unidentified person other than the addressee).

Not Effective as to Members and Affiliates

District objects that the subpoenas duces tecum are vague and overbroad because they seek production of categories of items in the possession of unidentified "members or affiliates" of the District or Consortium. Student does not address this objection in his response.

OAH knows of no authority that would permit it to enforce a subpoena served on one person against additional unidentified and unserved persons or organizations. District's objections to the subpoenas' request for categories of items from "members and affiliates" of the District or Consortium as vague and overbroad are sustained. The subpoenas duces decum are quashed to the extent they seek production from "members and affiliates" of any of the three subpoenaed persons.

No Reasonable Necessity

The issues in Student's complaint are whether District denied Student a FAPE for the 2016-2017 school year by (1) failing to assess, and (2) failing to offer a FAPE, and whether District denied Student a FAPE during the 2017-2018 school year by (3) failing to offer Student a residential treatment center placement or (4) appropriately assess. Student alleged that as a result of District's procedural and substantive failures, Parents gave District notice of their intent to privately place Student in a residential treatment facility when he was discharged from an inpatient treatment program, and seek reimbursement.

Student's subpoenas duces tecum fall short of demonstrating good cause for production of the documents requested. On the issues alleged, Student bears the burden of proving that Student's educational needs during the period at issue required placement in a residential treatment center. If so, Student must also prove that (i) District failed to offer such a placement, and that (ii) Parents' private school placement was proper, to be entitled to reimbursement. (*Forest Grove School District v. T.A.* (2009) 557 U.S. 230, 246.) If Parents are seeking reimbursement for District's purported denial of FAPE, whether the residential treatment facility is on an approved list is not material. (See *C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155.) If Student is seeking Oxbow as prospective placement, instead of a non-specified residential treatment facility, Student needs to prove that Oxbow is the only facility that can provide Student with a FAPE.

Whether or not Oxbow is on District's list of residential facilities is immaterial to whether a residential treatment center should have been offered, or whether Student is entitled to an equitable prospective placement.[1]

Student does not need to understand why Oxbow is not on District's list of residential facilities. Rather, Student needs to present evidence pertaining to the information District knew, or should have known, regarding Student's educational needs and the special education, services and placement appropriate to meet those needs.

Similarly, the persons on District's steering committee, and any actions taken by that committee as to the residential treatment facilities on District's list of approved facilities, is irrelevant and immaterial to the issues in this case.[2]

Student has failed to make a threshold showing that the categories of items requested by the three subpoenas duces tecum are reasonably necessary for hearing, and District's motion to quash is granted.

Issues of Vagueness and Overbreadth of Categories Not Reached

District argues that the categories of items sought by Student's subpoenas duces tecum are vague and overbroad. However, as the subpoenas duces tecum are quashed due to

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[1]The IDEA requires school districts to offer and implement appropriate placements for students with disabilities. It is unclear what IDEA violation Student refers to when he refers to District's alleged failure to "approve" a facility.

[2] The subpoenas duces tecum each seek production of an "explanation" of the steering committee, including contact information for members. Student cites no authority for requiring an individual to prepare explanatory documents, or directories, in response to a production request.

Student's failure to show reasonable necessity for production, there is no need to reach District's specific objections to individual categories of production sought.

ORDER

Student's thee subpoenas duces tecum, with proofs of service dated June 19, 2018, directed to Tiffany Hazelwood, Theresa Kurtz, and Beth Hergesheimer, are quashed in their entirety.

IT IS SO ORDERED.

DATE: July 2, 2018

Alexa Hohensee

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings