BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

v.

BAKERSFIELD CITY SCHOOL DISTRICT,

OAH CASE NUMBER 2019120777

and

BAKERSFIELD CITY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2020010042

ORDER GRANTING IN PART AND DENYING IN PART

MOTION TO QUASH SUBPOENA

MARCH 2, 2020

On February 12, 2020, Student filed a second amended request for due process naming Bakersfield City School District. On February 11, 2020, a scheduling order was issued.

On February 25, 2020, Student issued subpoenas duces tecum on two employees of Bakersfield City. One was a teacher and the other was a school psychologist. The subpoena to the teacher sought "all emails, internal documents, and memoranda" from February 20, 2018, to February 20, 2020, concerning Student's "special education program, general education program, behaviors, conduct during class, 504 plan, requests for assistance with [Student] or special education assessments." The subpoena to the school psychologist sought all of the above, as well as "all notes data, and observations, collected or drafted by" the school psychologist concerning Student. Bakersfield City raises no separate argument regarding the additional request of the school psychologist.

On February 27, 2020, Bakersfield City filed a motion to quash the subpoenas on the grounds that they constituted discovery, requested irrelevant material, and failed to demonstrate need for the subpoenas. On February 27, 2020, Student filed in opposition to the motion.

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), 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, Office of Administrative Hearings, referred to as OAH relies by analogy on the relevant portions of the Code of Civil Procedure. Code of Civil Procedure section 1987.1 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.

NOT PREHEARING DISCOVERY

Bakersfield City argues that Student is seeking pre-hearing production of documents. 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. Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District,* (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing 5 business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

Bakersfield City argues that it has provided Student with his student records and the documents Bakersfield City plans to introduce at hearing. However, that is not all to which Student has a right. At the hearing, Student is entitled to obtain documents from Bakersfield City which are relevant to his issues. Such a request is improper discovery if delivery is requested before the start of hearing, but properly sought if returnable at the start of the hearing. Student's subpoenas direct the respondents to produce the subpoenaed records on the first day of hearing. While Student has no statutory right to pre-hearing discovery, the subpoenas do not seek delivery prior to the hearing.

REASONABLE NECESSITY FOR THE RECORDS

Bakersfield City argues that the subpoena duces tecum should be quashed because it fails to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the material and relevant information sought. (*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.)

Student's declaration in support of the subpoena states that he has no access to the respondents' emails, information, documents, or records other than by this subpoena duces tecum. Bakersfield City contends that Student has not shown reasonable necessity for the documents because the documents he seeks are not material to the issues to be heard. That argument addresses the scope of the request, and not the necessity of proceeding by subpoena. Student's declaration sufficiently establishes reasonable necessity for production of the records by Bakersfield City.

LIMITING THE SCOPE OF THE SUBPOENA

Bakersfield City contends that the subpoena is overly broad as the subpoena requests documents regarding Student's educational plan and special education

program. Bakersfield City argues that the expedited hearing is only concerned with issues of Student discipline. Further, Bakersfield City objects that the request for "all emails, internal documents, and memoranda" related to Student would encompass class lists, internal teacher scheduling, or emails from Parent notifying a teacher that Student might be tardy. Bakersfield City's argument excessively compresses the scope of the hearing and ignores some limitations on the production request contained in Student's subpoena.

Student's issues include the allegation that Bakersfield City had a basis of knowledge that Student might have a disability prior to the date upon which he was found qualified for special education, and that such a basis of knowledge required a manifestation determination review be held. To prove that basis of knowledge, Student needs access to the emails, notes and memoranda teachers and staff exchanged regarding his behavior, problems at school, and response to correction. The scope of such material greatly exceeds simple disciplinary records, as it is certainly not just disciplinary records that creates a suspicion that a student may need special education.

Bakersfield City's concern that the request requires it to produce irrelevant material such as class lists and tardy emails ignores the limitation to documents concerning his "special education program, general education program, behaviors, conduct during class, 504 plan, requests for assistance with [Student] or special education assessments." Bakersfield City objects that Student cites his need to evaluate Bakersfield City's use of restraints on Student and its decision to deny independent educational evaluations in his section discussing the need to obtain these materials by subpoena. Those aspects of the case are not at issue at the expedited hearing.

Student's limitation to documents concerning his education programs, behaviors, class conduct, 504 plan, requests for assistance in handling student, and assessments

resolves some of the over breadth concerns raised by Bakersfield City. Still, Student's educational planning is not at issue in the expedited hearing, and while Bakersfield City's communications regarding the need to assess Student or discussing the need to deal with his behaviors are relevant, its 504 plan and its responses to Parent's request for independent assessments are not. Section 1987.1 of the Code of Civil Procedure, provides that a request to quash a subpoena may be resolved by quashing a subpoena entirely, modifying it, or directing compliance with it. As the subpoena mixes proper and improper requests for production, the subpoena will be modified.

ORDER

1. Bakersfield City's motion to quash Student's subpoenas to its teacher and school psychologist is DENIED in part and GRANTED in part. The records shall be produced by the respondents to the Administrative Law Judge on the first day of the hearing in this matter.
2. Bakersfield City's motion to quash Student's subpoena is granted in part and the subpoena is hereby modified. Respondents shall produce documents from February 20, 2018 to September 25, 2019, regarding any concerns expressed by parent in writing regarding Student's need for special education or related services; any request by parent for an evaluation of Student, or any concerns about Student's behavior raised by any school personnel to any supervisor or to Bakersfield's Director of special education services.
3. Respondents shall produce all documents from the 2019 to 2020 school year concerning Student's behavior, conduct, requests for assistance in dealing with Student, and any assessments of Student conducted or internally considered by Bakersfield City. Bakersfield City shall not produce any records

relating solely to its responses to any request by Parent for independent assessments or to its general policies on the use of restraints.

4. Counsel for Student shall immediately serve a copy of this order on the teacher and school psychologist previously subpoenaed.

DocuSigned by:
Chris Butchko
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Chris Butchko

Administrative Law Judge

Office of Administrative Hearings