BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2015060170
v.	ORDER GRANTING, IN PART, AND DENYING, IN PART, STUDENT'S MOTION TO QUASH DISTRICT'S SUBPOENA DUCES TECUM
NEWPORT-MESA UNIFIED SCHOOL DISTRICT.	

On September 22, 2015, Student filed a motion to quash a subpoena duces tecum, issued by Newport-Mesa Unified School District upon Student's school of attendance, New Vista School. On September 25, 2015, District filed opposition. On September 28, 2015, a prehearing conference was help before Administrative Law Judge Clifford H. Woosley. Attorney Phillip VanAllsburg appeared on behalf of Student; Alefia Mithaiwala appeared on behalf of District. The parties argued the motion to quash at the PHC. The motion was granted in part.

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 SDT's 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)).

Educational Records

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act 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).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) Education records do not include "records of instructional, supervisory, and administrative personnel…which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo)*, after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Further, the Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Falvo, supra,* 534 U.S. at p. 434.)

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV)*, the Court of Appeal agreed with *Falvo* and stated that "the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*Id.* at pp. 751-754.) In *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 (*S.A.*), the district court found that school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA, citing *Falvo*, because the emails had not been placed in his permanent file.

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 SDT's. In ruling on such motions, the 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.

DISCUSSION

District's SDT seeks production of Student's educational records from New Vista, where Parents unilaterally placed Student the prior year. The SDT directs New Vista to produce the documents at the hearing room on the first day of hearing. In the declaration for SDT, District described the records, as follows:

> Any and all educational records for [Student] during the 2014/2015 school year, Summer 2015, and 2015/2016 school year, including but not limited to: Speech and language records while at New Vista, behavior data, communications (including email, letters, phone logs, communication logs) with [Student] and/or [Parents], attendance records, enrollment paperwork, progress on goals, and report cards.

District acknowledged that the requested records are not relevant to whether it provided a FAPE to Student at the various IEP's listed in Student's complaint. However, District asserts its ability to respond to the remedies sought by Student requires information about Student's program, services, and general performance at New Vista. Student responds that the document request is overbroad, even if District intends on limiting use of the documents to Student's remedy requests, especially as to communications.

Communications are not typically included in a student's educational file, as noted in the appellate and district court decisions that apply the *Falvo* guidelines. Further, here, the communication records are not reasonably necessary for purposes of District addressing Student's remedy requests. Therefore, Student's motion to quash is granted as to the portion of the described records which refers to "communications."

However, Student's motion to quash is otherwise denied. Student's proposed resolutions include: a finding that New Vista is an appropriate placement, District reimbursement of all New Vista tuition, District funding of compensatory education, and placement in an appropriate nonpublic school. District has demonstrated that the requested records, as modified by this order, are reasonably necessary to present its case as to Student's remedy requests.

ORDER

1. Student's motion to quash District's subpoena duces tecum upon New Vista School is granted, in part, as follows: The phrase "communications (including email, letters, phone logs, communication logs) with [Student] and/or [Parents]" is stricken from the document description contained in the declaration for subpoena duces tecum.

2. Student's motion to quash District's subpoena duces tecum upon New Vista School is otherwise denied. New Vista School shall produce the documents described in the subpoena duces tecum declaration, as modified by this order, on the first day of hearing, October 7, 2015.

DATE: September 28, 2015

/s/
CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings