

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:  PARENT ON BEHALF OF STUDENT,  v.  NEWPORT-MESA UNIFIED SCHOOL DISTRICT,	OAH Case No. 2015050430
NEWPORT-MESA UNIFIED SCHOOL DISTRICT,  v.  PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016010309  ORDER GRANTING, IN PART, AND DENYING, IN PART, STUDENT'S MOTION TO QUASH DISTRICT'S SUBPOENA DUCES TECUM

On April 25, 2016, Parent on behalf of Student filed a motion to quash a subpoena and subpoena duces tecum, issued by Newport-Mesa Unified School District upon Student's private schools, Mariners Christian School and Newport Christian School. On April 25, 2016, a prehearing conference was held before the undersigned Administrative Law Judge. Richard L. Isaacs, Attorney at Law, appeared for Student. S. Daniel Harbottle, Attorney at Law, appeared on behalf of District. The parties argued the motion to quash at the PHC.

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

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 tecums 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*), 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 a subpoenas duces tecum in a special education due process proceeding is “reasonable necessity”, which requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2))

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecums. 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 subpoenas duces tecum seeks production of Student’s educational records from Mariners Christian School and Newport Christian School, where Parents unilaterally placed Student during the 2014-2015 and 2015-2016 school years. The subpoenas duces tecum directs Mariners and Newport to produce the documents, by their custodian of records, at the hearing room on the first day of hearing. In the declaration for subpoenas duces tecum, District described the records, as follows:

Any and all records for [Student] including, but not limited to, report cards, progress reports, notes, observation records, cumulative records, health records, any and all educational assessment reports of [Student], data collection, reports, charts, standardized testing results, records related to [Student’s] behaviors, correspondence, including, but not limited to e-mails and letters, and any other records relevant to [Student’s] education.

Student argues that the requested records are not relevant to whether District unlawfully failed to find Student eligible for special education, which is the primary issue for the present matter. However, Student overlooks that he has requested, as a remedy for his issue, that District reimburse Student for tuition that he incurred at Mariners and Newport. District correctly asserts that it requires information about Student’s program, services, and performance at Mariners and Newport, to respond to the requested remedies.

However, District’s request is overbroad. Correspondence and notes are not typically included in a student’s educational file. Moreover, the correspondence 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 notes and correspondence, including, but not limited to, e-mails and letters, unless those records are in Student's permanent file.

Student's motion to quash is denied as to the remaining records. 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.

DATE: April 26, 2016

DocuSigned by:

*Paul H. Kamoroff*

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PAUL H. KAMOROFF  
Administrative Law Judge  
Office of Administrative Hearings