

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

CAPISTRANO UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2016030010

PARENT ON BEHALF OF STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2016020203

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
QUASH SUBPOENA DUCES TECUM

BACKGROUND INFORMATION

On January 29, 2016, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings in OAH case number 2016020203, naming the Capistrano Unified School District. Student alleges that District has denied her a free appropriate public education by failing to provide her with round trip transportation from home to school and by holding an individualized education program team meeting without Student's parent. District filed a complaint on February 26, 2016, naming Student. On March 10, 2016, OAH granted District's motion to amend its complaint. District seeks a finding that its January 16, 2016 offer of placement and services provided Student with a FAPE as did its February 8, 2016 response to Student's complaint.

On March 7, 2016, Student served a subpoena duces tecum on District, requesting, the following items:

1. Emails, correspondence, and letters from and to District schedulers and employees referencing Student, Parent, Student's disability, and any of Student's IEP team meetings occurring during the 2014-2015 and 2015-2016 academic school years.
2. Any and all District policies and procedures in effect from the 2015-2016 academic school year regarding or referencing scheduling of IEP meetings with

parents of students with special needs, including annual IEP meetings and meetings falling outside the annual IEP statutory timeline mandated by the California Education Code.

3. Any and all District policies and procedures in effect from the 2014-2015 and 2015-2016 academic school years regarding or referencing related services for special education eligible students.
4. Any and all emails, correspondence, and letters from or to District personnel or between District personnel, including Luci Coppola, Steven Forbes, Kimberly Gaither, Sara Young, Amy Sabol, and any of Student's teachers for the 2014-2015 and 2015-2016 academic school years, referencing or discussing Student's disability, Student's need for transportation services, Student's 2015 annual IEP meeting, scheduling IEP meetings with Parent, and Student's ability to navigate Student's school campus;
5. Any and all documents, emails, letters, and correspondence from or to District personnel or between District personnel referencing or regarding Student's ability to utilize various transportation methods utilized by Student's neuro-typical peers, Student's ability to safely and timely navigate Student's surroundings, Student's emotional vulnerability and, or, Student's inability to communicate Student's needs to strangers due to Student's disability, including any information or correspondence relied upon or considered by District in District's decision to deny Parent's transportation request for Student.

In paragraph six of the subpoena, Student clarified that she was not requesting any documents to or from District's attorney that were privileged.

Student's subpoena is returnable on the first day of the due process hearing, which is presently scheduled to begin on May 31, 2016.

District filed a motion to quash Student's subpoena on May 4, 2016. Student filed an opposition to District's motion on May 6, 2016.

APPLICABLE LAW

Federal law provides for the rights 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).) Both of those subsections relate only to due process hearings, not to any prehearing procedures. A party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights 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.) Both of those subsections relate only to due process hearings, not to any prehearing procedures.

Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to “[a] party to a hearing held pursuant to this section ...” (Ed. Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. 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 Board 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.

The provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) Subdivision (c)(2) of section 3082 of title 5 of the California Code of Regulations provides in pertinent part that 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).”

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 the California Code of Civil Procedure. Section 1987.1 of that code 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.

Section 3082, subsection (c)(2) of Title 5 of the California Code of Regulation (Section 3082) permits the issuance of subpoenas duces tecum “upon a showing of reasonable necessity by a party.” This requirement mirrors that required by California 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 Code of Civil Procedure also requires a similar affidavit in a subpoena duces tecum. Section 1985 requires that a subpoena duces tecum shall be served with an affidavit demonstrating good cause in “full detail” how the material being sought is material to the issues involved. The requirement to demonstrate good cause as to materiality is not met by the affiant’s legal conclusion. 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) Cal. App.2d 71, 77.)

The regulations governing this proceeding specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings. Although the OAH subpoena form has options for production of the records under subpoena, not all of them may apply to special education matters.¹ While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Parents have the right to request and receive the pupil's educational records. (Ed. Code § 56504.) Additionally, the parties are entitled to receive copies of all the documents the school district intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).) These required disclosures are the only mechanisms by which a party may obtain documentary information from another party prior to hearing.

In addition, the standard for issuance of a subpoena in this proceeding is "reasonable necessity," which is a stricter standard than that provided under the Administrative Procedures Act. This standard requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. The declaration in support of a subpoena duces tecum must set forth sufficient detail, specific to the legal or factual issues to be adjudicated, to show that the required documents are objectively required for the party present a case or defense.

DISCUSSION

District first objects to Student's subpoena to the extent it requests District's policies and procedures relating to special education matters. It states that the information is readily available on its website and that Student can obtain it through a Public Records Act request. District also argues that Student has not demonstrated reasonable necessity for any of the requested documents. District argues that Student's requests are vague and overly broad, making it unduly burdensome for District to produce the records. Finally, District contends that it is not obligated to produce internal emails unless they are maintained by District in Student's educational file.

¹ At the bottom of the box chosen by the LEA's to instruct production of the subpoenaed records to their attorney on a date prior to hearing, the OAH form has a warning in italics: "*NOTE: This manner of production may not satisfy the requirements of Evidence Code section 1561 for admission at hearing.*" Evidence Code section 1560, subdivision (e) specifically describes this prehearing attorney production option as a "deposition subpoena."

Request for Copies of District's Policies Regarding IEP Team Meetings and Related Services

Student has not demonstrated reasonable necessity for her request for copies of District's policies and procedures regarding District procedures for holding IEP team meetings or for policies and procedures relating to the provision of related services to special education eligible students. Student has not demonstrated the relevance of those documents. Student has not alleged that she was denied any related service or that an IEP team meeting was scheduled without her parent based on a District policy that resulted in District predetermining how and when it schedules meetings or provides related services. The issues in this case pertain solely to whether District committed a procedural violation of *Student's* rights, not whether a policy it follows in and of itself may violate Student's rights or those of other pupils. Any such policy, even if it existed, would not tend to prove or disprove whether District's actions as alleged by Student denied her a FAPE. In addition, Student's request for District written policies regarding the provision of all related services is over-broad as the only related service at issue in this case is transportation.

Request for Documents and Communications Concerning Student's Disability and/or Need for Transportation, and/or the Scheduling of Student's IEP Team Meetings

Student has demonstrated reasonable cause for the production of the requested communications. At issue in this case is whether District properly denied Student's request for round-trip transportation from school to home. Student believes that the decision to deny her transportation as a related service was not justified. Communications between District staff regarding the decision to deny transportation and Student's disability are fully related to the issues and may or may not support Student's contention that her actual need for the transportation was not the motivating factor in District's decision. Student also contends that District improperly held an IEP team meeting without her parent. If this occurred, District's reasons for doing so are directly at issue in this case. Any documentation or correspondence concerning the scheduling of Student's IEP team meetings are therefore relevant to the issue presented and Student's has demonstrated reasonable necessity for their production. Additionally, the requests for communications and documents relating to only the issues of the scheduling of IEP team meetings and the provision of transportation to Student is not vague, and is narrowly drawn. Student has particularly excluded any documents or correspondence that is covered by the attorney-client privilege.

Records Not Maintained in Student's Education File

District's argument that it is not required to provide emails and other correspondence concerning Student that is not part of her educational file is not persuasive. As correctly pointed out by Student in her opposition, the email records requested in Student's subpoena are not the type of educational records contemplated by FERPA and Education Code section 56504. As Student points out, emails are not considered educational records if not maintained in Student's file in the normal course of business. However, contrary to District's argument, the case of *S.A. ex rel. L.A. and M.A. v. Tulare County Office of Education* (N.D.Cal. Nov. 20, 2009), does not stand for the proposition that a student may

not subpoena records that are not part of her education file. Rather, the district court in that case explained its earlier ruling in *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24,) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653. In each of this series of cases, the district court did not find that emails are not discoverable. Rather, that case, as Student correctly argues, stands for the proposition that emails are not educational records that need to be maintained in student educational files, and therefore the emails do not have to be produced pursuant to a request for a student's educational records. Rather, a subpoena duces tecum asking for production of those types of records on the day the hearing commences is the proper manner of obtaining the records. The emails requested by Student are therefore items properly requested in a subpoena duces tecum.

ORDER

1. District's motion to quash Student's subpoena duces tecum is granted in part and denied in part.
2. District is ordered to produce copies of any and all documents, emails, and/or other correspondence presently in existence to or from any District personnel concerning or mentioning transportation for Student or Student's disability for the 2014-2015 and 2015-2016 school years.
3. District is ordered to produce copies of any and all documents, emails, and/or other correspondence presently in existence to or from any District personnel concerning or mentioning the scheduling of Student's IEP team meetings during the 2015-2016 school year.
4. District's motion to quash Student's request for copies of District policies is granted.

DATE: May 23, 2016

DocuSigned by:

Darrell Lepkowsky

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DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings