

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012051032

ORDER GRANTING DISTRICT'S
MOTION TO QUASH

On August 13, 2012, Student served a subpoena duces tecum (SDT) on Melanie Brown, a District representative, that requested extensive records concerning Student and District staff. On August 14, 2012, District filed a motion to quash Student's SDT, in part or in its entirety. Student responded on August 17, 2012, by opposing District's motion and seeking to compel production of the documents subpoenaed. District filed a response to Student's opposition on August 22, 2012, and Student filed a further opposition on August 23, 2012. As discussed below, District's motion to quash is granted.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act (IDEA) 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 (SDT) (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(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 material is 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 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.

Parents may request copies of their child's educational records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code § 56504.) Educational records under Education Code, section 56504, include assessments and assessment protocols that are personally identifiable to the child, and must be disclosed to the parents. (*Newport-Mesa Unified Sch. Dist. V. State of Calif. Dept. of Educ.* (C.D. Cal. 2005) 371 F.Supp.2d 1170, 1175.) Education Code section 49091.10, subdivision (a), permits a parent to inspect instructional materials, which include assessments and teacher's manuals.

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA) 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).) 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." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their reasons for doing so." (*Falvo, supra*, 534 U.S. at p. 434.) 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." (*Id.*) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar..." (*Id.* at pp. 434-435.)

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. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not “maintained” by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

In addition to the parents’ right to copies of educational records within five business days of a request, a party to a due process proceeding is entitled to be served, five business days before the hearing, with copies of all the documents the other party or parties intend to use at the hearing, and a list of all witnesses intended to be called with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).)

DISCUSSION

Background

Student’s complaint alleges that District denied Student a FAPE at the beginning of the 2010-2011 and 2011-2012 school years by failing to find Student eligible for special education. Student contends that District committed procedural and substantive violations of the IDEA by conducting assessments that failed to detect a profound discrepancy between Student’s intellectual ability and academic achievement in reading, and failing to provide Student with needed special education and related services. The hearing in this matter is currently scheduled for October 9 through 11, 2012.

Student’s SDT seeks pre-hearing production, on August 17, 2012 of nine categories of documents: (1 and 2) test protocols and assessment results from Student’s initial evaluation pursuant to a signed September 9, 2010 assessment plan; (3) certain Reading Recovery Program Protocols; (4) certain Reading Recovery assessments of Student conducted by the District between September 2011 and April 2012; (5) proof of training in Reading Recovery intervention by District staff member Karen Moffatt; (6) STAR state testing results for Student for the 2011-2012 school year; (7) District’s Special Education Procedural Handbook; (8) “all Poway Unified School District Emails and Letters on [Student]”; and (9) curriculum vitae for 15 named teachers and service providers.

District moves to quash the SDT on grounds that Student (i) is improperly using the SDT process to obtain documents prior to the hearing, (ii) failed to comply with statute by including an affidavit showing reasonable necessity, (iii) makes a vague and overbroad request for documents beyond the time frame of the dispute, and (iv) is not entitled to the emails requested. Student opposes the motion and moves to compel production of his “complete educational records as requested” in his SDT.

On August 22, 2012, District filed a reply, supported by the declaration of Doyan Howard, District's assistant director of special education, to establish that on August 22, 2012, District provided copies of "all educational records maintained by the district to date" to Student's mother. No showing was made of what documents, or categories of documents, were included in the educational records provided, or whether those records complied with all or part of the SDT. On August 23, 2012, Student filed a further reply, stating that according to Student's attorney, District emails and protocols for a Sentence Completion test had not been received.

Analysis

District's objection to the SDT as pre-hearing discovery is well taken. Student did not make the requisite showing of reasonable necessity for issuance of a SDT under Section 3082. Student argues that, as petitioner in this matter, he has the burden of persuasion at hearing (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]), but that burden does not relieve him of the requirement of showing reasonable necessity for each category of documents sought in the SDT.

Student failed to include with the SDT a sworn declaration setting forth in detail the materiality of the documents sought to the issues involved in the case, and why a subpoena, as opposed to a request for records, was required. Student's SDT had a blank section for a declarant to state why the documents sought were "material to the proper presentation of this case, and good cause exists for their production by reason of the following facts," but rather than make such a showing, Natalie Hoxie, an educational consultant, wrote onto the SDT "[s]ee attached Declaration identifying documentary evidence requested," which declaration consisted of a list of documents, nothing more. Student belatedly attempts to establish the materiality of the documents to the issues involved in this proceeding, but as Student's motion is not accompanied by a declaration under penalty of perjury, this attempt fails.

Student's issues for hearing all generally relate to Student's contention that District should have found him eligible for special education based on Student's academic performance and/or the results of assessments conducted by the District. Student also raises issues that assessments were either not properly conducted or were not sufficiently extensive. On their face, the issues raised by Student's complaint should be able to be addressed by documents in Student's educational records or by testimony at hearing on such matters as assessor qualifications. On its face, none of the issues raised by Student's complaint should require review of District emails or correspondence that are not otherwise contained in Student's educational records. One of the categories of documents, seeking a copy of something called "Special Education Procedural Handbook," is unclear as to what is being requested, but even so, absent some specific connection to what Student is alleging, it would not be reasonably necessary for hearing. Student has a right to inspect all educational records, and District has demonstrated that they have been produced. Moreover, the parties are required to exchange documents they intend to rely on at hearing, such that Student will

have notice of any District document not otherwise contained in the educational records already produced.

Accordingly, for the reasons set forth above, Student has failed to make a threshold showing that the documents requested in the SDT are reasonably necessary for hearing. Thus, the SDT is quashed.

Student's motion to compel production in compliance with the SDT fails for the same reasons articulated with regard to District's motion to quash.

ORDER

1. Student's subpoenas duces tecum, dated August 13, 2012, and directed to Melanie Brown, is quashed in its entirety.
2. Student's motion to compel production of documents request in the August 13, 2012 subpoenas duces tecum is denied.
3. This order is made without prejudice to Student seeking issuance of SDT's by the ALJ assigned to hear this matter at the prehearing conference and upon a showing of reasonable necessity.

Dated: August 30, 2012

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings