

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2014030356

ORDER GRANTNG IN PART AND  
DENYING IN PART MOTION TO  
COMPEL AND MOTION TO QUASH

On March 6, 2014, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings (OAH), naming Oakland Unified School District (District) as respondent. On May 1, 2014, OAH granted Student's Motion to Amend, vacating the May 6, 2014 hearing date. By order dated May 7, 2014, OAH denied District's pending motions to quash Student's subpoenas duces tecum on the grounds that District's motions were moot because the May 6, 2014 hearing date had been vacated and Student was required to serve new subpoenas in accordance with the new hearing date. On May 8, 2014, OAH scheduled the hearing to begin on June 25, 2014. On May 22, 2014, pursuant to the parties' joint request for continuance, OAH rescheduled the hearing for September 29 and 30, and October 1 and 2, 2014.

On June 13, 2014, Student filed a Motion to Compel, seeking an order compelling District to comply with a new subpoena duces tecum served on May 12, 2014. Student contends the subpoena required District to produce designated instructional service logs, individual service agreements and parent reimbursement records by no later than May 30, 2014. Student contends he previously requested Student's educational records in June 2013, but District's January 2014 production did not include records relating to the delivery of Student's services or its reimbursement records. Student met and conferred with District in June 2014, but District neither produced the records nor objected to the subpoena. Student contends he needs the requested records to prove when District provided the agreed upon services, to determine how much District owes in compensatory education and to determine whether District complied with its reimbursement obligations. Student contends he can only obtain the requested records from District.

On June 13, 2014, District filed its Opposition to Motion to Compel and Motion to Quash Subpoena. District contends the subpoena constitutes an impermissible attempt to obtain prehearing discovery and Student has failed to make a showing of reasonable necessity for the requested documents. District argues Student's motion to compel is premature because there has been no refusal by District to produce the requested records at the September 29, 2014 hearing.

## APPLICABLE LAW AND DISCUSSION

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 (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 condition mirrors the requirement in Code of Civil Procedure section 1985, subdivision (b), which states:

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 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) 107 Cal.App.2d 75, 77.)

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 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.

To guarantee parents the ability to make informed decisions about their child’s education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child’s “identification, evaluation and educational placement.” (20 U.S.C. §1415(b)(1).) 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.) 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).) Pupil or 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).)

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).)

Here, Student attached to his motion to compel a copy of his subpoena duces tecum served on May 12, 2014. It does not require the appearance of anyone at the due process hearing. Instead, it allows only for production of the documents by sending them to the offices of Student’s attorney by May 30, 2014. At the time Student issued the subpoena, the hearing was set to begin on June 25, 2014. Since then, the hearing has been continued to September 29, 2014. District correctly argues that special education law does not contain any provisions authorizing pre-trial discovery. 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. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits at least five business days prior to the hearing, but this provision requires a party to disclose witnesses and exhibits it intends to use during the due process hearing, not all records in its possession. If Student requires specific records for the hearing, a subpoena duces tecum can be used to compel the production of records on the day the hearing is to commence.

Further, neither the individual service agreements nor the parent reimbursement records appear to be the type of education records contemplated by FERPA and Education Code section 56504. Because the requested records may not be “education records,” a subpoena duces tecum asking for production on the day the hearing commences would be proper, were the requisite showing of reasonable necessity properly made and assuming no other legal bar to production. However, Student has failed to make the requisite showing of reasonable necessity with regard to each category of documents sought by the subpoena. While Student has attached a sworn declaration to the subpoena, the declaration does not make an adequate factual showing of why each category of documents is material and relevant to the issues at hearing. Specifically, the declaration attached to the subpoena states the documents are material to the amount of services Student is owed, but it is unclear how and which individual service agreements or the parent reimbursement records are reasonably necessary to the litigation of that issue or any other issue at hearing. The subpoena is therefore defective because there is no adequate showing in the declaration supporting the subpoena as to why Student needs these records at the hearing.

Student’s education records under FERPA and the Education Code can be requested from District at any time pursuant to Education Code section 56504. When a request for education records is made, the records must then be produced no later than five business days

after the request is made and no showing of reasonable necessity is required. However, only the service logs appear to fall within the applicable definition of education records under FERPA and the Education Code since they directly relate to implementation of Student's individualized education plan. Other than noting a request for Student's education records was made to District, Student fails to specifically or adequately address or explain if and how the other requested records fall within the parameters of "education records" entitling Student to production. Notably, District does not address whether any of the documents are education records. District also does not deny that the service logs are education records and it did produce a Verification of Behavioral Services log for February 18-21, 2014, in response to Student's request for production. Accordingly, while the service logs appear to be education records, Student has failed to establish that the other records sought are education records within the meaning of FERPA and the Education Code.

#### ORDER

1. With the exception of the designated instructional service logs, Student's motion to compel production is denied.
2. With the exception of the designated instructional service logs, District's motion to quash is granted.
3. District shall, within five business days of the date of this order, produce the designated instructional service logs to Student's counsel.
4. This order is made without prejudice to Student seeking issuance of subpoena(s) duces tecum for production of documents at the hearing.

DATE: June 18, 2014

/s/

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LAURIE GORSLINE  
Administrative Law Judge  
Office of Administrative Hearings