

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LAMONT SCHOOL DISTRICT; KERN  
HIGH SCHOOL DISTRICT.

OAH Case No. 2015050842

ORDER GRANTING MOTION TO  
QUASH

On May 12, 2015, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings (OAH), naming Lamont High School District (Lamont) and Kern High School District (Kern) as respondents. On June 12, 2015, Student filed a First Amended Request for Due Process Hearing Complaint following an Order of Determination of Insufficiency as to Kern dated May 28, 2015. A new Scheduling Order was issued, setting the Due Process Hearing originally scheduled for July 8, 2015, on August 6, 2015. On June 23, 2015, OAH continued the matter for good cause to October 12, 2015.

On June 12, 2015, Student filed a Motion to Quash, seeking an order quashing Lamont's subpoena duces tecum. Lamont's subpoena requests Kern's production on June 15, 2015 of all of Student's educational records, and specifically all of the records which were sent by Lamont to Kern when Student matriculated to Kern in August 2011. The subpoena states that the hearing involves a dispute about Student's educational program at Lamont, Lamont does not have copies of these documents, and Lamont cannot prepare a defense without these documents.

Student contends the subpoena constitutes an impermissible attempt to obtain prehearing discovery, is facially invalid, vague and overbroad. Student previously agreed to produce the relevant records five days prior to hearing and Lamont is not entitled to an earlier production. Student claims that the proofs of service on the subpoena and notice to consumer are defective because they were either not completed or not signed. Student also argues that the subpoena lacks a signed and sufficient supporting declaration establishing necessity, relevance and good cause for production.

On June 19, 2015, Lamont filed its Opposition to Student's Motion to Quash. Lamont argues that under Education Code section 49068, it was required to send its educational file to Kern when Student matriculated, but that it failed to keep a copy. Lamont unsuccessfully attempted to obtain permission from Student's counsel for Kern's production of the Lamont cumulative file. Lamont claims the subpoena was served on Kern, Kern's counsel, and Mother, and that its counsel inadvertently neglected to sign her supporting

declaration attached to the subpoena. Lamont claims it seeks only its own records which it gave Kern when Student matriculated to Kern and Student's agreement to produce the records five days prior to hearing is insufficient time to permit Lamont to prepare for hearing or mediation.

## APPLICABLE LAW AND DISCUSSION

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. (IDEA)). 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).)

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).) While subpoenas duces tecum 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 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 educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code, § 56505, subd. (e)(7).)

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); 34 C.F.R. § 99.3.) 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); 34 C.F.R. § 99.3.)

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. Code of Civil Procedure section 1987.1 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.

Here, Lamont's subpoena duces tecum provides for Kern's compliance by sending the requested documents to the offices of Lamont's attorney on June 15, 2015, well before the scheduled hearing date. Student correctly argues that special education law does not contain

any provision authorizing prehearing 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. (20 U.S.C. § 1415(h); Ed. Code § 56505, subd. (e).)

Although a student's education records can be requested by a student from a district at any time pursuant to Education Code section 56504, Lamont cites to no authority which permits a district to compel prehearing production of education records held by another district, even where those records were once held by the subpoenaing district. Lamont's claim of prejudice notwithstanding, there is no authority which allows the pretrial production sought here.

Because Lamont is not entitled to use a subpoena to obtain conduct pretrial discovery, its subpoena duces tecum seeking production of such records is improper. Nevertheless, Student agreed to produce the relevant records five business days prior to the due process hearing. Lamont can meet and confer with Student and/or Kern in an effort to obtain early production of their Education Code section 56505 disclosures. Otherwise, a subpoena duces tecum seeking production of documents on the day the hearing commences may also be appropriate if the requisite showing of "reasonable necessity" is properly made and assuming no other legal bar to production exists. Finally, in the event Kern or Student fails to produce the records in sufficient time for Lamont to adequately prepare for hearing, Lamont can also request a continuance of the hearing from the ALJ presiding over the hearing.

With regard to the subpoena at issue here, Lamont has also failed to make a proper showing of reasonable necessity with regard to each category of documents sought by the subpoena. The declaration attached to the subpoena was not signed and the subpoena appears to seek more than Lamont's own file by requesting "[a]ny and all educational records of Student..." without specifying why Lamont requires production of Student's educational records after 2011.

Student's other objections are overruled. Lamont has adequately stated why it needs the records prior to Student's matriculation to Kern in 2011. While the form proofs of service attached to the subpoena and notice to consumer were not completed and/or signed, there is an attorney generated proof of service on the last page of Student's papers, which was completed and signed by Lamont's counsel establishing service.

ORDER

1. Student's motion to quash is granted.
2. This order is made without prejudice to the issuance of subpoena(s) duces tecum for production of documents at the hearing.

IT IS SO ORDERED.

DATE: June 24, 2015

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LAURIE GORSLINE  
Administrative Law Judge  
Office of Administrative Hearings