BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2022060225

ORDER GRANTING STUDENT'S AND DISTRICT'S MOTIONS TO QUASH SUBPOENA IN PART

OCTOBER 03, 2022

On June 6, 2022, Parent on behalf of Student filed a request for due process naming San Dieguito Union High School District. On June 8, 2022, a scheduling order was issued. On June 29, 2022, an order granting a continuance and mediation was issued by the Office of Administrative Hearings, referred to as OAH. The hearing is set to begin on October 6, 2022.

On September 16, 2022, San Dieguito issued subpoenas duces tecum to Dr. Jennifer Friedman, Dr. Brett Pickering, Dr. Lauren Gist, and Dr. Alissa Maitino. A notice to consumer was sent to Student advising Student of the subpoenas directed to the above doctors. Copies of the subpoenas were sent to Student's counsel with the notice to

consumer. The subpoena to each doctor sought medical records, communications, and other records related to Student.

On September 19, 2022, Student filed a motion to quash the subpoenas on the grounds that San Dieguito did not fully comply with Code of Civil Procedure Section 1985.3, that the requests were overbroad and immaterial to the issues presented to OAH, and that they violated Student's medical privacy. On September 22, 2022, San Dieguito opposed the motion.

On September 16, 2022 Student issued subpoenas for testimony to numerous San Dieguito employees, which were served on San Dieguito's counsel. These subpoenas included Cheryl James Ward, the former district Superintendent, and Mark Miller, the Deputy Superintendent. San Dieguito seeks to quash the subpoenas on the grounds each witness's expected testimony will be irrelevant and immaterial, will be cumulative, and that compelling the testimony will be burdensome and harassing to the district. Student opposed the motion to quash.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act 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 Regs., tit. 5, § 3082, subd. (c)(2).) This requirement

mirrors that required by 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 good cause requirement is met by a factual showing of why the requested documents or things 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.)

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 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.

STUDENT'S MOTION TO QUASH

FAILURE TO SERVE CONSUMER NOTICE

California law requires that a Notice to Consumer be served on the subject of a subpoena for personal records not less than 10 days prior to the date for production of records plus the additional time required based on the method of service per Code of

Civil Procedure section 1013. (Code Civ. Proc., § 1985.3, subd. (b).) Personal records are those records, whether maintained on paper or electronically, that are sought from those providing personal service to a party such as health care providers, psychiatrists, bankers, pharmacists, laboratories, insurance companies, telephone service providers and schools to name a few. (Code Civ. Proc., § 1985.3, subd. (a)(1).) The proof of service of the notice to consumer must be served on the witness from whom documents are being sought. (Code Civ. Proc., § 1985.3, subd. (c)(2).)

Student asserts that the subpoena at issue seeks personal records and improper notice of consumer was served. San Dieguito argues that a notice to consumer was served on September 16, 2022, which was 18 days before the start of the pending hearing.

Because San Dieguito did serve a Notice of Consumer, and it was served at least 10 days before the commencement of the hearing, San Dieguito complied with the Code of Civil Procedure.

NO RIGHT TO PREHEARING DISCOVERY

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

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 tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District,* (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing 5 business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

San Dieguito's subpoenas duces tecum each indicated the date of production was October 4, 2022, the original date of commencement of the hearing. The issued subpoena does not seek prehearing discovery. OAH has set up a procedure for witnesses to upload those documents to Case Center. Only OAH has access to those documents. Any documents shall be produced to Case Center and the Administrative Law Judge will determine the relevance of those documents at the time of the hearing.

As discussed below, the subpoena will be further modified as to the scope of the documents that each party must produce.

REASONABLE NECESSITY FOR THE RECORDS

Student argues that the subpoenas duces tecum should be quashed because they fail to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the material and relevant information sought. (*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.)

Student argues that the medical documents sought are immaterial to the issues regarding the assessments, child find and educational issues pled in the complaint. San Dieguito argues that the documents are relevant to cross-examine expert witnesses listed on Student's witness list. Each subpoena that was issued contained a cover letter, and an explanation of the requisite need for the documents. The subpoenas complied with the requirement establishing reasonable necessity for production of the records.

SCOPE OF THE SUBPOENA AND MEDICAL PRIVACY

Student contends that the subpoena is overly broad as the subpoena requests documents not covered by the issues in Student's complaint. Student also argues that producing the records would violate Student's medical privacy.

California law recognizes a constitutional right to privacy in an individual's medical history. (See, *Pettus v. Cole*, (1996) 49 Cal. App. 4th 402, 440.["the 'zones of privacy' created by Article 1 , section 1 of the California Constitution extend to the details of one's medical history"]; *Palay v. Superior Court, (1993)* 18 Cal. App. 4th 919, 932, ["Fundamental to the privacy of medical information is the ability to control its circulation …"] The constitutional right of privacy is not absolute, but is subject to

invasion where a compelling public interest is involved. (*Freed v. Home Depot U.S.A, Inc.* (S.D. Cal 2019) 2019 W.L. 183833, p. 5; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37.) State law governs an individual's right to privacy in a civil matter. (Fed. Rule Evid. 501; *Freed v. Home Depot U.S.A.* (S.D. Cal. 2019) 2019 WL 183833.)

San Dieguito argues that the documentation is relevant and necessary as Student has listed the subpoenaed doctors as non-retained, percipient experts. Student's list of witnesses uploaded to Case Center indicates that Drs. Pickering, Gist and Maitino will testify to information related to Student's disabilities, how Student's disabilities manifest at school, accommodations to be made on behalf of Student, and Student's counseling and emotional needs. Student argues that the information is not relevant to Student's educationally related needs and is overbroad.

San Dieguito has established some necessity for the documents because Student has put the medical providers' records in issue by listing them as percipient experts. However, the subpoenas as written was overbroad. San Dieguito argues that it did not tailor the document request to those documents that supported only the areas where the doctors would testify because it was under pressure from OAH deadlines. San Dieguito's counsel also states it attempted to meet and confer with Student's counsel to limit the scope of the documents, but did not receive a substantive response. As such, all records and communications letters from the health care providers, were subpoenaed.

Student has a right to privacy in his medical records. While San Dieguito argues that Student has placed his medical records at issue by listing each doctor as an expert witness, this argument falls short of a complete analysis of the protection of Student's right to privacy in their medical records. Student has not placed his entire medical

history at issue. Student maintains their right to privacy as to medical matters not at issue in this case. (*Freed, supra*, at p. 5. ["The party seeking the constitutionally protected information bears the burden of establishing that the information is directly relevant to the claims at issue."].)

Furthermore, the fact that the documents would be disclosed in the educational setting and thus subject to the confidentiality protections of educational records does not ameliorate concerns with invasions of Student's privacy. "[A]dequate protections against public disclosure do not obviate constitutional concerns as privacy interests are still implicated when the government accesses personal information without disseminating it." (*Grafilo v. Wolsham* (2019) – Cal. App 3. --, 2019 WL 1450733, citing *Lewis v. Superior Court* (2017) 3 Cal. 5th 561, 577.)

This is not to say that Student has an absolute right to block disclosure of any information related to their medical history. A right of privacy is not absolute. (*Hill, supra* at p. 38.) A court must construe any claim of waiver, due to placing medical matters at issue, narrowly and the competing compelling interest is found only where it is established that the material sought is directly relevant to the litigation. (*Freed*, *supra,* at p. 5 citing *Tylo v. Superior Court* (1993) 55 Cal. App 4th 1379, 1387.)

As noted above, Student has submitted a witness list to Case Center identifying Drs. Pickering, Maitino and Gist as possible expert witnesses. The subpoenas for Dr. Jennifer Friedman and Megan Gilmore, M.ED, are quashed. The subpoenas for the three testifying doctors are modified as follows:

1. Any and all records you created and/or relied upon in forming your opinion and recommendations to which you intend to testify in this matter regarding Student's disability-related educational needs and school-based performance,

from January 1, 2019 to present, including but not limited to reports, assessments (informal or formal), observations notes, service logs, and data collection.

2. Any and all communications pertaining to Student (via email, text, written or otherwise recorded) from August 23, 2021 to present, between Dr. Brett Pickering, Dr. Lauren Gist, Dr. Alissa Maitino, Rosa K. Hirji and/or anyone from her office.
3. Any and all agreements, retainers, invoices, and/or payment information pertaining to your participation in and all of Student's pending litigation, including this case, from August 23, 2021 to present.

San Dieguito shall serve an amended subpoena duces tecum on each doctor, file each amended subpoena with OAH, and provide working emails for each doctor to OAH. The date for production shall be set for October 11, 2022.

SAN DEIGUITO'S MOTION TO QUASH

SUBPOENA FOR ATTENDANCE OF WITNESS(ES)

California Code of Regulations, title 5, section 3082, subdivision (c)(2), specifies the right of the parties in a special education hearing to compel the attendance of witnesses at hearing. That regulation states, "[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)." Thus, subpoenas are available to require the production of information that is reasonably necessary in order for a party to present their case at hearing.

In the absence of regulations pertaining to the details of subpoena processes in administrative hearings, the Office of Administrative Hearings requires parties to comply

with procedures described in California Civil Code. California Civil Code section 1985 governs the issuance of subpoenas. In accordance with the California Civil Code, OAH allows attorneys to issue subpoenas to witnesses to require their attendance at hearing with documents and to excuse the attendance of witnesses if documents are produced. Parties must also comply with the consumer protections of California Civil Code 1985.3 when seeking the production of the personal records of a consumer. (*Sehlmeyer v. Dept. of General Services* (1993) 17 Ca. App. 4th 1072.) A subpoena for the attendance of a witness must also meet the good cause requirement by a factual showing of why the testimony and/or production of records 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.)

Here, Student has served witness subpoenas on Cheryl James Ward, the former district Superintendent, and Mark Miller, the Deputy Superintendent. San Deiguito argues that Ms. Ward was the Superintendent for only ten months, does not have any individualized knowledge relevant to the issues in the matter, did not attend Individualized Education Program meetings, referred to as IEP, and that her testimony would be cumulative. San Dieguito argues that Mr. Miller's testimony also will be immaterial and cumulative as he did not attend IEP meetings, did not review or prepare assessments, or any of the other IEP related documents. Student argues that Ms. Ward's and Mr. Miller's testimony will focus on conversations they each had with Parent, as well as the district's policies concerning special education.

San Deiguito's motion to quash is granted in part. Neither Ms. Ward nor Mr. Miller shall testify until the final day of hearing, subject to an offer of proof from Student that they will only be questioned on non-cumulative, material matters.

IT IS HEREBY ORDERED:

1. Student's motion to quash San Dieguito's subpoena duces tecum to Dr. Jennifer Friedman and Megan Gilmore, M.ED, is granted. Those subpoenas are hereby quashed so long as neither witness is called as an expert to testify.
2. Student's motion to quash San Dieguito's subpoenas duces tecum to Dr. Brett Pickering, Dr. Lauren Gist, Dr. Alissa Maitino is granted in part. San Dieguito shall serve an amended subpoena duces tecum, in compliance with the above modification, on each doctor, file each amended subpoena with OAH, and provide working emails for each doctor to OAH. The date for production shall be set for October 11, 2022.
3. Counsel for San Dieguito shall also serve a copy of this order on each doctor subpoenaed, including Dr. Friedman and Ms. Gilmore. The parties may reach an agreement in writing on service of counsel in lieu of serving the doctors directly.
4. San Dieguito's motion to quash Student's subpoenas to Cheryl James Ward and Mark Miller is granted in part. Neither Ms. Ward nor Mr. Miller shall testify until the final day of hearing, subject to an offer of proof from Student that they will only be questioned on non-cumulative, material matters.



Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings