BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

BEVERLY HILLS UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021040512

AUGUST 13, 2021

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

On June 8, 2021, Student filed an amended request for due process Beverly Hills Unified School District. On July 26, 2021, an order granting a continuance in this matter was granted scheduling the case for hearing beginning on August 17, 2021.

On July 12, 2021, Beverly Hills issued a subpoena duces tecum on the Custodian of Records at New Leaf Academy. A copy of the subpoena was sent to Student with the notice to consumer. The subpoena to New Leaf Academy sought "any and all records for Student generated for or by New Leaf Academy and its employees from April 2021 to Present, including but not limited to educational records, enrollment/intake paperwork, therapy records, behavior data, discipline records/entries, progress on goals,

report cards, assessment protocols, assessment reports completed by New Leaf Academy and its staff, internal and external communications (including emails, letters, phone logs, communication logs, contracts, individual service agreements, invoices and/or billing, and proof of payment) regarding Student's educational needs and/or educational progress and attendance, as between New Leaf Academy and/or with Student's parents or their attorneys."

On July 21, 2021, Student filed a motion to quash the subpoenas on the grounds that the subpoena was overly broad and burdensome, the documents sought were available by other means, the subpoena constituted prehearing discovery, and Beverly Hills failed to establish the documents were reasonably necessary to its case.

On July 26, 2021, Beverly Hills opposed the motion arguing the documents sought are reasonably necessary for Beverly Hills to defend on the issues asserted by Student in her complaint, and to appropriately cross examine Student's witnesses. Further, the request is not overly broad as it covers only a short period of time from April 23, 2021, to the present time.

On July 26, 2021, OAH continued due process hearing to August 17, 2021. Student's motion to quash the subpoena was continued to the prehearing conference on August 9, 2021. Beverly Hills reissued its subpoena to New Leaf Academy on July 30, 2021, requesting production of the documents on August 17, 2021, the first day of hearing.

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, Office of Administrative Hearings, referred to as 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.

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. Prehearing 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 five business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

Beverly Hills' subpoena directs New Leaf Academy to produce the subpoenaed records to the CaseLines link on August 17, 2021, which is the first day of hearing. The issued subpoena does not seek prehearing discovery. It was issued to give adequate notice for the production of documents and complied with the required notice to consumer.

Student argues that the subpoena duces tecum should be quashed because it fails 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.)

Beverly Hills' subpoena states the records requested are material to the issues in dispute and are reasonably necessary for Beverly Hills to defend against Student's request for due process complaint and proposed remedies therein. Student's complaint alleges that Beverly Hills denied Student a free appropriate public education and that Parent therefore chose to privately enroll Student at New Leaf Academy in or around April 2021. Student's complaint requests reimbursement for all educational expenses and costs incurred by Parents including but not limited to assessments, services, and private school placement. Beverly Hills' ability to respond to Student's requested remedies requires information about what New Leaf Academy has provided to Student, which goals or areas of need New Leaf Academy addressed over time and how those needs have changed, and Student's educational performance and progress at New Leaf Academy. These records, and any other records that New Leaf Academy has in its possession regarding Student from April 2021 to the present, are necessary to

effectuate effective cross-examination of Parent and any New Leaf Academy staff that may testify.

During the Prehearing Conference, the ALJ raised the potential of attorney-client privilege regarding the subpoenaed documents. In review of Student's motion to quash however, it is noted that Student did not raise the issue of privilege, therefore, the order at the Prehearing Conference is revised to indicate that Beverly Hill's request for all documents and communications between New Leaf Academy and Student's attorney is subject to the subpoena for production at hearing. Any such attorney communication, however, shall be held in camera, and shall be subject to additional objection regarding privilege at hearing. Communications directed towards any third party or educational advocate not working directly for Student's attorney, are not privileged, and shall be produced as requested.

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 extends 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.)

Student is seeking reimbursement and prospective placement in a residential treatment center due to mental health issues. Student has a right to privacy in her

medical records, however her medical and therapy records are central to the issues in Student's complaint. 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) 33 Cal.App.5th 1024, 1035, 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.) Therefore, New Leaf Academy shall produce Student's therapy records and notes for the period of April 1, 2021, through August 17, 2021, however these records shall be held in camera by the administrative law judge pending further determination at hearing of the relevance of Student's therapy records to the issues as presented by Student.

ORDER

1. Student's' motion to quash Beverly Hills' subpoena is granted in part and the subpoena is hereby modified. New Leaf Academy shall produce all documents requested in the subpoena duces tecum issued July 30, 2021, EXCEPT AS FOLLOWS:
    a. New Leaf Academy shall produce all documents and communications with Student's attorney or the staff of A2Z Educational Advocates,

however they shall be separately marked and held in camera by the administrative law judge.

b. New Leaf Academy shall produce Student's medical and therapy records for April 1, 2021, through August 17, 2021, however they shall be separately marked and held in camera by the administrative law judge.

2. All other documents shall be produced as requested in the subpoena duces tecum issued on July 30, 2021.

3. New Leaf Academy shall download Student's records to the CaseLines software link as directed in the instructions contained in the subpoena. OAH must have your email address so that you can upload your response to CaseLines. Shortly after you have been served with a subpoena, OAH will send you an email through CaseLines. The email will be from "noreply@caselines.com." The email will contain a link to upload your documents into the program at the time requested in the subpoena. The email will specify how long you have access to the link to upload documents. The documents shall be downloaded on or before August 17, 2021, at 9:00 AM.

4. Counsel for Beverly Hills shall immediately serve a copy of this order on the Custodian of Records at New Leaf Academy.

IT IS SO ORDERED

Judith Pasewark

Judith Pasewark

Administrative Law Judge

Office of Administrative Hearings