BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

CHULA VISTA ELEMENTARY SCHOOL DISTRICT.

OAH CASE NUMBER 2023100984

ORDER DENYING MOTION TO QUASH SUBPOENA AND DENYING MOTION FOR SANCTIONS AGAINST CHULA VISTA

FEBRUARY 20, 2024

On October 31, 2023, Student filed a request for due process naming Chula Vista Elementary School District. On December 14, 2023, Chula Vista issued subpoenas duces tecum to Dr. Abbe Irshay and Dr. Sookyung Shin, who were identified as expert witnesses who would testify in support of Student's case at the hearing. The subpoenas sought documents relevant to the testimony provided at hearing by each witness.

On the first day of hearing, December 19, 2023, the matter was continued for one day, and the parties were ordered to create a witness list. The hearing proceeded on December 20, 2023. Pursuant to the issued subpoenas, the experts were expected to

produce any responsive documents by December 19, 2023; however, neither expert produced documents prior to testifying on January 4, 2024.

On January 4, 2024, both experts were afforded the opportunity to testify within their areas of expertise, conditioned upon their compliance with the Subpoenas. Chula Vista argued that Dr. Shin produced evasive responses during the hearing and sent counsel an incomplete response on January 4, 2024. According to Chula Vista, Dr. Irshay sent an inadequate response, and then on January 7, 2024, sent one attachment that included an email confirming access to Case Center and three pages of handwritten notes. The undersigned Administrative Law Judge, referred to as ALJ, ordered both experts to produce any notes made in preparation for testimony, agreements to receive payment for their testimony, and to otherwise respond to Chula Vista's subpoenas as they relate to Student's issues by January 5, 2024. The hearing concluded on January 9, 2024.

Also on January 9, 2024, Student filed a Motion to Quash the two subpoenas, and a Motion for Sanctions against Chula Vista. Student argues that Chula Vista's subpoenas sought "irrelevant and unnecessary 'documents' by continuing to harass student's witnesses," despite each witnesses' attempts to cooperate by providing items "that are beyond the scope of a permissible" subpoena duces tecum. Student also filed a concurrent motion for sanctions against Chula Vista for harassing the expert witnesses. Closing briefs were submitted on January 30, 2024.

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.

THE MOTION TO QUASH IS MOOT

The subpoenas in this case were served on December 13, 2023, approximately six days before the start of the hearing. Student did not file a motion to quash at any time before the hearing, or during the first two weeks of the hearing.

Student called each expert witness to testify on January 4, 2024. At the start of each witness's testimony, counsel for Chula Vista raised concerns that the witnesses had not produced all the documents contained in the subpoenas and this hampered counsel's effort to properly cross-examine each witness. Argument was entertained by the undersigned ALJ, and Student's counsel's position was heard. During the testimony of each witness, the ALJ ordered both Dr. Irshay and Dr. Shin to respond to Chula Vista's subpoena, and to produce records by the end of January 5, 2024. This included any notes taken by either witness concerning Student, any emails between the witnesses and Parents or Student's counsel, and any billing information related to their services as an expert in this matter. District's counsel continued to email both witnesses on January 5, 2024, to ascertain when the documents would be produced. On January 9, 2024, the last day of hearing, Student filed the two instant motions.

Student argues that both the subpoenas and Chula Vista's counsels later emails were harassing, and support quashing the subpoenas. However, Student's argument lacks merit. First—no effort to quash the subpoenas was made at any time prior to January 9, 2024. If Student felt that the subpoenas were improper, it was his counsel's responsibility to raise those issues before the witnesses testified at the hearing—not on the last day of hearing. Second—and of greater significance—the issue of the subpoenas was discussed on the record, during the hearing, on January 4, 2024. Student's concerns were raised, and the ALJ ordered the witnesses to produce specific documents to Chula Vista's counsel. The nature of the production was discussed in

detail with each witness by the ALJ, and each witness confirmed they understood their obligation. Accordingly, the issues raised in the motion to quash were already ruled upon by the undersigned ALJ and are now moot. The motion to quash is denied.

Finally, the emails written by counsel were submitted as exhibits during the hearing. They were reviewed and discussed with both counsels. The content of the emails was neither unprofessional nor harassing, but merely reminded each witness what documents had not been produced pursuant to the ALJ's order. There is no basis to issue sanctions against Chula Vista's counsel or Chula Vista for their effort to obtain compliance with the subpoena and this ALJ's order. The motion for sanctions is denied.

ORDER

1. Student's motion to quash Chula Vista's subpoenas to Dr. Irshay and Dr. Shin is DENIED.
2. Student's request for Sanctions is DENIED.



Brian H. Krikorian
Administrative Law Judge
Office of Administrative Hearings