BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020050465

ORDER DENYING MOTION TO COMPEL LOS ANGELES TO MAKE NON-EMPLOYEE WITNESSES AVAILABLE AT HEARING OR TO ACCEPT SERVICE ON THEIR BEHALF

JULY 6, 2020

On May 18, 2020, Parent on behalf of Student filed a request for due process naming Los Angeles Unified School District. On May 19, 2020, an amended scheduling order was issued scheduling the case for hearing on July 7, 2020 through July 9, 2020. No response has been received from Los Angeles.

On June 30, 2020, Student filed a motion to compel Los Angeles to:

- Make available for hearing all of the nonpublic school staff appearing on Student's witness list, and

- Accept service of subpoenas on behalf of any witnesses under its control, including employees of the nonpublic school.

Student contends that because the nonpublic school provides services to Student under a contract with Los Angeles, and Los Angeles staff worked side-by-side with nonpublic school staff, the nonpublic school is not an independent organization. Student also asserts, without a sworn declaration or other authenticated and admissible evidence, that Los Angeles has the authority, control, resources and contact information of the nonpublic school staff at its disposal. Student points to a number of witnesses on Los Angeles's witness list, and states that those witnesses are really nonpublic school staff.

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).)

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 that the hearing officer has the right to issue subpoenas, that is, orders to appear and give testimony, upon a showing of reasonable necessity by a party. Thus, subpoenas are available to require the production of information that is reasonably necessary for a party to present their case at hearing.

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].)

In special education proceedings in California the hearing officer is given the authority to issue subpoenas for personal appearances upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) Service of the subpoena must be made in accordance with Code of Civil Procedure, section 1987, and witnesses are entitled to the same fees and mileage allowed to a witness in a civil case. (Govt. Code, §§ 11450.50, 11450.40.) If a witness does not comply with a subpoena, that person is subject to contempt sanctions. (Govt. Code, § 11455.10). OAH does not enforce contempt sanctions, but may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted for enforcement. (Govt. Code, § 11455.20.)

In the June 29, 2020 Order Following Prehearing Conference for Hearing by Videoconference, it was ordered that:

- Parties are responsible for producing their own witnesses, and
- Parties shall make witnesses under their control reasonably available.

Student submits no evidence that individual employees of a nonpublic school are under the control of Los Angeles, let alone within the control of Los Angeles to compel attendance at a due process hearing. Employees of an independent nonpublic school

are not employees of Los Angeles. Student also submits no evidence that personal contact information, such as telephone numbers or mailing addresses are accessible to Los Angeles.

Accordingly, Student's motion to compel Los Angeles to make nonpublic school staff available to testify at hearing, or to accept service on their behalf, is denied.

If Student requires a short continuance to make arrangements for service of subpoenas due to any difficulties contacting the nonpublic school due to school closures during the COVID-19 pandemic, Student should meet and confer with Los Angeles on mutually agreeable proposed dates, and file a joint motion for continuance if the parties can agree on dates.

Student bears the burden of proof in this matter, and should be prepared to present witnesses or to otherwise prove up Student's case beginning on the first day of hearing.

IT IS SO ORDERED.

DocuSigned by:
Alexa Hohensee
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Alexa Hohensee
Administrative Law Judge
Office of Administrative Hearings