BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

ALTA LOMA SCHOOL DISTRICT.

OAH CASE NUMBER 2019091099

ORDER DENYING MOTION TO QUASH SUBPOENA

On September 27, 2020, Student filed a request for due process naming Alta Loma School District. Alta Loma School District will be referred to as Alta Loma. On November 12, 2019, the Office of Administrative Hearings issued an order granting a continuance in this matter and scheduled the case for hearing on February 11, and 12, 2020.

On January 17, 2020, Alta Loma issued a subpoena duces tecum on the Custodian of Records of Dr. Douglas Stephey. A notice to consumer was sent to Student, through his attorney, advising Student of the subpoena directed to the Custodian of Records of Dr. Douglas Stephey. Copies of the subpoena(s) were sent to Student, through his attorney, with the notice to consumer. The subpoena to the Custodian of Records of Dr. Douglas Stephey sought production of documents on February 11, 2020, the first day of hearing. The documents sought were for records and documents referencing Student from August 1, 2017 to February 11, 2020.

On February 21, 2020, Peter Attwood filed a motion to quash the subpoena on the grounds that it included attorney-client privilege materials, and that Alta Loma did not show reasonable necessity for the documents to be produced at hearing. Mr. Attwood also argued that the subpoena was overbroad and requested irrelevant documents. On January 24, 2020, Alta Loma opposed the motion arguing that Mr. Attwood is not an attorney, and does not represent Student; and that Mr. Attwood, a non-party, has no standing to motion to quash the subpoena.

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.

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).)

Mr. Attwood asserts that the subpoena at issue was procedurally deficient as no notice of consumer was served on him. Mr. Attwood is not a consumer within the meaning of Code of Civil Procedure § 1985.3 because the records sought are not

Mr. Attwood's personal records, but that of Student. The fact that Peter Attwood's name may appear in the records as a non-attorney advocate for a party, Student, or his parents, would not render Mr. Attwood a consumer requiring a consumer notice. Further, the documents sought are not Mr. Attwood's personal records. Therefore, a notice of consumer was not required to be served on Mr. Attwood. Alta Loma properly served a consumer notice to Student's attorney, Tania Whiteleather, as to Student's personal records held by the Custodian of Records of Dr. Douglas Stephey.

Moreover, Mr. Attwood is not an attorney and cannot represent Student, or assert any claims including claims of attorney client privilege on Student's behalf.

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).)

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. Alta Loma's subpoena properly directs The Custodian of Records of Dr. Douglas Stephey to produce the documents to the hearing site on the first day of hearing, currently February 11, 2020.

REASONABLE NECESSITY FOR THE RECORDS

Mr. Attwood 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.)

Alta Loma's declaration in support of the subpoena states the subpoenaed records (which include assessments, reports, correspondence, notes, contracts and billing that references Student and/or Parents) are reasonably necessary to defend against Student's due process allegations that: Alta Loma's cost cap for visual processing assessment by Dr. Stephey was reasonable; and whether it timely paid for Dr. Stephey's visual processing assessment. Further, Mr. Attwood stated in his motion to quash that he advocated and communicated on Student's and parent's behalf (presumably with Dr. Stephey) before Student hired Ms. Whiteleather as Student's attorney. Attwood's motion to quash concluded that the subpoenaed records are immaterial and irrelevant to the due process complaint. Contrary to Ms. Attwood's assertions of irrelevance of the subpoenaed documents, the documents are reasonably necessary for Alta Loma to defend itself at hearing when Mr. Attwood testifies at hearing about his communications with Dr. Stephey about the reasonableness and cost of Dr. Stephey's visual processing assessment, and the time frame of such payment.

SCOPE OF THE SUBPOENA

Although Mr. Attwood contends that the subpoena is overly broad, this was unsupported as the subpoena requests documents for time periods covered by the issues in addressed Student's complaint, August 1, 2017 to February 11, 2020. There was no evidence supporting that the subpoena was overbroad.

ORDER

1. Mr. Attwood's motion to quash Alta Loma's subpoena to the Custodian of Records of Dr. Douglas Stephey is DENIED. The records shall be produced by the Custodian of Records of Dr. Douglas Stephey to the Administrative Law Judge on the first day of the hearing in this matter.

2. The Custodian of Records of Dr. Douglas Stephey shall deliver Student's records to the West End SELPA, 8265 Aspen Ave., Suite 200, Rancho Cucamonga, CA 91730, at 9:30 a.m. on February 11, 2020.
2. Counsel for Alta Loma shall immediately serve a copy of this order on the Custodian of Records of Dr. Douglas Stephey.

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Sabrina Kong
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DATED: January 28, 2020

Sabrina Kong
Administrative Law Judge
Office of Administrative Hearings