BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

PACIFIC GROVE UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023060766

ORDER GRANTING IN PART STUDENT'S MOTION TO QUASH SUBPOENA DUCES TECUM

JULY 26, 2023

On June 16, 2023, Parents on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings naming Pacific Grove Unified School District, called Pacific Grove. The Office of Administrative Hearings is called OAH. On June 22, 2023, OAH issued a scheduling order scheduling the case for hearing on August 1, 2, and 3, 2023.

On July 7, 2023, Pacific Grove issued a subpoena duces tecum to Chartwell School. Pacific Grove sent a notice to consumer and a copy of the subpoena issued to Chartwell School to Student's attorney of record on July 7, 2023. The subpoena duces tecum generally sought production of the following documents from Chartwell School:

1. any and all general education records, special education records, enrollment forms, attendance records, health plans, health records, disciplinary records, behavioral incident records, services logs, summer school services, [individualized education program, called IEP] records, goals, progress reports, report cards, and transcripts;
2. invoices for services and tuition;
3. payment receipts for tuition or services provided to Student;
4. communications between Chartwell School and Parents;
5. records, correspondence, service logs, and progress reports from service providers relating to Student's educational needs, progress, and programming;
6. assessments and tests given to Student, including protocols, Student's responses, assessor notes, and reports; and
7. records from physicians, counselors, psychologists, psychiatrists, and therapists who evaluated or provided services to Student for any medical, psychological, mental health, and or behavioral needs.

On July 20, 2023, Student filed a motion to quash the subpoena on the grounds Pacific Grove did not make a specific showing that the requested documents are reasonably necessary for Pacific Grove to present its defense at hearing. Student further argued Pacific Grove failed to serve a notice to consumer on Student.

Pacific Grove filed an opposition to Student's motion to quash on July 24, 2023. Pacific Grove argued it served a notice to consumer on Student's attorney, and further that it established reasonable necessity for the requested documents.

A party to a due process hearing under the Individuals with Disabilities 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).) While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. 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).) The requesting party must set forth sufficient detail, specific to the legal and factual issues to be adjudicated, that the requested records are reasonably necessary for the party to present a case or mount a defense. The reasonable necessity standards is a distinct, more stringent standard than the "good cause" standard governing standard discovery requests in civil litigation.

Code of Civil Procedure section 1985, subdivision (b), 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 complaint alleges Pacific Grove denied her a free appropriate education, called FAPE, during the 2020-2021 school year, beginning June 16, 2021, and continuing through the 2022-2023 school year, by failing to provide Student with appropriate academic services, including reading intervention and visual processing services. The complaint further alleges Pacific Grove failed to offer Student an appropriate placement at various IEP team meetings held during the 2021-2022 and 2022-2023 school years. Parents notified Pacific Grove on August 2, 2022, of their intention to unilaterally place Student at Charter School. Student seeks reimbursement for educational costs, including tuition and transportation costs, and compensatory education.

PACIFIC GROVE ESTABLISHED IT SERVED A NOTICE TO CONSUMER ON STUDENT THROUGH HER ATTORNEY OF RECORD

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 pursuant to 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).)

The parties do not dispute that the documents requested by Pacific Grove, specifically education records, enrollment forms, invoices for services and tuition, proof of payment, special education assessments and programming, communications with Parents, and medical records were private and therefore a notice to consumer was required. Pacific Grove established it served the notice to consumer on Student's attorney of record on July 7, 2023, by service through certified mail, but that Student's attorney failed to retrieve the mail from the United States Postal Service. Pacific Grove's opposition brief was supported by proof of mailing of the notice to consumer and confirmation from the United States Postal Service that the document was delivered but not retrieved by Student's attorney. Therefore, Pacific Grove established that it served Student with the notice to consumer.

THE SUBPOENA WAS SERVED IN SUFFIECIENT TIME TO ALLOW CHARTWELL SCHOOL A REASONABLE TIME TO LOCATE AND PRODUCE THE RECORDS

California Code of Civil Procedure section 1985.3, subdivision (d), states that service of a subpoena dues tecum must be made "in sufficient time to allow the witness reasonable time to locate and produce the records or copies thereof." Code of Civil Procedure section 2020.410, subdivision (c), defines sufficient time as "no earlier than 20 days of the issuance, or 15 days after the service" of the subpoena, whichever is later. Under these two code sections, Pacific Grove provided Chartwell School sufficient time to respond to the subpoena. Pacific Grove established it emailed the subpoena duces tecum on Chartwell School on July 17, 2023, which was 16 days prior to the August 1,

2023, hearing start date. Therefore, the subpoena duces tecum was timely served on Chartwell School.

PACIFIC GROVE ESTABLISHED THE REASONABLE NECESSITY FOR THE REQUESTED DOCUMENTS IN CATEGORIES 1 THHROUGH 6

Pacific Grove asserts the requested documents are relevant to Student's progress and educational program at Chartwell School. Pacific Grove also argues the documents are necessary to establish the expenses for which Student seeks reimbursement, including for tuition, transportation costs, and other expenses related to Student's enrollment at Chartwell School.

Student argues 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. Student's contention that the documents subpoenaed are not reasonably necessary to Pacific Grove's defense is not persuasive. Student's complaint alleges Pacific Grove failed to offer her a FAPE and that Parents unilaterally placed Student at Chartwell School. Student's complaint further alleges Chartwell School was an appropriate placement and that she made progress. Student seeks as a resolution reimbursement of tuition and other expenses related to her enrollment at Chartwell School. The documents identified in numbers 1 through 6 in Pacific Grove's subpoena relate to Student's educational program provided at Chartwell School, Student's progress, communications with Parents, and proof of expenses and payment. These documents are potentially relevant and reasonably necessary to Pacific Grove's defense in this case. Pacific Grove established reasonable necessity for production of the records listed in paragraphs 1 through 6 in its subpoena.

PACIFIC GROVE DID NOT ESTABLISH REASONABLE NECESSITY FOR RECORDS RELATIONG TO STUDENT'S MEDICAL, MENTAL HEALTH, AND BEHAVIORAL NEEDS

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 is a law that provides for a national standard for the protection of certain health information. Generally, consent is required to disclose medical records. (42 U.S.C. § 1320d, et seq.; 45 C.F.R. § 164.508(a).) However, federal regulations provide for circumstances under which an authorization to the medical provider by the individual whose records are sought, or opportunity for the individual to agree or object to disclosure of documents by the medical provider is not required. One of those circumstances involves disclosures to an administrative tribunal pursuant to a subpoena. (45 C.F.R. § 164.512(e)(1)(ii).)

Evidence Code section 994 creates a physician-patient privilege which protects confidential communications between a patient and their physician. Evidence Code section 1010, subdivision (d), creates a psychotherapist-patient privilege which protects confidential mental health communications. Similarly, Evidence Code section 1010.5 creates an educational psychologist-patient privilege. However, there is a litigation exception to these privileges. (Evid. Code, §§ 996, 1016.)

Although Student's complaint generally alleges Student was embarrassed by her reading skills and showed signs of low academic self-esteem and task avoidance, it does not allege Pacific Grove denied Student a FAPE by failing to meet Student's medical, mental health, or behavioral needs. Further, Student's attorney confirmed at the July 24, 2023, prehearing conference that Student was not claiming a denial of FAPE relating to any of Student's unique medical, mental health, or behavioral needs.

Pacific Grove's declaration in support of its subpoena did not contain any specific reason for the necessity of obtaining the documents relating to Student's medical, mental health, or behavioral needs. Pacific Grove failed to establish reasonable necessity for these documents. Accordingly, Student's motion to quash is granted, in part, only as to the records identified in paragraph 7 of the subpoena.

ORDER

1. Student's motion to quash Pacific Grove's subpoena to Chartwell School is granted, in part. Chartwell School is not required to produce the records in paragraph 7 of the subpoena relating to Student's medical, mental health, or behavioral needs. Chartwell School is required to produce all remaining requested documents in the manner specified.
2. Pacific Grove shall immediately serve a copy of this Order on Chartwell School.

Jennifer Kelly

Jennifer Kelly
Administrative Law Judge
Office of Administrative Hearings