BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023050768

ORDER GRANTING AND DENYING IN PARTS THE MOTION TO QUASH SUBPOENA

AUGUST 1, 2023

On May 19, 2023, Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Fremont Unified School District, called Fremont. On June 16, 2023, OAH granted Student's motion to amend the due process hearing request and set the first day of hearing on August 8, 2023.

On July 13, 2023, Student issued a number of subpoenas and subpoenas duces tecum. On July 26, 2023, Fremont filed a motion to quash two of the subpoenas issued by Student: one to Fremont's Director of Special Education, Frances English, to produce documents on July 26, 2023; and the other for the testimony of Elizabeth Schwartz, Fremont's attorney, on August 8, 2023.

On July 28, 2023, OAH granted a request to continue the hearing to August 22, 2023. Student did not file an opposition to Fremont's motion to quash the subpoenas to Ms. English and Attorney Schwartz.

THE SUBPOENA DUCES TECUM TO MS. ENGLISH FOR PRODUCTION OF DOCUMENTS

Student's subpoena duces tecum to Ms. English directed her to produce all documents related to Student from March 2019, through May 2022, and all emails related to Student on July 26, 2023, 13 days before the previously scheduled first day of hearing, August 8, 2023. Fremont argued the subpoena duces tecum to Ms. English to produce documents on July 26, 2023, should be quashed because Student was not entitled to pre-hearing discovery and did not show the documents were reasonably necessary to the case before OAH.

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act, called the IDEA. (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 in 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 five business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).) The party subpoenaing the documents must also make the requisite showing of reasonable necessity for the requested documents such as showing that the documents sought consists of material and relevant information. (*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.)

Student has no statutory right to pre-hearing discovery. Therefore, Student cannot require Ms. English to produce any documents on July 26, 2023, or on any date before the hearing. Further, the subpoena duces tecum failed to include a declaration establishing reasonable necessity for the production of the records sought. Student did not provide any support for the subpoenaed documents from Ms. English or demonstrate that the subpoenaed documents were material and relevant to the case before OAH.

Therefore, Fremont's motion to quash the subpoena to Ms. English to produce documents is granted. Ms. English is not required to produce any documents pursuant to Student's subpoena duces tecum.

THE SUBPOENA FOR ATTORNEY SCHWARTZ'S TESTIMONY AT HEARING

Student's subpoena directed Attorney Schwartz to testify at hearing on August 8, 2023. Fremont argued that the subpoena for Attorney Schwartz's testimony at hearing should be quashed because the information sought from her would be cumulative of the testimony from other Fremont witnesses who also attended the same IEP team meetings. Fremont further argued that Attorney Schwartz's testimony would be barred based on attorney client privilege because she was and continues to serve as Fremont's attorney in this case.

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, "[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)." Thus, subpoenas are available to require the production of information that is reasonably necessary in order for a party to present their case at hearing.

In the absence of regulations pertaining to the details of subpoena processes in administrative hearings, OAH requires parties to comply with procedures described in the California Civil Code. California Civil Code section 1985 governs the issuance of subpoenas. In accordance with the California Civil Code, OAH allows attorneys to issue subpoenas to witnesses to require their attendance at hearing with documents and to excuse the attendance of witnesses if documents are produced. Parties must also

comply with the consumer protections of California Civil Code section 1985.3, when seeking the production of the personal records of a consumer. (*Sehlmeyer v. Dept. of General Services* (1993) 17 Ca. App. 4th 1072.) A subpoena for the attendance of a witness must also meet the good cause requirement by a factual showing of why the testimony and/or production of records are material and relevant to the litigated issues. (*Johnson v. Superior Court, supra,* 258 Cal. App.2d at 835-836; see also *Seven Up Bottling Company v. Superior Court, supra,* Cal. App.2d at 77.)

The subpoena stated Attorney Schwartz attended the August 19, 2021, January 20, 2022, and February 23, 2022 individualized education program, called IEP, team meetings. Attorney Schwartz conceded she attended various IEP team meetings regarding Student. Therefore, Student demonstrated the need for Attorney Schwartz's testimony as a percipient witness regarding the August 19, 2021, January 20, 2022, and February 23, 2022 IEP team meetings, even though the subpoena to Attorney Schwartz was not accompanied by a declaration.

Whether Attorney Schwartz's testimony would be cumulative of other evidence at hearing was not a persuasive legal basis for quashing the subpoena for her testimony as a percipient witness to the IEP team meetings she attended. Equally unpersuasive was Fremont's argument that Attorney Schwartz's continued role as Fremont's attorney in this case completely bars her testimony as a percipient witness to the IEP team meetings she attended. Fremont did not cite to any legal authority supporting that Attorney Schwartz's role as its attorney completed barred her testimony as a percipient witness. Therefore, Fremont's motion to quash the subpoena for Attorney Schwartz's testimony at hearing is denied. However, the subpoena for Attorney Schwartz's testimony is modified and she is ordered to comply with the subpoena and be available for

testimony on August 22, 2023, the currently scheduled first day of hearing, as opposed to August 8, 2023.

Fremont's objections regarding the cumulative nature of Attorney Schwartz's testimony and any applicable attorney client privilege matters will be decided by the ALJ during the hearing, the appropriate time for these issues to be addressed.

ORDER

1. Fremont's motion to quash Student's subpoena duces tecum to Ms. English to produce documents on July 26, 2023, is granted. Ms. English is not required to produce any of the subpoenaed documents.
2. Fremont's motion to quash Student's subpoena for Attorney Schwartz's testimony is denied. Attorney Schwartz is ordered to be available on August 22, 2023, the first hearing date, to testify as a percipient witness regarding the IEP team meetings she attended. Any objections to Attorney Schwartz's testimony based on the cumulative nature of her testimony and attorney client privilege matters shall be determined by the ALJ at hearing.

IT IS SO ORDERED.

Sabrina Kong

Sabrina Kong
Administrative Law Judge
Office of Administrative Hearings