BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SAN MARCOS UNIFIED SCHOOL DISTRICT,	OAH Case No. 2018101112
SAN MARCOS UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2019020520 ORDER DENYING SAN MARCOS' MOTION TO QUASH SUBPOENAS AND SUBPOENAS DUCES TECUM; AND DENYING STUDENT'S MOTION TO STRIKE THE DECLARATION OF DAWN DULLY

On October 25, 2018, Parent on behalf of Student filed a request for due process (complaint) with the Office of Administrative Hearings, naming San Marcos Unified School District. Student's complaint alleges that San Marcos denied him a free appropriate public education by failing to timely assess Student in 2017, and seek reimbursement for parental placement in a nonpublic school.

On February 14, 2019, District filed a complaint with OAH naming Student to defend its psychoeducational assessment of Student. The cases were consolidated by order dated February 15, 2019. The consolidated hearing is scheduled for March 12-14, 2019.

On February 21, 2019, Student served subpoenas and subpoenas duces tecum on all employees of San Marcos who have assessed Student or participated in IEP team meetings for Student.

On February 27, 2019, San Marcos filed a motion to quash the subpoenas duces tecum. On March 4, 2019, Student filed opposition to San Marcos' motion to quash and a motion to strike the declaration of dawn Dully filed by San Marcos in support of its motion. The undersigned ALJ heard argument by the parties on San Marcos' motion to quash at the prehearing conference of March 4, 2019.

As set forth below, San Marcos' motion to quash the subpoenas and the subpoenas duces tecum is denied.

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) (Section 1985(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, OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which 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.

DISCUSSION

The 12 subpoenas duces tecum served by Student on San Marcos employees seek writings and emails pertaining to Student between the individuals served and other San Marcos employees, employees of another school district assessing Student, or employees of the nonpublic school where Student was parentally placed, from September 2017 to the present. Each individual is also subpoenaed to appear at various times during the second and third day of hearing.

The declaration of Student's counsel included in the subpoenas duces tecum, which is the same for each person subpoenaed, states that the documents sought are relevant and necessary to prove Student's claims that he was denied a free appropriate public education because he was not timely assessed by San Marcos, and to disprove San Marcos' claim that its assessments were appropriate.

San Marcos argues that the subpoenas duces tecum should be quashed because: Student failed to make the requisite showing of reasonable necessity for the requested documents; the documents are irrelevant; the requests are vague and overbroad; and Student failed to provide the employees with a reasonable time to produce the requested documents. San Marcos argues that most of the individuals subpoenaed had no part in Student's assessments, and so will have no responsive documents. The sworn declaration of San Marcos' executive director of special education states that she believes it will take up to 30 days for the employees to make a search of District's records in order to comply with the subpoenas duces tecum.

Student opposes, arguing that he has attempted to obtain the documents from San Marcos by less intrusive means, without success. Student argues that the categories in the subpoenas were specific enough for San Marcos to estimate that it needed 30 days to search and review the compliant documents, so were not vague or overbroad. Student notes that the executive director's declaration constituted speculation, inadmissible opinion and violates the best evidence rule, and has filed a separate motion to strike the declaration.

San Marcos offers no ground for quashing the subpoenas for appearance. In fact, each of the individuals subpoenaed was already named as a witness who would appear and testify at hearing on the witness list submitted by San Marcos in its prehearing statement. Accordingly, the motion to quash is denied as to the subpoenas for appearance.

The declaration of Student's counsel demonstrates reasonable necessity for production of the documents sought. In its witness list, San Marcos also stated that the testimony of each and every one of the persons on its witness list (and subpoenaed by Student) might include, but not be limited to:

> Students' disability, assessments, educational program, placement, services provided, *as well as correspondence between the parties* (emphasis added)

If San Marcos anticipates that correspondence between the parties will be significant evidence at hearing, and both parties' exhibit list suggests that it will, it is reasonably necessary for Student to obtain the full scope of the communications both to prosecute Student's case and defend against District's case, as stated in the declaration of Student's counsel. Student has alleged a failure to assess despite parent requests, attempts by San Marcos to shift responsibility for assessment to another school district, and failure of San Marcos to make arrangements for staff at Student's nonpublic school to attend the IEP team meetings and participate in development of Student's educational program. Documents

evincing communications between San Marcos employees, the other school district and the nonpublic school are therefore reasonably necessary for Student to prepare for the consolidated hearing. Accordingly, the declaration of Student's counsel makes a sufficient factual showing that the requested documents are material and relevant to the litigated issues.

San Marcos' own witness list indicates that any one of the subpoenaed individuals may have had a role to play in the assessment process, been involved in the decisions regarding the program and placement offered Student, and corresponded with the other participants. In light of this, Student's request for writings and emails between the various actors involved in Student's assessment, the design of his educational program, and placement seeks highly relevant information. Student's complaint clearly alleges that Student was never enrolled in San Marcos, and therefore San Marcos' employees' involvement with Student, Parents, the other school district and the nonpublic school pertaining to Student over the one and one-half year period at issue would be very limited. The categories of documents sought are expressly limited to communications regarding Student, and the majority are further limited to writings and emails between identified individuals. Accordingly, the documents sought for production are relevant, the categories identified are not vague or overbroad, and San Marcos' objections to the subpoenas duces tecum on those grounds are overruled.

San Marcos makes the inconsistent argument, both in its moving papers and previously at the PHC, that the individuals subpoenaed did not possess or control documents responsive to the subpoenas duces tecum, but yet it was burdensome for those individuals to search for such documents. The subpoenas duces tecum are very limited in scope, seeking only documents pertaining to a student who never attended a San Marcos school (and should not have generated voluminous correspondence or documentation). In light of this, the declaration of executive director Dully is speculative and unpersuasive. Email searches of such limited contacts, even taking into account review for privilege and redactions, should not take more than a day or two, and the persons subpoenaed have had a reasonable amount of time to comply with the subpoenas duces tecum. If necessary, the parties can request at hearing that the ALJ schedule an additional non-consecutive day for testimony after production of the documents requested. Each of the subpoenaed individuals will be testifying, and whether or not additional time is necessary to search for responsive documents can be explored with each witness under oath.

Student filed a 47-page motion to strike the declaration of Ms. Dully, but cites no authority for that request. Accordingly, Student's motion to strike is denied.

The appearances required by the subpoenas were not scheduled taking into account the order at the PHC that the parties meet and confer to develop a joint witness schedule that takes into account the factors identified at the PHC, such as estimates of time for direct and cross-examination, scheduling witnesses to avoid delays in the hearing and to minimize or eliminate the need to call a witness twice. Therefore, the parties are ordered to include the subpoenaed witnesses in the joint witness schedule in compliance with the PHC order.

ORDER

1. District's motion to quash Student's subpoenas and subpoenas duces tecum served on Dawn Dully, Nikki Sestina, Joanne Navilliat, Neika Maryn, Brett Klepacki, Beth Lawson-Abreu, Tara Razi, Raquel Carr, Amanda Carlson, Marci Davis, Stephen Warnock, and Craig Fox, is denied in its entirety.

2. Student's motion to strike the declaration of Dawn Dully is denied.

3. The parties shall meet and confer regarding the schedule of subpoenaed witnesses, and include those witnesses in the joint witness schedule for presentation on the first day of hearing in accordance with the Order after Prehearing Conference dated March 5, 2019.

DATE: March 7, 2019

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings