BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019080539

ORDER DENYING MOTION TO QUASH SUBPOENA AND MODIFYING PRODUCTION DATE

On August 13, 2109, Student filed a request for due process naming Garden Grove Unified School District. On September 30, 2019, the Office of Administrative Hearings, referred to as OAH, granted Student's request to continue and set the due process hearing to commence on December 3, 2019. On November 22, 2019, OAH granted Student's request to amend his complaint and issued a scheduling order scheduling the due process hearing to commence on January 14, 2020.

On November 12, 2019, Garden Grove issued a notice to consumer to Student advising Student of the subpoenas duces tecum directed to Dr. Peter Vu and Dr. Rosa Patterson and its intent to serve the subpoenas duces tecum within seven days. Copies of the subpoenas duces tecum were sent to Student with the notice to consumer. The subpoena duces tecum to Dr. Vu and Dr. Patterson sought any and all records from January 2017 to the present including but not limited to medical records, educational

records, intake paperwork, assessment protocols, and assessments reports. The subpoena duces tecum also requested all internal and external communications regarding Student's transition needs, hygiene needs, and medical needs. The subpoena duces tecum ordered Dr. Vu and Dr. Patterson to appear in person and produce the records on the first day of hearing at the hearing location.

On November 20, 2019, Student filed a motion to quash the subpoenas duces tecum on the grounds that they were exceptionally overbroad, seek documents that are not relevant to the issue at hand, and are not reasonably necessary. On November 21, 2019, Garden Grove opposed the motion arguing that the documents requested were relevant, and reasonably necessary.

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.

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).)

Garden Grove's subpoenas duces tecum directs Dr. Vu and Dr. Patterson to produce the subpoenaed records to Garden Grove Unified School District on December 3, 2019, which was the first day of hearing. Although Garden Grove's subpoenas duces tecum were returnable on the first day of hearing, OAH granted Student's motion to amend which reset the hearing dates. Section 1987.1 of the Code of Civil Procedure, provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it. Therefore, the subpoenas duces tecum are modified to change the date of production to January 14, 2020. The documents shall be produced to the Administrative Law Judge hearing this matter at the hearing location.

REASONABLE NECESSITY FOR THE RECORDS

Student 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.)

Garden Grove's declaration in support of the subpoena duces tecum for Dr. Vu states Student's requested remedy is a male aide as recommended by Dr. Vu. Garden Grove anticipates that Student will call Dr. Vu to testify and it needs the records to prepare for hearing and to cross-examine Dr. Vu regarding the basis for his recommendation for Student to have a male aide for hygiene support. Student contends the records are not necessary because Student is not calling Dr. Vu as a witness.

Garden Grove's declaration in support of the subpoena duces tecum for Dr. Patterson states Student's complaint is based heavily on Dr. Patterson's functional behavior assessment. Garden Grove anticipates that Student will call Dr. Patterson to testify and it needs the records to prepare for hearing and to cross-examine Dr. Patterson. Student contends the records are not necessary because Garden Grove has not established that the information it seeks is not available through testimony from Dr. Patterson and Garden Grove already has a copy of Dr. Patterson's functional behavioral assessment.

Student also argues the information requested from Dr. Vu and Dr. Patterson is duplicative as Student must provide Garden Grove with all documents he intends to use

to meet his burden of proof in the due process hearing five days prior to the due process hearing.

Garden Grove's declaration establishes that the documents subpoenaed are material and relevant. Specifically, Garden Grove limited the documents requested from Dr. Vu to nutrition or gastrointestinal issues which are the basis for his recommendation. Even if Student does not intend to call Dr. Vu as a witness, the documents requested are specific to the issues at hand and Dr. Vu's opinion is the basis for the claim. As to the records requested from Dr. Patterson they are directly related to the issues, specifically the functional behavioral assessment Dr. Patterson created. Student's argument that the information requested could be obtained from Dr. Patterson's testimony is not persuasive as Garden Grove seeks the information to prepare to cross-examine Dr. Patterson.

Student's argument that the records are duplicative is unpersuasive as although Student is required to exchange all documents he intends to use to meet his burden of proof he is not required to exchange all the documents Garden Grove requested.

SCOPE OF THE SUBPOENA

Student contends that the subpoenas duces tecum are overly broad as the request for any and all communications could potentially reveal private information unrelated to Student's allegations and proposed remedy. Student also argues that he is not requested reimbursement for any of Dr. Vu's or Dr. Patterson's services so the request for contracts, individual service agreements, invoices, billing, and proof of payment is unnecessary. Student also argues that the subpoenas duces tecum request privileged information in the form of communications with Student, his Parents, and his attorney.

The subpoenas duces tecum are not overly broad or request private or privileged information. The subpoenas duces tecum are limited to documents relevant to the issues for hearing.

MEDICAL PRIVACY

Student also argues that the subpoena duces tecum requests information protected under HIPPA.

California law recognizes a constitutional right to privacy in an individual's medical history. (See, *Pettus v. Cole*, (1996) 49 Cal. App. 4th 402, 440.["the 'zones of privacy' created by Article 1 , section 1 of the California Constitution extend to the details of one's medical history"]; *Palay v. Superior Court, (1993)* 18 Cal. App. 4th 919, 932, ["Fundamental to the privacy of medical information is the ability to control its circulation …"] The constitutional right of privacy is not absolute, but is subject to invasion where a compelling public interest is involved. (*Freed v. Home Depot U.S.A, Inc.* (S.D. Cal 2019) 2019 W.L. 183833, p. 5; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37.) State law governs an individual's right to privacy in a civil matter. (Fed. Rule Evid. 501; *Freed v. Home Depot U.S.A.* (S.D. Cal. 2019) 2019 WL 183833.)

Student has a right to privacy in her medical records. Student maintains their right to privacy as to medical matters not at issue in this case. (*Freed, supra*, at p. 5. ["The party seeking the constitutionally protected information bears the burden of establishing that the information is directly relevant to the claims at issue."].)

This is not to say that Student has an absolute right to block disclosure of any information related to their medical history. A right of privacy is not absolute. (*Hill, supra* at p. 38.) A court must construe any claim of waiver, due to placing medical

matters at issue, narrowly and the competing compelling interest is found only where it is established that the material sought is directly relevant to the litigation. (*Freed*, *supra,* at p. 5 citing *Tylo v. Superior Court* (1993) 55 Cal. App 4th 1379, 1387.)

Here, Garden Grove is requesting only the information specific to the issues for hearing. Garden Grove limited the medical information requested from Dr. Vu to gastrointestinal and nutrition, the areas in which Dr. Vu made his recommendation for a male aide. Garden Grove is not requesting Student's complete medical file.

ORDER

1. Student's motion to quash Garden Grove's subpoena duces tecum to Dr. Vu and Dr. Patterson is DENIED. The records shall be produced by Dr. Vu and Dr. Patterson to the Administrative Law Judge on the first day of the hearing in this matter.
2. The subpoenas duces tecum are hereby modified. Dr. Vu and Dr. Patterson shall deliver Student's records to the Garden Grove Unified School District, located at 10331 Stanford Avenue, Third Floor, Garden Grove, California 92840, at 9:30 a.m. on January 14, 2020.
2. Counsel for Garden Grove shall immediately serve a copy of this order Dr. Vu and Dr. Patterson.

DATED: November 27, 2019

DocuSigned by:
Linda Johnson
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Linda Johnson
Administrative Law Judge
Office of Administrative Hearings