BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

MT. DIABLO UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2023010234

OAH CASE NUMBER 2022120477

ORDER DENYING MOTION TO COMPEL DISCOVERY AND GRANTING MOTION TO QUASH SUBPOENAS

MARCH 6, 2023

The parties' requests for due process hearing were consolidated during a prehearing conference on January 17, 2023. During that prehearing conference, the hearing on the consolidated cases was also continued to March 21, 22, and 23, 2023.

On February 1, 2023, and February 6, 2023, Mount Diablo received subpoenas duces tecum issued by Student. The dates of the three subpoenas ranged from January to February 2023. The subpoenas to Mount Diablo sought:

"all student records including work samples related to Goals, Speech and OT Session notes including all dates/therapist, all

> teachers notes related to Goals, all Aide informal notes, Complete DATA records, ALL VIDEOS, PHOTOS, behavioral, feeding notes, any other records that identify Student within 5 Business Days."

Mount Diablos also received two prior subpoenas duces tecum in January 2023, one for all videos and one for all records. Mount Diablo treated the subpoena for all records as a Student record request and responded to that on January 31, 2023. In the space requesting an explanation of the reasonable necessity of the documents, Student wrote: "ALL ABOVE REQUIRED." No further explanation was provided.

On February 22, 2023, Student filed a motion to compel the production of documents and other items sought in the subpoenas. On February 23, 2023, Mount Diablo filed an opposition to the motion to compel production of documents and things on the grounds that the IDEA does not provide for pre-hearing discovery. Mount Diablo also filed a motion to quash the subpoenas, on the grounds that the IDEA does not allow pre-hearing discovery, that Student failed to establish a need for the items subpoenaed, and that the subpoenas were overbroad. On February 24, 2023, Student opposed the motions to quash. While the motion is not entirely clear as to the bases asserted for producing the documents, it appears that Student is arguing the IEP requires that the documents requested be kept and Mount Diablo is obligated to produce them.

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, the hearing officer shall have the right to issue Subpoenas ordering witnesses to appear and give testimony and Subpoenas Duces Tecum ordering witnesses or opposing parties to produce documents upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) The reasonable necessity requirement is the same as 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 stating facts explaining why the requested documents or things are necessary for the party to prove their case; and how the requested documents or things, such as videos or photographs, are relevant to the issues being considered in the hearing. (*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.

LIMITED RIGHT TO PREHEARING DISCOVERY IN SPECIAL EDUCATION MATTERS

In general, the right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act is quite limited. (20 U.S.C. § 1400 et seq.) 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)). However, California law does not give the parties the right to broad prehearing discovery in special education proceedings.

The use of subpoenas is narrow in special education hearings. The California Education Code, section 56505, subdivision (a), gave the California Department of Education the authority to create regulations and also said, "the state hearing shall be conducted in accordance with regulations adopted by the board." Under that authority the Department of Education issued regulation section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum. However, these regulations limit the authority for the use of subpoenas special education 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 statues and regulations controlling these proceedings. 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).)

Student's subpoenas referenced a "pdf" that was not included with her subpoenas. This results in the subpoena being vague and incomplete. The subpoenas also direct Mount Diablo to produce the subpoenaed records to Student's Parent within five days of service, which was many days prior to the first day of hearing.

Mount Diablo included a sworn declaration in its opposition documents stating it produced Student's educational records within five days of the request being received. Student has failed to cite any legal authority allowing him to receive any other documents, videos or photographs requested prior to the hearing. Furthermore, the subpoenas fail to establish reasonable necessity for documents that are outside the range of educational documents maintained by the District.

REASONABLE NECESSITY FOR THE RECORDS

Student's declaration in support of the subpoena fails to comply with the requirement that it be accompanied by a declaration establishing reasonable necessity for production of the records. It fails to state a reasonable necessity for requesting the documents to be produced for the hearing. The subpoenas either expand on the range of documents being requested in the space designated for the explanation of necessity, or simply state "ALL ABOVE REQUIRED."

While section 1987.1 of the Code of Civil Procedure, gives the ALJ the option to modify a subpoena, quash it entirely, or direct compliance with it, here, the failure to

state the necessity of the documents leave no option, as no good cause for production of the records has been established. The subpoena cannot be modified. As the subpoena will be quashed on these grounds, Mount Diablos' other bases for quashing the subpoena will not be addressed in this order.

ORDER

1. Student's motion to compel the subpoenaed documents is Denied.
2. Mount Diablo's motions to quash Student's subpoenas duces tecum issued in this case through February of 2023 to Mount Diablo Unified School District are GRANTED. The subpoenas for records to Mount Diablo Unified School District issued in January and February 2023 are hereby quashed.

IT IS SO ORDERED.

Penelope S. Pahl

Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings