BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, SAN DIEGO SELPA, AND SAN DIEGO COUNTY OFFICE OF EDUCATION	OAH Case No. 2017020361 ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO QUASH SUBPOENA DUCES TECUM, LIMITING RESPONDENTS' SUBPOENA DUCES TECUM

On June 7, 2017, Parent on behalf of Student filed a Motion to Quash Subpoena Duces Tecum with the Office of Administrative Hearings.

On June 12, 2017, San Diego Unified School District, San Diego Special Education Local Plan Area, and San Diego County Office of Education (collectively "Respondents") filed a response in opposition.

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 at the hearing (20 U.S.C §1415(h)(2); Ed. Code, § 56506, subds. (e)(3).) There is, however, no right to pre-hearing discovery under the IDEA.

The provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) Section 3082, subsection (c)(2) of Title 5 of the California Code of Regulations permit the issuance of SDTs "upon a showing of reasonable necessity by a party." This standard of "reasonable necessity" for issuance of a subpoena in this proceeding is a stricter standard than that provided under the APA. This standard requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. The declaration in support of an SDT must set forth sufficient detail, specific to the legal or factual issues to be adjudicated, to show that the required documents are objectively required for the party present a case or defense.

California Code of Civil Procedure section 1985, subdivision (b), requires that an SDT shall be served with an affidavit demonstrating good cause in "full detail" how the material being sought is material to the issues involved. The requirement to demonstrate

good cause as to materiality is not met by the affiant's legal conclusion. The good cause requirement is met by a factual showing of why the requested documents 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) 107 Cal.App.2d 71, 77.)

While SDTs are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Parents have the right to request and receive the pupil's educational records. (Ed. Code, § 56504.) Additionally, a party to a due process proceeding is entitled to be served, five business days before the hearing, with copies of all the documents the other party or parties intend to use at the hearing, and a list of all witnesses intended to be called with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).) These required disclosures are the only mechanisms by which a party may obtain documentary information from another party prior to hearing.

Special education law does not specifically address motions to quash subpoenas or SDTs. In ruling on such motions, the Office of Administrative Hearings relies by analogy on the relevant portions of California 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. A party may make a motion to quash an SDT. (Code Civ. Proc., § 1987.1, subd. (b)(1).)

DISCUSSION

Student attached to her motion to quash, Respondents' Notice to Consumer and SDT, their Response to Request for Due Process dated February 17, 2017, and an email purportedly from Crimson Center for Speech and Language Pathology to Parent dated February 2, 2017. The Notice of Consumer is directed to Student, by and through her attorney of record. It was received by Student's attorney on June 6, 2017. The SDT seeks the records of Karyn Searcy, a speech and language pathologist identified by Student as a witness for hearing. The SDT seeks the following records from Ms. Searcy:

1) Any and all records relating to Student from September 2015 to the present.

2) Any and all documents and/or information relied upon in arriving at the opinions to which you intend to testify in this matter, including, but not limited to, all communications between you and any person that relates to the issues raised by Parent in this matter.

3) Any and all documents pertaining to rates charged by you for assessments and services provided to children or on your behalf by Crimson Center or other employers from September 2012 to the present.

4) Any and all documents reflecting any communication with Parent and/or her legal representatives or advocates or anyone acting on their behalf from September 2015 to the present.

The SDT specifies the production of all documents and electronically stored information, including, but not limited to, all student records, correspondence, emails, memoranda, assessments, completed test protocols, notes, faxes, recordings, messages, summaries, data compilations, analyses, charts, graphs, progress reports, settlement agreements, opinions, calendars, diaries, journals, bills, invoices, transcriptions, records, and/or memoranda of any telephone conversation, conference, voicemail, text message, meeting, or any other type of communication you prepared, created, reviewed, analyzed or otherwise relied upon in the formation of the opinions to which you intend to testify during the hearing. The SDT identifies June 14, 2017 as the deadline for compliance, with records to be delivered to the offices of Respondents' attorney. Respondents contend good cause exists for the production of these records because "production is critical for Respondents to be able to prepare to defend this case".

Student contends that the SDT is procedurally and substantively defective. Specifically, Student argues, among other things, that the SDT's request is overly broad and fails to establish the records sought to be reasonably necessary for Respondents to present a case at hearing.

Request numbers 1 and 2 of the SDT are overly broad and fail to meet the "reasonable necessity" standard for production of records. Ms. Searcy will be called by Student to testify. As indicated in Student's prehearing conference statement, Ms. Searcy is expected to testify about conducting speech and language (SPL) evaluations, independent educational evaluations, private or non-public practice, hourly rates, and reasonable cost criteria, correspondence(s) with public agencies regarding cost criteria, provider participation forms, and provider lists(s). The SDT seeks records that extend beyond Ms. Searcy's expected testimony. Ms. Searcy's testimony is limited to her general work as a speech and language pathologist and not specific to any service, if any, she may have provided to Student. Student maintains that she did not have any business transactions with or received any services from Ms. Searcy.

Assuming Ms. Searcy did provide services to Student, the declaration in support of the SDT fails to establish how those records have any bearing on the sole issue at hearing, which is whether Respondents denied Student a free appropriate public education by failing to determine and/or provide appropriate cost criteria for speech and language independent educational evaluation such that it denied Parent her choice of an assessor. Respondents fail to establish that production of Ms. Searcy's records which relate to Student or any records relating to Ms. Searcy's communications with Parent or Student's attorney is reasonably necessary to Respondents' defense on the sole issue.

Additionally, request number 4 of the SDT seeking documents and information which Ms. Searcy relied upon in arriving at the opinions in which she intends to offer at hearing is overly broad and constitutes pre-hearing discovery.

As to request number 3 of the SDT pertaining to the rates charged for assessments and services provided to children from September 2012 to the present, this request is overly broad. A SPL assessment was conducted on May 9, 2016. As Student's due process compliant points out, Parent did not request an SPL IEE until September 2016. At that time, Parent was informed that the allowable rates for a publicly funded SPL IEE was between $750 and $900. However, since Student seeks to have Ms. Searcy's testify as to her rates for SPL assessments, and to opine as to "reasonable cost criteria", Respondents' SDT will be limited to written letters, memorandums, correspondences, and emails from January 1, 2016 to the present relating to the rates charged by Ms. Searcy in conducting an SPL assessment.[1]

ORDER

1. Student' Motion to Quash Subpoena Duces Tecum requests numbers 1, 2 and 4 are granted.

2. Student's Motion to Quash Subpoena Duces Tecum request number 3 is partially granted. The SDT is limited to written letters, memorandums, correspondences, and emails from January 1, 2016 to the present relating to the rates charged by Ms. Searcy in conducting a speech and language assessment. These records will be provided to Respondents no later than 5:00 PM on June 16, 2017.

DATE: June 12, 2017

DocuSigned by:
Rommel P. Cruz
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ROMMEL P. CRUZ
Administrative Law Judge
Office of Administrative Hearings

[1] Ms. Searcy shall redact the name of any student for whom she has conducted an SPL assessment.