BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2024050221

# ORDER QUASHING STUDENT'S THIRD SET OF SUBPOENAS

JULY 18, 2024

On May 2, 2024, Student filed a request for due process naming Roseville Joint Union High School District, called Roseville. Also on May 2, 2024, the Office of Administrative Hearings, called OAH, issued a scheduling order. That scheduling order included a reminder to parties to subpoena witnesses for the due process hearing, as well as a link to information and subpoena forms on the OAH website.

On May 31, 2024, OAH granted Roseville's request for continuance in this matter. That order set the hearing dates for July 9, 10, and 11, 2024. That order also included the following order regarding the parties' need to subpoena witnesses:

The parties must immediately give potential witnesses the hearing dates, and must subpoena witnesses, if necessary, so they are available to testify. Failing to properly notify or subpoena a witness is not good cause to delay the hearing.

OAH convened a prehearing conference, called a PHC, on June 28, 2024. In the order following that PHC, the Administrative Law Judge, called an ALJ, who convened the PHC confirmed the July 9, 10, and 11, 2024 as the dates for hearing. The hearing would proceed day to day and could include additional days at the discretion of the ALJ conducting the hearing. That order included the following instruction regarding the parties' need to subpoena witnesses:

The parties shall immediately notify all potential witnesses of the hearing dates and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing. Instructions for issuing and responding to subpoenas and optional forms for subpoenas can be found on the website at https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Forms/Subpoenas?search=special%20education%20subpoena.

The order following the June 28, 2024, PHC also instructed the parties to develop a joint witness schedule, and instructed Student to have witnesses available at all times in the event there was not an agreement on a joint schedule.

On July 4, 2024, and July 8, 2024, Student issued his first two sets of subpoenas. Neither set of subpoenas was served properly. The undersigned quashed those subpoenas on the first day of the due process hearing, July 9, 2024, in a ruling from the bench. The undersigned issued a written order reflecting that ruling on July 12, 2024.

Part of the July 12, 2024 Order required Student to file with OAH any further subpoenas he may issue.

On July 12, 2024, following the issuance of the July 12, 2024 Order, Student filed five subpoenas. Each of these subpoenas were issued by Robert Burgermeister, another attorney with the Law Offices of Sheila C. Bayne, Esq., attorneys for Student. However, each of the five subpoenas was issued on July 4, 2024, and were included within the subpoenas the undersigned had previously quashed. Further, each subpoena contained additional defects detailed below.

The first subpoena was to Katie Carr, which instructed her to provide witness testimony on July 11, 2024, the day before the subpoena was filed with OAH, and a date which OAH did not convene hearing per the Parties' request. While the attached proof of service listed a mailing address for Carr, Burgermeister, who signed the proof of service, did not check the box to indicate the subpoena had been served via first class mail. Further, the subpoena was dated July 4, 2024, but Roseville had not provided Student's counsel with Carr's home address until July 8, 2024. Thus, is it apparent that the subpoena contains at least one significant inaccuracy. Overall, there is no clear indication from the subpoena how Carr was served, if at all.

The undersigned discussed this subpoena with the Parties on the morning of the next day of hearing July 16, 2024. Student's counsel, Ryan Song, represented that his office had attempted to serve the subpoena on Carr via personal delivery, but had not yet done so. This method of service was not reflected on the proof of service. When questioned about this, Song was unable to provide an explanation other than to suggest that the proof of service did not reflect what happened.

The second subpoena was to Avery Beebe, which instructed her to provide witness testimony on July 16, 2024. Once again, the attached proof of service listed a mailing address for Beebe, but Burgermeister did not check the box to indicate the subpoena had been served via first class mail. Further, the subpoena was dated July 4, 2024, but Roseville had not provided Student's counsel with Beebe's home address until July 8, 2024.

On July 16, 2024, Student's counsel represented to the undersigned that Beebe had been personally served on July 15, 2024, the day before she was ordered to testify through the subpoena. Roseville's counsel confirmed that Beebe had been in contact with Roseville staff to inquire about the subpoena. However, Beebe's subpoena did not reflect that it was sent via personal delivery, and Student provided neither OAH nor Roseville's counsel with an updated proof of service.

The third subpoena was to Jo Anne Cook, which instructed her to provide witness testimony on July 11, 2024, the day before the subpoena was filed with OAH, and a date which OAH did not convene hearing per the Parties' request. Once again, the attached proof of service listed a mailing address for Cook, but Burgermeister did not check the box to indicate the subpoena had been served via first class mail. Further, the subpoena was dated July 4, 2024, but Roseville had not provided Student's counsel with Cook's home address until July 8, 2024. This proof of service does indicate that Burgermeister served Cook via email at her Roseville email address on July 8, 2024.

As with the previous subpoenas described above, Song represented to the undersigned that Cook's July 4, 2024 subpoena had subsequently been reissued via personal delivery, despite the proof of service reflecting otherwise.

The fourth subpoena was to Jessica McCartney, which instructed her to provide witness testimony on July 12, 2024, the same day Student filed the subpoenas with OAH and a date that OAH had never scheduled for hearing. The attached proof of service listed a mailing address for McCartney, but Burgermeister did not check the box to indicate the subpoena had been served via first class mail. Further, the subpoena was dated July 4, 2024, but Roseville had not provided Student's counsel with McCartney's home address until July 8, 2024. This proof of service does indicate that Burgermeister served McCartney via email at her Roseville email address on July 8, 2024.

Once again, Song represented to the undersigned that McCartney's July 4, 2024 subpoena had subsequently been reissued via personal delivery, despite the proof of service reflecting otherwise.

The fifth subpoena was to Anna Marie Damiano Clark, which instructed her to provide witness testimony on July 12, 2024, the same day Student filed the subpoenas with OAH and a date that OAH had never scheduled for hearing. Again, the attached proof of service listed a mailing address for Clark, but Burgermeister did not check the box to indicate the subpoena had been served via first class mail. Further, the subpoena was dated July 4, 2024, but Roseville had not provided Student's counsel with McCartney's home address until July 8, 2024.

Once again, Song represented to the undersigned that McCartney's subpoena had subsequently been reissued via personal delivery, despite the proof of service reflecting otherwise. Based on the proof of service, it is not clear that Clark was ever served with this subpoena.

These five subpoenas described above, which were filed with OAH on July 12, 2024 are called the July 12th subpoenas.

At the start of hearing on July 16, 2024, Roseville moved to quash the July 12th subpoenas on the grounds that they were not properly served and that the subpoenas had previously been quashed. Student opposed the motion, arguing that the third set of subpoenas had been properly served through personal delivery.

The undersigned heard argument from both parties and quashed the July 12th subpoenas. The undersigned issues this written order reflecting that order from the bench.

## 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. A court may make such orders on its own motion. (Code Civ. Proc. § 1987.1, subd. (a).)

## SUBPOENA FOR ATTENDANCE OF WITNESSES

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. Like all other documents relevant to a due process matter, subpoenas must be served on all parties to the matter.

In the absence of regulations pertaining to the details of subpoena processes in administrative hearings, the Office of Administrative Hearings requires parties to comply with procedures described in 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 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* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.) A court may quash a subpoena for attendance of a witness. (*People v. Rhone* (1968) 267 Cal.App.2d 652, 657-658.)

## STUDENT FAILED TO PROPERLY SERVE THE JULY 12TH SUBPOENAS

Student's counsel failed to properly serve the July 12th subpoenas. The proofs of service included with the July 12th subpoenas reflected either no clear method of service, or that the subpoenas were served via email. Student did not prove any of the witnesses agreed to be served via email.

Student's belated explanation that the July 12th subpoenas were served via personal delivery is unpersuasive. Song did not have personal knowledge of how or even when the July 12th subpoenas were sent and by whom, despite the undersigned asking for this information multiple times. Student's counsel cannot belatedly correct

errors in proof of service after the subpoenas have been issued. As such, the July 12th subpoenas were not served properly and are quashed.

## THE JULY 12TH SUBPOENAS CONTAIN SIGNIFICANT ERRORS WHICH RENDER THEM INVALID

The July 12th subpoenas are replete with multiple errors, aside from the defects with the proofs of service, such that they are not valid. For example, all the July 12th subpoenas indicate that Burgermeister issued them on July 4, 2024. Additionally, four of the subpoenas called for witnesses to testify prior to the time those subpoenas were filed with OAH and served on Roseville, and on days that OAH did not convene the due process hearing. As such, compliance with 4 of the July 12th subpoenas would have been impossible. The last subpoena called for Beebe to appear on July 16, 2024, at 9:30 AM. Song represented that Beebe had been served with her subpoena on July 15, 2024. Therefore, she had less than 24 hours' notice to appear as a witness. As discussed below, the timing of Student's July 12th subpoenas also renders them invalid.

The undersigned previously quashed all of Student's subpoenas issued on July 4, 2024. Based on the information Song provided at hearing on July 16, 2024, it appears as though Student's counsel did not issue new subpoenas on July 12, 2024, but merely served the July 4, 2024 subpoenas on July 12, 2024 through another means. In other words, Student served five previously quashed subpoenas on July 12, 2024, even though Student knew those subpoenas had previously been quashed. Overall, Student's counsel failed to properly draft the July 12th subpoenas and the errors contained within them rendered them invalid and are quashed.

## THE TIMING OF STUDENT'S SUBPOENAS RENDERED THEM INVALID

As reflected in the July 12, 2024 Order Quashing Student's Subpoenas, the undersigned is again concerned with the timing of Student's July 12th subpoenas. Parties must serve a person with a subpoena, "as to allow the witness a reasonable time for preparation and travel to the place of attendance." (Code of Civ. Proc. § 1987, subd. (a).) While there is no specific measure for reasonability under subdivision a, Section 1987 of the Code of Civil Procedure provides specific timelines for serving other types of subpoenas. For example, if a party of record is to testify, the subpoena must be served at least 10 days before the time required for attendance. (Code of Civ. Proc. § 1987, subd. (b).) That time is extended to 20 days if the witness is required to bring documents, electronically stored information, or other things under their possession or control. (Code of Civ. Proc. § 1987, subd. (c).) Courts may quash a subpoena to "protect [a subpoenaed] person from unreasonable or oppressive demands." (Code of Civ. Proc., § 1987.1, subd. (a).)

Here, Student has provided the subpoenaed witnesses with either an impossible mandate to appear prior to receiving the subpoenas or being forced to comply with approximately 24 hours' notice. Neither of these situations is reasonable. As discussed in the undersigned's July 12, 2024 Order, Student's counsel have not acted diligently in timely subpoenaing possible witnesses despite multiple orders from OAH instructing them to do so. Student's counsel cannot subject witnesses to "unreasonable or oppressive demands" because they failed to take appropriate steps to subpoena these witnesses when necessary. The untimeliness of the July 12th subpoenas is yet another reason why they are not valid and are quashed.

## ORDER

1. Student's July 12th subpoenas are quashed in full.
2. Avery Beebe, Jo Anne Cook, Jessica McCartney, Anna Marie Damiano Clark, and Katie Carr are not required to comply with the July 12th subpoenas.
3. Student shall immediately provide Avery Beebe, Jo Anne Cook, Jessica McCartney, Anna Marie Damiano Clark, and Katie Carr with a copy of this Order.

IT IS SO ORDERED.

*Ashok Pathi*

Ashok Pathi
Administrative Law Judge
Office of Administrative Hearings