BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2024040358

ORDER GRANTING IN PART AND DENYING IN PART FREMONT'S MOTION TO QUASH SUBPOENA TO BASHIR GOUHARY

MAY 24, 2024

On April 9, 2024, Parents on behalf of Student, filed a request for due process naming Fremont Unified School District. On April 16, 2024, the Office of Administrative Hearings, called OAH, granted a continuance in this matter scheduling the case for hearing on May 29, 2024, through May 30, 2024.

On April 23, 2024, Parents issued a subpoena duces tecum to Bashir Gouhary, seeking:

1. Modified Curriculum for all academic subjects (English language arts, English Language Development, Math, Science, Science lab, History-Social Science, typing/writing) with aligned state standards and all other instructional material that were used or planned to be used to teach [Student] from 10/12/2023 to the end of 23-24 school year.
2. Modified Curriculum of weekly overviews with information on aligned state standards and grade levels.
3. All of [Student]'s completed worksheets/work samples and data collection that Mr. Bashir Gouhary kept at school.
4. Blank copies of all reading comprehension worksheets given to [Student] to work on at school.
5. Formal Incident Report of [Student]'s injury at school on 1/19/2024
6. Formal Incident Report of [Student]'s injury at school on 2/29/2024
7. The number of human biting incidents reported between 8/16/23 and 4/21/24 in Mr. Bashir II SDC classroom in MSJE
8. The number of human biting incidents (causing broken skin and blood) reported between 8/16/23 and 4/21/24 in Mr. Bashir II SDC classroom in MSJE

Copies of the subpoena(s) were sent to Fremont with the notice to consumer. The subpoena to Gouhary sought modified curriculum and other instructional material used to teach Student, along with general education curriculum, Student's completed work, blank copies of all reading comprehension worksheets given to Student, formal Incident Reports for Student's injury at school on January 19, 2024, and February 29, 2024, and the number of human biting incidents in Gouhary's classroom between August 16, 2023, and April 24, 2024. The records were to be produced through upload to the Case Center platform on May 29, 2024, the first day of hearing.

On May 16, 2024, Fremont filed a motion to quash the subpoenas on the grounds that Parents failed to establish reasonable necessity for the records, that the requests were overbroad, unduly burdensome and did not seek information relevant to the instant case. On May 20, 2024, Parents opposed the motion arguing that the subpoenas sought necessary and relevant information.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act, also called IDEA, 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.

REASONABLE NECESSITY FOR THE RECORDS

Fremont 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.)

Parents' declaration in support of the subpoena states that the curriculum and instructional materials, along with Student's work samples and blank assignments, specific incident reports and totals of human biting incidents in Gouhary's classroom, are necessary to determine whether the alternative curriculum utilized for Student denied Student a free appropriate public education, called a FAPE, because Fremont unilaterally modified the special day class curriculum in all classes taught by Gouhary to Student without Parents' consent, and whether Student is safe in the Gouhary

classroom. Fremont contends that the records sought by Parents are a fishing expedition and not necessary for Parents to be able to present a case at hearing.

Parents have alleged that Student was denied a FAPE as a result of being given a modified curriculum in all subjects taught by Gouhary, instead of the general education curriculum, without their consent. Parents' declaration asserts that some of the documents subpoenaed are material and relevant. Specifically, Parents argue that some records are necessary to prove Fremont denied Student a FAPE when it unilaterally utilized modified curriculum. Parents also argue that Student was not safe in the Gouhary classroom and seek specific and general records regarding human biting incidents.

The subpoena that was issued complied with the requirement that it be accompanied by a declaration establishing reasonable necessity for production of the records.

SCOPE OF THE SUBPOENA

Fremont contends that the subpoena is overly broad and unduly burdensome as the subpoena requests documents that are either not relevant for hearing or place unreasonable demands on the producing party. The general education and modified curriculum frameworks in the subjects taught to Student by Gouhary, along with Student's completed worksheets and work samples, are necessary and relevant and must be produced, along with completed worksheets and work samples, and formal Incident Reports for Student's injuries at school on January 19, 2024, and February 29, 2024. However, Student failed to provide sufficient basis for needing all other instructional materials, rather than just the identified modified and general education curriculum frameworks used to implement the State standards in the subjects Gouhary

taught Student. Likewise, Student failed to provide a sufficient basis for blank copies of reading comprehension worksheets. Finally, Student failed to establish a reasonable necessity for general information regarding biting incidents in Gouhary's classroom that did not involve Student between August 16, 2023, and April 21, 2024.

ORDER

1. Fremont's motion to quash Parents' subpoena is granted in part and the subpoena is hereby modified. Gouhary shall produce responsive documents in Gouhary's possession identified as the modified and general education curriculum frameworks that Gouhary used to implement the State standards for the subjects taught to Student in the fifth-grade special day class for the 2023-2024 school year, Student's completed worksheets, work samples, and Student's injury Incident Reports for January 19, 2024, and February 29, 2024.
2. Student's request for records relating to other instructional materials aligned with State standards that were used or intended to be used with Student in Gouhary's special day class is quashed, as are Student's requests for blank reading comprehension worksheets, and general information regarding biting incidents not pertaining to Student in Gouhary's classroom between August 16, 2023, and April 21, 2024.
3. Gouhary shall upload responsive records to the Case Center platform through the link provided by OAH, on Wednesday, May 29, 2024, by 9:30 a.m.

4. Counsel for Fremont shall immediately serve a copy of this order on Gouhary.

IT IS SO ORDERED.

Ted Mann

Ted Mann

Administrative Law Judge

Office of Administrative Hearings