BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

MOUNT DIABLO UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2024020456

OAH CASE NUMBER 2024010744

ORDER GRANTING MOTION TO QUASH IN PART AND MODIFYING SUBPOENAS DUCES TECUM

MARCH 22, 2024

On January 24, 2024, Mount Diablo Unified School District filed with the Office of Administrative Hearings, called OAH, a request for due process hearing, called a complaint naming Student.

On February 12, 2024, Student filed a complaint naming Mount Diablo. On February 15, 2024, OAH issued an order granting Student's motion to consolidate the two matters, setting the consolidated matters for hearing on April 3 and 4, 2024, the dates set in Student's case.

On March 13, 2024, Mount Diablo issued a subpoena duces tecum and served Parent with a notice to consumer seeking records from Anthony Verzi, Dr. Olga Kelly, Jennifer Jourdain, University of California San Francisco Benioff Children's Hospital, or Benioff, and Nan Arkwright. Mount Diablo bases the need for subpoenaed documents on, in party, the following information. Arkwright holds a masters of occupational therapy, is Student's service provider, and a member of Student's IEP team. Verzi, a board certified behavior analyst, has documents pertaining to interactions with school personnel, feeding, behavior plans, goals, assessments and reports, is Student's provider and an IEP team member. Dr. Kelly and Benioff have information pertaining to Student's feeding therapy, specific foods and allergies, which Parent has alleged are directly related to medical diagnoses and physician orders. Jourdain holds a certificate of clinical competence in speech language pathology and is a member of Student's IEP team. Jourdain has information regarding Student's food allergies, school observations, feeding therapy, assessment and evaluations.

On March 14, 2024, Student filed a motion to quash the subpoenas duces tecum on the grounds that Mount Diablo is not entitled to communicate with Student's medical doctors and private providers without Parent's consent. Student further argued that OAH cannot order medical doctors and private providers to produce their records regarding Student.

On March 19, 2024, Mount Diablo opposed the motion arguing that the records are necessary to put on a defense to the issues alleged in Student's complaint. Specifically, Student alleges Mount Diablo violated procedural and substantive due process by ignoring medical and private reports, recommendations, evaluations, and medical data pertaining to Student's feeding issues and needs.

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.)

On January 24, 2024, Mount Diablo filed a complaint to obtain an order from OAH that its 2023 feeding evaluation report was appropriate, such that San Lorenzo need not fund an independent feeding therapy evaluation at public expense.

On February 12, 2024, Student filed a complaint alleging several procedural and substantive FAPE violations related to Student diagnosis of avoidant restrictive food intake disorder, or ARFID. Student alleges ARFID is a serious, chronic, and sometimes life-threatening food disorder and that, without appropriate interventions, can cause extensive learning and health problems. Student also alleges that multiple service methods and accommodations are necessary at every meal and that knowledgeable and trained providers work with Student to increase his nutritional intake, broaden his food choices, and monitor his functional eating skills.

Student's complaint challenges Mount Diablo's decision-making process, including offers of FAPE, regarding supports, services, accommodations, and goals addressing Student's feeding issues. Student also challenges Mount Diablo's failure to revise and implement his IEP based on an August 11, 2023, feeding evaluation, medical recommendations, and private feeding therapist recommendations including specially designed instruction and related services. Student alleges that Mount Diablo ignored parent provided reports, evaluations, and medical data and that it did not consider how Student's food disorder affects his learning, endurance, and behavior throughout the school day.

Here, the subpoenas duces tecum were served with notices to consumer and seek production of documents at the time of hearing. The requests are not overly broad in scope of time, as each is limited to January 1, 2023, through March 12, 2024, a time period covered by the allegations in Student's complaint.

Each subpoena is accompanied by a declaration stating reasonable necessity for the documents requested. There is no dispute that documents of Student's private providers and medical doctors exist outside the control of Mount Diablo, such that it is unable to produce the documents without the need for a subpoena.

However, the requests are somewhat overly broad in that not each request seeks documents solely related to Student's feeding disorder, feeding issues, and feeding related needs. With this modification, the requests for documents from each provider align with allegations in Student's complaint, as outlined above. Accordingly, an order modifying the subpoenas is necessary.

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.

The subpoenas duces tecum served on Jourdain, Arkwright, Verzi, Dr. Kelly, and Benioff shall be modified to include documents responsive to each request, which pertain to Student's feeding disorder, feeding issues, and feeding related needs.

Student also argues, in his opposition, that OAH cannot order medical providers to submit medical records and that Mount Diablo has no entitlement to communicate with Student's medical doctors or private providers without Parent's consent. Student cites a prior OAH Decision involving the same parties in support of these arguments. In the prior consolidated matter, OAH Case numbers 2023010234 and 2022120477, OAH determined Mount Diablo's issue of whether it could speak to Student's medical doctors and private providers without Parent's consent and whether it could conduct a proposed feeding assessment of Student.

OAH determined that Mount Diablo could proceed with its proposed feeding assessment. OAH then determined that OAH did not have subject matter jurisdiction to

determine or enforce Student's individual rights under HIPAA or FERPA. OAH also determined that it did not have personal jurisdiction over Student's medical providers and, on that basis, could not order the providers to give private medical information to Mount Diablo over Parent's objection.

The Decision in the prior consolidated matters between the same parties does not govern of the instant order. Although OAH decisions may be persuasive, they are not binding authority. (Cal. Code Regs., tit. 5, § 3085.) Moreover, the Decision did not make any determinations regarding issuance of subpoenas, like those at issue here. Parties do have a right to subpoena documents from private and medical providers to a due process hearing. That specific issue was not before OAH and not decided in the consolidated matters to which Student cites.

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 his medical records. This pertains to records from Dr. Kelly and Benoit, not to the universe of Student's private providers. Mount Diablo argues that Student has placed his medical records at issue, and the undersigned

ALJ finds this to be true, with respect to medical records relating to Student's feeding disorder, feeding issues, and feeding related needs. Such modification of the subpoena's duces tecum here balances the protection of Student's right to privacy in medical records with Mount Diablo's need for such records to put on a defense.

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.)

Accordingly, OAH orders as follows:

1. Student's motion to quash Mount Diablo's subpoenas duces tecum to Jourdain, Arkwright, Verzi, Dr. Kelly, and Benoit is granted in part and the subpoenas are hereby modified. The records shall be produced by each of the subpoenaed persons or entities to the Administrative Law Judge on the first day of the hearing in this matter. An invitation for uploading the subpoenaed documents into CaseLines will be sent by OAH to each subpoenaed person or entity for the purpose of compliance with the subpoenas. The sole limitation of the subpoenas issued to each person or entity shall be that documents must be produced in conformance with each subpoenaed limited to Student's feeding disorder, feeding issues, and feeding related needs.
2. If the hearing date is continued, the date of production shall be the first day of the continued hearing.

3. Nothing in this Order mandates admissibility of such subpoenaed documents. Admissibility of evidence shall be by order of the ALJ presiding over the due process hearing.
2. Counsel for Mount Diablo shall immediately serve a copy of this order on each person and entity subpoenaed.

IT IS SO ORDERED.

Cole Dalton

Cole Dalton
Administrative Law Judge
Office of Administrative Hearings