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, SAN DIEGO COUNTY OFFICE OF EDUCATION.	OAH Case No. 2017020361 ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO QUASH SUBPOENAS AND SUBOENAS DUCES TECUM, LIMITING STUDENT'S SUBPOENAS DUCES TECUM

On June 12, 2017, San Diego Unified School District, San Diego Unified School District Special Education Local Plan Area, and San Diego County Office of Education (collectively "Respondents") filed a motion to quash, or in the alternative, to limit student's subpoenas and subpoenas duces tecum of Carolyn Nunes, Jennifer Parks-Orozco, and Sheila Weinberg.

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 permits 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

Respondents attached to their motion to quash, Student's due process complaint dated February 7, 2017, email exchanges between Student's attorney and Respondent's attorney dated May 25, 2017, a letter dated June 2, 2017 written by Respondent's attorney to Student's attorney, and Student's subpoenas and SDTs of Carolyn Nunes, Jennifer Parks Orozco, and Sheila Weinberg.

The June 7, 2017 subpoenas and SDTs of Ms. Nunes, Ms. Parks-Orozco, and Ms. Weinberg seek their attendance and the production of the following records for the due process hearing date June 13, 2017:

1. All electronic correspondence and or writings, relating to SPL IEE and/or SPL educationally related assessments (collectively "Assessments"), on or after January 1, 2015, relating to the development of the IEE list, between Relevant Parties[1].

[1] The SDTs identifies "Relevant Parties" as Sheila Weinberg, Carolyn Nunes, Soniz Picos, Kathy Thomas, Jennifer Parks-Orozco, the San Diego County Office of Education, related SELPAs (East County, North Coastal, North Inland, Poway, San Diego Unified, and South County), related Districts, and any and all Speech and Language Pathologists (SPL) that were contacted to be on the Independent Educational Evaluation (IEE) list, or contacted the County, SELPAs, or a District within the SELPAs.

2. Any writing, including but not limited to lists, compilations, memos, including drafts, relating to Assessments, complied or otherwise, for the purpose of developing the IEE cost criteria for SPL since January 1, 2014.

Student's declarations in support of the SDTs contend that the requested documents "will help to clarify and establish how the cost criteria for SPL IEEs were developed and the providers that were involved, which are at issue in Student's case, and to the extent relating to the provider list, in Respondent's answer."

Respondents contend, among other things, that the SDTs are overly broad, unintelligible, ambiguous, and vague. Additionally, Respondents argue that the declarations in support of the SDT fail to establish that the records sought are reasonably necessary for Student to present her case.

The sole issue at hearing is whether Respondents denied Student a free appropriate public education by failing to determine and/or provide appropriate cost criteria for speech and language (SPL) independent educational evaluation such that it denied Parent her choice of an assessor. The SDT fails to establish how the first request with respect to electronic correspondences or writings relating to the development of the IEE list to be reasonably necessary to Student's case in litigating the appropriateness of Respondents' cost criteria for SPL IEEs. Accordingly, the SDTs' first request is quashed.

The second request for records relating to the development of Respondents' IEE cost criteria is reasonably necessary to Student's case. Here, Student seeks to address the appropriateness of Respondents' determination of the allowable charges for SPL IEEs, contending that the allowable charges were improperly determined such that it denied Student a free appropriate public education. To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989). If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific tests. (*Id.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*; *A.A. v Goleta Union School Dist.* (C.D. Cal. Feb 22, 2017, Case No. CV 15-06009 DDP (MRWx)) 2017 WL 700082.)

However, the SDTs seek records dating back to January 1, 2014. This is overly broad and fails to establish how records more than two and half years prior to Student's efforts to obtain a SPL IEE is reasonably necessary to her case. A SPL assessment was conducted on May 9, 2016. As Student's due process compliant points out, Parent did not request a 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. Accordingly, Student's SDT with respect to the second request will be limited to written letters, memorandums, correspondences, and emails from January 1, 2016 to the present relating only to SPL IEE

cost criteria development. Further, it is unreasonable to serve a SDT on June 7, 2017, and expected Respondents to produce the requested records less than a week later, especially since the hearing dates in this matter were set on March 16, 2017.

ORDER

1. Respondents' Motion to Quash Subpoenas Duces Tecum as to request number 1 is granted.

2. Respondents' Motion to Quash Subpoenas Duces Tecum request number 2 is partially granted. The SDT is limited to written letters, memorandums, correspondences, and emails relating to speech and language IEE cost criteria development from January 1, 2016. These records will be provided to Student no later than 5:00 PM on June 16, 2017.

3. All other requests in Respondents' Motion to Quash are denied.

DATE: June 12, 2017

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