BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

UPLAND UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019101198

ORDER GRANTING MOTION TO QUASH SUBPOENA IN PART, AND MODIFYING DATE OF PRODUCTION OF SUBPOENAED DOCUMENTS

On October 30, 2019, Student filed with the Office of Administrative Hearings, referred to as OAH, a request for due process naming Upland Unified School District, referred to as Upland. On December 6, 2019, Upland issued a subpoena duces tecum, using OAH's form for such subpoenas, to the custodian of records of Western Christian Schools.

Upland's subpoena requested the appearance of Western Christian Schools' custodian of records with specified records regarding Student at the hearing then set for January 2, 2020. The subpoena offered Western Christian Schools the alternative of mailing the requested documents to OAH prior to the hearing, with a declaration from Western Christian Schools authenticating the documents. Upland served a notice to

consumer on Student advising Student of the subpoena, together with a copy of the subpoena.

Upland's subpoena to Western Christian Schools requested the following categories of documents from the period July 1, 2016 to January 2, 2020, that referred to Student or Parents:

- Assessment and evaluation reports, including draft reports
- Special education documents
- Report cards
- Progress reports
- Testing data
- Assessment and test protocols
- Communication logs
- Correspondence between staff at Western Christian Schools and Parents
- Contracts for service
- Enrollment records
- Registration documents
- Discipline records
- Attendance records
- Speech and language and occupational therapy service logs
- Billing records

Upland's subpoena also requested all correspondence between Western Christian Schools and Student's attorneys of record.

Upland's counsel declared the requested documents were material to Upland's proper presentation of its case, to allow Upland to cross-examine anticipated Student witnesses from Western Christian Schools, and for Upland to address Student's

proposed resolutions of Student's case, including Student's request that Upland provide Student compensatory education.

On December 19, 2019, OAH granted the parties' joint request to continue the hearing to March 24 through 26, 2020. Also on December 19, 2019, Student filed with OAH a motion to quash Upland's subpoena duces tecum directed to Western Christian Schools. Student moved to quash Upland's subpoena on grounds that:

- The subpoena called for the production of records prior to the first day of hearing.
- The subpoena was moot, because Student would produce the requested documents in Student's evidence binder, due five business days prior to the commencement of the hearing.
- The subpoena failed to make a showing of reasonable necessity for the requested documents.
- Upland failed to make an inquiry for the documents before serving the subpoena duces tecum.

Upland did not file an opposition to Student's motion to quash.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act, referred to as the 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, 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.

NO RIGHT TO PREHEARING DISCOVERY

In general, there is no right to prehearing discovery in due process proceedings under the IDEA. (20 U.S.C. § 1400 et seq.) Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "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).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings. (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum. These regulations specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings. (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].)

While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District,* (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing five business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

Upland's subpoena directed Western Christian Schools to produce the subpoenaed records at the commencement of hearing on January 2, 2020. When issued on December 6, 20219, Upland's subpoena did not seek prehearing discovery. However,

the hearing was subsequently continued to begin on March 24, 2020. Section 1987.1 of the Code of Civil Procedure allows a court to modify a subpoena. Therefore, the subpoena is modified to change the date of production to March 24, 2020. The documents shall be produced at the hearing location to the Administrative Law Judge, referred to as an ALJ, hearing this matter. Alternatively, Western Christian Schools may mail the requested documents to OAH prior to the hearing, with a declaration authenticating the documents, in the manner described in the subpoena duces tecum.

SUBPOENA NOT MOOT BECAUSE OF STUDENT'S INTENDED PRODUCTION OF THE REQUESTED DOCUMENTS

Upland's subpoena duces tecum was not rendered moot by Student's representation in the motion to quash that Student would produce the requested documents in Student's exhibit binder due five business days prior to the hearing. Student had not produced the requested documents at the time of Student's motion. In the event Student failed to produce the requested documents five business days before the hearing, Upland would not have adequate time to obtain the requested documents from Western Christian Schools. California Code of Civil Procedure section 1985.3, subdivision (d), states that service of a subpoena duces tecum must be made "in sufficient time to allow the witness reasonable time to locate and produce the records or copies thereof." Code of Civil Procedure section 2020.410, subdivision (c) defines sufficient time as "no earlier than 20 days of the issuance, or 15 days after the service" of the subpoena, whichever is later.

REASONABLE NECESSITY FOR THE RECORDS

Student 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.)

Upland's declaration in support of its subpoena duces tecum stated Upland required the requested documents from Western Christian Schools to cross-examine anticipated Student witnesses from Western Christian Schools, and for Upland to address Student's proposed resolutions of Student's case, including Student's request that Upland provide Student compensatory education. In light of Student's statement that Student would provide the requested documents in Student's exhibit binder due five business days prior to the hearing, Upland has made an adequate factual showing of why the requested documents or things are material and relevant to the litigated issues.

FAILURE TO MAKE INQUIRY PRIOR TO ISSUING SUBPOENA DUCES TECUM

Student did not indicate to whom Upland should have directed an inquiry for documents prior to issuing its subpoena duces tecum to third-party Western Christian Schools. Student also presented no legal authority requiring that Upland make any such inquiry to Student, Western Christian Schools, or any other person or entity. Student failed to establish that Upland's subpoena duces tecum was defective on this ground.

ORDER

1. Student's motion to quash Upland's subpoena duces tecum is granted in part. The subpoena is modified to change the date and location of production of the documents to the hearing location on the first day of hearing, presently March 24, 2019, at 9:30 AM. The documents shall be produced to the Administrative Law Judge hearing this matter. If the

hearing date is further continued, the date of production shall be the first day of the continued hearing. Alternatively, Western Christian Schools may mail the requested documents to OAH prior to the hearing, with a declaration authenticating the documents, in the manner described in the subpoena duces tecum.

2. Any documents regarding Student received by Upland from Western Christian Schools prior to the first day of hearing, shall remain sealed in the delivery envelope and brought to the first day of hearing, to be unsealed by the ALJ hearing this matter.

3. Student's motion is otherwise denied.

4. Counsel for Upland shall immediately serve a copy of this order on Western Christian Schools.

DATED: January 2, 2020

DocuSigned by:

Robert G. Martin
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Administrative Law Judge
Office of Administrative Hearings