BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022050501

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

AUGUST 10, 2022

On May 13, 2022, Student filed a request for due process naming Long Beach Unified School District as respondent. On June 20, 2022, an order granting a continuance was issued scheduling the hearing for August 9 through 11, 2022. During the August 1, 2022, prehearing conference, Parties jointly requested and were granted a continuance of the prehearing conference and due process hearing. The prehearing conference is now set for August 15, 2022, and the due process hearing is set for August 23 through 25, 2022.

On July 14, 2022, a notice to the consumer was served on Student's attorney and the following individuals and entities: Behavior and Education, Inc, Dr. Molly K. Rearick,

Dr. Farhad Yaghoubi, Dr. Agnesa Papazyan, Gwendolyn Olicker, Susan Holler, Sophia Liu, and Lindamood Bell Learning Process. On July 20, 2022, Long Beach also served Student's attorney and the above-named entities copies of the subpoenas duces tucum and the notices to consumer by mail.

On July 27, 2022, Student filed a request to quash each of the subpoenas duces tecum. Student generally asserts they should be quashed because Long Beach did not utilize alternate means to obtain the information, they are overbroad and burdensome, irrelevant, and violate Student's privacy rights. On August 1, 2022, Long Beach opposed the motion to quash each subpoena.

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.

NO RIGHT TO PREHEARING DISCOVERY

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act. (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 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.

STUDENT'S RIGHT TO PRIVACY

California law recognizes a constitutional right to privacy in an individual's medical history. [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.) (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.)

BEHAVIOR AND EDUCATION, INC

The SDT seeks documents from Behavior and Education, Inc. from January 1, 2020 to August 9, 2022. The SDT includes 12 categories. The SDT requests documents identifying Student or Parent and generally requests assessments and reports; special education documents; report cards, progress reports, or testing data; test protocols; communication and service logs; observation notes; correspondence and letters among specified BEI staff; service contracts and enrollment records; attendance records; billing records; and referrals. The SDT includes a statement of necessity. Long Beach asserts that BEI assessed Student, provided in-home ABA services, and that BEI staff participated in IEP team meetings for Student. The SDT is limited to documents created from January 1, 2020, through August 9, 2022, which is generally the time period at issue in this case.

Student did not establish this SDT should be quashed in total. Student argued Long Beach could access the documents via alternate means; however, no legal authority was provided establishing, if true, the SDT must be quashed on this basis. Further, the documents are limited to the relevant time period. Student also argues that it violates Student's right to privacy; however, provided no argument as to why these records violate Student's right to privacy. Behavior and Education, Inc., does not provide medical services to Student. Student made no argument that Behavior and Education Inc., provided medical services to Student or how release of these records would violate Student's right to privacy.

Student also argues that the SDT is overbroad asserting it was a "tactic to burden Student's witnesses, and thereby to intimidate or harass Parent as the hearing approaches." However, Student's complaint challenges Long Beach's IEP offers, including behavior and social skills services, and seeks a prospective non-public school

placement. The assessments and services Student received during the time at issue in the hearing is relevant to the case. With the limited exception below, the documents sought are relevant and not overbroad. However, the SDT also seeks service contracts and billing records. There is no reimbursement claim for BEI's services. Long Beach did not dispute this contention in its opposition to the motion to quash. Therefore, the SDT is quashed as to Numbers 9 and 11 which seek contracts and billing records. The remainder of the SDT is not quashed.

DR. MOLLY K. REARICK

The SDT seeks documents from Dr. Molly K. Rearick. from September 1, 2020 to August 9, 2022. The SDT includes 10 categories. The SDT requests documents identifying Student or Parent and generally requests assessments and reports; special education documents; report cards, progress reports, or testing data; test protocols; communication and service logs; observation notes; correspondence and letters; service contracts and enrollment records; attendance records; billing records; and referrals.

The SDT includes a statement of necessity. Long Beach asserts Rearick was selected by Parent to conduct a transition independent educational evaluation, known as IEE, of Student. Student alleges Long Beach impeded parental participation by failing to fund Parent's request for IEE or file for due process. The SDT is limited to a period of September 1, 2020 to August 9, 2022 and is generally the time period in this case. Student did not establish this SDT should be quashed in total.

As above, Student failed to provide any legal authority that Long Beach was required to, or factually that it could, access the documents via alternative methods. The time is limited to the relevant time period. Student provided no argument that this SDT violates Student's right to privacy. Student did not demonstrate any records

pertaining to this SDT would violate Student's medical privacy. Accordingly, with the exception below, the records are relevant to the issues and the request not overbroad. However, Student's argument that Long Beach requested billing records and contracts has merit. Long Beach is obligated to directly fund Rearick's assessment and Student is not seeking reimbursement. As above, Long Beach also did not dispute this point. As a result, the SDT is quashed as to Number 8 to 10.

DR. FARHAD K. YAGHOUBI

The SDT seeks documents from Dr. Farhad K. Yaghoubi. The SDT includes 11 categories. The SDT requests documents identifying Student or Parent and generally requests assessments and reports; special education documents; report cards, progress reports, or testing data; test protocols; communication and service logs; observation notes; correspondence and letters among specified BEI staff; service contracts and enrollment records; attendance records; billing records; and referrals.

The SDT includes a statement of necessity. Student placed at issue how her mental health impacts her in an educational setting. Dr. Yagoubi is Student's medical doctor. Student has not placed her entire medical history at issue. Long Beach argues the requested records are what Dr. Yagoubi used to form his opinions and recommendations. The SDT is limited to documents created from February 1, 2019 to August 9, 2022 the general time period at issue.

As discussed above, Student failed to provide any legal authority for procuring the documents in an alternative method; did not provide a declaration from the party subpoenaed stating they would be unable to produce the records due to the scope of the request; and did not raise a specific relevancy augment to this SDT.

However, there is a medical privacy argument with this SDT. Student raises the concern Dr. Yagoubi may disclose private medical information not relevant to this case as a result of responding to this SDT. Student provides no specific examples of which documents run the risk of exposing irrelevant medical information.

Long Beach argues Student has placed at issue how her mental health impacts her in an educational setting. Long Beach further argues the requested records are what Dr. Yaghoubi used to form his opinions and recommendations. Student has placed at issue her mental health and is seeking mental health and counseling services as remedies.

Student fails to provide a declaration from Dr. Yagoubi demonstrating how he would be unable to comply with the scope of the SDT without inadvertently disclosing Student's private medical records. Thus, Student's motion to quash Dr. Yagoubi's SDT is denied. Nothing in this order prevents the parties from seeking in in camera review of Student's medical records at the time of hearing.

DR. AGNESA PAPAZYAN

This SDT includes 10 categories, like above, including assessments, reports, special education documents, report cards, progress reports, protocols, communication, service logs, correspondence with selected individuals, service contracts, enrollment records, attendance logs, and billing records from the period of August 1, 2019 through August 9, 2022 from Dr. Agnesa Papazyan.

The SDT includes a statement of necessity. Long Beach asserts Papazyan assessed Student in or around January 2020 and those documents would form the basis of Papazyan's opinion should she be called to testify.

Student argues Papazyan's SDT should be quashed as Papazyan last conducted an assessment of Student in 2020. Long Beach argues Student identified Papazyan on her witness list. Like the above SDTs, Student provided no legal authority on alternative means, failed to demonstrate how the scope was overbroad, and provided no argument that this SDT would impact Student's medical privacy. Student's argument that it is unclear "what, if any, additional documents would be in her possession," is unpersuasive. The motion to quash as to Papazyan is denied.

GWENDOLYN OLICKER

This SDT includes 10 categories, like above, including assessments, reports, special education documents, report cards, progress reports, protocols, communication, service logs, correspondence with selected individuals, service contracts, enrollment records, attendance logs, and billing records from the period of August 1, 2019 through August 9, 2022 from Gwendolyn Olicker.

The SDT includes a statement of necessity. Long Beach asserts Olicker is presently assessing Student in occupational therapy. Long Beach argues Olicker's documents are needed to defend against allegations it failed to timely reply to Parent's occupational therapy requests and provide Student with appropriate occupational therapy services.

Student established that Long Beach's request for billing records, contracts, and attendance records were not relevant as Long Beach directly funded this IEE and Student is not seeking reimbursement. Student's arguments to alternative method, overbroad, relevance and medical privacy were not raised with this specific SDT.

This SDT is quashed to Numbers 8, 9, and 10 only.

LINDAMOOD-BELL LEARNING PROCESS

Long Beach served an SDT on Lindamood-Bell Learning Processes. The SDT covers 10 areas like Olicker's SDTs. The period at issue is from July 1, 2020 until August 9, 2022. The SDT includes a statement of necessity. Long Beach asserts that Lindamood-Bell provides Student with 1-to-1 intensive remediation services with the support of a behavioral aide. Student placed the Lindamood-Bell program at issue when she requested Long Beach extend timeline provided for Student to access the services because Student was unable to access them without behavioral support.

Student argues the services Lindamood-Bell provided Student were the result of a Long Beach funded contract. Student's argument is persuasive that there should be no need for Long Beach to require the service contacts, and billing records from Lindamood-Bell as Lindamood-Bell was directly contracted and funded by Long Beach and reimbursement is not at issue. However, unlike the above SDT's Student has put attendance directly at issue, thus Student's attendance records at Lindamood-Bell are relevant. Student's argument fails to an alternate method of obtaining these records, identify which record are overbroad, and make any argument that records from Lindamood-Bell impact Student's medical privacy. Thus, only items 8 and 10 of Lindamood Bell's SDT are quashed.

SUSAN HOLLAR AND/OR HOLLAR SPEECH AND LANGUAGE THERAPY

Long Beach served a SDT on Susan Hollar. The SDT covers the period from August 1, 2019 until August 9, 2022. The SDT includes a statement of necessity. Long Beach asserts Hollar conducted an IEE on Student and recommended Student be assessed in additional areas and required Lindamood-Bell as a service program for three-to- four hours per day for eight-to-ten weeks. The SDT covers 10 categories like

the above SDTs. Student acknowledged that Hollar's testimony is relevant. However, Student provided no authority for the alternative methods and failed to address how Hollar's SDT impacted Student's medical privacy. As a remedy, Student requested an IEE in speech and language therapy, thus, all Hollar records are relevant. The motion to quash the SDT to Hollar is denied.

SOPHIA LIU AND/OR HAYNES FAMILY OF PROGRAMS—STAR ACADEMY

Long Beach served a SDT on Sophia Liu. The SDT covers the period from September 1, 2020 until August 9, 2022. The SDT includes a statement of necessity. Long Beach asserts Liu conducted a functional behavior IEE on Student. The SDT covers 10 categories like the above SDTs. Also like the above SDT's, Student provided no authority for the alternative methods and failed to address how Liu's SDT impacted Student's medical privacy. As a remedy, Student requested a FBA IEE from Long Beach. This puts all of Liu's records at issue. The motion to quash the SDT to Liu is denied.

ORDER

1. Student's motion to quash Long Beach's SDT to Behavior and Education, Inc, is granted to items 9, 10, and 11.
2. Student's motion to quash Long Beach's SDT of Lindamood-Bell is granted to items 8 and 10.
3. Student's motion to quash Long Beach's SDT of Dr. Molly K. Rearick and Gwendolyn Olicker, is granted to items 8, 9, and 10. The records shall be produced from the above listed parties to the Administrative Law Judge on the first day of the hearing in this matter.
4. Student's motion to quash Long Beach's SDT to Dr. Farhad Yaghoubi, Dr. Agnesa Papazyan, Susan Hollar, and Sophia Liu is denied.

5. Pursuant to Section 1987.1 of the Code of Civil Procedure, the date of production is moved to correspond to the continued due process hearing of August 23, 2022. All documents shall be uploaded via the document upload function on Caselines.

IT IS SO ORDERED.

Tiffany Gilmartin
Tiffany Gilmartin (Aug 10, 2022 13:26 PDT)

Tiffany Gilmartin

Administrative Law Judge

Office of Administrative Hearings