BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020100499

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

JANUARY 12, 2021

On October 16, 2020, Student filed a request for due process naming Fremont Unified School District, called Fremont. On November 26, 2020, an order granting a continuance in this matter was granted scheduling the case for hearing on January 26, 27, and 28, 2021.

On December 31, 2020, and January 5, 2021, Student issued subpoenas to Fran English, Michael Tagami, Rebecca Olson, Julie Kelly, Jasmine Zartman, Stefanie Walton, Eddie Valez, and Jennifer Athanacio, and supoenas duces tecum to English, Zartman, and Walton. A notice was sent by Student to counsel for Fremont, advising of the subpoenas, including copies of the subpoenas.

On January 6, 2021, Fremont filed a motion to quash the subpoenas duces tecum issued to English, Zartman, and Walton, and the subpoena issued to Velez. The grounds for the motion to quash the subpoenas duces tecum are that Student has not established a reasonable necessity for the subpoenas, the subpoenas duces tecum are vague and overbroad, and they seek confidential attorney-client communications. The grounds for the motion to quash the subpoena issued to Velez is that Velez does not have information relevant to the issues in this case. On January 11, 2021, Student filed a response.

The subpoena duces tecum issued to English requests:

1. All emails and other documents between Ms. English and anyone within the Fremont Unified School District ("District"), between August 1, 2018, through October 16, 2020, that has any reference to Student's services, accommodations, placement and/or any form of Student's pupil records within an/or attached to any email that was sent and/or received.
2. All emails and other documents between Ms. English and the law offices of Fagen Friedman & Fulfrost, LLP, between August 1, 2018, through October 16, 2020, that has any reference to Student's services, accommodations, placement, and/or any form of Student's pupil records within and/or attached to any email that was sent and/or received.
3. All emails and other documents between Ms. English and any other individual outside the district, between August 1, 2018, through October 16, 2020, that has any reference to Student's services, accommodations, placement, and/or any form of Student's pupil records within and/or attached to any email that was sent and/or received.
4. Attendance records from American High School and Kennedy High School.

5. All Student Attendance Review Board ("SARB") records for Student.

The subpoena duces tecum to Walton requests:

1. All emails and other documents between Ms. Walton and anyone within the district, between June 1, 2018, through October 16, 2020, that has any reference to Student's services, accommodations, placement and/or any form of Student's pupil records within an/or attached to any email that was sent and/or received.
2. All emails and other documents between Ms. Walton and the law offices of Fagen Friedman and Fulfrost, LLP, between June 1, 2018, through October 16, 2020, that has any reference to Student's services, accommodations, placement, and/or any form of Student's pupil records within and/or attached to any email that was sent and/or received.
3. All emails and other documents between Ms. Walton and any other individual outside the district, between June 1, 2018, through October 16, 2020, that has any reference to Student's services, accommodations, placement, and/or any form of Student's pupil records within and/or attached to any email that was sent and/or received.

The subpoena duces tecum issued to Zartman requests:

1. All emails and other documents between Dr. Zartman and anyone within the district, between March 20, 2019 through October 16, 2020, that has any reference to Student's services, accommodations, placement and/or any form of Student's pupil records within an/or attached to any email that was sent and/or received.

2. All emails and other documents between Dr. Zartman and the law offices of Fagen Friedman & Fulfrost, LLP, between March 20, 2019 through October 16, 2020, that has any reference to Student's services, accommodations, placement, and/or any form of Student's pupil records within and/or attached to any email that was sent and/or received.
3. All emails and other documents between Dr. Zartman and any other individual outside the District, between March 20, 2019 through October 16, 2020, that has any reference to Student's services, accommodations, placement, and/or any form of Student's pupil records within and/or attached to any email that was sent and/or received.

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 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 5 business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

REASONABLE NECESSITY FOR THE RECORDS

Fremont argues that the subpoenas 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.)

The issues in this matter are very narrow and all involve alleged procedural violations concerning Student's May 4, 2020 individualized program plan team meeting.

Student's declaration in support of the subpoenas state generally the issues in the case, in addition to other claims not included in Student's complaint. Student failed to specify the exact matters or things desired to be produced, set forth in full detail the materiality thereof to the issues involved in the case, and state that the witness has the desired matters or things in his or her possession or under his or her control. Student's declaration fails to establish that the subpoenaed documents are material and relevant to the issues in this matter.

SCOPE OF THE SUBPOENA

The timeframe involved in Student's issues is narrow, and includes the timeframe immediately before the May 4, 2020 IEP team meeting, and the meeting itself. Fremont contends that the subpoenas duces tecum are vague and overly broad as the subpoenas request all emails to any individual outside the district and documents for time periods not covered by Student's complaint. Student's subpoenas duces tecum seek information back to 2018, and relating to Student's services, accommodations, and placement, prior placements and attendance, none of which are at issue in this matter. Accordingly, Student's subpoenas duces tecum are vague and overly broad.

CONFIDENTIAL ATTORNEY-CLIENT INFORMATION

Fremont asserts that Student's subpoenas duces tecum request information that is protected by the attorney-client privilege and is therefore confidential. All three subpoenas duces tecum request emails and other documents exchanged in communications with Fremont's counsel. Student provided no persuasive authority to support the request.

SUBPOENA FOR ATTENDANCE OF WITNESS VELEZ

Student issued a subpoena for the appearance and testimony of Velez. Fremont asserts that Student's subpoena must be quashed as Velez did not attend the May 4, 2020 IEP team meeting at issue in this matter, and therefore his testimony would not be relevant to the issues in this case. Student contends that Velez has been a positive support for Student over the years and has participated in almost all of Student's IEP team meetings. Student asserts that Mr. Velez has information concerning and leading up to the May 4, 2020 IEP team meeting. Student has set forth facts to establish good cause for her subpoena for the appearance and testimony of Velez. Any concerns regarding the relevance of this witness's testimony will can be raised by Fremont and determined at hearing.

ORDER

1. Fremont's motion to quash Student's subpoenas duces tecum to Fran English, Jasmine Zartman and Stephanie Walton is granted as to its contention that the subpoenas are vague, overbroad, request confidential information protected by the attorney-client privilege, and lack of good cause to establish that the information requested is material and necessary. The subpoenas for records to Fran English, Jasmine Zartman, and Stephanie Walton are hereby quashed.
2. Fremont's motion to quash subpoena to Edward Velez is denied.

3. Counsel for Fremont shall immediately serve a copy of this order on Fran English,, Jasmine Zartman, and Stephanie Walton.

Rita Defilippis

Rita Defilippis

Administrative Law Judge

Office of Administrative Hearings