

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

ETIWANDA SCHOOL DISTRICT.

OAH CASE NUMBER 2021070856

ORDER GRANTING IN PART AND DENYING IN PART

MOTION TO QUASH SUBPOENA

DECEMBER 22, 2021

On July 27, 2021, Student filed a request for due process naming Etiwanda School District. On August 26, 2021, an order granting a continuance in this matter was granted scheduling the case for hearing on January 19 and 20, 2022.

On December 7, 2021, Etiwanda sent a notice to consumer and a copy of a subpoena to Student's counsel advising Student of a subpoena directed to Collaborative Autism Management Programs. Etiwanda had not yet served the subpoena on Collaborative Autism Management Programs. On December 9, 2021, Student filed a motion to quash the subpoena. On December 12, 2021, Etiwanda served an opposition to the motion to quash. On December 15, 2021, Etiwanda issued the subpoena duces

tecum on Collaborative Autism Management Programs and served a copy of the subpoena on Student.

The subpoena to Collaborative Autism Management Programs sought 19 categories of documents specifically regarding Student and dated between March 1, 2020 and January 19, 2022, to be produced on the first day of hearing, January 19, 2022. Student argues, in his motion to quash the subpoena, that Etiwanda had not shown reasonable necessity for the documents to be produced at hearing, that Etiwanda sought documents protected by the attorney-client privilege or by the attorney work product doctrine, and that the subpoena was overly broad seeking documents not relevant to the issues alleged in the complaint.

Etiwanda argues, in its opposition, that the subpoena seeks documents relevant to Etiwanda's ability to defend itself as to the issues and remedies alleged in Student's complaint, as more specifically addressed, below.

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).)

The issued subpoena does not seek prehearing discovery. It was issued to give adequate notice for the production of documents and complied with the required notice to consumer. The subpoena directed Collaborative Autism Management Programs to produce the documents on the first day of hearing through OAH’s electronic evidence system.

REASONABLE NECESSITY FOR THE RECORDS

Student's complaint alleges, among other things, that Etiwanda denied Student a free appropriate public education, referred to as a FAPE, by failing to provide appropriate assessments identifying social emotional functioning, behavior, and health needs and by failing to appropriately address academic and behavior needs before and during COVID-19 related distance learning. Student further alleges, as a result of these failures, Parents retained in-home services consisting of a behavior aide and nurse to implement Student's behavior intervention plan and assist him with accessing his virtual educational program. Moreover, Parents limited Student's contact with others, allowing only the behavior aide and nurse into the home after the pandemic began allegedly based upon recommendations from Student's doctors. Student seeks compensatory education and reimbursement for in-home services as a result of Etiwanda's alleged FAPE violations.

In Student's motion to quash, Student contends that Collaborative Autism Management Programs employees will testify at hearing and any records related to their testimony will be provided to Etiwanda prior to hearing. Moreover, Student argues he has already provided Etiwanda with several copies of invoices for the in-home services. Student concludes that Etiwanda can obtain any necessary information through employee testimony and Student produced exhibits, making additional subpoenaed documents unnecessary. Declarations supporting Student's opposition acknowledge that both Parents own and run Collaborative Autism Management Programs. Parent describes the agency as a behavioral health treatment and applied behavior analysis nonpublic agency approved by the California Department of Education, which provides assessments and services to children with special needs.

Etiwanda's subpoena contains a statement of reasonable necessity for many of the requested records, which provides a nexus between certain requested documents and the issues and remedies alleged in Student's complaint. The subpoena seeks documents limited to the time period covering school closures due to the pandemic. Etiwanda seeks subpoenaed documents relevant to percipient and expert witness testimony anticipated from Collaborative Autism Management Programs employees. Currently, such documents exclusively reside within Parents' control as owners of the agency.

Similarly, Etiwanda seeks Collaborative Autism Management Programs communications with Student's pediatrician Dr. Cynthia Cheng and his pediatric neurologist Dr. Stephen Ashwal regarding medical issues impacting Student's ability to access distance learning and whether he required home-hospital services. Both doctors provided notes recommending Student receive home-hospital instruction. Dr. Ashwal recommended home-hospital instruction for Student's 2021-2022 school year.

Etiwanda should not be required to rely on Student's production of exhibits in support of his case to test the credibility of agency witnesses or to probe witness testimony regarding Student's ability to access distance learning, the need for home-hospital instruction, or the need for reimbursement or compensatory education.

On the other hand, some of Etiwanda's request are overly broad in scope. Section 1987.1 of the Code of Civil Procedure provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it.

Accordingly, Etiwanda's subpoena is modified as follows. First, Collaborative Autism Management Programs is required to produce documents in response to

requests 1, 2, 3, 4, 6, 7, 8, 9(a) through (g), 11, 12, 13, 14, 16, and 18, as described in the subpoena.

Student's motion to quash is granted as to subpoena request number 9(h), (i), and (j). Etiwanda made no statement of reasonable necessity allowing it to circumvent attorney-client privilege or the attorney work product doctrine regarding communications between Collaborative Autism Management Programs, owned and operated by Parents, and Student's counsel.

MEDICAL PRIVACY

Student argues that Etiwanda's subpoena seeks records unrelated to the issues. Specifically, Etiwanda's reasonable necessity statement failed to explain the relevance of documents only pertaining to Parents, or prescribed medications, Medicare or Medical documents.

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.)

First, the subpoena issued does not seek records pertaining only to Parents or their business or clients other than Student. Rather, Etiwanda specifically tailored the subpoena to apply to records held by Collaborative Autism Management Programs pertaining to Student.

Second, Etiwanda's subpoena of medical and other private information was overbroad as written. Specifically, request number 5 seeks medical assessments, intake forms, diagnostic reports, lab results, prescription information, medical recommendations, admission notes and documentation, discharge summaries, chart notes, and doctor's notes. Etiwanda failed to tailor the request to documents upon which providers relied in forming their opinions and conclusions regarding Student's educational needs, including during distance learning and recommendations for home-hospital instruction. Etiwanda has not shown reasonable necessity for medical records relating to health concerns unrelated to Student's ability to attend school or required supports and services.

Student has a right to privacy in his medical records. Etiwanda made no statement of reasonable necessity that would allow wholesale access to Student's medical records or to records tangentially related to the issues at hand. Student has not placed his entire medical history at issue in requesting additional supports during distance learning, home instruction, compensatory education, or reimbursement. Student maintains his right to privacy as to medical matters not at issue in this case. (*Freed, supra*, at p. 5. ["The party seeking the constitutionally protected information bears the burden of establishing that the information is directly relevant to the claims at issue."].)

This is not to say that Student has an absolute right to block disclosure of any information related to their medical history. 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.)

Here, Collaborative Autism Management Programs shall produce documents in response to the subpoena, request number 5, limited to medical assessments and recommendations related to Student for documents dated March 1, 2020 through January 19, 2022, the timeframe identified in the subpoena. Collaborative Autism Management Programs shall also produce documents responsive to request numbers 10 within the same parameters identified above. The ALJ presiding over the prehearing conference and/or hearing may make any further order, including any orders regarding relevance or privacy protections upon an in-camera review of the subpoenaed documents, before such documents are released to either party.

Student's motion to quash is granted as to request numbers 15, 17, and 19. Etiwanda failed to make a showing of reasonable necessity for documents unrelated to Student's educational program from Regional Center, health insurance companies generally, or from Medicare, Medi-Cal, or Medicaid. The requests do not relate specifically to any issue in this matter, including compensatory education or reimbursement.

ORDER

1. Student's motion to quash Etiwanda's subpoena is granted as to subpoena request numbers 9(h), (i), and (j), 15, 17, and 19 and the subpoena is hereby modified as regarding request number 5.

- a. Collaborative Autism Management Programs shall produce documents pertaining to Student dated March 1, 2020 through January 19, 2022, as described in subpoena request numbers 1, 2, 3, 4, 6, 7, 8, 9(a) through (g), 11, 12, 13, 14, 16, and 18.
 - b. Collaborative Autism Management Programs shall produce documents pertaining to Student dated March 1, 2020 through January 19, 2022, in response to request number 5, limited to medical assessments and recommendations related to Student.
 - c. Collaborative Autism Management Programs shall not provide documents responsive to request numbers 9(h), (i), and (j), 15, 17, and 19.
2. Collaborative Autism Management Programs shall deliver the subpoenaed records to OAH by uploading them into OAH's electronic evidence service as directed in the subpoena, no later than 9:30 AM on January 19, 2022, unless otherwise ordered.
 3. Counsel for Etiwanda shall immediately serve a copy of this order on Collaborative Autism Management Programs.

IT IS SO ORDERED..

Cole Dalton

Cole Dalton

Administrative Law Judge

Office of Administrative Hearings