BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

EL MONTE CITY SCHOOL DISTRICT.

OAH CASE NUMBER 2023120569

ORDER GRANTING DISTRICT'S MOTION TO QUASH SUBPOENAS DUCES TECUM TO AMANDA JOHNSTON

FEBRUARY 23, 2024

On December 15, 2023, Student filed a request for due process naming El Monte City School District. On January 12, 2024, the Office of Administrative Hearings, called OAH, granted the parties' joint request for a continuance in this matter and scheduled the case for hearing on March 5, 6, and 7, 2024.

On February 5, 2024, Student issued two subpoenas' duces tecum naming Amanda Johnston as the witness subpoenaed to produce documents and testify at hearing. Student sent copies of the two subpoenas to OAH, which did not include the notices to consumers or employees that Student issued with the subpoenas. Student attached some notices as exhibits to Student's opposition to El Monte's motion to

quash the subpoenas. The exhibits are not properly authenticated by either of the two declarations Student's attorneys filed. Based on the content of the two declarations, Student issued additional notices to consumers or employees, which – properly authenticated or not – were not provided to OAH.

One subpoena attached a Notice to Consumer or Employee addressed to "Dr. Dana Khudaverdyan." The proof of service of that Notice indicates the notice to consumer or employee was sent on the same date as the subpoena duces tecum was sent to the witness Amanda Johnston, and that the Notice was sent by mail to Amanda Johnston, not Khudaverdyan. This Notice to Consumer or Employee stated the witness was Khudaverdyan, despite the subpoena naming Amanda Johnston as the witness.

The second subpoena attached a Notice to Consumer or Employee addressed to "Jenny Michelson.'' The proof of service of that Notice indicates the notice to consumer or employee was sent on the same date as the subpoena duces tecum was sent to the witness Amanda Johnston, and was sent by mail to Amanda Johnston, not Michelson. This Notice to Consumer or Employee stated the witness was Michelson, despite the subpoena naming Amanda Johnston as the witness.

The first subpoena duces tecum required Amanda Johnston, who is the attorney of record in this matter for El Monte, to produce the requested documents to Student's attorney on February 26, 2024, and testify on March 5, 2024. The first subpoena duces tecum requested documents meeting 12 categories/descriptions. The first subpoena duces tecum purported to provide a statement of reasonable necessity for the categories of documents but did not attempt any statement of reasonable necessity for category 12.

The second subpoena duces tecum required Johnston to produce the requested documents to Student's attorney on February 26, 2024, and testify on March 5, 2024. The second subpoena duces tecum requested documents meeting five categories/descriptions. The second subpoena duces tecum purported to provide a statement of reasonable necessity for the five categories of documents.

On February 14, 2024, El Monte filed a motion to quash the two subpoenas on the grounds that the subpoenas were not properly served, failed to subpoena the proper persons or entities, are vague and overbroad, are unduly burdensome, are an impermissible attempt at pre-hearing discovery, and the requested documents bear no discernable relationship to the allegations in Student's complaint.

On February 20, 2024, Student opposed the motion to quash. Student characterized the two subpoenas' duces tecum as being one subpoena to El Monte City School District, and one subpoena to Shirpser Elementary School, the specific campus Student attended and attends. Student asserts service was proper, the subpoenas are reasonable in scope and "supported by reasonable necessity," and are not unduly burdensome. Most significantly, Student asserts Student's attorney "issued subpoenas for District employees, which are parties represented by Ms. Johnston, their legal counsel. As they are represented parties, it is only appropriate to issue a subpoena to that representative, here, Ms. Johnston …."

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.

The two subpoenas' duces tecum Student's attorney issued are defective in many ways, on both process and substance. For purposes of El Monte's motion to quash

them, the fatal deficiency is the fact that Student named El Monte's attorney in this case, Amanda Johnston, as the witness. Student did not, as characterized in Student's opposition to the motion to quash the subpoenas, issue subpoenas for, or to, El Monte employees. Further, El Monte's employees are not, as Student argued, "parties" in this case, let alone "represented parties." El Monte's attorney of record in this matter is an improper person to name as the witness either for the production of documents or for testimony regarding the subpoenaed documents. For this reason alone, El Monte's motion to quash the two subpoenas' duces tecum is granted.

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. (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, subd. (e)(7).)

Student's subpoenas direct an improper witness to produce the subpoenaed records to Student's attorney on February 26, 2024, which is eight days prior to the first day of hearing. Student has no statutory right to pre-hearing discovery. Student's subpoenas duces tecum should have been returnable on the first day of hearing. 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. For this additional reason, the two subpoenas' duces tecum are quashed.

All other grounds El Monte asserted in its motion to quash the two subpoenas' duces tecum to Amanda Johnston are moot. These grounds are not waived but are preserved and may be reasserted, if appropriate, in any future motion.

IT IS SO ORDERED.

Kara Hatfield

Kara Hatfield
Administrative Law Judge
Office of Administrative Hearings