BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020110479

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

MARCH 23, 2021

On January 22, 2021, Student and Parents, referred to collectively as Student, filed an amended request for due process, referred to as a complaint, naming San Marcos Unified School District. A continuance in this matter was granted at a prehearing conference on March 8, 2021, scheduling the case for hearing on April 13 through April 15, 2021.

On March 1, 2021, San Marcos Unified served three subpoenas duces tecum, referred to as subpoenas, on the Custodians of Records of Dr. Robert Gray, Sara Feeney, and Lindamood-Bell. Parents retained Dr. Gray to perform an independent neuropsychological evaluation of Student, and he did so in February 2020. He

presented his findings at an individualized education program team meeting on May 11, 2020, referred to as an IEP team meeting. Parents retained Ms. Feeney to perform an independent occupational therapy evaluation, which she did in July 2020, and she shared her findings at an IEP team meeting on September 10, 2020. Parents also sought a reading assessment from Lindamood-Bell in late 2020 or early 2021, and shared the results with San Marcos Unified on January 16, 2021.

On February 22, 2021, Notices to Consumer were sent to Student advising Student of each of these subpoenas. Copies of these subpoenas were sent to Student with the Notices to Consumer. Each of the subpoenas sought the same categories of documents, to be produced five business days prior to March 16, 2021. March 16, 2021 was, at the time the subpoenas were served, the first day of hearing.

Exhibit 1 to each of the subpoenas sought the following documents, "including electronic records" "regarding Student":

1. Assessment and evaluation reports, including draft reports, that reference Student or Parents by name, initials, or identification number;
2. Special education documents that reference Student and/or Parents by name, initials, or identification number;
3. Assessment protocols, test protocols, and questionnaires that reference Student and/or Parents by name, initials, or identification number;
4. Observation notes that reference Student and/or Parents by name, initials, or identification number;
5. Correspondence, including, but not limited to, letters and emails, between:
    a. [Named subpoenaed person and office] and Parents regarding Student; and

b. [Named subpoenaed person and/or office] and staff of Student's counsel's office regarding Student; and

6. Contracts for service, and registration documents that reference Student and/or Parents by name, initials, or identification number.

The time frame for the records requested varied for each witness, focusing on a period before the performance of their respective assessments, and extending until five days before hearing. The subpoena to Dr. Gray's office stated, "The time period for the records. . . is from November 1, 2019, through March 9, 2021. . . ." The subpoena to Sara Feeney's office stated: "The time period for the records. . .is from May 1, 2020, through March 9, 2021. . . ." The subpoena to Lindamood-Bell stated: "The time period for the records. . .is from November 1, 2020, through March 9, 2021."

On March 3, 2021, Student filed a motion to quash the subpoenas on the grounds that they are overly broad, cause an undue burden, are not reasonably necessary to San Marcos Unified's defense, are intended to harass Student's witnesses, infringe on attorney-client privilege, and require Dr. Gray, and perhaps the other witnesses, to violate professional ethics by requesting production of test protocols and notes. On March 5, 2021, San Marcos Unified filed opposition to the motion, arguing that compliance with the subpoenas would not constitute professional misconduct of any of the witnesses. San Marcos Unified further contended that the subpoenas were not overly broad, and were not meant to harass the witnesses or infringe on attorney-client privileged communications. Additionally, San Marcos Unified contends the requested records were material and relevant to the issues, and San Marcos Unified established reasonable necessity for the records.

San Marcos Unified also contended that the motion should be denied in its entirety because the moving papers did not include the subject subpoenas. Student

thereby amended his motion to include the subject subpoenas, and the subject subpoenas were also included in the case file of the Office of Administrative Hearings, referred to as OAH. Consequently, the motion will not be denied on this ground.

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, 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 issuing protective orders.

FAILURE TO TIMELY SERVE CONSUMER NOTICE

California law requires that a Notice to Consumer be served on the subject of a subpoena for personal records not less than 10 days prior to the date for production of records plus the additional time required based on the method of service per Code of Civil Procedure section 1013. (Code Civ. Proc., § 1985.3, subd. (b).) Personal records are those records, whether maintained on paper or electronically, that are sought from those providing personal services to a party, such as health care providers, psychiatrists, bankers, pharmacists, laboratories, insurance companies, telephone service providers and schools to name a few. (Code Civ. Proc., § 1985.3, subd. (a)(1).) The proof of service of the Notice to Consumer must be served on the witness from whom documents are being sought. (Code Civ. Proc., § 1985.3, subd. (c)(2).)

Student did not raise the timeliness of the Notices to Consumer in its motion, but the Notices to Consumer was served on February 22, 2021, only seven days prior to the March 1, 2021, date on which the subpoenas were served. In other circumstances, the failure to serve the Notice to Consumer at least 10 days prior to service of the subpoena duces tecum on a witness when a Notice to Consumer was required to be served would constitute grounds to quash the subpoena. Here, however, Student did not raise the issue, the matter was continued after the Notices to Consumers and subpoenas were served, such that the return date on the subpoenas is no longer applicable, and Student

promptly filed the Motions to Quash in any event. Furthermore, except for the subpoena directed at Dr. Gray, there was no specific evidence or legal discussion as to whether the subpoenas required service of a Notice to Consumer. Consequently, the subpoenas will not be quashed for failure to timely serve the Notices to Consumer.

REASONABLE NECESSITY FOR THE RECORDS AND SCOPE OF SUBPOENAS

Student contends that the subpoenas should be quashed because they fail to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the materiality and relevancy of the 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.) Student also contends that the subpoenas are overly broad. Indeed, the gross overbreadth of the requests set forth in Exhibit 1 of each subpoena illustrates why San Marcos Unified has failed to demonstrate that the documents sought are reasonably necessary for its defense of this action.

San Marcos Unified's declarations in support of all of the subpoenas contain essentially the same assertions: Student's first amended complaint references the recipients named in the subpoenas, their evaluation of Student, their opinions, recommendations and conclusions about Student's needs and educational programs, requests reimbursement for the recipient's assessments or services, and San Marcos Unified expects the person or a representative of the organization named in the subpoena to be called as a witness at hearing. The declarations also all assert that all of the requested records are reasonably necessary for San Marcos Unified to defend the case, because such records would include information the recipients used to base their opinions and recommendations, and their credibility or potential bias.

The declarations fail to establish that all of the subpoenaed documents are material and relevant, or that they are reasonably necessary to defend the action, or any basis for needing all of the records sought. The fact that the subpoenas divide the records into six categories cannot hide the fact that each subpoena, read as a whole, requests nearly every scrap of paper or electronic document in the recipient's office "regarding Student," that bears Student's name, or Parents' name(s), "for" a specified time period, which varied for each witness. Such subpoenas, on their face, violate the requirement that the documents sought must be reasonably necessary for the defense of this action. The subpoenas fail to describe any document with particularity, even though San Marcos Unified has specific information about each witness, such as copies of the evaluation reports that are at issue in the case and which were discussed at IEP team meetings. For example, Paragraph 1 of Exhibit 1 of each subpoena asks for assessment and evaluation reports that reference Student and/or Parents, and drafts thereof, but the subpoenas do not show that all such assessments and reports are at issue in this action. These witnesses could have performed assessments of Student other than those that are at issue in this action. Further, these witnesses could have performed assessments and generated reports about Parents, or other of Student's family members, which are certainly not at issue in this action, but could reference Student or Parents such that they are included by the terms of Paragraph 1. Paragraph 3 of Exhibit 1 of each subpoena, which requests assessment protocols, test protocols, and questionnaires that reference Student and/or Parents has the same defects as does Paragraph 1. There is no specificity as to which assessments or tests the request refers to. On its face, it requests documents that relate to assessments, tests, or questionnaires that have no relation to the assessments that are at issue in this case. Paragraph 4 of Exhibit 1 of each subpoena is similarly defective, in that it refers simply to "Observation notes that reference Student and/or Parents" without specifying who was

being observed, and by whom, or why, or even what is meant by "observation." The request does not specify whether it refers to an observation conducted as part of an evaluation. On its face, the request could include a random note scribbled on a stray piece of paper about what the witness observed that had nothing to do with the witness's evaluation. For example, "I liked Student's sneakers; I have to ask Parents where they got them," could be an "observation note." Such an "observation note" is not reasonably necessary for San Marcos Unified to defend this action. A reasonable person could not determine whether such a document should be produced or risk being penalized for non-compliance with a subpoena.

Student contends that production of the protocols and observation notes requested in Paragraphs 3 and 4 of Exhibit 1 of the subpoenas would violate Dr. Gray's and perhaps other witnesses' professional ethics, but this contention is not meritorious, for all of the reasons set forth in San Marcos Unified's opposition papers. In particular, Student failed to cite any authority that the professional ethics in question were applicable to the subject document requests. Rather, as already stated, Paragraphs 3 and 4 are objectionable because they are so overbroad and unspecific that San Marcos Unified has not demonstrated that they are reasonably necessary for the defense of this action.

Paragraph 2 of Exhibit 1 of each subpoena requests "Special education documents." That term is undefined. Reasonable third parties, such as these subpoenaed witnesses, would not be able to ascertain whether the request called for educational records, as legally defined, or something more, or something else. A third party witness should not be burdened with ascertaining what documents to produce in response to this request, or trying to guess what San Marcos Unified's counsel had in mind in drafting this request, especially when the witness is subject to penalty if they

guess wrong. While 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; as even the category of the documents sought are not defined, and as the category does not describe the exact things desired to be produced, reasonable necessity and good cause for production of the records have not been established. Therefore, Paragraph 2 of Exhibit 1 of the subpoena cannot be modified.

Paragraph 5 of Exhibit 1 of each subpoena requests is in two parts. Part 5a requests "correspondence" regarding Student between the individual or organization named in the subpoena and Parents. Part 5b requests "correspondence" between the individual or organization named in the subpoena and Parents' attorneys. Contrary to Student's assertion, there is no evidence that correspondence between Parents' attorneys and these witnesses are subject to the attorney-client privilege, because the witnesses are not clients of the attorneys. However, this request is also overbroad and San Marino made no showing that these requests are reasonably necessary for the defense of any issues in this matter. Beyond the vague subject of "regarding Student," the request does not specify the subject matter of any such correspondence, and San Marcos Unified has made no showing that all correspondence "regarding Student" is relevant at all to this case, let alone reasonably necessary to its defense of this matter. There is no limitation of the subject matter to the assessments at issue in this case, or to any of the witnesses' opinions, recommendations, and conclusions, or to Student's educational program, or to any other issue in this case.

Nor does San Marcos Unified provide any authority that such broad requests are reasonably necessary for its defense of this action because they may reflect the witnesses' credibility or bias. Significantly, the request does not identify a single piece of correspondence, let alone any correspondence that reflects credibility or bias. The mere

possibility that some imagined piece of correspondence may impact a witness' credibility or show bias cannot constitute a showing that a request for all correspondence is reasonably necessary to the defense of this action. If such a mere possibility were sufficient, it would swallow the requirement of "reasonably necessary. Moreover, even if a piece of correspondence shows a lack of credibility, not all lapses in a witness's credibility are relevant to the issues in the case, and are therefore reasonably necessary to the defense of the matter. As far as bias is concerned, San Marcos Unified has made no showing that any of this correspondence will reflect any bias beyond the known facts that Student retained the recipients of these subpoenas to provide assessments and/or services, and Student will call them as witnesses to testify in support of his position.

As was stated above with respect to Paragraph 2, 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. However when, as here, the category does not describe the exact things desired to be produced, and there is no specific factual showing of reasonable necessity, or good cause for production of all "correspondence," the subpoena cannot be modified.

Finally, Paragraph 6 of each subpoena requests "contracts for service, and registration documents that reference Student and/or Parents. . . ."Again, this document request makes no attempt to describe the subject matter of such contracts or registration documents, so as tie them into the assessments performed by these witnesses that are at issue in this case.

The overbreadth of these requests is not cured by the opening paragraph of Exhibit 1, which states San Marcos Unified requests records "regarding Student." For example, evaluations, observations, or contracts for service regarding Parent, or

regarding a sibling of Student, or of Student himself but which are not at issue in this case, may, depending on the circumstances, be considered to be "regarding Student." Further, the date limitations placed on these requests is also expressed in a vague and ambiguous manner: "The time period for the records requested. . is from [date] through March 9, 2021," with the beginning date apparently tailored to each of the recipients of the subpoena. First, the wording of the time periods is ambiguous. A reasonable person may not know how the dates relate to the requested documents. The time periods could refer to the date the witness received a document. They could refer to the date the witness sent the document somewhere. They could refer to the date the document was generated They could refer to the date the document bears. Again, a witness should not be burdened with trying to resolve the ambiguity, especially when the witness may be penalized for an incorrect guess.

Additionally, the only justification in the declarations supporting the subpoenas for requesting records up to March 9, 2021, well after any of the recipients of these subpoenas assessed Student and their reports were discussed at an IEP team meeting, or, in the case of Lindamood-Bell, after its report was transmitted to San Marcos Unified, is: "[San Marcos Unified] *understands* that [the witness] *may* possess information related to Student after his assessment." San Marcos Unified's "understanding" that a witness "may" possess information "related to Student" does not support that the vaguely-described documents requested during that time period are reasonably necessary for San Marcos Unified to defend this action. As was discussed above, simply because certain documents or information are "related to Student" does not mean that they have any bearing on the issues in this case.

ORDER

1. Student's motion to quash San Marcos Unified's subpoena duces tecum directed to the Custodian of Records for Dr. Robert Gray is granted in part and the subpoena is hereby modified. Dr. Gray shall produce documents that are responsive to Paragraphs 1, 3, 4, and 6, of Exhibit 1 to the subpoena duces tecum. Such documents shall be produced only insofar as they were generated on or between November 1, 2019, and May 11, 2020. Additionally, such documents shall only be produced insofar as they relate or refer to the Neuropsychological Assessment of Student Dr. Gray performed in February 2020, including his administration of any formal or informal assessment instruments as part of the Neuropsychological Assessment, and his opinions, conclusions, and recommendations as set forth in the report of the Neuropsychological Assessment and/or which he expressed at the IEP team meeting of May 11, 2020, at which he presented his report of the Neuropsychological Assessment. Dr. Gray need not produce any documents in response to Paragraph 2 or Paragraph 5a and 5b of Exhibit 1.
2. Student's Motion to Quash the subpoena duces tecum directed to the Custodian of Records for Sara Feeney, San Diego Occupational Therapy, is granted in part, and the subpoena is hereby modified. Ms. Feeney shall produce documents that are responsive to Paragraphs 1, 3, 4, and 6, of Exhibit 1 to the subpoena duces tecum. Such documents shall be produced only insofar as they were generated on or between May 1, 2020, and September 10, 2020. Additionally, such documents shall only be produced insofar as they relate or refer to the Occupational Therapy assessment of Student Ms. Feeney performed in July 2020, including her

administration of any formal or informal assessment instruments as part of the Occupational Therapy Assessment, and her opinions, conclusions, and recommendations as set forth in the report of the Occupational Therapy Assessment and/or which she expressed at the IEP team meeting of September 10, 2020, at which she presented her report of the Occupational Therapy Assessment. Ms. Feeney need not produce any documents in response to Paragraph 2 or Paragraph

3. 5a and 5b of Exhibit 1 to the subpoena duces tecum.
4. Student's Motion to Quash the subpoena duces tecum directed to the Custodian of Records for Lindamood-Bell, is granted in part, and the subpoena is hereby modified. Lindamood-Bell shall produce documents that are responsive to Paragraphs 1, 3, 4, and 6, of Exhibit 1 to the subpoena duces tecum. Such documents shall be produced only insofar as they were generated on or between November 2020 and January 16, 2021. Additionally, such documents shall be produced only insofar as they relate or refer to its Assessment of Student performed in or about January 2021, including the administration of any formal or informal assessment instruments as part of the Assessment, and its opinions, conclusions, and recommendations as set forth in the report of the Assessment. Lindamood-Bell need not produce any documents in response to Paragraph 2 or Paragraph 5a and 5b of Exhibit 1 to the subpoena duces tecum.
5. The People or Agencies subpoenaed shall upload the documents to CaseLines, as directed in their respective subpoenas, at least five business days before April 13, 2021.

6. Counsel for San Marcos Unified shall immediately serve a copy of this Order on the Custodians of Records of Dr. Gray; Ms. Feeney, San Diego Occupational Therapy; and Lindamood-Bell.

Elsa Jones

Elsa H. Jones

Administrative Law Judge

Office of Administrative Hearings