BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MANHATTAN BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020120386

ORDER GRANTING, IN PART, STUDENT'S MOTION TO QUASH SUBPOENAS

APRIL 26, 2021

On December 11, 2020, Student filed with the Office of Administrative Hearings, called OAH, a request for due process, called a complaint, naming Manhattan Beach Unified School District as a party. On March 9, 2021, OAH granted Student's motion to file an amended complaint. This matter is scheduled for hearing beginning May 5, 2021.

On April 15, 2021, Manhattan issued subpoenas duces tecum on Variations Psychology and/or Drs. Shinn, Sample, and Torres; Paradigm Malibu Treatment Center; and Dr. Stuart Wolman requesting records pertaining to Student. On April 5, 2021, Manhattan sent three separate notices to consumer to Student's attorney advising Student of each of the three subpoenas. Copies of the subpoenas were provided along

with the consumer notices. Each subpoena called for the production of numerous categories of documents related to Student and which specifically referenced Student or Parents by name, initials, or identification number.

The subpoena to Dr. Shinn of Variations Psychology sought Student's records from the time period September 1, 2020, to the first day of hearing, May 5, 2021, specifically, (1) psychoeducational assessment and evaluation reports including draft reports; (2) special education documents; (3) assessments, report cards, progress reports and testing data; (4) assessment and test protocols; (5) observation data and notes; (6) communication logs; (7) clinical and diagnostic interview notes; (8) correspondence regarding Student, including letters and emails between the subpoenaed party and Parents; Student's counsel; the other subpoenaed parties; and staff at Futures Academy; Frostig School West, and Bridges Academy; (9) contracts for services, enrollment records, and registration documents; and (10) billing records.

The subpoena to Dr. Wolman sought Student's records from February 1, 2017, to May 5, 2021 specifically, (1) assessment and evaluation reports including draft reports; (2) special education documents; (3) assessments, report cards, progress reports and testing data; (4) assessment and test protocols; (5) observation data and notes; (6) communication logs; (7) clinical and diagnostic interview notes; (8) correspondence regarding Student, including letters and emails between the subpoenaed party and Parents; Student's counsel; the other subpoenaed parties; and staff at Fusion Academy; (9) contracts for services, enrollment records, and registration documents; (10) records relating to diagnoses and/or prescribed medications; (11) counseling, therapy, psychological, or psychiatric service logs; and (12) billing records.

The subpoena to Paradigm sought Student's records from February 1, 2019, to May 5, 2021, specifically, (1) assessment and evaluation reports including draft reports;

(2) education documents; (3) assessments, report cards, progress reports and testing data; (4) assessment and test protocols; (5) communication logs; (6) clinical and diagnostic interview notes; (7) observation notes; (8) correspondence regarding Student, including letters and emails between the subpoenaed party and Parents; Student's counsel; and the other subpoenaed parties; (9) contracts for services, admittance records and registration documents; (10) attendance records; (11) service logs; and (12) billing records.

On April 16, 2021, Student filed a motion to quash the subpoenas on the grounds that they are overbroad, cause undue burden to Student, are intended to harass potential witnesses, are not based on reasonable necessity, infringe on Student's right to privacy regarding sensitive mental health records, infringe on attorney-client and work-product privileges, subject recipients to potential professional misconduct for releasing test protocols, and the requested records are protected by the Health Insurance Portability and Accountability Act and California Confidentiality of Medical Information Act such that Student must consent to their release.

On April 22, 20219, Manhattan opposed the motion arguing the subpoenas are not overly broad, do not cause undue burden, are not meant to harass, do not infringe on any privilege, would not subject recipients to professional misconduct, and do not require Student's consent. Manhattan contends its declarations in support of each subpoena establish that the requested records are material and relevant to the hearing issues and reasonably necessary for Manhattan to defend against the case and the requested remedies.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities and 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).) While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings.

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).) The requesting party must set forth sufficient detail, specific to the legal and factual issues to be adjudicated, that the requested records are reasonably necessary for the party to present a case or mount a defense. The reasonable necessity standard is a distinct, more stringent standard than the "good cause" standard governing standard discovery requests in civil litigation.

The Code of Civil Procedure, section 1985, subdivision (b), 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 protective orders.

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 is a law that provides for a national standard for the protection of certain health information. Generally, consent is required to disclose medical records. (42. U.S.C § 1320d et. seq.; 45 C.F.R. § 164.508(a).) However, federal regulations provide for circumstances under which an authorization to the medical provider by the individual whose records are sought, or opportunity for the individual to agree or object to disclosure of documents by the medical provider is not required. One of those circumstances involves disclosures to an administrative tribunal pursuant to a subpoena. (45 C.F.R. § 164.512(e)(1)(ii).)

So long as the medical provider receiving the subpoena has satisfactory assurance that the party seeking documents has either given notice of the request to the individual whose records are being sought; or that the party seeking the documents has secured an appropriate protective order pertaining to the records being sought, disclosure of documents is allowed without authorization or consent. (45 C.F.R. § 164.512(e)(1)(ii)(A) and (B).) Satisfactory assurance is attained if the medical provider

receives documentation demonstrating a good faith attempt to provide notice to the individual whose records are being sought; that the notice included information about the proceeding in which the protected health information is requested to be used to permit the individual to object; and that sufficient time elapsed for an objection to be made and that either no objections were filed, or the objections filed were resolved by the administrative tribunal. (45 C.F.R. § 164.512(e)(1)(iii).)

Evidence Code section 1010, subdivision (d) creates a psychotherapist-patient privilege which protects confidential mental health communications. Similarly, Section 1010.5 creates an educational psychologist-patient privilege. However, there is a litigation exception to these privileges. Evidence Code section 1016 states, "[t]here is no privilege under this article as to a communication relevant to an issue concerning mental or emotional condition of the patient if such issue has been tendered (a) by the patient."

DISCUSSION

Student's amended complaint alleges Manhattan denied him a free appropriate public education, called FAPE, from December 20, 2018, through March 9, 2021, by failing to appropriately assess him in all areas of suspected disability. Student also alleges numerous procedural violations and substantive denials of FAPE including a failure to offer appropriate goals, services, and placement in the least restrictive environment and reasonably calculated to meet his needs. Student seeks independent educational evaluations at public expense, placement at a school of Parent's choice, reimbursement for educational costs, and compensatory education.

SUBPOENA DUCES TECUM TO VARATIONS PSYCHOLOGY

Student's amended complaint places at issue the private evaluations conducted by Dr. Shinn of Variations Psychology in November 2020 and March 2021. Student refers to Dr. Shinn's evaluation report as an "expert" report. The complaint cites extensively to Dr. Shinn's evaluation findings and recommendations, including those for specific school placements. Student has identified Dr. Shinn as a witness in Student's prehearing conference statement filed with OAH on April 20, 2021. Having placed these evaluations at issue, Student has waived any claim of psychotherapist-patient privilege and cannot claim records gathered, relied upon, or generated by Dr. Shinn are protected under HIPPA.

Student cannot have it both ways, relying on his expert's testing results and opinions in support of his due process claims, yet preventing Manhattan from obtaining relevant records and testing data that Dr, Shinn relied upon in forming her opinions. With the exception of two of the requested categories for records, namely, education records, Manhattan's declaration in support of its subpoena to Dr. Shinn, identified with sufficient specificity the requested records and established they are reasonably necessary for it to mount its defense. Notably, Manhattan's declaration highlights the issues and resolutions to be adjudicated, and its need for information that informed Dr. Shinn's understanding of Student and her opinions, and which she relied upon in developing recommendations related to Student's educational needs and programming.

Manhattan is requesting records regarding Student that Dr. Shinn used to form the basis for her assessment, conclusions, and recommendations. Student intends to call Dr. Shinn as a witness in support of his contention that Manhattan failed to provide him a FAPE and that he requires a placement other than that offered as well as compensatory education. Therefore, any records that informed Dr. Shinn's opinions are

relevant to this case, including correspondence with Parent, other providers, and Student's attorney, none of which are protected by any legal privilege.

The documents sought may include confidential health care records protected by HIPAA. However, there are exceptions to these provisions for production of records pursuant to a subpoena when litigation is pending. (45 C.F.R. § 164.512(e)(1)(ii).) The requested documents are relevant to Student's central claim that Manhattan failed to meet Student's unique educational, mental health, and behavioral needs. Similarly, such records are not covered by the psychotherapist-patient privilege. Student cannot claim this privilege because he has placed Dr. Shinn's evaluation at issue and raised his mental state and mental health needs as a primary issue in this case.

Student failed to establish his claim that Dr. Shinn would be subject to professional misconduct for releasing the requested testing data and protocols. Manhattan's arguments in this regard are persuasive. Student's additional arguments, including those of undue burden and intent to harass have been considered and found unpersuasive.

Regarding two categories of requested records, namely, (2) special education documents and (3) assessments, report cards, progress reports, and testing data, Manhattan failed to identify these with sufficient specificity. A third-party witness should not be required to produce unspecified special education documents. Further, it is likely that Manhattan, which Student alleges has been responsible for his special educational programming for many years, has in its possession or available to it, or even created the documents covered by these categories. As such, Manhattan did not establish reasonable necessity for these records. At hearing, Manhattan will be able to cross examine Dr. Shinn as to what education documents she considered. Student's

motion to quash the subpoena to Dr. Shinn is granted as to these two categories of records.

Manhattan has proved the relevance and reasonable necessity for the records requested in the subpoena duces tecum to Variations Psychology, with the exception of categories (2) and (3). Therefore, Student's motion to quash the subpoena duces tecum on Variations Psychology and Dr. Shinn is denied as to all requested records with the exception of (2) special education documents and (3) assessments, report cards, progress reports, and testing data. As to these records, the motion to quash is granted.

In the motion to quash, Student requested a protective order preventing the further disclosure of any records produced pursuant to Manhattan's subpoenas. Student's request is denied as premature. At the time of hearing, should the administrative law judge release any subpoenaed documents to the requesting party, Student may renew his motion for a protective order limiting the disclosure of any documents released.

SUBPOENA DUCES TECUM TO DR. WOLMAN

According to Student's amended complaint, he has been receiving psychiatric care from Dr. Wolman for many years. Student's mental and emotional states are relevant to the instant matter, and Student has identified Dr. Wolman as a witness in these proceedings. However, in doing so, Student has not placed his entire psychiatric history at issue nor opened the floodgates to his psychiatric records for the past three years.

In this instance, Manhattan has failed to establish reasonable necessity for the requested records. The supporting declaration references a 2017 letter Dr. Wolman drafted in support of Student being placed at Fusion Academy. However, the

declaration fails to specify Manhattan's need for the requested records as it relates to the issues and resolutions to be adjudicated. This is a fatal flaw given important public policy considerations underlying the psychotherapist-patient privilege. Simply because the requested documents or information are related to Student and reference Student or Parent by name, initials, or identification number ,does not mean that they have any bearing on the issues in this case.

The request is substantially overbroad since it is not limited by reference to specific issues in this matter. Rather, the subpoena calls for every assessment, all observation and interview notes, every counseling and psychiatric log, diagnoses and prescribed medications, and every communication including every email concerning Student sent or received over the past three years. The supporting declaration fails to establish any basis for needing all of the records sought, or that all of the subpoenaed documents are material and relevant, let alone reasonably necessary to defend the action.

Nor does Manhattan 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. 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 reasonable necessity. Accordingly, Student's motion to quash the subpoena duces tecum to Dr. Wolman is granted.

SUBPOENA DUCES TECUM TO PARADIGM

It is determined that Manhattan failed to establish reasonably necessity for the records sought from Paradigm. Manhattan is correct that Student seeks placement in a school of his choice and reimbursement for educationally related expenses. However, Student also bears the burden of proving his claims at hearing and any right to a requested remedy. Manhattan retains the right to cross examine Student's witnesses and evidence, and to also subpoena any witness it deems necessary from Paradigm.

According to the amended complaint, in March 2019, Parent requested Manhattan place Student at Paradigm, described as a short term residential medical facility. Manhattan denied this request. Student further alleged he briefly stayed at Paradigm in April 2019. Manhattan assumes Student will call Paradigm staff to testify or seek to admit Paradigm documents into evidence. Student has not identified in his prehearing conference statement any Paradigm witnesses. Nor has Student specifically requested as a proposed hearing resolution, reimbursement for Paradigm expenses.

Manhattan's position that the requested records are necessary for it to defend its position that Student is not entitled to reimbursement for medical components of Student's program at Paradigm is not persuasive. While Manhattan contends the requested records include information Paradigm staff relied on to form opinions and make recommendations related to Student's educational program, it is unknown if Paradigm staff formed any opinions regarding Student's educational needs or whether Student intends to rely upon these at hearing.

In addition, the requested documents are described in overly broad and general terms, such that the subpoena is no different from a standard discovery request that is routine in civil litigation. However, such use of subpoenas is neither authorized, nor

appropriate in this special education due process proceeding. Manhattan's supporting declaration is inadequate to establish reasonable necessity for the production of the requested records, which is a higher standard than good cause. If the production of records could be compelled on a boilerplate recital that they were material and relevant, the reasonable necessity standard would mean almost nothing. Student's motion to quash is granted.

ORDER

1. Student's motion to quash Manhattan's subpoena to Variations Psychology is Granted, in part. Variations Psychology is not required to produce the records requested in categories (2) special education documents, and (3) assessments, report cards, progress reports, and testing data. Variations Psychology is required to produce all remaining requested records in the manner specified.
2. Student's request for a protective order is Denied, subject to it being renewed at the time of hearing.
3. Student's motion to quash Manhattan's subpoena to Dr. Wolman is Granted. The subpoena for records to Dr, Wolman is hereby quashed.
4. Student's motion to quash Manhattan's subpoena to Paradigm is Granted. The subpoena for records to Paradigm is hereby quashed.

5. Manhattan shall immediately provide a copy of this Order to Variations Psychology, Dr. Wolman, and Paradigm.

IT IS SO ORDERED.

Theresa Ravandi

Theresa Ravandi

Administrative Law Judge

Office of Administrative Hearings