BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

AND

MT. DIABLO UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2023010234

OAH CASE NUMBER 2022120477

ORDER GRANTING, IN PART, MOTION TO QUASH SUBPOENA

MARCH 13, 2023

On January 10, 2023, Student filed a request for due process with the Office of Administrative Hearings naming Mt. Diablo Unified School District, in Case Number 2023010234, called Student's Case. The Office of Administrative Hearings is called OAH. In the complaint, Student asserts 19 enumerated issues.

On January 17, 2023, OAH granted Student's motion to consolidate Student's Case with a pending case filed by Mt. Diablo against Student in OAH Case Number 2022120477, called District's Case. OAH continued the hearing in the consolidated matter to March 21 through 23, 2023. District's Case seeks a determination as to

whether Respondent has a right to assess Student pursuant to a November 2022 assessment plan, including the right to speak with Student's medical doctor and private providers.

On March 7, 2023, Student emailed a subpoena duces tecum to Mt. Diablo's counsel, requesting that Respondent produce for the videoconference hearing "necessary weekly reports" on "August 202 [sic] through March 7, 2023" which are further described in the body of subpoena as "Necessary Weekly Reports, Parent review of Session and Logs by Speech Therapist, OT, Teachers pertaining to measuring IEP Goals. School currently provides only DATA sheets that normally attach to Weekly Reports missing this year. Examples attached as part of the IEP to parent from 2021, 2020, 2019, 2018, 2017, etc. as historic Precedent." The subpoena attached some examples of the types of reports Student seeks.

On March 9, 2023, Respondent filed a motion to quash the subpoena on the grounds that it constitutes improper pretrial discovery, and the subpoena is vague, overbroad, burdensome, and lacks any supporting explanation as to why the weekly reports sought are reasonably necessary to the issues at hearing. Respondent argues that the subpoena improperly compels production prior to the first day of hearing, now scheduled for March 21, 2023. Respondent asserts that the weekly reports do not exist, and it is improper to use a subpoena to request the development of such reports. Instead, Respondent argues that Student's individualized education program, or IEP, requires weekly notes with data, graphing, and comments regarding Student's performance on goals for the week, which the case manager already provides to Parent on a weekly basis. Respondent argues that it is unclear what Student wants produced, requiring Respondent to search through thousands of records to determine if the

reports exist. Respondent asserts that Student has made no factual showing that the requested documents are material and relevant to any issue in the consolidated matter.

On March 9, 2023, Student opposed the motion. Student's opposition is difficult to understand. However, it appears that Student is claiming that for the past six years except for the 2021-2022 school year when Student was disenrolled, Respondent provided Parent with weekly reports consisting of both data sheets and written narratives in the form of session/service logs from the teachers and related service providers. Student claims that during the 2022-2023 school year, Respondent has only provided the data sheets, but not the narrative portion of the session/service logs. Student argues that these documents are necessary for Parent to participate in the development of the IEP team meetings and progress meetings, participate in the hearing, and to determine if the IEP has been implemented. Student argues these documents are essential and relate to the measurement of progress on IEP goals. Student contends that Respondent is obstructing Parent from IEP input by failing to provide the complete reports.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act (20 U.S.C. § 1400 et seq.), or IDEA, 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).)

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.

In general, there is no right to prehearing discovery in due process proceedings under the IDEA. (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.) A public agency shall comply with a request for school records without unnecessary delay before any meeting regarding any individualized education program or any hearing and in no case more than five business days after the request is made orally or in writing. (Ed. Code, § 56504.) A public agency shall provide a parent, on request of the parent, a list of the types and locations of school records collected, maintained, or used by the agency. (*Ibid.*) 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(e)(7).)

Education records under the IDEA are defined by the Family Educational Rights and Privacy Act, called FERPA, to include "records, files, documents, and other materials" that "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 300.611(b).) Pupil or education records do not include "records of instructional, supervisory, and administrative personnel . . . [ ] . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(B)(i); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3.)

The United States Supreme Court in *Owasso Ind. School District v. Falvo* (2002) 534 U.S. 426 (*Falvo*) after conducting an analysis of FERPA provisions related to

education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their reasons for doing so." (*Falvo, supra,* 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Id.*) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar…" (*Id*. at pp. 434-435.)

In *Burnett v. San Mateo Foster City School District, supra,* relying on *Falvo,* the Ninth Circuit Court of Appeals affirmed the district court's determination that the school district was not required to turn over emails that were not "maintained" in a physical folder or secure electronic data base. (739 Fed. Appx. at p. 873.) "The Supreme Court has interpreted the word 'maintain' in FERPA as 'to keep in existence or continuance; preserve; retain' and reasoned that '[t]he word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database.'" (*Ibid*., quoting *Falvo*, 534 U.S. 426, 432-433.)

DISCUSSION

Although the first page of the subpoena requests production August 2022 through March 7, 2023, when read as a whole, it appears Student is seeking the weekly reports for that period to be produced to OAH for the hearing on March 21, 2023. At page 3, Student's subpoena duces tecum specifically provides for Respondent's

compliance by uploading or delivering the requested documents to OAH for the hearing by videoconference. As such, it is not, as Respondent argues, improper pretrial discovery.

Respondent's claim that it does not understand what documents are being sought is not convincing. As stated above, it appears from the subpoena and papers attached to it, that Student is seeking weekly reports prepared during the period from August 2022 through March 7, 2023, of the same type Parent received between 2017 and 2021, consisting of narrative portions of the session/service logs from his teachers and service providers, which briefly describe the sessions with Student. Respondent has apparently been providing the data sheets during the 2022-2023 school year, but not the narrative portion of the weekly reports it provided in prior years. Student's subpoena states that the documents are "now Necessary due to transition from whole year of disenrollment last year to new Middle School, for Parent Review" and development of Student's IEP, including Student's progress on goals and in the general education curriculum.

However, the subpoena falls short of demonstrating the relevance or materiality of the requested documents to the issues for hearing, much less establish that the documents are "reasonably necessary" for Student to present his case at hearing. In the subpoena, Student has not comprehensively explained to which of Student's 19 issues the documents pertain, let alone explain why they are reasonably necessary. Based on a review of the complaint, it appears that the documents could be relevant to Student's Issue 15, but the subpoena does not identify this issue or explain why they are reasonably necessary. In fact, the subpoena appears to state that Student seeks these documents so that Parent can review and discuss Student's IEPs with Respondent.

Among other things, there is no showing how documents prepared after the complaint was filed have any relevance to the issues for hearing.

Notwithstanding the foregoing, to the extent the requested documents are education records, Respondent is required to produce them. Student's education records can be requested from Respondent at any time pursuant to Education Code section 56504. When a request for education records is made, the records must then be produced no later than five business days after the request is made, and no showing of reasonable necessity is required. Neither party specifically addressed whether the subject documents are in fact education records as that term is defined by law. Rather, Respondent inconsistently argues that the documents do not exist, and at the same times asserts that it does not know whether they exist, and that it would require Respondent to search through thousands of records to determine if they exist. Respondent fails to proffer any competent evidence by way of declaration or otherwise, supporting these claims. The only declaration submitted in support of the motion is from its counsel, and it is based only on information and belief that the case manager provides Parent with weekly notes with data, graphing, and comments regarding Student's performance on goals. In any event, none of Respondent's assertions are a basis for refusing to produce Student's education records.

ORDER

1. Mt. Diablo Unified School District shall within three business days of its counsel's receipt of this Order, produce to Parent all weekly session reports and service logs pertaining to Student prepared by Student's teachers, and providers of occupational therapy and speech and language services, for the period from August 2022 through March 7, 2023, to the extent such documents exist, and are education records as that term is defined by law.

2. Respondent's motion to quash Student's subpoena is otherwise granted and the subpoena is otherwise quashed.
3. In the event Student serves a new subpoena, Student shall identify in the subpoena to which of Student's 19 issues the documents sought pertain and explain why such documents are "reasonably necessary" for Student to present his case at hearing on that issue. Student shall provide the same type of information in the subpoena if the documents sought pertain to the Respondent's issue.
4. Any subsequent motion to quash filed by Respondent in this matter shall specifically address whether any of the documents subpoenaed are education records and why, and whether or not the documents exist, including what efforts were made to determine their existence, and shall be supported by competent evidence in the form of a declaration(s) under penalty of perjury.

IT IS SO ORDERED.

Laurie Gorsline

Laurie Gorsline
Administrative Law Judge
Office of Administrative Hearings