BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021030757

ORDER DENYING IN PART AND GRANTING IN PART MOTION TO QUASH SUBPOENA, MODIFYING PRODUCTION DATE, AND CONTINUING DUE PROCESS HEARING

MAY 13, 2021

On March 22, 2021, Parents on behalf of Student filed a request for due process with the Office of Administrative Hearings, called OAH, naming Mount Diablo Unified School District, called Mount Diablo. On March 23, 2021, OAH issued a scheduling order setting the due process hearing to begin on May 18, 2021.

On May 3, 2021, Student issued and served two subpoenas duces tecum. One subpoena duces tecum was directed at Mount Diablo and served on Mount Diablo's

counsel via email with a production date of May 19, 2021. The other subpoena duces tecum was directed at Oak Hill School and served on Michael Breard via email with a May 19, 2021 production date. Both subpoenas included a notice to consumer.

On May 5, 2021, Mount Diablo filed a motion to quash both subpoenas on the grounds that they are untimely, overbroad, burdensome, seeks irrelevant information, and amounts to impermissible discovery requests.

On May 7, 2021, Student filed opposition to Mount Diablo's motion to quash the subpoenas maintaining that the subpoenas were timely, appropriate in scope, and reasonable necessity was established.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act, called 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).) 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 protective orders. (Code of Civ. Proc § 1987.1 subd. (a).)

OAK HILL SCHOOL SUBPOENA

Mount Diablo asserts that it has standing to move to quash a subpoena directed at a third party, Oak Hill School. Mount Diablo contends that section 1987.1 of the California Code of Civil Procedure gives enables it to quash a third- party subpoena. Code of Civil Procedure section 1987.1 states, in pertinent part, that a party to the lawsuit may file a motion to quash. (Code Civ. Proc § 1987.1 subd. (b)(1).) This, however, does not point to the proposition that a party can quash a third-party subpoena without demonstrating privilege or a violation of its rights.

Here, Mount Diablo's counsel did not claim to represent Oak Hill School or Breard, and it was not the party to whom the subpoena was directed. Additionally, it

failed to raise any privilege, or make a proper showing that the production of documents would violate its rights or the rights of its employees that would give rise to Mount Diablo's standing to object to the subpoena. Accordingly, Mount Diablo's motion to quash the subpoenas duces tecum directed at Oak Hill School is denied for lack of standing.

MOUNT DIABLO SUBPOENA

INSUFFICIENT NOTICE TO COMPLY

Mount Diablo contends that Student failed to serve the subpoena duces tecum within the specified timeframes as stated in California Code of Civil Procedures sections 1985.3, 2020.410, and 2020.430. Student disagrees.

In support of its contention, Mount Diablo first cites Code of Civil Procedure section 1985.3 subsection (b) which states, in relevant part, that the subpoena duces tecum shall be served on the consumer whose records are being sought not less than 10 days before the date for production specified in the subpoena duces tecum, plus the additional time provided by Section 1013 if service is by mail, and five days before service upon the custodian of the records. (Code Civ. Proc. § 1985.3 subd. (b).) Code of Civil Procedure section 1013 requires two additional court days if served by electronic transmission. (Code Civ. Proc. § 1013 subd. (g).) However, Code of Civil procedure section 1985.3 subdivision l states that if the subpoenaing party is the consumer, and the consumer is the only subject of the subpoenaed records, notice to the consumer, and delivery of the other documents specified in subdivision (b) to the consumer are not required. (Code Civ. Proc. § 1985.3 subd. (l).) Thus, Student timely served the Mount Diablo subpoena, as Student was not required to comply with the notice to consumer

requirements, and 10 days before the production date plus two additional court days for electronic transmission is May 18, 2021.

Next, Mount Diablo points to Code of Civil Procedure sections 2020.410 and 2020.430 to support its untimely subpoena proposition. California Code of Civil Procedure section 1985.3, subdivision (d), states that service of a subpoena dues tecum must be served "in sufficient time to allow the witness reasonable time, as provided in Section 2020.410, to locate and produce the records or copies thereof." (Code Civ. Proc. § 1985.3 subd. (d).) Code of Civil Procedure section 2020.410, subdivision (c) defines sufficient time as "in accordance with Section 2020.430 on a date that is no earlier than 20 days of the issuance, or 15 days after the service of the subpoena, whichever is later." (Code Civ. Proc. § 2020.410 subd. (d).) Here, sections 2020.410 and 2020.430 are inapplicable because they apply to deposition subpoenas, not hearing subpoenas. And, while Mount Diablo explained that production was burdensome, it did not specify how much time it needed to produce the documents and why 16 days was not a reasonable amount of time for production. Thus, the argument is unpersuasive.

However, out of abundance of caution and in light of COVID-19 and the limited staff at school districts at this time, the undersigned will modify the production date, giving Mount Diablo additional days for production, to 9:30 a.m. on May 25, 2021.

Additionally, the unsigned finds good cause exists to continue the due process hearing. A due process hearing must be conducted, and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed.Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the

Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs.,tit. 1, § 1020;Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal.Rules of Court, rule 3.1332(c).)

Here, good cause exists to continue this matter to May 25, 26, and 27, 2021, to give Mount Diablo more time to produce documents and have production coincide with the first hearing day. Further, there is no right to prehearing discovery in due process proceedings under the IDEA. (20 U.S.C. § 1400 et seq.) Thus, the Oak Hill School subpoena production date will also be at 9:30 a.m., on May 25, 2021.

SCOPE OF THE SUBPOENA

Mount Diablo asserts that the subpoenas duces tecum directed to Mount Diablo is overboard, burdensome, and seeks irrelevant information. Student maintains that the subpoena is appropriate but concedes in the opposition papers to limit the scope.

Student's subpoena directed to Mount Diablo requests:

1. "Any and all correspondence, notes, or emails from January 2015 to March 2020 between employees of Oak Hill School and employees of Mount Diablo Unified, which mention, describe, reference or are related to [Student's] communication needs including the need for speech/AAC/AT assessments and/or AAC/AT devices."
2. "Any and all assessments of student including assessment reports, and assessment protocols from 2016 to the present."

Student states the necessity for the documents is: (1) Student was attending Oak Hill School which was funded and directed by Mount Diablo; (2) the records will establish who made the decision not to assess from 2013 through 2021, (3) the records

will establish who decided not to assess Student's communication needs in 2016; and (4) to determine bias and objectivity of witnesses of Mount Diablo and Oak Hill School.

Mount Diablo argues that the subpoena duces tecum is overbroad and burdensome as to Student's request number one because it asks for correspondence, emails, and notes over a 5-year time period, with any mention, reference, or relation to Student's communication needs from an unknown number of unidentified employees. Further, Mount Diablo contends that Student failed to provide justifiable reasons for the request. Additionally, because the request is overbroad, Mount Diablo asserts that it is burdensome as to time and cost to comply with the request.

Evidence Code Section 350 states, "No evidence is admissible except relevant evidence." Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible person are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objections in civil actions. (Govt. Code §11513 (c).) The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Govt. Code §11513 (f).)

Here, Student asserts in the complaint alleged violations related to a failure to assess Student from the 2016-2017 school year through March 2020. Thus, the requested time period of January 2015 to March 2020 in the subpoenas duces tecum is relevant to the time period at issue in this matter, as documentation before the time period related to Student's communication needs may be relevant to a future failure to assess claim. Accordingly, the specified time period in the subpoena is not overbroad.

Mount Diablo proved, however, that the scope of Student's subpoena duces tecum is overbroad as to the document type and the information solicited. In fact, Student agreed in the opposition papers to limit the scope of the request to Mount Diablo employees working with Oak Hill. Further, the request should be limited to Student's witnesses as stated in Student's amended prehearing conference statement dated May 6, 2021, as other documentation would be hearsay with the inability to be corroborated at hearing and undercuts the reasonable necessity for production of such documents. And, while Student demonstrated the requisite necessity for written correspondence and emails to aid in Student's presentation at hearing regarding who decided to assess or not assess at different time periods, Student failed to show any reasonable relationship and the requisite necessity of employees' notes that remain in the sole possession of the maker as a means to prove or disprove the assessment issues in this matter. Further, Student's argument that the documents are needed to show bias and objectivity falls short of demonstrating any valid basis or justification for Mount Diablo to produce the requested documents absent a more particularized showing, as this reason is conclusory. And, it is the ALJ's role to make these determinations. Thus, Student's request number one as to Mount Diablo will be modified as follows:

1. Any written correspondence or emails from January 2015 to March 2020, which mention, describe, reference or are related to Student's communication needs including the need for speech, augmentative and alternative communication and assistive technology assessments, and augmentative and alternative communication and assistive technology devices, of any Mount Diablo employees who worked with Oak Hill School regarding Student, during the specified time period, and are named in Student's amended prehearing conference statement, dated May 6, 2021.

All other production requests directed at Mount Diablo were unopposed and thus remain as stated in Student's subpoenas duces tecum.

NO RIGHT TO PREHEARING DISCOVERY

Mount Diablo asserts that there is no right to prehearing discovery beyond that allowed for in the IDEA, and the California Education Code. Further, Student is not entitled to documents maintained outside of Student's education records.

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 here does not seek prehearing discovery. The subpoena requested production on May 19, 2021, the second day of hearing, and has been extended to May 25, 2021, the continued first day of hearing. Accordingly, Mount Diablo's assertion that Student is engaging in prehearing discovery fails.

Further, although Student's requested documents not part of a typical educational file, they may be material, relevant, and necessary to prove or disprove Student's issues in this matter. Since the requested documents, as modified, may contain relevant information, the production request is appropriate. Additionally, any objection based on relevancy may be made upon presentation at hearing.

ORDER

1. Mount Diablo's motion to quash is denied in part and granted in part.
2. Student's subpoenas duces tecum directed at Mount Diablo and Oak Hill School are modified to change the production date to 9:30 a.m. on May 25, 2021. The records shall be produced by Mount Diablo and Oak Hill School to the Administrative Law Judge through Caselines.com.

3. The due process hearing date is continued to May 25, 26, and 27, 2021.
4. Mount Diablo's motion to quash Mount Diablo's subpoena is granted in part, and the subpoena is hereby modified as to request number one as follows: Any written correspondence or emails from January 2015 to March 2020, which mention, describe, reference or are related to Student's communication needs including the need for speech, augmentative and alternative communication and assistive technology assessments, and augmentative and alternative communication and assistive technology devices, of any Mount Diablo employees who worked with Oak Hill School regarding Student, during the specified time period, and are named in Student's amended prehearing conference statement, dated May 6, 2021.
5. Counsel for Student shall immediately serve a copy of this order on Oak Hill School.

Cynthia Fritz

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings