BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SUMMIT PUBLIC SCHOOLS: DENALI, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018070224 ORDER GRANTING MOTION TO QUASH SUBPOENA DUCES TECUM

On July 3, 2018, Summit Public Schools-Denali, filed a request for due process hearing naming Parent on behalf of Student as respondent. The complaint seeks rulings on two issues[1]: 1) Whether Summit Denali should be allowed to implement its March 7, 2018 assessment plan, including the diagnostic placement, in the absence of parental consent; and 2) whether Summit-Denali's June 12, 2018 IEP offer constituted a free, appropriate public education.

History of the Process Leading to the June 12, 2018 IEP

Summit-Denali's complaint alleges that Student had never been eligible for special education prior to enrolling at Summit-Denali as a ninth grade student in the 2016-2017 school year. A full range of assessments were completed and an initial IEP team meeting was scheduled for January 13, 2017, at which time, Parents informed the IEP team that Student had serious mental health issues related to suicidal ideation and depression and would not be able to return to school. Summit-Denali agreed to Parents' requested independent educational evaluation of Student. Following consideration of the independent evaluation, Student's eligibility was determined on April 4, 2017. Summit-Denali offered Esther B. Clark non-public school as a placement. Parents consented to the eligibility and goals on April 24, 2017 but not to placement, although they did agree to provide information to Esther B. Clark school.

Summit-Denali's complaint further asserts that in May of 2017, Parents notified Summit-Denali they were unilaterally placing Student at Fusion Academy where Student would receive individual instruction but no special education. Student's private therapist attended an IEP team meeting as did a representative from Esther B. Clark on June 5, 2017. Student's therapist stated that Student's depression and anxiety were too great for him to return to a regular school environment. Following the June 5, 2017 IEP team meeting, two telephone conference calls were conducted that included Esther B. Clark, Student's private

[1] Originally, the complaint sought rulings on three issues. However, issue number three was dismissed at the time of the Prehearing Conference on the grounds that it sought an advisory opinion.

therapist and counsel for Parents and Summit-Denali during the summer of 2017 in which information was provided regarding Student's attendance at Fusion and Student's social interactions. Student's therapist shared his opinion that Student was unable to participate in school, even in a therapeutic setting.

Summit-Denali alleges that it attempted to schedule an IEP team meeting in October and November, 2017 but was unable to schedule all needed participants, including Student's therapist. Summit-Denali received a 10 day notice of unilateral placement in a residential treatment center from Parents on December 1, 2017. However, a specific treatment center was not identified. Summit-Denali alleges it had received information during the fall of 2017 that Student had been attending Fusion during the fall term. Summit-Denali denied reimbursement for the residential treatment but offered another IEP team meeting for further discussions.

Summit-Denali's complaint alleges that Student's private therapist could not participate in the December 15, 2017 IEP team meeting; however, Parents reported Student's condition had deteriorated. TLC Child and Family Services residential treatment center was offered by Summit-Denali at that time. Student did not attend TLC.

Student's therapist participated in a March 7, 2018 IEP team meeting at which time the therapist reported Student's condition had improved, though he was still on suicide watch. It was the therapist's opinion that moving him to a residential treatment facility would be harmful to his mental health and that returning Student to Summit-Denali could result in him having a negative experience. According to the complaint, Summit-Denali was informed Student was accessing his 1:1 instruction at Fusion and improving socially. Summit-Denali asked for further assessments to determine a proper placement, including a diagnostic placement. Parents consented to all but the diagnostic assessment.

Summit-Denali's complaint asserts that June 12, 2018 was the date on which the next IEP team meeting was able to be convened. Parent provided information regarding Student's grades, including copies of progress reports and reported participation in 1:1 discussions with teacher and participation in Homework Café during which all students completed classwork. Student was reported to be socializing, and remained on round-the-clock suicide watch. As of the June 12, 2018 IEP, he had not seen a therapist for six weeks. Summit-Denali alleges that, based on the information provided to the IEP team, Summit-Denali offered a diagnostic placement in a one-to-one setting at the Summit-Denali Linda Vista campus for 3 hours a day, with an IEP team meeting to be scheduled 30 days after the initiation of the placement to evaluate whether Student was able to tolerate more classes and more inclusion. Additional support services were also included in the offer.

Issuance of Subpoenas

On August 2, 2018, Summit-Denali issued two Notices to Consumer advising Parents, Student and their counsel that Summit-Denali sought records from the custodian of records for Fusion Academy, where Student currently attends school; and from Dr. Michael

Loughran, Student's therapist. The notices to consumer were accompanied by copies of the subpoenas Summit-Denali intended to issue. On August 13, 2018, duplicates of the subpoenas were issued to the two offices identified. Summit Denali alleges in its complaint that prior to subpoenaing the records, Summit-Denali had requested releases for the records from Parents, which had been refused.

One subpoena seeks records from Fusion related to Student, specifically "Any and all grade reports, transcripts, progress reports, attendance records, disciplinary records, teacher comments, communications with [Parents] and billing records related to [Student]," through its custodian of records and required their production on the first date set for hearing, August 28, 2018. The custodian of records was not required to appear at hearing if the records were delivered as directed.

The second subpoena, directed to Dr. Loughran, Student's private therapist, orders his appearance at on the first day of hearing, on August 28, 2018, in addition to requiring that records be produced. The documents sought were "all documents and/or calendars referencing scheduled appointments for [Student] from January 1, 2017 to the present; all billing records for all appointments for [Student] from January 1, 2017 to the present; and any and all treatment plans for [Student] from January 1, 2017 through the present."

Student's Motion to Quash & Summit-Denali's Opposition

Student filed a motion to quash the subpoenas on August 13, 2018 on the grounds that Summit-Denali has not articulated a reason the documents are needed to present their case at hearing. Student further objects to the subpoenas on the grounds that they are irrelevant to the hearing as the IEP in question must be evaluated based on the information available to Summit Denali on the date the IEP offer was made. Student's proof of service states the motion was served on the Office of Administrative Hearings and on counsel for Summit-Denali on the same day it was filed. No notice of the motion was provided to either of the witnesses being subpoenaed. Neither witness subpoenaed filed a motion to quash the subpoenas.

Summit-Denali filed an opposition to the motion on August 16, 2018 arguing that the subpoenas did not seek pre-hearing discovery; were timely and provided adequate time to produce records; and that the records sought were relevant to the questions of whether the IEP offer made was consistent with Student's treatment plan. Summit-Denali asserts that Fusion's records will allow Summit-Denali to demonstrate that their IEP offer met Student's needs, as it was created to mirror the situation described in IEP meetings as being offered to Student at Fusion. Summit-Denali further argues that the records are relevant to whether Student has been successful in attending school at Fusion, how he has progressed at Fusion and how his teachers evaluate his success as well as "what may be deemed FAPE under the current circumstances." Student filed a response to Summit-Denali's opposition on August 20, 2018 noting that Summit-Denali's issue number three had been dismissed at Prehearing Conference.

APPLICABLE LAW

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) 2018 WL 3120298, p.2.) 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).)

California Code of Regulations, title 5, section 3082, subdivision (c)(2), however, specifies the right of the parties in a special education hearing to compel the attendance of witnesses at hearing. That regulation states, "[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)." Thus, subpoenas are available to require the production of information that is reasonably necessary in order for a party to present their case at hearing. 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.) In the absence of regulations pertaining to the details of subpoena processes in administrative hearings, the Office of Administrative Hearings requires parties to comply with procedures described in California Civil Code. California Civil Code section 1985 governs the issuance of subpoenas. In accordance with the California Civil Code, OAH allows attorneys to issue subpoenas to witnesses to require their attendance at hearing with documents and to excuse the attendance of witnesses if documents are produced. Parties must also comply with the consumer protections of California Civil Code 1985.3 when seeking the production of the personal records of a consumer. (*Sehlmeyer v. Dept. of General Services*, (1993) 17 Ca. App. 4th 1072.)

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 Code of Civil Procedure section 1987.1, which 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.

Sufficiency of the Subpoenas

These subpoenas do not seek prehearing discovery. They were timed to give more than the minimum amount of notice required for production of documents while still directing that documents be produced, and in the case of Dr. Loughran, the witness, appear on the first day of hearing, which is scheduled for August 28, 2018. The subpoenas comply with the requirement of notice to the consumer (Student and his Parents through their attorney) and the subpoenas themselves were properly served on the entities from which documents and testimony were sought.

SUBPOENA TO FUSION ACADEMY

The subpoena to Fusion Academy requests information regarding Student's grade reports, transcript, progress reports, attendance records, disciplinary records, teacher comments, communications between the school and Parents and billing records from January 2017 to the present. According to the complaint, Student's attendance and experience at Fusion Academy was discussed in detail by the IEP team in making the determination as to what needed to be included in the assessment plan of March 7, 2018 and in the IEP offer of June 12, 2018. No documents from Fusion were produced to the IEP team during the time that they were developing the June 12, 2018 IEP offer.

SUBPOENA TO DR. LOUGHRAN

As with the Fusion subpoena, the subpoena to Dr. Loughran articulates the fact that the evidence being sought is required in order for Summit Denali to establish that it is able to offer a program to meet Student's needs. The complaint alleges that Dr. Loughran has been a member of the Summit-Denali IEP team and discussed his evaluations of Student's mental health status and his needs during multiple conversations with the IEP team. The subpoena seeks documents or calendars referencing appointments scheduled for Student, billing records related to appointments scheduled for Student and treatment plans for Student. Documents are sought for the time period from January 2017 to the present. No documents from Dr. Loughran were produced to the IEP team during the time that they were developing the June 12, 2018 IEP offer.

Summit-Denali has the burden establish that the assessment request it made to parent in its March 7, 2018 proposed assessment plan was necessary and that the IEP offer it made on June 12, 2018 offered Student a free, appropriate public education. Student asserts that the subpoenas are not necessary because Summit Denali had to make an offer of FAPE based on the information they had at the time of the IEP team meeting. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ*. (3d Cir.1993) 993 F.2d 1031, 1041.)

Student's ability to function in the environment provided by Fusion and his mental health needs are alleged to have been discussed extensively by the IEP team between the dates of January 13, 2017 and June 12, 2018. However, there are no allegations in the complaint that the records from Fusion or from Dr. Loughran's office were ever provided to the IEP team for their consideration. Applying the snapshot rule, Student's motion to quash the production of documents from Fusion and from Dr. Loughran is granted. Documents the team did not consider in developing the IEP offer or the assessment plan are not relevant to either issue pending in this case. The standard of review of Summit-Denali's IEP offer is whether it met the requirements of a free, appropriate public education; not whether it mirrored Parents preferred program or whether it aligned with Dr.

Loughran's treatment plan. Summit-Denali has not established that the subpoenaed records are reasonably necessary to present their issues at hearing.

ORDER

1. Student's motion to quash Summit-Denali's subpoena duces tecum to Fusion Academy is GRANTED.

2. Student motion to quash Summit-Denali's subpoena duces tecum for production of records to Dr. Loughran is GRANTED. Nothing in this order precludes Summit-Denali from subpoenaing Dr. Loughran to testify during the hearing as to the information provided to the IEP team in developing the IEP.

3. Summit-Denali shall immediately serve copies of this order on Fusion Academy and on the office of Dr. Loughran advising them that production of documents is not required.

IT IS SO ORDERED.

DATE: August 20, 2018

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings