BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019100147

ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUMS

JULY 14, 2020

On October 2, 2019, Parent on Behalf of Student filed a request for due process hearing with the Office of Administrative Hearings, called OAH, naming Long Beach Unified School District. On November 6, 2019, OAH granted the parties' joint request for continuance and the matter is currently set for hearing to begin on July 21, 2020.

On July 8, 2020, Long Beach issued subpoena duces tecums on Student's expert witnesses Susan Hollar and Dr. Agnesa Papazyan. The subpoenas sought production of documents related to Student's education and directed Ms. Hollar and Dr. Papazyan to produce the documents on the first day of hearing, July 21, 2020. Long Beach sent a notice to consumer advising Student of the subpoenas.

On July 10, 2020, Student filed a motion to quash the subpoenas on the grounds that the subpoenas were not reasonably necessary because the request was overbroad and not for educational records; improper pre-hearing discovery, and; in part, protected attorney work product. On July 14, 2020, Long Beach opposed the motion.

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.)

Code of Civil Procedure section 1985, subdivision (c), provides that an attorney of record in an action may sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena. OAH permits an attorney of record in a special education matter to sign and issue subpoena duce tecum consistent with this provision.

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecums. 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.

DISCUSSION

Student first argues the subpoena duces tecums are not reasonably necessary because the request was overbroad and not for educational records. However, the requested records were for educational records directly related to the pending due process hearing. For example, Long Beach's subpoena requested information, documents, and records prepared by or relied upon by Student's experts in forming their opinions and recommendations regarding Student's educational program, placement, and services, to which the experts would testify during the due process hearing. The subpoenas also requested communications between Parent and Student's experts regarding Student's educational program. Finally, the subpoena duces tecums requested communications between Student's attorney and Student's experts regarding

their opinions and recommendations pertaining to Student's educational program. Consequently, Student errs in arguing the requested documents were overly broad and not for educational records. To the contrary, the subpoena duces tecums were narrowly crafted to request only educational records relevant and reasonably necessary for Long Beach's defense in the due process hearing.

Student also contends the subpoena duces tecums were overbroad because the request did not specifically identify each document requested. This argument places an unreasonable burden for Long Beach to identify records that it is unfamiliar with. Long Beach's subpoenas are sufficiently clear to permit Ms. Hollar and Dr. Papazyan to produce the requested records.

Student next argues the documents sought may include confidential health care records protected by the Health Insurance Portability and Accountability Act of 1996 and Welfare and Institutions Code sections 4514 and 4518. However, there are exceptions to these federal and state laws for production of records pursuant to a subpoena duces tecum when litigation is pending or when government benefits are being sought. (45 C.F.R. § 164.512(e)(1)(ii); Welf. & Inst. Code, § 4514, subd. (c).) Further, this due process hearing is a confidential proceeding. Should Student feel that particular documents contain matters too sensitive for a confidential due process hearing, Student can seek a protective order.

Student next errs in arguing the subpoena duces tecums seek improper prehearing discovery. Student is correct that there is no formal pretrial discovery in special education cases. (20 U.S.C. § 1400 et seq.) For example, there is no provision in special education law that permits a party to serve interrogatories or to depose a witness. However, subpoenas and subpoena duces tecums, including to third parties like Student's experts, are permitted in special education cases.

Here, Long Beach's subpoena duces tecums were issued to give adequate notice for the production of documents and complied with the required notice to consumer. The subpoenas directed Ms. Hollar and Dr. Papazyan to produce the documents on the first day of hearing, not prior to the hearing. Consequently, there is no merit to Student's argument.

Finally, Student argues the requested records are, in part, protected attorney work product. However, Long Beach's subpoena duces tecums requested only records and communications between Student's attorney and Ms. Hollar and Dr. Papazyan regarding the expert witnesses' opinions and recommendations regarding Student's educational program. The request falls far short of confidential communications, as there is no attorney-client privilege between Student's experts and Student's attorney. Nor does it seek protected attorney work product, such as the attorney's legal research or the attorney's legal opinions of the case.

In sum, Long Beach's subpoena duces tecums met legal requirements and Student failed to establish that the subpoena duces tecums should be quashed.

ORDER

1. Student's motion to quash Long Beach's subpoena duces tecums to Susan Hollar and Dr. Agnesa Papazyan is DENIED. The records shall be produced by Ms. Hollar and Dr. Papazyan to the Administrative Law Judge on the first day of the hearing in this matter, consistent with the instructions for hearing by videoconference.
2. Counsel for Long Beach shall immediately serve a copy of this Order on Ms. Hollar and Dr. Papazyan.

IT IS SO ORDERED.

DocuSigned by:
Paul Kamoroff
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Paul H Kamoroff

Administrative Law Judge

Office of Administrative Hearings