BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2014090112
v.	ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO QUASH SUBPEONA DUCES TECUM
BERKELEY UNIFIED SCHOOL DISTRICT.	

On August 29, 2014, Parent on behalf of Student filed with the Office of Administrative Hearings a Request for Due Process hearing naming the Berkeley Unified School District as respondent. On January 27, 2015, Student filed a motion for leave to file a Second Amended Complaint (complaint). On February 1, 2015, OAH granted leave for Student to file the complaint. In the complaint, Student seeks to be reimbursed for all costs incurred by Student's parents in placing Student at the Center for Change, a residential treatment center, and for District to prospectively fund Student's continued placement at the Center.

On February 23, 2015, District's counsel, Jan E. Tomsky, issued a subpoena duces tecum addressed to "UHS Timpanogos (dba Center for Change), Paula Kidd, Director of Admissions." The subpoena contains requests for documents related to ten areas.

On March 5, 2015, Student filed a motion to quash the subpoena. On March 11, 2015, District filed an opposition to the motion to quash.

APPLICABLE LAW

Federal law provides for the rights 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).) Both of those subsections relate only to due process hearings, not to any prehearing procedures. A party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights 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).) Both of those subsections relate only to due process hearings, not to any prehearing procedures.

Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to "[a] party to a hearing held pursuant to this section ..." (Ed. Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. 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 Board 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.

The provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) Subdivision (c)(2) of section 3082 of title 5 of the California Code of Regulations provides in pertinent part that 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)."

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 California Code of Civil Procedure. Section 1987.1 of that code 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.

Section 3082, subsection (c)(2) of Title 5 of the California Code of Regulation (Section 3082) permits the issuance of subpoenas duces tecum "upon a showing of reasonable necessity by a party." This requirement mirrors that required by California 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 Code of Civil Procedure also requires a similar affidavit in a subpoena duces tecum. Section 1985 requires that a subpoena duces tecum shall be served with an affidavit demonstrating good cause in "full detail" how the material being sought is material to the issues involved. The requirement to demonstrate good cause as to materiality is not met by the affiant's legal conclusion. The good cause requirement is met by a factual showing of why the requested documents 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.)

Consistent with the Code of Civil Procedure, OAH permits an attorney of record in a special education matter to sign and issue subpoenas duces tecum. Therefore, Ms. Tomsky, as the attorney for District, was duly permitted to sign the subpoenas and they are valid.

The regulations governing this proceeding specifically disallow the provisions of the APA that provide broader authority for the use of subpoenas in other administrative hearings. Although the OAH subpoena form has options for production of the records under subpoena, not all of them may apply to special education matters.[1] While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Parents have the right to request and receive the pupil's educational records. ((Ed. Code § 56504).) Additionally, the parties are entitled to receive copies of all the documents the LEA intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).) These required disclosures are the only mechanisms by which a party may obtain documentary information from another party prior to hearing.

In addition, the standard for issuance of a subpoena in this proceeding is "reasonable necessity," which is a stricter standard than that provided under the APA. This standard requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. The declaration in support of a subpoena duces tecum must set forth sufficient detail, specific to the legal or factual issues to be adjudicated, to show that the required documents are objectively required for the party present a case or defense. In the present case, the uniform request is for "any and all documents and/or correspondence of any kind…." So, too, the subpoena duces tecum contains a conclusory declaration that the District requires the records to defend itself at hearing. Thus, the declarations provide a generic description of the case and the requested documents are described in overly broad and general terms. In this regard, the subpoenas are no different from standard discovery requests that are routine in civil litigation. However, such use of subpoenas is neither authorized, nor appropriate in this proceeding.

DISCUSSION

District's subpoena duces tecum requests that the Center produce the records on April 1, 2015, the day the hearing is scheduled to commence. The subpoena duces tecum also provides that the witness need not appear personally if the requested documents are

[1] At the bottom of the box chosen by the LEA's to instruct production of the subpoenaed records to their attorney on a date prior to hearing, the OAH form has a warning in italics: "*NOTE: This manner of production may not satisfy the requirements of Evidence Code section 1561 for admission at hearing.*" Evidence Code section 1560, subdivision (e) specifically describes this prehearing attorney production option as a "deposition subpoena."

forwarded to the issuing attorney by March 10, 2015, accompanied by an affidavit. The subpoena duces tecum requests these classes of records since August 12, 2012:

1. Admission and treatment services, including, but not limited, to parent documents submitted for admission purposes, admission reports, diagnoses reports, treatment reports, medical reports, and discharge reports relating to other care staff (i.e., psychotic nurses, nursing services, behavior therapists) for Student, held by UHS;
2. Admissions criteria policies for DFD;
3. Services offered and provided to patients;
4. Methods and therapies offered at CFC;
5. Associated costs for such services provided by CFC;
6. CFC's licenses to provide medical, social, emotional, and behavioral services;
7. Staff to student ratios at CFC;
8. Job qualifications and licensing CFC requires of staff as a condition of employment;
9. CFC's organization and treatment structure; and
10. Student's educational records.

In the declaration as to the good cause for the subpoena, Ms. Tomsky states that Student is claiming reimbursement for costs incurred while she attended the Center during the 2013-2014 and 2014-2015 school years.

In her motion, Student contends that OAH should quash the subpoena duces tecum on grounds that (1) it is overly broad, irrelevant, and unduly burdensome; (2) it requests confidential medical records; and (3) it was improperly served.

The subpoena was properly served. District's counsel served Student's attorney with a copy of the subpoena duces tecum along with a Notice to Consumer on February 24, 2015, by email, a method which previously had been utilized by the parties. On March 2, 2015, District served the Center by mail with a return receipt. Student's contention that there was no indication that the Center was served is without merit.

Student also claims that the records requested are confidential pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPPA). Student admits that there are exceptions to HIPPA including when there is litigation pending. Evidence Code Section 1016 (b) states that there is patient and psychotherapist privilege under state law where the person's mental or emotional condition is at issue. Student fails to cite any authority which would support her position. Since the complaint raises the Student's mental and emotional state required placement at the Center, the information sought, in general, is relevant and material.

As to Student's contention that the subpoena duces tecum is overly broad and irrelevant, it is necessary to examine each of the ten areas where documents were requested.

(A) *Admission and treatment services*. District requests documents related to the application and consideration by the Center for the admission of Student as well

as records involving the care and treatment of Student. As to the admission documents, the application and all supporting documents relating to Student's psychological, emotional and medical condition are relevant to the matter. Any documents relating to information as to Parents' financial condition are not relevant. Treatment reports, discharge reports, and diagnoses reports are relevant to whether the Center was an appropriate placement.

(B) *Admission criteria for the Center.* Student demonstrated that the Center operates numerous facilities and types of services. District has not demonstrated how the admission criteria utilized by the Center and its parent company, UHS Timpanogos, are relevant or material.

(C) Services offered by the Center in general. District has failed to demonstrate whether this information is not generally available to the public. Student has attached as an exhibit to her motion, a copy of the Center's public website where such information is available in general terms.

(D) Methods and therapies offered by the Center. See (C) above.

(E) Associated costs for services offered by the Center. This request is overly broad and immaterial as it requests information which may not apply to Student.

(F) The Center's licenses to provide medical, social, emotional, and behavioral services. This information is relevant and material as to the appropriateness of Student's placement at the Center.

(G) Staff to student (patient) ratios. Since the Center operates numerous programs, it would appear that this information is not relevant and is overly broad. This request should be modified to such documents which relate to the program(s) which Student participated at the Center.

(H) Job qualifications and licensing the Center requires of staff as a condition of employment. District has failed to demonstrate whether such information is equally available to the public. Student has attached a copy of the Center's website which lists the qualifications of the Center's personnel.

(I) The organization and treatment structure of the Center. Student has not opposed this request.

(J) Student's education records maintained by the Center. Student has not opposed this request.

ORDER

1. Student's motion to quash the documents sought in the sixth, ninth, and tenth area is DENIED.

2. Student's motion to quash the documents sought in the second, third, fourth, fifth, and eighth is GRANTED.

3. Student's motion to quash the documents sought in the first area is DENIED in part and GRANTED in part. The request for admission documents relating to the

financial condition of Student's family shall not be produced. Student's request to quash the remaining documents shall be produced.

4. Student's motion to quash documents relating to staff-patient ratios is GRANTED only as it relates to any program in which Student was a participant.

5. District shall provide a copy of all documents received within 24 hours to Student's attorneys. Should Student want to file with OAH a motion as to admissibility of any of the documents, Student shall file such motion within four days of receipt of the copies received.

IT IS SO ORDERED.

DATE: March 12, 2015

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings