BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013100405 ORDER DENYING STUDENT'S MOTION TO QUASH SUBPOENAS DUCES TECUM AND GRANTING PROTECTIVE ORDER

On March 3, 2014, Student filed a motion to quash, or in the alternative, for a protective order regarding Sacramento City Unified School District's (District's) two subpoenas duces tecum (SDT's) dated February 26, 2014, seeking limited records individually from Mother and Father (Parents). On March 4, 2014, District filed an opposition to the motion to quash and a notice of nonopposition to the request for a protective order.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities Education Improvement Act (IDEA) has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).) California Code of Regulations, title 5, section 3082, subdivision (c)(2) sets forth the right of the parties in a special education hearing to compel the attendance of witnesses. It provides in pertinent part that, "[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)." California Code of Regulations, title 5, section 3089, specifies that the subpoena provisions of the Administrative Procedure Act (APA), found in California Government Code sections 11450.05 to 11450.30, do not apply in special education due process hearing matters. Special education law does not specifically address whether or how an SDT may be quashed.

In ruling on a motion to quash a SDT, OAH uses as guidance and relies by analogy on the relevant portions of the APA and the California 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

District's SDT's to Parents ask for two items: (a) Student's fall 2013 application for admission to Falcon Ridge Ranch school in Utah; and (b) Student's diary or journal for the time period between May and October 3, 2013. Student's motion to quash is based on the ground that District's SDT's do not contain a showing of reasonable necessity for the documents requested, and that they constitute unreasonable violations of Student's and Parents' rights to privacy.

On March 4, 2014, the due process hearing in this matter began. On March 5, 2014, Student withdrew her motion to quash the SDT's as to the application for her attendance at Falcon Ridge Ranch. Since the motion was withdrawn, no ruling was made.

On March 5, 2014, the parties orally argued Student's motion to quash the SDT's as to her journal. In this case, Student claims that, due to her emotional and social state related to her disability of Emotional Disturbance, District should have offered her an educational placement in a residential treatment facility. Student's exhibit binders, delivered to District prior to the hearing in compliance with Education Code section 56507, subdivision (e)(7), included an excerpt from her personal journal as Student's Exhibit S-72. Student claimed the excerpts are material to show her state of mind during the relevant time period. District claimed that Student waived her right to privacy by placing her mental health at issue and voluntarily disclosing private journal excerpts in her exhibit binder.

Because Student has placed her mental health at issue in this case, and opened the door to the relevance of her journal, Student's motion to quash District's SDT's was denied. However, because of the highly sensitive and personal information contained in the journal, while it may be relevant to the matters in this closed hearing, the journal should not thereby become part of Student's "educational records." Indeed, District does not claim that it intends to use the document for educational and individualized education program (IEP) purposes and stipulates to a protective order to limit its use.[1] Based on the foregoing, the ALJ found that Student's right to privacy justifies the issuance of a protective order. These orders were placed on the record on March 5, 2014, and are set forth as follows:

ORDER

1. Student's motion to quash District's SDT's for production of her journal is denied.

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[1] In this regard, it must be noted that Student cannot have it both ways. Once a protective order is granted, Student cannot later argue that District's IEP team, at a future date, should have known of the protected contents of the journal in making an IEP offer. (See, e.g., *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; see also *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1523 (discussion of parents' refusal to turn over portions of an expert's report).)

2. Student's motion for a protective order limiting access to and use of her journal is granted. Student shall redact from her journal any personally identifying information such as the names of other minors under the age of eighteen, and shall number the pages.

3. Student shall produce three copies of her redacted journal to the District for use during this hearing by District's lead counsel, Mr. Osher; assistant counsel, Ms. Link; and Special Education Director Bryant. Student shall produce one copy of the journal that will be marked for identification as Exhibit S-72 in the official exhibit binders; and one copy of the journal for the ALJ. No other copies of the journal will be made or distributed unless ordered otherwise.[2]

4. The parties are prohibited from disclosing the journal to anyone other than the legal representative of the parties, except as provided in this order. District is hereby restricted to using Student's journal, in whole or in part, solely for purposes of this pending due process litigation. District may use the journal in its examination of witnesses on the record during the hearing but may not show the journal or any of its pages to any witnesses prior to their testimony.

5. At the conclusion of the hearing and after the submission of the parties' closing arguments, all copies of Student's journal shall be returned to the attorney for Student with the following exceptions:

   (a) Student's journal marked as Exhibit S-72 shall be sealed by OAH and maintained with the record of the case.[3]

   (b) The ALJ's copy of Exhibit S-72 shall be shredded by the ALJ after the Decision has been issued and served on the parties.

DATE: March 10, 2014

/s/
DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

[2] Student asked to substitute her excerpts in Exhibit S-72 for the journal. All copies of the excerpts shall be returned to Student's counsel.

[3] The ALJ noted on the record that in the event of an appeal or civil suit arising out of this matter, OAH will not have further jurisdiction and Student may or may not need to seek further protections for the sealed document.