BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ANAHEIM ELEMENTARY SCHOOL DISTRICT.	OAH Case No. 2018070654 ORDER DENYING STUDENT'S MOTION TO QUASH SUBPOENA DUCES TECUM SEEKING RECORDS FROM DR. STEPANOFF

On July 12, 2018, Parent on behalf of Student filed a request for due process hearing (complaint) naming Anaheim Elementary School District as respondent. Parent is self-represented. On August 3, 2018, Student's request to file a first amended complaint was granted with the amended complaint deemed filed that day. On August 13, 2018, Anaheim issued notices to consumer, pursuant to California Civil Code 1985.3 to Parent on behalf of Student seeking documents from Benjamin Stepanoff, Psy.D. and Dr. Juan Mocega, accompanied by subpoenas duces tecum to each care provider, directing them to appear with documents on October 4, 2018 for testimony in the hearing scheduled to begin that day.

On August 20, 2018, Parent on behalf of Student, filed objections to the subpoena of Dr. Stepanoff. This is being treated as a motion to quash the subpoena. Anaheim opposed the motion to quash the subpoena directed to Dr. Stepanhoff and further requested that the subpoena directing production of documents by Dr. Mocega also be determined to be valid despite the fact that it had not been the subject of an objection by Student. Absent a motion to quash the subpoena to Dr. Mocega, OAH will not make a ruling as to the adequacy of the subpoena issued to Dr. Mocega. Dr. Stepanhoff did not file a motion to quash the subpoena at issue here.

APPLICABLE LAW

Subpoenas in Special Education Due Process Hearings

California Code of Regulations, title 5, section 3082, subdivision (c)(2), 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.)

Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) is a law that provides for a national standard for the protection of certain health information. Generally, consent is required to disclose medical records. (45 C.F.R. § 164.508(a).) However, federal regulations provide for circumstances under which an authorization to the medical provider by the individual whose records are sought, or opportunity for the individual to agree or object to disclosure of documents by the medical provider is not required. One of those circumstances involves disclosures to an administrative tribunal pursuant to a subpoena. (45 C.F.R. § 164.512(e)(1)(ii).)

So long as the medical provider receiving the subpoena has satisfactory assurance that the party seeking documents has either given notice of the request to the individual whose records are being sought; or that the party seeking the documents has secured an appropriate protective order pertaining to the records being sought, disclosure of documents is allowed without authorization or consent. (45 C.F.R. § 164.512(e)(1)(ii)(A) and (B).) Satisfactory assurance is attained if the medical provider receives documentation demonstrating a good faith attempt to provide notice to the individual whose records are being sought; that the notice included information about the proceeding in which the protected health information is requested to be used to permit the individual to object; and that sufficient time elapsed for an objection to be made and that either no objections were filed, or the objections filed were resolved by the administrative tribunal. (45 C.F.R. § 164.512(e)(1)(iii).)

Motions to Quash in Special Education Proceedings

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.

DISCUSSION

Request to Quash Subpoena

Parent failed to establish that the subpoenas for records should be quashed. Although many sections of statutes were quoted, Parent did not raise facts relevant to the matter before OAH and sufficient to warrant quashing the subpoena.

Parent quotes portions of regulatory sections requiring that certain procedures be employed when using documents covered by HIPAA when subpoenaing documents to an administrative tribunal such as OAH. (45 C.F.R. §160. 512.). However, Parent does not raise facts demonstrating that producing the requested documents is prohibited by the sections cited. In fact, the sections cited demonstrate compliance with the process by which documents can be produced to an administrative tribunal pursuant to a properly issued subpoena. Here, the subpoena was served nearly two months in advance of the day the documents were to be produced and was accompanied by the Notice to Consumer required by California law. Anaheim has demonstrated that they served the required notices and gave Parent the opportunity to object as required by federal regulation. (45 C.F.R. § 164.512(e)(1)(iii).) Parent clearly had sufficient notice to object as this motion was filed.

Anaheim's Reasonable Need for the Documents Subpoenaed

The declarations in support of the subpoenas establish that the information sought is reasonably necessary to Anaheim's defense of the request for due process hearing filed by Student. Student's complaint raises, among others, issues including the appropriateness of Student's initial home hospital placement and the appropriateness of the continuation of that placement; the need for additional accommodations, as ordered by Student's medical providers, in order for Student to have been provided a free, appropriate public education; failure to assess; failure to convene an IEP meeting upon Parents' request; failure to provide educational record upon request; and failure to provide a clear Individual Educational Program offer. Student's allegations date from November 1, 2016 forward.

Anaheim's response to the complaint alleged Student's failure to participate in home hospital instruction based on claims of Student illness; refusal of parents to identify the accommodations ordered by her medical providers; refusal of Parents to allow Student to participate in assessments; and refusal of Parents to participate in IEP team meetings; and, that Student is no longer a student in the Anaheim Elementary School District. Anaheim asserts that they requested a release of records from Parents for the records sought which was refused.

Anaheim's subpoena to Dr. Stepanhoff seeks reports, assessment, data, protocols, medical reports, notes or other documentation upon which he relied in connection with his evaluations of and service recommendations for Student since November of 2016. The subpoena properly requires that the documents be produced on the first day of hearing as there is no provision for pre-hearing discovery in special education hearing procedures.

Anaheim articulates the necessity for the documents as being its need to establish Dr. Stepanhoff's evaluation and treatment of Student, as well as the medical and assessment services provided to her in relation to her need for home instruction, her alleged anxiety and health related educational needs. Given Student's allegations and Anaheim's response, the declaration in support of the subpoena issued demonstrates a reasonable necessity for the information sought. The requested documents are necessary to Anaheim's defense of Student's claims regarding whether the District met Student's unique health needs, including mental health needs. All other avenues for securing the records were foreclosed to Anaheim by Parents. The Motion to quash production of Dr. Stepanhoff's records is therefore denied. However, the records produced shall be sealed so that the ALJ at hearing may consider whether it is necessary to conduct an in-camera review as to relevancy of the particular documents produced and/or whether it is appropriate to issue any protective orders to ensure maintenance of Student's privacy.

ORDER

1. The Motion to Quash the records production pursuant to Anaheim's subpoena duces tecum is DENIED.

2. Dr. Stepanoff shall produce the requested records in a sealed envelope and deliver them to the Administrative Law Judge on the morning of the first day of hearing. Nothing in this order precludes Student from requesting a protective order at the time of hearing limiting the disclosure of the documents produced during the course of the hearing process.

4. Nothing in this order impacts the subpoena requiring Dr. Stepanhoff's appearance to testify at hearing. Dr. Stepanhoff shall appear as directed by the subpoena served by Anaheim.

5. The undersigned declines to make a ruling on the validity of the subpoena directed to Dr. Mocega as the subpoena directed to him was not a subject of Parent's motion.

IT IS SO ORDERED.

DATE: August 24, 2018

DocuSigned by:
Penelope S. Pahl
B3DF836E5DA94F2...

PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings