BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT AND OAKLAND UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2014050135 ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO QUASH SUBPEONA DUCES TECUM

On February 24, 2015, Oakland Unified School District issued and served a subpoena duces tecum on the Custodian of Records of the Fred Finch Youth Center. The SDT requested Fred Finch to produce records related to Student from July 2014 to present in the following areas: "intakes, assessments, progress reports and data, contracts for services, billing statements and invoices, and correspondence (including e-mails)."

On March 30, 2015, Student filed with OAH an objection to the SDT. This objection is deemed to be a motion to quash the SDT. On March 30, 2015, a prehearing conference was held where oral argument was held. Student's objected to the production of any documents that may include family therapy notes, which was not related to Student's treatment and may be protected by the attorney-client or attorney-work product privileges. As to the latter, Student failed to indicate what documents may be protected by any such privileges.

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 SDT's.

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 SDTs. In ruling on such motions, the Office of Administrative Hearings 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 SDTs "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 an SDT. Section 1985 requires that an SDT 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) 107 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 SDT's. Therefore, Ms. Tomsky, as the attorney for Oakland, was duly permitted to sign the SDT's 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 SDT's 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 educational agency 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 an SDT 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 SDT contains a conclusory declaration that Oakland 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

There is no dispute that Student's mental condition is at issue in this matter. In reviewing the documents requested, the following are related to Student's mental condition and treatment: intake, assessments, progress report supporting those reports, and service logs, which would demonstrate the level of services provided to Student. Any documents which

[1] At the bottom of the box chosen 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."

reference therapy sessions involving Student's family which were not part of Student's direct therapy are not relevant or material and should not be produced.

Contracts involving services to be provided to Student, billing statements and invoice for such services are not relevant to the issues herein. The documents requested involve contracts between Fred Finch and providers and the invoicing for such services. Student has made no claim for reimbursement for the cost of his placement at Fred Finch as he was placed by Regional Center.

The SDT also requests copies of any correspondence regarding Student including any emails. Oakland made no showing as to how such correspondence would be relevant or material to the issues herein. Additionally, such communications may include material protected by the attorney work product privilege. This request is overly broad and appears to be nothing more than a fishing expedition.

The date for production of the documents shall be April 9, 2015 with a complete copy of any documents produced by Fred Finch be served upon Student's counsel forthwith. Student will be permitted to make any motions involving the produced documents on the first day of hearing.

ORDER

1. Student's motion to quash the SDT is DENIED as to documents related to Student's treatment in the areas of intake reports, assessments, progress report, data supporting such progress reports, and service logs.

2. Student's motion to quash is GRANTED as to documents relating to contracts for services, billing statements, invoices, and correspondence.

3. Oakland shall produce a complete copy of all documents produced subject to the SDT to Student's counsel upon receipt.

DATE: April 3, 2015

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings