BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. MCKINLEYVILLE UNION SCHOOL DISTRICT, HUMBOLDT COUNTY OFFICE OF EDUCATION, AND NORTHERN HUMBOLDT UNION HIGH SCHOOL DISTRICT,	OAH CASE NO. 2013080004
HUMBOLDT COUNTY OFFICE OF EDUCATION, v. PARENTS ON BEHALF OF STUDENT.	OAH CASE NO. ORDER GRANTING MOTION TO QUASH SUBPOENAS DUCES TECUM

These consolidated matters are set for hearing before the Office of Administrative Hearings (OAH) beginning on October 28, 2013.

On or about September 9, 2013, McKinleyville Union School District, Humboldt County Office of Education, and Northern Humboldt Union High School District (collectively referred to as the local educational agencies (LEA's) served three subpoenas duces tecum (SDT's) on the following witnesses: Dore Haws of Humboldt County Probation; Laurie Maldonado of Humboldt County Department of Health and Human Services, Social Services Department; and Patt Sweeney of Youth Services Bureau. All of the SDT's seek to compel the production of records pertaining to Student. The LEA's served Student's attorney with consumer notices and copies of the SDT's.

On September 24, 2013, Student filed a motion to quash all of the SDTs on the grounds that only the Juvenile Court, and not OAH, has jurisdiction over Student's records; only an administrative law judge (ALJ) with OAH may issue a SDT; all of the SDT's are vague and overly broad; and the LEA's have not made the requisite showing of specificity or relevance for the subpoenas. On September 26, 2013, the District filed an opposition to the

motion. On September 27, 2013, Student filed a response, and on September 30, 2013, the LEA's filed another response.

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 an SDT may be issued by an attorney, or whether or how an SDT may be quashed.

Given that special education law is silent on these topics, and the APA does not apply, OAH looks to the relevant portions of the California Code of Civil Procedure. Code of Civil Procedure, section 1985, subdivision (c) provides that an attorney of record in an action may sign and issue a SDT to require production of the matters or things described in the subpoena. Code of Civil Procedure, section 1985.3 provides that anyone who seeks to obtain personal records pertaining to a consumer in connection with a civil action or proceeding must take certain steps to notify the consumer that his or her personal records are being sought, including personal information held by a local governmental agency. (Code Civil Proc., § 1985.4.) A party subpoenaing confidential third party records in an administrative proceeding must comply with the notice protections of section 1985.3. (*Sehlmeyer v. Dept. of General Services* (1993) 17 Cal.App.4th 1072.) In ruling on a motion to quash a subpoena or SDT, OAH also relies by analogy on the relevant portions of 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

Although Student did not attach copies of the SDT's to his motion, the LEA's produced complete copies of the SDT's and consumer notices with their opposition. All of the SDT's recite the same description of the records sought to be produced, as follows:

> Any and all documents and/or correspondence of any kind created by and/or in possession of … [the named agency] … with respect to, or which reference [Student][date of birth….]

All of the SDT's are signed by Carl D. Corbin, attorney for the LEA's. The SDT's are on pre-printed forms bearing the OAH letterhead and State of California seal. The SDT's all instruct the witness that he or see need not appear in person at the hearing in this matter, but may produce the records, along with a declaration of custodian of records in compliance with Evidence Code section 1561, directly to Mr. Corbin, as General Counsel of School and College Legal Services, at his address of record by September 25, 2013.

First, 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, Mr. Corbin, as the attorney for the LEA's, was duly permitted to sign the SDT's and they are not invalid on this ground.

However, a party does not have the right to use a subpoena or SDT to compel the production of documents prior to a special education due process hearing. In general, there is no right to prehearing discovery in these proceedings. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses generally 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).) Similarly, California law extends the rights to present evidence and compel the attendance of witnesses to "[a] party to a hearing held pursuant to this section ..." (Ed. Code, § 56505, subd. (e).) 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 Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and SDTs.

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 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

[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."

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, each of the SDT's contains a conclusory declaration that the LEA's require the records to defend themselves 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.

This showing is inadequate to establish reasonable necessity for the production of the records, which is a higher standard than good cause. There is nothing in the declarations that establishes any necessity for compelling production of unspecified records. There is no claim, for example, that the records cannot be obtained in some other way, or that they will not likely be produced by Student's legal guardians as part of their evidence five business days before the hearing pursuant to Education Code section 56505, subdivision (e)(7), or that the records have been requested from the agencies via another mechanism (the Juvenile Court) and the requests have been denied, or even that the records are not already in the possession of the LEA's. The fact that the operative recitals are identical for all three SDTs reinforces the conclusion that the declarant failed to focus on any individualized need for the records sought. If the production of records could be compelled on a boilerplate recital that they were material and relevant, the reasonable necessity standard would mean almost nothing. The LEA's failed to meet the reasonable necessity standard.

Moreover, the SDT's do not require production of the requested documents at the hearing, but require each witness to deliver the documents to the attorney for the LEA's over a month prior to the hearing. This is an additional indication that the SDT's are being used for advance discovery not authorized under special education law. Therefore, the SDT's were improperly issued by requiring production to the attorney in advance of the hearing instead of requiring production at the hearing as contemplated under the applicable law.

Finally, as to Student's assertion that OAH has no jurisdiction over the production of his "juvenile records," the above analysis concludes that the generic description of the records sought by the LEA's is so vague it cannot be ascertained what records they are seeking. In addition, Student did not support his motion with any factual evidence or declarations to support his claim that all records sought from all three agencies are protected juvenile court records. In fact, the LEA's now claim the records include Student's

educational records, but, again, none of that was included within the four corners of their SDT's.

Since the SDTs are vague and overly broad in describing the records sought, do not contain a showing of reasonable necessity for production of the records, and constitute prehearing discovery by calling for production of the records prior to the due process hearing, they are quashed.

ORDER

The subpoenas duces tecum for records pertaining to Student served by the LEA's on or about September 9, 2013, on Dore Haws of Humboldt County Probation; Laurie Maldonado of Humboldt County Department of Health and Human Services, Social Services Department; and Patt Sweeney of Youth Services Bureau; or their custodians of records, are hereby quashed.

Dated: October 1, 2013

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