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 MOTION TO QUASH SUBPEONA DUCES TECUM FOR DR. MOCEGA

On July 12, 2018, Parent, on behalf of Student, filed a request for due process hearing (complaint) with the Office of Administrative Hearings naming Anaheim Elementary School District. 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 Dr. Juan Mocega, accompanied by subpoenas duces tecum for Dr. Mocega. The subpoena duces tecum directed him to appear with documents and testify on October 4, 2018, the first day of the due process hearing in this matter. A declaration from Anaheim's attorney described the requested documents and explained why Anaheim needs them. Dr. Mocega has not filed any response to the subpoena duces tecum, or contacted OAH regarding it.

On August 30, 2018, Parent on behalf of Student, filed a motion to quash the subpoena duces tecum for Dr. Mocega. On August 31, 2018, Anaheim filed an opposition to the motion to quash this subpoena duces tecum.[1]

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

[1] On August 21, 2018, Parent filed an objection to a subpoena duces tecum for another doctor, which was deemed to be a motion to quash the subpoena, and was denied by OAH in an order issued on August 24, 2018.

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 the 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

Parent initially claims that he did not receive the notice to consumer and copies of the subpoena duces tecum for Dr. Mocega until August 29, 2018. He then argues that the subpoena duces tecum for Dr. Mocega should be quashed for several reasons. First, Parent claims that the records being sought are protected by the Health Insurance Portability and Accountability Act. Second Parent claims Student has not been treated by Dr. Mocega since October 2016, and therefore the records do not exist. Third, Parent argues that although parties must disclose documents they intend to use for hearing five business days prior to the beginning of the hearing (Ed. Code § 56505, subd. (e)(7)), Anaheim is asking for them to be produced on the day the hearing begins, not five business days before it begins. Student also asserts, in this regard, that Anaheim is also asking for copies of the records to be provided to its attorney more than a month before the hearing is set to begin. Lastly, Parent argues that the subpoena duces tecum is overly broad in describing the documents it seeks, and the supporting declaration is insufficient for Anaheim to be able to show reasonable necessity for the records. Parent did not present, with the motion to quash, a copy of the notice to consumer, the challenged subpoena duces tecum for Dr. Mocega and the supporting declaration that accompanies the subpoena duces tecum. However, Anaheim has done so with its opposition.

With its opposition, Anaheim includes a proof of service that establishes Parent was personally served with the notice to consumer, the subpoena duces tecum for Dr. Mocega, and the supporting declaration. In its opposition, Anaheim establishes that it met the Health Insurance Portability and Accountability Act requirements for issuance of a subpoena duces tecum for Dr. Mocega. Further, Anaheim has produced as exhibits emails from Parent and an attorney who previously represented Student that contradict Parent's assertion that Dr. Mocega has not treated Student since October 2016.

The only way Anaheim can obtain Student's medical records is by way of a subpoena duces tecum that requires them to be produced at the hearing. Therefore it cannot comply with the requirements of Education Code section 56505, subdivision (e)(7) in regards to these records, nor is it required to do so. Furthermore, there is nothing in the copy of the subpoena duces tecum, supporting declaration, and the notice to consumer Anaheim has presented with its opposition that says anything about Dr. Mocega providing these records to Anaheim's attorney several weeks prior to hearing. Lastly, Anaheim's request in the subpoena duces tecum for Dr. Mocega, and supporting declaration is not overly broad. The subpoena asks for the production of "all reports, assessments, protocols or other documentation upon which [y]ou relied in connection with [y]our evaluations of, and service recommendations for, the Student since November 2016." The supporting declaration for the subpoena duces tecum explains that Student has filed a complaint pursuant to the Individuals

with Disabilities Education Act that raises issues concerning eligibility, the type of program and services Student may requires, as well as the need for home instruction. Therefore, the subpoena duces tecum is not overly broad, and it establishes that Anaheim has a reasonable need for the requested documents. Student's motion to quash the subpoena for Dr. Mocega is denied.

In order to protect the confidentiality of Student's medical information, when the records are produced on the first day of hearing, the ALJ assigned to the hearing may, in his or her discretion, conduct an in camera inspection of the documents to ensure they are relevant to one or more of the claims being adjudicated, prior to giving copies to Student's and Anaheim's legal representatives. Nothing in this order limits either party from arguing the relevance of the documents.

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ORDER

1. Student's motion to quash the subpoena duces tecum for Dr. Mocega is **DENIED.**

2. Dr. Mocega shall produce the requested records in a sealed envelope and deliver them to the ALJ assigned to the hearing on the morning of the first day of hearing.

3. 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. Mocega's appearance to testify at hearing. He shall appear as directed by the subpoena served by Anaheim.

DATE: September 12, 2018

DocuSigned by:
Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings