BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: ANAHEIM UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No: 2019030675 ORDER QUASHING SUBPOENAS FOR MEDICAL RECORDS

On March 18, 2019, Anaheim Unified School District filed a request for due process hearing naming Parent on behalf of Student as a party. Hearing in this case is scheduled to begin April 30, 2019.

On March 29, 2019, Counsel for Anaheim issued a subpoena to two of Student's health care providers seeking copies of Student's medical records. [1] The subpoena required production of copies of the documents and testimony by the health care providers identified, beginning on April 30, 2019 at 9:30 a.m. at Anaheim's district offices, which is the location designated for the hearing. However, both subpoenas advised the health care providers that they could avoid a personal appearance by producing copies of the records sought on April 14, 2019, to the offices of the Anaheim's counsel, which shares the address of the District's offices.

On March 27, 2019, Student filed a motion to quash Anaheim's subpoenas for records on the grounds that the subpoena seeks improper pre-trial discovery and fails to establish good cause for the production of the records; as well as invading Student's privacy and violating the Health Insurance Portability and Accountability Act (HIPAA). Anaheim filed an opposition to motion to quash on April 9, 2019

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act has the right 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); see also Ed. Code, § 56505, subd. (e).)

[1] The subpoena was accompanied by the required notice to consumer served on Student.

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)." (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(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 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.)

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.

California law recognizes a constitutional right to privacy in an individual's medical history.[2] (See, *Pettus v. Cole*, (1996) 49 Cal. App. 4th 402, 440.["the 'zones of privacy' created by Article 1 , section 1 of the California Constitution extend to the details of one's medical history"]; *Palay v. Superior Court, (1993)* 18 Cal. App. 4th 919, 932, ["Fundamental to the privacy of medical information is the ability to control its circulation …"] The constitutional right of privacy is not absolute, but is subject to invasion where a compelling public interest is involved. (*Freed v. Home Depot U.S.A, Inc.* (S.D. Cal 2019) 2019 W.L. 183833, p. 5; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37.)

DISCUSSION

Anaheim argues that the subpoenaed information is necessary in order for them to

[2] State law governs an individual's right to privacy in a civil matter. (Fed. Rule Evid. 501; *Freed v. Home Depot U.S.A.* (S.D. Cal. 2019) 2019 WL 183833.)

defend against Student's claims at the hearing in this matter.[3] Specifically Anaheim identifies issues regarding Student's asserted need for the home based instruction Parents have stated is supported by notes from the two health care providers subpoenaed. Referencing California Code of Regulations title 5, section 3082, subdivision(c)(2)'s right of hearing officers to issue subpoenas; and California Code of Civil Procedure section 1985 subdivision (c), Anaheim asserts that, as an attorney, its General Counsel may issue a subpoena for records in a special education case. In requesting that the documents be produced to counsel on April 14, 2019, Anaheim points to its need to disclose documents it intends to introduce at hearing five business days prior to the hearing date as required by California Education Code section 56505, subdivision (e)(7).

No Right to Pre-Hearing Discovery

Anaheim's is not entitled to subpoena documents for production in advance of the hearing. Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board." 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 subpoenas *duces tecum*. These regulations specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings. (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].)

Generally, there are no provisions for pre-hearing discovery under the Individuals with Disabilities in Education Act. (20 U.S.C. § 1400 et seq.) Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "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).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e).) However, the statute does not confer the right to prehearing discovery. Subpoenas *duces tecum* are authorized in special education hearings. However, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code § 56504), and (ii) the parties are entitled to receive copies of all the documents each intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).) No provision exists for Anaheim's request to receive records from a third party in advance of the first day of hearing.

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[3] At the time this subpoena was issued, this matter consisted of consolidated requests for due process that concerned issues with overlapping claims regarding Student's right to home instruction. Student dismissed her complaint. However, Anaheim's complaint also raises the issue of whether home instruction constitutes the least restrictive environment for Student. Therefore, despite Student's dismissal, the issue of home instruction remains one that will be addressed should this case proceed to hearing.

Statement of Good Cause Supporting the Subpoenas

The subpoena that was issued failed to comply with the requirement that it be accompanied by a declaration establishing good cause for production of the records. As stated above, the applicable standard requires a statement of "reasonable necessity" designating the "exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case." Here, the subpoena as written was overbroad. Rather than tailoring the document request to those documents that supported the letters from the health care providers, all documents from Dr. Berry and Dr. Cheng related to any services provided to Student from July 1, 2018 forward were subpoenaed. The affidavits in support of the subpoenas acknowledge that Dr. Berry's letter stating Student was unable to attend school was dated February 13, 2019 and Dr. Cheng's letter was dated August 2, 2018. No basis for seeking records from the date of July 1, 2018 was established by the affidavit. Nor was any basis for seeking records that might relate to health care concerns unrelated to Student's inability to attend school established.

STUDENT'S RIGHT TO PRIVACY

Student has a right to privacy in her medical records. While Anaheim argues that she has placed her medical records at issue by requesting home instruction and asserts that the records are maintained as private through the rules governing special education and other education records, these arguments both fall short of a complete analysis of the protection of Student's right to privacy in her medical records. Student has not placed her entire medical history at issue in requesting home instruction. She maintains her right to privacy as to medical matters not at issue in this case. (*Freed, supra*, at p. 5. ["The party seeking the constitutionally protected information bears the burden of establishing that the information is directly relevant to the claims at issue."].)

Furthermore, the fact that the documents would be disclosed in the educational setting and thus subject to the confidentiality protections of educational records does not ameliorate concerns with invasions of Student's privacy. "[A]dequate protections against public disclosure do not obviate constitutional concerns as privacy interests are still implicated when the government accesses personal information without disseminating it." (*Grafilo v. Wolsham* (2019) – Cal. App 3. --, 2019 WL 1450733, citing *Lewis v. Superior Court* (2017) 3 Cal. 5th 561, 577.)

This is not to say that Student has an absolute right to block disclosure of any information related to her medical history. A right of privacy is not absolute. (*Hill, supra* at p. 38.) A court must construe any claim of waiver, due to placing medical matters at issue, narrowly and the competing compelling interest is found only where it is established that the material sought is directly relevant to the litigation. (*Freed*, *supra,* at p. 5 citing *Tylo v. Superior Court* (1993) 55 Cal. App 4th 1379, 1387.)

Modification is not Appropriate in these Circumstances

While section 1987.1 of the Code of Civil Procedure provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it, here, the affidavit is so overbroad that modification is not appropriate.

As the subpoenas will be quashed based on the procedural challenges of requesting pre-hearing discovery, and failure to provide an adequate basis as well as on the basis of invasion of privacy, it is not necessary to address Student's assertion that the subpoenas violate HIPAA.

ORDER

1. The subpoenas for records to Jason C. Berry, D.O. and Henry Cheng, M.D. are hereby quashed.

2. Counsel for Anaheim Unified School District shall immediately serve a copy of this order on Dr. Cheng and Dr. Berry informing them that the subpoenas issued have been quashed and production of documents is not authorized.

IT IS SO ORDERED.

DATE: April 10, 2019

DocuSigned by:
Penelope Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings