BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017120674
CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2018031019 ORDER DENYING MOTION TO QUASH SUBPOENAS DUCES TECUM TO DR. ROSA PATTERSON

On May 2, 2018,[1] Student filed a motion to quash a subpoena duces tecum issued by Capistrano Unified School District to Dr. Rosa Patterson, an expert witness who observed Student at her previous District placement and at the Child Development Center, the private school Student presently attends. On May 4, 2018, District filed an opposition to the motion. On May 4, 2018, a prehearing conference was help before Administrative Law Judge Darrell Lepkowsky at which time the parties supplemented their pleadings with oral argument. The ALJ took the motion to quash under submission.

No Prehearing Discovery in Special Education Due Process Proceedings

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities 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)), but does not confer the right to prehearing discovery.

[1] The Office of Administrative Hearings did not have a record of receiving Student's motion, which District confirmed was filed on May 2, 2018. Student filed another copy of her motion with OAH on May 4, 2018.

Education Code, 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 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].) While subpoenas duces tecum are authorized in special education hearings, 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 the parties intend to use at hearing, not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)).

The Reasonable Necessity Standard for Subpoena Duces Tecum Production

The standard for issuance of an SDT in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This standard is stricter than the general APA standard of "good cause" for issuance of SDT's, adopted from Code of Civil Procedure, which states that:

> 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.

(Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

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. OAH employs this process in ruling on motions to quash, as modified by special education's unique procedures and standards.

DISCUSSION

District's subpoena duces tecum to Dr. Patterson seeks production of all her records related to Student. The subpoena duces tecum requires Dr. Patterson to appear at the first day of the hearing on May 15, 2018, at 9:30 a.m. along with the requested records. District's declaration in support of the subpoena duces tecum describes the records sought:

> Any and all educationally related records for [Student] from December 18, 2015 to present, other than [District] generated IEPs or assessments, which were prepared, referenced, reviewed, or considered in developing any opinions and/or recommendations regarding [Student's] education. Such records shall include, but are not limited to, assessment data, protocols, work samples, notes, observation records, reports, charts, emails and other electronic documents, or letters, provided to or from [Student], her parents, and attorneys, and regarding [Student's] ability to access her education and to function in an educational environment.

In suppport of her motion to quash, Student argues that the supoena's declaration does not provide a reasonable necessity for the documents requested, that the subpoena is overly broad, and that the items are duplicative of what Students has listed in her exhibit list for hearing.

Student's arguments are not persuasive. Student intends to call Dr. Patterson as a witness in support of her contention that her previous placement at District failed to provide her a free appropriate public education, that her present placement at the Child Development School is appropriate, and that she requires a prospective placement at a school similar to the Child Development School. Therefore, any records that informed Dr. Patterson's opinions are relevant to this case. District has provided reasonable necessity for the records requested in the subpoena duces tecum.

Student contends the subpoena is overbroad because some of the records requested are not educational records. That argument is inapposite as subpoenas duces tecum are not limited to educational records. If such were the case, students would be unable to subpoena non-educational records, such as emails, from school districts. Student provides no persuasive authority for this argument.

Student also argues that the subpoena seeks privileged documents as it requests communications between Dr. Patterson and Parents and/or student's attorneys. Student has failed to show how an attorney-client relationship exists between Dr. Patterson and Student's attorneys. Without such a relationship, any such communications would not be privileged. As to communications between Dr. Patterson and Parents, Student has waived any privilege that might exist by virtue of calling Dr. Patterson as an expert witness. Similarly, for the same reasons, Student has waived any psychoanalyst-patient privilege that might exist.

Finally, Student contends that the subpoena requests records that Student has listed in her exhibit list. However, as of the PHC in this case, Student had not yet served District with her exhibit binder. Her argument is therefore speculative as to which documents she actually intends to serve on District.

ORDER

Student's motion to quash District's subpoena duces tecum to Dr. Patterson is denied.

DATE: May 7, 2018

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings