

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014040312

ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS TO
QUASH SUBPOENAS DUCES TECUM

On August 26, 2014, Student filed motions to quash Elk Grove Unified School District's two subpoenas duces tecum, issued on August 22, 2014, for records from the following: Dr. Kristene Corn and Pamela Taylor. On August 27, 2014, District filed oppositions to both motions. The SDT's seek to compel the production of records pertaining to Student. Production was required at the outset of the hearing in this matter on August 27, 2014.

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, 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 or how an SDT may be quashed.

Since special education law is silent on these topics, and the APA does not directly apply, the Office of Administrative Hearings looks to the relevant portions of the APA and the California Code of Civil Procedure as guidance. 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

Student's motions to quash are based on several grounds. She primarily claims District's SDT's are vague and overly broad, call for irrelevant records, and do not contain a showing of reasonable necessity. District's SDT to each witness is substantially the same. They each seek "any and all" records pertaining to Student, "including but not limited to" those in an extensive, bulleted list of six generic categories, summarized here as communications with Student's parents or representatives; observation, meeting, intake, personal, team meeting, and other notes referencing her; all documents referencing the nature and frequency of services; all reports, evaluations, or other tests prepared or received by the witness; all assessment materials including handwritten notes, protocols of assessment tools, raw data, work samples, videotapes, charting or other documents; and all documentation upon which the witness relied in evaluating or providing services to Student.

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 they intend to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).) The standard for issuance of a subpoena in this proceeding is "reasonable necessity," which is a stricter standard than the "good cause" requirement 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.

During the hearing on August 28, 2014, the ALJ granted Student's motions to quash the SDT's directed to Dr. Corn and Ms. Taylor on the record. The motions were granted on the grounds that the SDT's are vague, overly broad, call for confidential attorney-client communications, and reflect District's general desire to discover all documents pertaining to Student each witness may have. With some exceptions, the SDT's do not describe the documents sought with sufficient specificity, nor did District demonstrate a reasonable necessity for them in the body of the SDT's. District has the right to craft SDT's in compliance with the legal requirements and re-serve them on the witnesses. However, the parties met and conferred and agreed on the record to stipulate to the order below, providing

for the production of limited documents in the interests of completing this hearing on the merits in a timely fashion.¹

ORDER

1. Student's motions to quash District's SDT's dated August 22, 2014, to Dr. Corn and Ms. Taylor are denied in part. The witnesses are ordered to produce the following records, for the time period of January 2013 to the present, pursuant to the stipulated procedures ordered below:

Any and all assessment protocols for assessment tests administered to Student by the witnesses; observation, meeting, intake, and/or treatment notes made in the course of assessing or providing services to Student; and assessment, evaluation, intake, screening, and or test reports of Student administered and/or prepared by the witnesses.

2. Student shall forthwith contact the witnesses and meet and confer with them regarding all documents in the above categories in their possession or under their control.

3. Student shall then forthwith meet and confer with District to identify: (a) which records in the above categories exist for production, and (b) which records, if any, the witnesses assert do not exist, or for which they assert privileges or other objections.

4. Student and District shall arrange a mutually agreeable time during the course of the hearing for District's receipt of the documents produced by the witnesses pursuant to this order. The parties shall report any problems to the ALJ at the outset of the continued hearing. The ALJ shall rule on any objections during the hearing.

5. Student's motions to quash District SDT's to the above witnesses are granted as to all other documents sought by District in the SDT's.

DATE: August 29, 2014

/s/

DEIDRE L. JOHNSON
Administrative Law Judge

¹ The parties did not stipulate to the time period covered in the SDT's. District argued that Student's early records from 2012 should be covered but Student objected. Since Student's transition meeting was not until October 2013, the ALJ has limited the scope to records beginning in 2013 onward.

