

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TWIN RIVERS UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015031066

ORDER GRANTING IN PART AND
DENYING IN PART STUDENT'S
MOTION TO QUASH SUBPOENAS
DUCES TECUM

On October 16, 2015, Student filed a motion to quash subpoenas duces tecum that were issued by Twin Rivers Unified School District to four of Student's independent assessors: Christina Keefe, Communication Technology Education Center, Taylor Pediatric Physical Therapy, and Vista Child Therapy. The hearing in this matter is scheduled to begin on November 3, 2015, and Twin Rivers has requested the subpoenaed parties to produce the records on the first day of hearing. Twin Rivers submitted an opposition to the motion on October 21, 2015, and an amended opposition to the motion on October 22, 2015. Student filed a reply to Twin Rivers' opposition on October 22, 2015. Both parties provided argument on Student's motion to quash during the October 23, 2015, prehearing conference.

APPLICABLE LAW

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 the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2)-(3).)

While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. The provisions of the Code of Civil Procedure are used to provide guidance concerning SDT's. An Administrative Law Judge may issue a subpoena duces tecum upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) Code of Civil Procedure section 1985, subdivision (c), provides that an attorney of record in an action may sign and issue an SDT to require production of the matters or things described in the subpoena. OAH permits an attorney of record in a special education matter to sign and issue SDT's consistent with this provision. Code of Civil Procedure section 1985, subdivision (b), details the requirements for the issuance of an SDT:

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.

Special education law does not specifically address motions to quash subpoenas or SDT's. In ruling on such motions, OAH relies by analogy on the relevant portions of Code of Civil Procedure. 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

On October 9, 2015, Twin Rivers served Student's attorney, Daniel Shaw, with copies of the SDT's at issue in Student's motion to quash. On October 14, 2015, Twin Rivers mailed the SDT's to the subpoenaed parties. In each of the SDT's, the Declarations for Subpoena Duces Tecum requested:

[A] copy of any and all educational, therapy, and assessment records including, but not limited to, pupil records, educational records, assessment and evaluation reports, diagnoses, test protocols, special education documents, IEPs, goals and objectives, progress reports, behavior records, report cards, student work, communication logs, therapy/assessment records, logs and notes, and correspondence and emails relating to Petitioner . . . from January 1, 2015, to the present held by [the subpoenaed party]. Good cause exists for the production of the requested records . . . as Student was evaluated by and/or allegations raised by Petitioner in OAH Case number 2015031066; Petitioner's issues for hearing include allegations of a denial of a free appropriate public education; and for the administration of justice. In order for TRUSD to defend itself in the due process hearing, it needs access to all of the requested records from [the subpoenaed party].

Student contends that Twin Rivers has failed to establish good cause to issue the SDT's. Twin Rivers has established that good cause exists to issue the SDT's as to some of the requested records that are reasonably necessary to provide a defense at hearing.

In this case, Student alleges he has been denied a free appropriate public education during the 2013-2013, 2013-2014, and 2014-2015 school years, including extended school years. Student is seeking compensatory education in the form of tutoring in all academic areas, including independent living skills, speech and language therapy, physical therapy,

transition services, orientation and mobility, occupational therapy, and alternative augmentative communication/assistive technology services. The subpoenaed parties have conducted, or are in the process of conducting, assessments of Student. Student intends to call the subpoenaed parties or the subpoenaed parties' representatives as expert witnesses at hearing to testify about Student's educational needs and to the provision of special education services. Twin Rivers has established that assessment and evaluation reports, diagnoses, test protocols, communication logs, therapy/assessment records, and logs and notes from January 1, 2015, to the present are necessary to present a defense to Student's allegations that Twin Rivers denied Student a FAPE.¹

In each of the SDT's at issue in Student's motion, Twin Rivers seeks any and all educational, therapy, and assessment records including, but not limited to, pupil records, educational records, special education documents, IEP's, goals and objectives, progress reports, behavior records, report cards, and student work from January 1, 2015, to the present. Student's assertion that some of Twin Rivers' requested records are already in the District's possession is well taken. To the extent that any of the requested records were created by Twin Rivers and/or are in Twin Rivers' possession, the motion to quash is granted.

Twin Rivers entered into a direct contract with the subpoenaed parties to assess Student in 2015. It is unclear whether the contract terms permitted Twin Rivers to request copies of the records requested in the SDT's. Therefore, to the extent that any of the requested records can be obtained through contractual enforcement, the motion to quash is granted as to those requested records.

Lastly, Twin Rivers requests correspondence and emails relating to Student from January 1, 2015, to the present. The Declarations for Subpoenas Duces Tecum as to the request for correspondence and emails is too overbroad to establish that those records are reasonably necessary for Twin Rivers to defend itself against Student's allegations of a FAPE denial. However, Twin Rivers is not precluded from eliciting testimony at hearing from Student's expert witnesses about correspondence and emails during the relevant time period.

ORDER

1. Student's motion to quash District's subpoenas duces tecum issued to the custodians of record for Christina Keefe, Communication Technology Education Center, Taylor Pediatric Physical Therapy, and Vista Child Therapy is granted in part and denied in part.

¹ During the prehearing conference, the parties indicated an informal agreement existed between them for the exchange of test protocols used by the subpoenaed parties. However, Twin Rivers' attorney indicated Twin Rivers has not received all of the requested test protocols.

2. Student's motion to quash Twin Rivers' subpoenas duces tecum issued to all parties pertaining to any and all assessment and evaluation reports, diagnoses, test protocols communication logs, therapy/assessment records, and logs and notes is denied. However, the motion to quash, as to these requested records, is granted to the extent that these records can be obtained through contractual enforcement between Twin Rivers and the subpoenaed party.

3. Student's motion to quash Twin Rivers' subpoenas duces tecum issued to all parties pertaining to any and all requested records that were created by Twin Rivers and/or in Twin Rivers' possession is granted.

4. Student's motion to quash Twin Rivers' subpoenas duces tecum issued to all parties pertaining to correspondence and emails relating to Student from January 1, 2015, to the present is granted.

DATE: October 23, 2015

/s/

DENA COGGINS
Administrative Law Judge
Office of Administrative Hearings