BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Consolidated Matters of:<br><br>TORRANCE UNIFIED SCHOOL DISTRICT **,**<br><br>**v.**<br><br>PARENT ON BEHALF OF STUDENT , | OAH Case No. 2015090012 [Primary] |
| PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>TORRANCE UNIFIED SCHOOL DISTRICT. | OAH Case No. 2015080141 [Secondary]<br><br>ORDER GRANTING IN PART AND DENYNG IN PART DISTRICT'S MOTION TO QUASH STUDENT'S SUBPOENA DUCES TECUM FOR PRODUCTION OF DOCUMENTS AT HEARING |

On July 28, 2015, Student filed a Due Process Hearing Request (complaint) with the Office of Administrative Hearings, naming Torrance Unified School District (Student's Case). On August 29, 2015, District filed a complaint naming Student (District's Case). The two matters were subsequently consolidated, and are presently set for hearing on October 27, 28, 29 and November 9, 2015.

On August 27, 2015 Student personally served a subpoena duces tecum on District. The subpoena was signed and issued by Student's counsel, and directed to District's custodian of records. It commanded the custodian of records to produce to Student's counsel at the hearing location, by the first day of hearing, the following documents:

1. Any and all District communications and correspondence, including but not limited to e-mails, relating to petitioner's March 2015 request for a speech and language IEE;

2. Any and all district communications and correspondence, including but not limited to e-mails, relating to petitioner's March 2015 request for a psychoeducational IEE;

3. Any and all internal policies, procedures, and criteria governing District's evaluation procedures in effect since March 2015 including, but not limited to, qualifications for District speech and language evaluators, fee schedules, and standard contracts with independent speech and language evaluators;

4. Any and all internal policies, procedures, and criteria governing District's evaluation procedures in effect since March 2015 including, but not limited to, qualifications for District psychoeducational evaluators, fee schedules, and standard contracts with independent psychoeducational evaluators;

5. Any and all district communications and correspondence during the 2014-2015 school year, including but not limited to e-mails, relating to District's decision to exit Student from special education; and

6. Any and all district communications and correspondence during the 2014-2015 school year, including but not limited to e-mails, relating to District's decision regarding the areas in which District's evaluators were to assess Student, Student's areas of suspected disability, or Parent's concerns, resulting in District's 2015 speech and language assessment report or District's psychoeducational assessment report.

Student's subpoena was supported by the sworn declaration of Student's counsel, stating that the requested documents were necessary to support Student's contentions that: (1) District unreasonably delayed filing its complaint to determine the appropriateness of District speech and language and psychoeducational assessments after Student requested that District fund independent educational evaluations in those areas; and (2) Student is entitled to full reimbursement of the costs of Student's independent speech and language and psychoeducational evaluations because the private evaluators met District's IEE criteria and policies.

District's motion to quash was made on grounds that it was issued by Student's attorney rather than by OAH, and Student failed to show a reasonable necessity to subpoena the requested documents, because: (i) Student failed to show that the requested documents could not be obtained in another manner, such as a Public Records Act request or a request by Parent for Student's educational records; (ii) Student did not explain why documents already in Student's possession were insufficient to prove Student's case; (iii) the documents sought were irrelevant to Student's claims for full reimbursement or that District unnecessarily delayed filing a complaint to defend its assessments. District also objected that Student's request for all e-mails, communications and correspondence "relating to" Student's IEE requests and District decisions were overbroad and sought materials protected by the attorney-client privilege.

Student filed an opposition to District's motion to quash on October 12, 2015.

The parties argued the motion at the prehearing conference held in these matters on October 16, 2015, before Administrative Law Judge Robert Martin. In oral argument, District clarified that its principal objection to Student's requests 3 and 4, above, were that District had already produced the requested documents to Parents in response to a Public Records Act request.

## APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education 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) and (3).) A parent may obtain his or her child's educational records (Ed. Code § 56504), and parents are entitled to receive copies of all the documents a district intends to use at hearings no less than five days prior to the hearing (Ed. Code § 56505, subd. (e)(7).).

California Code of Regulations, title 5, section 3082, subdivision (c)(2) gives parties to a due process hearing the right to compel witnesses to attend the hearing, and to testify and produce documents at the hearing. In pertinent part, it provides 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." This requires a 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 standard of "good cause" in the Administrative Procedures Act for issuance of subpoenas duces tecum, 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)].) 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 whether a subpoena may be issued by an attorney, or whether or how a subpoena duces tecum may be quashed; however, relevant provisions of the California Code of Civil Procedure provide guidance. Code of Civil Procedure, section 1985, subdivision (c) provides that an attorney of record in an action may sign and issue a subpoena to require production of the matters or things described in the subpoena. California 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.

## ANALYSIS

Student's subpoenas were appropriately issued by Student's counsel and properly called for production of documents at the commencement of hearing. District's motion as to categories 1, 2, 3 and 4 was granted in part and denied in part, as explained below. District's motion was granted as to categories 5 and 6.

District's objection to Student's requests 1 and 2 on grounds that Student's use of the term "relating to" made the requests vague, ambiguous and overbroad, was well taken, as was District's objection that the requests call for the production of attorney-client communications. To address District's objections, Student's requests 1 and 2 are ordered modified as follows, for purposes of District's response to Student's subpoena duces tecum:

1. Any and all non-privileged District communications and correspondence, including but not limited to e-mails, referencing or discussing petitioner's March 2015 request for a speech and language IEE.

2. Any and all non-privileged District communications and correspondence, including but not limited to e-mails, referencing or discussing petitioner's March 2015 request for a psychoeducational IEE.

To the extent that District had previously produced the documents called for in Student's requests 3 and 4, Student conceded that a duplicate production by District was not reasonably necessary for Student to present Student's case at hearing. District's motion to quash Student's subpoena duces tecum was therefore granted with respect to Student's requests 3 and 4 to the extent that District had previously produced the requested documents to Parents. District was ordered either to provide a list of responsive documents previously produced to Parents, or a duplicate copy of any responsive document previously produced to Parents, at District's option.

Student's supporting affidavit did not mention, much less show reasonable necessity for, the documents in Student's request 5 or 6. Accordingly, District's motion to quash Student's subpoena duces tecum was granted with respect to Student's requests 5 and 6. Student's counsel stated that Student expected to serve a new subpoena duces tecum with affidavits to support these requests.

IT IS SO ORDERED.

DATE: October 14, 2015

**/s/**

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings