BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. PLEASANTON UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018071095 ORDER GRANTING IN PART AND DENYING IN PART SUBPOENA DUCES TECUM FOR RECORDS FROM STACEY HILL

On September 27, 2018, Student filed a motion to quash a subpoena duces tecum for records from Stacey Hill Therapy[1] issued by Pleasanton Unified School District's attorney on September 25, 2018.[2] On the same date Student's attorney filed a declaration in support of the motion to quash. On October 1, 2018, Pleasanton filed an opposition to the motion to quash, and on October 5, 2018, it filed an amended oppostion.

APPLICABLE LAW

Subpoenas in Special Education Due Process Hearings

California Code of Regulations, title 5, section 3082, subdivision (c)(2), specifies the right of the parties in a special education hearing to compel the attendance of witnesses at hearing. That regulation states, "[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)." Thus, subpoenas are available to require the production of information that is reasonably necessary in order for a party to present their case at hearing. In the absence of regulations

[1] Student calls Ms. Hill "Stacey Hill-Lee" in his complaint. However, in documents attached to the declaration of Student's attorney as part of the motion to quash, Ms. Hill does not use "Lee" as any part of her name, but refers to herself as "Stacey Hill" and that is what she will be called in this order.

[2] On September 27, 2018, Student filed motions to quash five separate subpoenas duces tecums issued to five separate entities by Pleasanton's attorney. Student's attorney has also filed at least one separate declaration to support the motion to quash for each entity. Pleasanton filed an opposition to each motion to quash on October 1, 2018. A separate order granting or denying each motion to quash will be issued as to each entity.

pertaining to the details of subpoena processes in administrative hearings, the Office of Administrative Hearings requires parties to comply with procedures described in the Code of Civil Procedure. Section 1985 of that Code governs the issuance of subpoenas. In accordance with that provision, OAH allows attorneys to issue subpoenas to witnesses to require their attendance at hearing with documents and to excuse the attendance of witnesses if documents are produced at hearing. Parties must also comply with the consumer protections of Code of Civil Procedure section 1985.3 when seeking the production of the personal records of a consumer. (*Sehlmeyer v. Dept. of General Services*, (1993) 17 Cal.App.4th 1072.)

Motions to Quash in Special Education Proceedings

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.

DISCUSSION

In his complaint, Student, who is 12 years of age, claims he began receiving therapy for school-related anxiety from Ms. Hill in 2017, and also claims that Ms. Hill developed a behavior plan that aided in his attendance at Fusion Academy, the unilateral private placement for which Parents are seeking reimbursement. He asks that Pleasanton pay for Ms. Hill's services for the 2018-2019 school year. Documentation provided by Student as part of the motion to quash the subpoena duces tecum for records from Ms. Hill identifies her as a licensed marriage and family therapist.

In his motion to quash the subpoena duces tecum for records from Ms. Hill, Student argues that Pleasanton's attorney is asking for records to be produced before the date of hearing, and there is no prehearing discovery in special education due process hearings. Instead parties are required to produce documents they intend to introduce at hearing and provide them to the other party five business days prior to hearing. (Ed. Code § 56505, subd. (e)(7).) Pleasanton attached a copy of the entire subpoena for Ms. Hill's records to its opposition, and the subpoena asks that Ms. Hill either provide the documents on the first day of hearing, which is October 16, 2018, at the hearing, or in the alternative produce the documents at the attorney's office on October 10, 2018, five business days before the hearing. Pleasanton claims in its opposition that October 10, 2018, is five business days before the beginning of the hearing and therefore should not be considered "discovery," and cites, in support of this contention, an order in OAH Case Number 2012110566. However, OAH's orders and decisions in special education due process cases are not precedential. (Cal. Code Regs. tit. 5, § 3085.) The requirement that records only be produced at hearing does not depend on the characterization of a subpoena as "discovery;" it turns on the language of section 3082, subdivision (c)(2) of title 5 of the California Code of Regulations.

Student's attorney makes an additional argument in her motion that the subpoena for Ms. Hill's records be quashed. He argues that the request "is overly broad" and asks for information that is not relevant to the proceedings since he is asking for reimbursement for Ms. Hill only for the 2018-2019 school year. Pleasanton argues that it requires documents from Ms. Hill because Student is asking reimbursement for behavioral services rendered by Ms. Hill at his Fusion placement for this school year and in essence is claiming that the services provided by Ms. Hill are appropriate and necessary. Further, Pleasanton argues that Student claims its offer of placement and services for the 2018-2019 school year is not appropriate because it lacks social/emotional and behavioral supports, and records from Ms. Hill will establish whether Ms. Hill's services meet those needs.

The declaration of the attorney in the subpoena duces tecum itself states Student has filed a complaint against Pleasanton asking that Pleasanton fund Ms. Hill's services, and it requires the documents to respond to the allegations. The documents requested from Ms. Hill are attendance reports, therapy notes, therapeutic records, behavior plans, treatment plans, behavior logs, proofs of payment, invoices, assessments and assessment protocols, behavioral data, and intake information.

Student is correct that Pleasanton cannot require the documents to be produced at any time prior to hearing, because there is no prehearing discovery in these matters. The right to a subpoena in special education proceedings is a hearing right, not a prehearing right. (5 Cal.Code Regs. § 3082, subd. (b)(2).) Accordingly, the portion of the subpoena duces tecum requiring Ms. Hill to produce documents to Pleasanton's attorney on October 10, 2018, is quashed. However, Student is incorrect in concluding that Pleasanton's subpoena duces tecum for Ms. Hill is "overly broad," and/or not relevant. Student is asking that Pleasanton pay for his services from Ms. Hill, because he claims they are appropriate for him. Pleasanton, as part of its defense, is entitled to refute Student's evidence in this regard. Records from Ms. Hill may assist Pleasanton in doing so by demonstrating what services he has received in the past and is presently receiving, any progress he made or is making at Ms. Hill, and whether the services are educationally related.

However, Ms. Hill, in an email to Student's attorney attached to the attorney's declaration, raises another issue in regards to her records pertaining to Student, the issue of confidentiality. It is possible that some of the information contained in those records may be subject to the psychotherapist-patient privilege (Evid. Code § 1010, et seq.). In addition, on October 10, 2018, Pleasanton filed a motion asking for an order to compel Ms. Hill to produce the records because it received a letter from Denise M. Calkins, Attorney at Law, objecting to the subpoena duces tecum and enclosing releases of information to be executed by Students parents.[3] However, the fact that Student is a minor does not extinguish his own right to assert the psychotherapist-patient privilege. What may override the privilege is

[3] The motion to compel will not be ruled upon until Student has responded, or three business days have passed with no response, whichever occurs first.

Student's claim in his complaint that he requires the private placement at Fusion because he suffers from school-related anxiety.

In order to protect the confidentiality of Student's mental health information, when the records are produced on the first day of hearing, the ALJ assigned to the hearing may, in his or her discretion, conduct an in camera inspection of the documents to ensure they are relevant to one or more of the claims being adjudicated (which would override the psychotherapist-patient privilege), prior to giving copies to Student's and Pleasanton's legal representatives. Nothing in this order limits either party from arguing the relevance of the documents. Student's motion to quash is granted in regards to the requirement that the records be produced at Student's attorney's office on October 10, 2018. Otherwise, the motion to quash is denied.

ORDER

1. Student's motion to quash the subpoena duces tecum for records from Ms. Hill is granted in regards to the request that Ms. Hill produce records by tendering them at Pleasanton's attorney's office in advance of the hearing.

2. Ms. Hill shall produce the requested records in a sealed envelope and deliver them to the ALJ assigned to the hearing on the morning of the first day of hearing. The ALJ may, at his or her discretion, conduct an in camera review of the documents to determine whether they are subject to the psychotherapist-patient privilege, and whether that privilege can be claimed.

3. Nothing in this order precludes Student from requesting a protective order at the time of hearing limiting the disclosure of the documents produced during the course of the hearing

4. In all other regards, the motion to quash is denied.

IT IS SO ORDERED.

DATE: October 10, 2018

DocuSigned by:
Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings