

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT, ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2006050433

**ORDER GRANTING MOTION TO
QUASH SUBPOENA DUCES TECUM
AND DENYING MOTION FOR
SANCTIONS**

On May 11, 2005, Parents filed a request for due process hearing on behalf of Student. The due process hearing was held before the undersigned Administrative Law Judge (ALJ) on July 6-7, 10-14, and 24, 2006. On August 24, 2006, the ALJ ruled in favor of the District.

On February 22, 2008, Judge Susan Illston of the United States District Court for the Northern District of California partially reversed the ALJ's decision and remanded the matter for the hearing of additional evidence. (*K.S. v. Fremont Unified School Dist.* (N.D.Cal., No. C 06-07218) 2008 U.S. Dist. Lexis 13397.) The matter is currently set for further hearing on October 24, 2008, and November 17 and 18, 2008.

On July 30, 2008, Parents' attorney Jessica Cochran issued a Subpoena Duces Tecum (SDT) to the District's custodian of records and served it by certified mail. The SDT demanded the production by August 19, 2008, at Ms. Cochran's office, of the following documents:

Data sheets referenced by classroom teacher Ms. Shannon Neely, requested by parents' counsel at [Student's] March 12, 2008 IEP meeting and ordered on June 3, 2008, to be provided to parents by CDE.

The last phrase of that description referred to the result of a compliance complaint filed by Parents against the District before the California Department of Education (CDE) seeking the same records. On or about June 3, 2008, CDE ordered the District to produce the records on the ground that they constituted pupil records available to Parents under Education Code section 56504 and related statutes. On or about June 25, at the District's request, CDE granted reconsideration of its prior ruling, and was in the process of reconsideration when the SDT was issued and served. On or about August 4, 2008, CDE reversed its previous ruling and ruled that the District was in compliance with applicable law because the records were not "pupil records" within the meaning of the Education Code's

disclosure provisions. Instead, CDE ruled, they were informal notes that remained solely in the possession of the maker and were therefore exempt from disclosure under Education Code section 49061, subdivision (b).

On August 12, 2008, the District moved to quash the SDT. On August 13 and 15, 2008, Parents filed a declaration of one of Parents' attorneys and an opposition to the motion to quash, and moved for sanctions against the District on the ground that the motion to quash was frivolous. On August 18, 2008, the District filed an opposition to the motion for sanctions.

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, subs. (e)(2), (3).) The hearing officer in a special education due process hearing may issue subpoenas or subpoenas duces tecum (SDTs) upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit.5, § 3082, subd. (c)(2).) However, special education law does not specifically address motions to quash subpoenas or SDTs. In ruling on such motions, OAH relies by analogy on the relevant portions of the California Code of Civil Procedure. Section 1987.1 of that code 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.

An ALJ in a special education due process matter may assess monetary sanctions to defray reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure. (Gov. Code, § 11455.30; see also, Cal. Code Regs., tit. 1, § 1040; *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637.)

DISCUSSION

Reasonable necessity

The District correctly argues that the Declaration for Subpoena Duces Tecum does not establish reasonable necessity for the subpoena. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) The form declaration required for issuance of the SDT provides space for the declarant to establish that "good cause exists" for the production of the documents sought "by reason of the following facts." Parents' attorney declared:

The information sought is highly relevant to the instant case. Additionally, Petitioner needs the below requested documents to prepare for the examination of witnesses.

These recitals contain no facts, just conclusions. The documents must be shown to be “reasonably necessary,” not just “highly relevant,” and the necessity must be established by “facts.” The statement that the documents are needed for undescribed reasons for the examination of unidentified witnesses is merely an opinion unsupported by facts. The declaration is insufficient to support enforcement of the SDT.

Prehearing production of documents pursuant to SDT

It is not necessary to address all the ramifications of the District’s argument that there is no prehearing discovery in special education due process cases in California. At minimum, parents may before a hearing obtain pupil records under Education Code section 56504 and related statutes, and are entitled to receive, five business days before the hearing, copies of all the documents the district intends to use at the hearing, and a list of all witnesses the district intends to call, with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).)

However, a party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights to present evidence and compel the attendance of witnesses in “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).) Both of those subsections relate only to due process hearings, not to any prehearing procedures.

Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to “[a] party to a hearing held pursuant to this section ...” (Ed. Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. 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 Board of Education promulgated section 3082, subdivision (c)(2), of Title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and SDTs.

In arguing that SDTs may be used to compel the production of documents before a hearing, Parents do not cite any California statute or regulation, or any decision of any California or federal court or administrative agency. Instead, they rely solely on one sentence in a previous order in this matter filed on July 5, 2006, by ALJ Suzanne Brown. That order granted Parents’ motion to quash certain SDTs that had been served by the District on Student’s private service providers before the previous hearing. Judge Brown granted the motion on the sole ground that the District had failed to serve on Parents the notice required to be served 10 days before the compelled production of consumer records. (Code Civ. Proc. § 1985.3.) Among Parents’ unsuccessful arguments was the claim that the District was not entitled to the subpoenaed documents because they had not been produced

five business days before the hearing under Education Code section 56505, subdivision (e)(7). This was Judge Brown's response:

This argument is unpersuasive because the District's ability to subpoena documents is separate from the rules regarding disclosure and admission of proposed documentary evidence; as the District points out, *a party may use documents to prepare for examination of witnesses, even if those documents are not admitted into evidence.*

(*Student v. Fremont Unified School Dist.*, OAH Case No. N2006050433, Order Granting Petitioner's Motion to Quash Subpoenas Duces Tecum [and] Order Denying Petitioner's Motions for Sanctions (July 5, 2006), p. 4 (emphasis supplied).) Parents now characterize this language as a "clear holding" that SDTs may be used for the production of documents prior to hearing for the purpose of preparing for the hearing.

Parents read too much into Judge Brown's dictum. The quoted language addresses the use of possibly inadmissible documents for preparing witnesses. It says nothing about the timing of that use. Subpoenaed witnesses often produce documents at hearing which are then used in preparing or examining other witnesses. There is nothing in Judge Brown's phrase "to prepare for examination of witnesses" that implies that such preparation would occur before a hearing begins. Subpoenaed parties frequently volunteer to produce documents before hearing in order to avoid motions for continuance or to recall witnesses, but they cannot be compelled to do so.

Additional issues

The nature of the documents sought is not entirely clear. From unsworn descriptions in the parties' pleadings it appears that at an Individualized Education Program (IEP) meeting on March 12, 2008, one of Student's current teachers referred to certain "data sheets" that reflect Student's progress.

This matter concerns the school years 2003-2004, 2004-2005, and 2005-2006 only. Parents' pleadings do not describe the period of time during which the data sheets allegedly demonstrate Student's progress. The district's pleadings state that the data sheets pertain to the school year 2007-2008, and were created by a teacher who did not teach Student during the school years at issue here.

Judge Illston, in remanding this matter, stated:

If on remand the ALJ finds it necessary to make a determination that plaintiff is severely mentally retarded and incapable of more significant progress, the ALJ should hear more evidence on this issue from both parties.

(*K.S. v. Fremont Unified School Dist.*, *supra*, 2008 U.S. Dist. Lexis 13397 at p. 5.)

The District assumes this statement relates only to evidence about the school years in question. Parents seem to assume it relates to evidence created at any time.

At the trial setting conference on July 15, 2008, the parties informed the ALJ that there had been evidentiary disputes in the District Court concerning the relevance of evidence outside the school years at issue, and that those disputes would continue on remand. A briefing schedule was set during October for motions *in limine* that will address these issues.

There is no need to resolve any of these issues here, and no opinion is expressed about them. Because the SDT is unsupported by a showing of reasonable necessity and demands the production of documents prior to hearing, it will be quashed. Ruling on any other issues the parties raise is premature.

Motion for sanctions

Parents move for sanctions on the ground that all of the grounds for the District's motion to quash are frivolous. On the contrary, as shown above, at least two of them have merit. Parents are most critical of the District's argument that the data sheets in question are not pupil records, as CDE eventually ruled on reconsideration. Parents correctly point out that whether the documents are pupil records has no bearing on whether they can properly be subpoenaed. From this, Parents reason that the District's argument is so specious that it is deserving of sanction.

However, Parents invited the dispute over the characterization of the documents as pupil records by describing the documents in the SDT as having been "ordered on June 3, 2008 to be provided to parents by CDE." That description was correct at the time, as CDE had not yet reversed its ruling. Whether the documents sought are pupil records has at least some bearing on this motion to quash. If they are pupil records, they would be automatically available to Parents under Education Code section 56504, and the District would be hard put to defend its failure to produce them even without a subpoena, or to justify wasting the time and resources of the parties and OAH by moving to quash the SDT. Parents' description of the documents in the SDT also implied that the District was defying an order of CDE. The District was at least colorably entitled to negate those implications in its pleadings. Thus the District's argument concerning the pupil records issue was not frivolous or evidence of bad faith.

ORDER

1. The motion to quash the subpoena duces tecum is granted, and the subpoena is hereby quashed, without prejudice to the issuance, service, or possible enforcement of a similar subpoena returnable at hearing and supported by an adequate showing of reasonable necessity.

2. The motion for sanctions is denied.

Dated: August 27, 2008

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings