

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

DEL MAR UNION SCHOOL DISTRICT.

OAH CASE NO. 2009060209

ORDER DENYING MOTION TO  
QUASH SUBPOENAS DUCES TECUM

On June 5, 2009, Student and his parents (Student) filed a request for a due process hearing with the Office of Administrative Hearings (OAH) naming the Del Mar Union School District (District) as the respondent. After the initial hearing dates were set, the parties requested a continuance, and the case is currently set for hearing beginning on September 21, 2009.

In approximately August 2009, the District served subpoenas duces tecum (SDTs) on the San Diego Regional Center (Regional Center) and the Center for Autism and Related Disorders (CARD), seeking production of documents related to Student. On August 11, 2009, Student filed a motion to quash the SDTs. On August 14, 2009, the District filed an opposition to that motion.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities 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 proceeding may issue subpoenas or SDTs upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) Special education law does not specifically address motions to quash subpoenas. In ruling on such motions, OAH relies by analogy on the relevant portions of the California Code of Civil Procedure.<sup>1</sup> 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.

Special education law is also silent as to whether an SDT may be issued by an attorney and, if so, what requirements apply. Therefore OAH once again analogizes to the relevant portions of the Code of Civil Procedure. (See, e.g., Order Denying Student's

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<sup>1</sup> Code of Regulations, title 5, section 3089, specifies that the subpoena provisions of the Administrative Procedure Act found in Government Code sections 11450.05 to 11450.30, do not apply in special education due process proceedings.

Motion to Quash Subpoenas in OAH Consolidated Case numbers 2009030672/2009050587.)

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 SDTs 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.<sup>2</sup>

### DISCUSSION

Student raises several arguments in the motion to quash. First, Student argues that only an administrative law judge (ALJ) may issue an SDT. However, as stated above, OAH permits an attorney to issue a subpoena in accordance with the Code of Civil Procedure. Likewise, contrary to Student's arguments, special education statutes and regulations do not forbid the use of an SDT to obtain documents from third parties prior to a hearing.<sup>3</sup>

Student also argues that Student has voluntarily produced some documents from the Regional Center and CARD to the District without need for a subpoena. However, there are apparently documents that have not been produced which may be relevant to the issues of this case. For example, Student's own moving papers admit that Student is seeking reimbursement from the District for CARD services, so CARD records regarding Student are relevant to this due process case. Likewise, the Regional Center has been providing services to Student for the same or a similar disability for which Student now seeks services from the District. Regional Center documents are relevant to allow the District to defend this case.

Student argues that he will provide the District with all "relevant" records. However, the law does not give Student's counsel the final say as to what documents are or are not relevant (otherwise the law would not have provided for the SDT process in special education cases).

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<sup>2</sup> Student does not argue that the District's subpoenas failed to meet the requirements of the Code of Civil Procedure.

<sup>3</sup> Student is correct that generally there is no formal pretrial "discovery" in special education cases. For example, there is no provision in special education law or regulations to permit a party to serve interrogatories. Nothing in this order is intended to imply that there are broad rights to pretrial discovery in special education due process proceedings. However, the law specifically provides for subpoenas and SDTs in special education cases.

Student also argues that the documents sought may include confidential health care records protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Welfare and Institutions Code sections 4514 and 4518. However, the District, in its opposition papers, correctly points out that there are exceptions to these federal and state laws for production of records pursuant to an SDT when litigation is pending or when government benefits are being sought. (45 C.F.R. § 164.512(e)(1)(ii); Welf. & Inst. Code, § 4514, subd. (c).) Further, this due process case is itself a confidential proceeding. Should Student feel that particular documents or portions of documents contain matters too sensitive even for a confidential due process proceeding, Student can seek a protective order.

#### ORDER

Student's motion to quash is denied.

Dated: August 28, 2009

/s/

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SUSAN RUFF  
Administrative Law Judge  
Office of Administrative Hearings