

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ORANGE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010021086

ORDER GRANTING DISTRICT'S
MOTION TO QUASH SUBPEONA
DUCES TECUM

On October 12, 2010, Student served by certified mail a subpoena duces tecum (SDT) on District's counsel. The SDT was addressed to "Debra K. Ferdman," an attorney of record for the District in this matter, and requested (1) class enrollment forms for all special education classes at Cerra Villa Middle School (Cerra Villa), (2) other information regarding to special education pupils at Cerra Villa, and (3) the name and address of an individual who attended a meeting on November 16, 2009 which included Parent. The SDT states that these "documents are necessary for the proper adjudication of the above-captioned matter."

On October 18, 2010, the District filed a Motion to Quash the SDT on grounds that (a) the SDT does not contain a showing of proper necessity; (b) is invalid as it does not list specific documents requested and is actually a demand for discovery; (c) was improperly served because District counsel is not in possession of District records; (d) service should have been made by personal service pursuant to Code of Civil Procedure sections 1987 and 1988; and (e) Student's advocate does not have the power to issue an SDT.

On October 21, 2010, Student filed a Motion to Compel the information sought in his SDT. This pleading is deemed to be an opposition to the Motion to Quash. Student avers that the information sought is material and germane to his case.

APPLICABLE LAW AND DISCUSSION

California Code of Regulations, title 5, section 3082, subdivision (c)(2), provides that the hearing officer may issue SDTs upon a showing of reasonable necessity by a party. However, special education law does not specifically address whether an SDT may be issued by an attorney, or what requirements apply. Given that special education law is silent on this topic, OAH analogizes to the relevant portions of the California Code of Civil Procedure. 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. Here, Student's advocate is not an attorney and section 1985, subdivision (c), does not authorize him to issue an SDT.

California 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.

Here, the SDT does not contain such an affidavit.

A party does not have the power to utilize a SDT to compel discovery prior to a hearing. (*Student v. Fremont Unified School District*, OAH Case No. 2006050433 (Order).) Here, it is readily apparent that the SDT is being used as a vehicle to obtain discovery. This is a misuse of the SDT process.

The Code of Civil Procedure section 1987 requires that service be to “the witness personally.” Here service was by facsimile. In practice, attorneys many times waive the service requirement and permit service by mail or facsimile upon the attorney. But such courtesy is not mandatory. Here, service was improper as it the SDT was not personally served.

ORDER

Student’s motion to quash is GRANTED.

Dated: October 21, 2010

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings