

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

RIPON UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2010080006

RIPON UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2010090779

ORDER DENYING STUDENT'S
MOTION TO QUASH SUBPOENA
DUCES TECUM ISSUED TO
DR. LINDSAY M. CUNHA, AND
REQUEST FOR PROTECTIVE ORDER
AND IN CAMERA REVIEW

Student and District each filed a Due Process Complaint, against one another, in these matters. In the consolidated matters, numerous issues are pending resolution, including, among others, assessments disputes and whether Student was denied a FAPE during the 2009-2010 and 2010-2011 school years. Also, and as relevant herein, Student alleges that District failed to provide services relating to his school anxiety and post traumatic stress disorder (PTSD). Hearing has begun in these matters, and the next day of hearing is on January 4, 2011.

On December 14, 2010, District through its attorney issued and served a Subpoena Duces Tecum (SDT) on Linda Cunha, M.D., requesting the production of records on January 4, 2011. On December 16, 2010, Student filed a Motion to Quash the STD. District filed an opposition and Student filed a reply.

District's STD to Dr. Cunha provides that "the undersigned states that the books, papers, documents and/or other things named below and requested by this subpoena are material to the proper presentation of this case, and *reasonable necessity exists* for their production by reason". Specifically, the STD requests a copy of any and all records and documents regarding, referring to, or discussing Student, that are in the possession of Dr. Cunha, between August 2009 and the present, including mental health records, assessments,

evaluations, notes, clinical impressions, prescriptions and diagnoses. Further, all reports regarding Dr. Cunha's treatment provided to Student, and social-emotional and/or mental health issues related to school, including services provided by Genesis Behavior Center, among others, are requested because, as District explains, Dr. Cunha would be testifying at the due process hearing on behalf of Student and the records are relevant to the issues in dispute and are necessary for District to defend" itself.

Student opposed, and moved that the STD be quashed because 1) the STD's records request is overly broad and seeks records and testimony from Dr. Cunha that are protected by the therapist-patient privilege; 2) an in camera review should be conducted by the Administrative Law Judge (ALJ) to determine relevancy of the documents sought in the SDT; and 3) whatever records and testimony are produced should be subject to a protective order that limits District's use of such records and testimony to litigation purposes only.

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 provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) Subdivision (c)(2) of section 3082 of title 5 of the California Code of Regulations provides in pertinent part that in special education proceedings in California, "[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)."

Special education law does not specifically address motions to quash subpoenas or SDTs. In ruling on such motions, the Office of Administrative Hearings relies by analogy on the relevant portions of the California 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

Student has standing to make the motion because he is a holder of the psychotherapist-patient privilege as to his services from Dr. Cunha. (Evid. Code, § 1013.) However, in this proceeding, Student has alleged that he has anxiety and PTSD, and has alleged that these disorders are related to events that took place at school during the time period at issue in this due process hearing. Therefore, Student placed his mental or emotional health at issue in this proceeding and as such information relating to his anxiety and PTSD, as they may relate to those events that occurred at school, is exempt from the

privilege. (Evid. Code § 1016.) Therefore, Student's motion to quash, based on privilege, is denied.

Because the scope of the records that were requested is limited to the time period set forth in Student's complaint, and generally involves school-related anxiety and PTSD involving his experiences relating to the school environment, the STD is not overbroad.

Further, Student's request that an *in camera* review should be conducted by the ALJ, to review all records for relevancy is denied. Student may make any relevance objection when the records or testimony of Dr. Cunha are presented at the due process hearing.

Lastly, Student's fails to provide an adequate basis for requesting a protective order at this time, and as such, this request must also be denied. Student may provide additional information relating to any specific information or record he wants protected, and why such records should be protected. Student may renew his request for protective order when such additional information is provided.

ORDER

1. Student's motion to quash the SDT served on Linda Cunha, M.D. is denied.
2. Student's request for a protective order is denied, and
3. Student's request for an in camera review of records is denied without prejudice.

IT IS SO ORDERED.

Dated: December 28, 2010

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings