

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

RIPON UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010080302

ORDER GRANTING IN PART AND
DENYING IN PART STUDENT'S
MOTION FOR PROTECTIVE ORDER

On December 22, 2010, Student filed a motion for protective order to limit the use of documents that were produced to the Ripon Unified School District (District) pursuant to a subpoena duces tecum. On December 27, 2010, the District filed an opposition to that motion. On December 28, 2010, Student filed a reply.

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, subd. (e).)

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 motions for protective order. 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.

DISCUSSION

Student filed the underlying due process case in August 2010. The case is currently set for hearing at the end of January 2011. In approximately October 2010, the District served subpoenas duces tecum (SDTs) requesting records related to Student. One of the SDTs was served on Marla Arata, a psychotherapist who provided treatment to Student. Student brought a motion to quash the SDT, but that motion was denied, in part, because Student had placed Student's mental and emotional state at issue in the case.

According to Student's moving papers, the documents have been produced pursuant to the SDT. Student now seeks a protective order limiting the use of those documents by the District solely to this litigation. Student argues that the therapy records produced by Ms. Arata are private records, protected by the psychotherapist-patient privilege and California privacy rights.

The District does not contest the privileged or private nature of the documents. However, the District contends that the therapy records are relevant to the determination of what constitutes a free appropriate public education (FAPE) for Student. The District believes that it has an obligation to consider those documents when developing Student's individualized educational program (IEP). If a protective order is granted, the District requests that that order permit the District to use the documents for educational and IEP purposes in addition to litigation purposes.

Both parties raise very important policy concerns with respect to these records. Student is correct that therapy records are normally confidential. However, the District is also correct that it has an obligation to consider all documents relevant to a child's educational needs in connection with the IEP process. In crafting an educational program for a child, it is very important that the IEP team rely upon complete and up-to-date information.

In resolving the conflict between these two important policies, it is helpful to consider what past Ninth Circuit cases have stated about the IEP process. The law recognizes that a school district may not always possess all relevant information regarding a child when drafting an IEP. Instead, the school district is required to offer an IEP program that is reasonably calculated to provide educational benefit based on the knowledge possessed by the school district at the time of making the offer. (See, e.g., *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; see also *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1523 (discussion of parents' refusal to turn over portions of an expert's report).)

Absent the current litigation, the District would not have served the SDT on Arata. If a protective order is issued and the use of the documents is restricted to this litigation, the IEP team will be in no worse position than it would have been if the litigation had not been filed. Any methods that the District may use to obtain documents as part of the IEP process are still available to the District, notwithstanding a protective order issued as part of this litigation. A subpoena served as part of litigation is not intended to be a method for the District to gain information that it would not otherwise have as part of the IEP process.¹

Student requests a similar protective order related to Arata's testimony at hearing. It is premature to issue a protective order related to testimony. That is a matter more appropriately addressed by the administrative law judge hearing this case at the prehearing conference or during the hearing.

¹ Of course, Student cannot have it both ways – if a protective order is granted, Student parents cannot later argue that the IEP team was aware of the contents of Arata's records, should any future due process proceeding arise between the parties. Any offer of a FAPE made by the District would be made without consideration of the contents of the Arata documents, unless the documents are made available to the IEP team separate from the SDT that is at issue in this motion.

ORDER

1. Student's request for a protective order is granted as to the documents produced by Marla Arata pursuant to the SDT served by the District. The District is hereby restricted to using the documents produced by Arata pursuant to that SDT solely for purposes of this pending due process litigation.

2. Student's request for a protective order regarding Arata's testimony is denied without prejudice. Student may raise the issue again at the time of the prehearing conference or hearing in this case.

Dated: December 28, 2010

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings