

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. PARADISE UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2010100642
PARADISE UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. ORDER ON MOTION TO QUASH SUBPOENAS

On October 8, 2010, Student filed a due process hearing request (complaint). Student's first claim alleged that during the 2008-2009, 2009-2010 and 2010-2011 school years, District denied Student a free appropriate public education (FAPE) by: failing to offer Student appropriate placement and services; failing to meet its child find obligations; failing to provide Student with occupational therapy (OT); failing to convene annual Individualized Education Program (IEP) team meetings; failing to conduct a triennial assessment; failing to provide Student with social skills training; failing to provide Student with accommodations and modifications; failing to provide Student with a health plan; failing to ensure Student's safety; and failing to provide Student with equal access to his education. Student's second claim alleged that the District procedurally denied Student a FAPE during the 2008-2009, 2009-2010 and 2010-2011 school years by: failing to convene annual IEP team meetings; failing to conduct a triennial assessment; and failing to convene an IEP team meeting within 30 days of his placement in a District program. Student alleged, as factual background, that he has been diagnosed with many medical issues, including bronchio-pulmonary dysphasia, lung disease, seizure disorder and pulmonary hypertension, as well as delays in language, social skills, and sensory integration issues; that his last IEP was dated 2004; that Mother did not agree with the IEP and placed Student in private school; that Student's triennial assessment would have been due in December 2007 but was never performed; that in 2010 Student was enrolled at a charter school but District convened no IEP team meeting; that Student required social skills training, speech and language therapy, OT; a health plan; and a 1:1 aide to assist with social interactions. The complaint seeks a finding that Student was denied a FAPE; compensatory education in the form of individual tutoring; OT; speech and language therapy; independent educational evaluations; and that District be ordered to convene an IEP meeting and develop a health plan.

On March 16, 2011, District issued subpoenas duces tecum (SDTs) to (1) Student's Mother; (2) Dr. Tedford; (3) Dr. Chipps; (4) David Graham, M.A., M.F.T.; (5) Dr. Daniyan; (6) Dr. McDonald; (7) Dr. Phillips; and (8) Dr. Pappas seeking any and all records in their possession regarding, referring or pertaining to Student from September 1, 2009 to the present. On April 6, 2011, Student moved to quash the subpoenas, arguing that only Administrative Law Judges, and not District's counsel, may issue subpoenas in special education matters. Student also argued that the medical records are privileged, and that the subpoena to Mother seeking "any and all documents pertaining to" Student is overbroad.

On April 11, 2011, District opposed, arguing that its counsel was authorized to issue subpoenas, that Student has waived the privilege by putting his own health at issue, and that the subpoena to Mother was not overbroad. More specifically, District argued (without however any supporting declarations or evidence) that certain records Mother already provided were forged, and that it has a right to see the originals. District further argued that Dr. Daniyan and Dr. Tedford are pediatricians whose records are relevant to Student's current health needs as such needs impact his education. Dr. Chipps, pulmonologist, has records that are relevant to Student's lung disease. Dr. McDonald, gastroenterologist, has records that are relevant to a request Mother made regarding Student's use of a G-tube at school. Dr. Phillips, neurologist, and Dr. Pappas, psychiatrist, have records that are necessary to address Student's social needs and requested Autism services. Finally, M.F.T. David Graham participated in an assessment by Brislain Learning Center indicating that Student has characteristics of a child with Autism. Finally, District seeks Mother's records to learn if Student has any additional healthcare providers of which it is not currently aware. District claims that the subpoenaed records, while privileged pursuant to the doctor-patient privilege and psychotherapist-patient privilege, fall within the exceptions to privilege when the patient has put his own health status at issue. District further argues that the records are relevant to its own filing against Student which has been consolidated with Student's complaint.

APPLICABLE LAW

The rules of privilege are effective in a special education due process hearing to the same extent that they are otherwise required by statute to be recognized at hearing. (Gov. Code § 11513, subd. (e).) Among those privileges is the privilege regarding confidential communications between patient and doctor or psychotherapist. (Evid. Code §§ 994; 1014.) The patient holds the privilege, and a doctor or psychotherapist is obligated to assert the privilege on behalf of his or her patient. (Evid. Code §§ 995; 1013-1015.) However, there is no privilege as to such communication relevant to an issue concerning the condition of the patient if such issue has been tendered by the patient or any party claiming through the patient. (Evid. Code §§ 996; 1016.)

The Administrative Procedure Act, found in California Government Code sections 11450.05 to 11450.30, provides that attorneys of record may issue subpoenas in

administrative proceedings. However, California Code of Regulations, title 5, section 3089 specifies that the subpoena provisions, do not apply in special education due process hearing matters. Instead, 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.

An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is “a snapshot, not a retrospective.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

A local educational agency must assess a special education student in all areas of suspected disability, including if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).) A state or local educational agency must conduct a full and individual initial assessment before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414 (a); 34 C.F.R. § 300.301¹ (2006); Ed. Code, § 56320). After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child’s educational or related services needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1)). However, absent an agreement to the contrary between a school district and a student’s parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion on all of the issues raised by his complaint.

DISCUSSION

District has not established either waiver of privilege nor reasonable necessity for its subpoenas, nor did it apply to the hearing officer prior to issuing them. The subpoenas are therefore quashed in their entirety. This order is without prejudice to District’s right to make a further showing of waiver and/or reasonable necessity to the hearing examiner.

First, District’s assertion that Mother forged certain medical records is unsupported by any declarations or evidence, which would need to be considered in any ruling on the reasonable necessity of producing the originals.

¹ All citations to the Code of Federal Regulations are to the 2006 edition.

Second, to the extent that District relies on the issues raised by its own complaint, the argument is without merit, as Student did not put District's complaint at issue. Waiver of privilege must be judged in light only of that which Student himself has put at issue.

Third, to the extent that Student asserts District's failure to assess or convene IEP meetings, his health condition is irrelevant to these procedural allegations.

Fourth, District's subpoenas to Mother seeking any and all of her records pertaining to Student is clearly overbroad.

To the extent that Student alleges District's failure to offer appropriate placement and services; OT; social skills training; accommodations and modifications; a health plan; ensure his safety; and provide him with equal access to his education, his medical condition may be at issue. However any analysis of reasonable necessity of his medical records would depend upon the proof Student offers at hearing, since he has the burden of proof and since District's offers of FAPE will be judged, in accordance with the snapshot rule, on the basis of the information District had or should have assessed at the time of the offers. Thus, without knowing what evidence Student will offer on those issues, the subpoenas are at this time overbroad. Therefore the subpoenas are quashed; however this is without prejudice to District's right to make a further showing of waiver and/or reasonable necessity to the hearing examiner.

ORDER

The subpoenas are quashed in their entirety. This order is without prejudice to District's right to make a further showing of waiver and/or reasonable necessity to the hearing examiner.

IT IS SO ORDERED.

Dated: April 11, 2011

/s/

JUNE R LEHRMAN
Administrative Law Judge
Office of Administrative Hearings