

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

FAIRFIELD-SUISUN UNIFIED SCHOOL
DISTRICT, LIVE OAK SCHOOL
DISTRICT, AND CYPRESS CHARTER
SCHOOL.

OAH CASE NO. 2010120551

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
QUASH SUBPOENAS DUCES TECUM

On December 16, 2010, Parent on behalf of Student (Student) filed a request for a due process hearing (complaint) against the Fairfield Suisun Unified School District (Fairfield), Live Oak School District (LOSD), and Cypress Charter School (CCS). On February 9, 2011, Fairfield produced records to Student's counsel.

On March 21, 2011, Student issued and served on the Districts' counsel a subpoena duces tecum (SDT) requesting therapy session notes made by Student's counselor. Student also served a SDT on Fairfield seeking treatment notes from their counselor. LOSD and CCS produced therapy notes from Megan Tresham for the 2008-2009 school year. The notes included redacted sessions on March 25, 2009, and from April 27, 2009 through May 12, 2009. Counsel for LOSD and CCS indicated that the redactions were made to protect confidential information, the identity of the mandatory reporter of child abuse, pursuant to Penal Code, section 1167, subdivision (d)(1).

On March 23, 2011, LOSD and CCS filed a motion to quash the SDT and to redact certain information in order to shield the identity of the mandatory reporter. On March 30, 2011, Student filed a motion seeking to compel Fairfield to comply with the SDT. On April 7, 2011, OAH issued an order as to the Fairfield SDT.¹

On April 11, 2011, Student filed a document entitled, "Response to OAH's April 7, 2011 Order." Basically, Student is requesting a ruling on the motion to quash by LOSD and CCS. The pleading is deemed to be a request for ruling on the motion to quash brought by LOSD and CCS.

¹ The April 7, 2011 order by OAH instead mistakenly ruled as if the motion to quash had been brought by Fairfield instead of LOSD and CCS.

On April 12, 2011, OAH issued an order that stated that it would conduct an in-camera review as to whether the treatment notes are subject to confidentiality pursuant to Penal Code, section 1167, subdivision (d)(1). On April 20, 2011, LOSD and CCS filed under seal a copy of the treatment notes without redaction along with a copy of the redacted treatment notes already produced to Student, and a written statement of their position as to why these portions should not be produced. On April 22, 2011, Student filed an opposition to LOSD's and CCS's 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.² 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.

The confidentiality of reports of child abuse in California is governed by Child Abuse and Neglect Reporting Act (CANRA), Penal Code, section 11167.5, which provides:

(a) The reports required by Sections 11166 and 11166.2, or authorized by Section 11166.05, and child abuse or neglect investigative reports that result in a summary report being filed with the Department of Justice pursuant to subdivision (a) of Section 11169 shall be confidential and may be disclosed only as provided in subdivision (b). Any violation of the confidentiality provided by this article is a misdemeanor punishable by imprisonment in a county jail not to exceed six months, by a fine of five hundred dollars (\$500), or by both that imprisonment and fine.

(b) Reports of suspected child abuse or neglect and information contained therein may be disclosed only to the following:

(11) Persons who have been identified by the Department of Justice as listed in the Child Abuse Central Index pursuant to paragraph (7) of subdivision (b) of Section 11170 or subdivision (c) of Section 11170, or persons who have verified with the Department of Justice that they are listed in the Child Abuse Central Index as

² 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.

provided in subdivision (f) of Section 11170. Disclosure under this paragraph is required notwithstanding the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code. Nothing in this paragraph shall preclude a submitting agency prior to disclosure from redacting any information necessary to maintain confidentiality as required by law.

Pupil or education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Pupil records include any item of information “directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means.” (Ed. Code, §§ 49061, 56504.) The purpose of a due process hearing complaint is to determine whether a school district violated the IDEA, not to obtain records of child abuse and neglect. (*A.B. v. Clarke County School Dist.* (M.D.Ga. 2009) 2009 WL 902038, *11.)

DISCUSSION

Student served a SDT, seeking copies of therapy and counseling records from the Districts. The unredacted therapy notes provided by LOSD and CCS of Ms. Tresham for the 2008-2009 school year consist of three typewritten pages. Student received the redacted notes, which did not include Ms. Tresham’s entries for March 25, 2009 and April 27 through May 12, 2009. LOSD and CCS claimed that these entries are confidential pursuant to CANRA as they relate to mandated child abuse reports. Student asserts that she is not seeking the name of the mandated report, but the actual therapy notes and that the three typewritten pages do not encompass all of LOSD’s and CCS’s therapy notes.

As to the typewritten therapy notes that LOSD and CCS provided for OAH for in-camera review, the March 25, 2009 entry is appropriately redacted as it includes identifying information regarding the mandated reporter. Additionally, Student did not establish that Parent sought to obtain the requested child abuse information as provided in Penal Code, section 11170, subdivision (f).

However, the April 27 through May 12, 2009 entry includes no information about any mandated child abuse report or person who submitted a mandated report. Therefore, LOSD and CCS did not establish why April 27 through May 12, 2009 entry is protected by the confidentiality requirements of CANRA.

As to Student’s issue that LOSD and CCS did not produce all of Student’s therapy session notes, Student did not establish that any other notes, other than those produced by LOSD and CCS, exist, and LOSD and CCS represent that the three pages are the entirety of the therapy session notes. However, if at hearing, Ms. Tresham or any other LOSD and CCS employee indicates that LOSD and CCS have additional notes, Student may raise again her

request for LOSD and CCS to produce additional request records. Accordingly, LOSD's and CCS' motion to quash is granted in part.

ORDER

1. LOSD's and CCS's Motion to Quash is granted in part as to the March 25, 2009 entry, which shall remain redacted.

2. LOSD's and CCS's Motion to Quash is denied in part as to the April 27 through May 12, 2009 entry. LOSD and CCS shall provide Student with an unredacted April 27 through May 12, 2009 entry by 5:00 p.m. on April 26, 2011.

Dated: April 25, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings