

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

HIGH TECH MIDDLE MEDIA ARTS
SCHOOL AND HIGH TECH HIGH
SCHOOL.

OAH CASE NO. 2008070060

ORDER GRANTING STUDENT'S
MOTION TO QUASH SUBPOENA
DUCES TECUM

On July 1, 2008, the Office of Administrative Hearings (OAH) received a due process hearing complaint from attorney Patricia Lewis, on behalf of Student, against the High Tech Middle Media Arts School (HTMMAS) and High Tech High School (HTHS).

On July 7, 2008, Jack B. Clarke, Jr., attorney for HTMMAS and HTHS, issued Subpoenas Duces Tecum (SDTs) for records regarding Student. Those SDTs were served on Dr. Michael McManus, Dr. Patricia Juarez, Dr. Anthony E. Magit, Dana Dean, O.D., and the San Diego Unified School District. Each of these individuals or agencies reportedly assessed and/or provided services to Student.

On July 18, 2008, OAH received Student's motion to quash the SDTs, and Student's addendum to the motion on July 21, 2008. On July 24, 2008, OAH received HTMMAS' and HTHS' opposition to the motion.

APPLICABLE LAW

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. California Code of Regulations, title 5, section 3089 specifies that the subpoena provisions of the California Administrative Procedure Act (APA), found in California Government Code sections 11450.05 to 11450.30, do not apply in special education due process hearing matters. California Code of Regulations, title 1, section 11450.20, subdivision (a), provides that the service and notice requirements of Code of Civil Procedure section 1985.3, subdivision (c), apply to SDTs issued in administrative hearings conducted pursuant to the APA. California Code of Regulations, title 5, section 3082, subdivision (c)(2), says nothing regarding notice to the party whose records are being sought.

Code of Civil Procedure section 1985.3 provides that anyone who seeks to obtain personal records pertaining to a consumer in connection with a civil action or proceeding must take certain steps to attempt to notify the consumer that the consumer's personal records are being sought. A “consumer” includes any individual, and student records fall within the definition of personal records of a consumer. (Code Civ. Proc., § 1985.3, subd.(a).) Code of Civil Procedure section 1985.3, subdivision (k) states that “failure to comply with this section shall be sufficient basis for the witness to refuse to produce the personal records sought by a [SDT].”

Concerning the required notification, Code of Civil Procedure section 1985.3, subdivision (b), provides that, not less than ten days prior to the date called for in the subpoena for production of the records, the “subpoenaing party” shall serve on the consumer whose records are being sought a copy of the SDT, of the affidavit supporting the issuance of the subpoena, and of the notice described in subdivision (e).¹ If the consumer is a party, service may be made upon his or her attorney of record. (Code Civ. Proc., § 1985.3, subd. (b)(1).) Subdivision (c) requires that, prior to the production of the records, the subpoenaing party shall either: (1) serve upon the witness a proof of service attesting to compliance with subdivision (b); or (2) furnish the witness a written authorization to release the records signed by the consumer or his or her attorney of record.

Code of Civil Procedure section 1985.3, subdivision (e) describes the three required elements of the notice to consumer, as follows:

Every copy of the subpoena duces tecum and affidavit served on a consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court prior to the date specified for production on the subpoena; and (3) if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer’s interest in protecting his or her rights to privacy.

Code of Civil Procedure section 1985.3, subdivision (a)(3) provides that a “subpoenaing party means the person or persons causing a [SDT] to be issued or served in connection with any civil action or proceeding pursuant to this code, but shall not include the state or local agencies described in Section 7465 of the Government Code....” School districts are among the local agencies described in Government Code section 7465, subdivision (f).

¹ The service shall include the additional time provided by Code of Civil Procedure section 1013 if service is by mail.

The California Court of Appeals has held that in administrative proceedings that a party subpoenaing confidential third party records:

must take reasonable steps to notify the third party of the pendency and nature of the proceedings and to afford the third party a fair opportunity to assert [his or] her interests by objecting to the disclosure, by seeking an appropriate protective order from the administrative tribunal, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered.

(*Sehlmeyer v. Dept. of General Services* (1993) 17 Cal.App.4th 1072, 1080-1081.)

At the time of the *Sehlmeyer* decision, the APA did not require the subpoenaing party to provide the party whose records were subpoenaed with notice of the SDT, or to give that party any opportunity to challenge the SDT.² The Court held that the failure to provide a party of notice of the SDT and opportunity to challenge the SDT violated the party's California constitutional rights. To protect the party's constitutional rights, the Court incorporated the notice protections of Code of Civil Procedure section 1985.3 as a required procedure for a party in an administrative proceeding seeking confidential personal records. (*Sehlmeyer v. Dept. of General Services, supra*, 17 Cal.App.4th at pp. 1077 and 1079.)

DISCUSSION

While HTMMAS and HTHS served a copy of the SDTs on Student's attorney (Code Civ. Proc., § 1985.3, subd. (b)), HTMMAS and HTHS did not inform Student of her right to object to the SDTs by filing a motion with OAH. (Code Civ. Proc., § 1985.3, subd. (e).) HTMMAS and HTHS assert that they are not required to provide Student notice of her right to object to the SDTs because California Code of Regulations, title 5, section 3089, states that the Government Code sections 11450.05 through 11450.30, which governs subpoenas, do not apply in special education due process hearings. HTMMAS and HTHS also rely on *Student v. Cabrillo Unified Sch. Dist.* (2000) SEHO Case No. 2000-1073 (*Cabrillo USD*) for the proposition that they do not need to comply with the notice requirements of Code of Civil Procedure section 1985.3.

However, *Cabrillo USD* is not applicable in this case because *Cabrillo USD* did not address whether the school district was required to provide student with notice of the SDT pursuant to Code of Civil Procedure section 1985.3. In *Cabrillo USD*, student moved to exclude documents from hearing, alleging that the district did not provide student's attorney with a copy of the SDT. However, the *Cabrillo USD* order found that the district did send a copy of the SDT to student's attorney, and therefore did not address the Code of Civil

² The APA was amended effective January 1, 1997, to include the service and notice requirements in Code of Civil Procedure section 1985.3 for SDTs. (Govt. Code, § 11450.20.)

Procedure section 1985.3 requirements in special education proceedings, or analyze the requirements imposed by *Sehlmeyer*.

The *Sehlmeyer* decision required that the person whose personal records were subpoenaed to have the opportunity to object to the disclosure of the requested records. However, if the person is not notified of that right, the person, especially if not represented by legal counsel, would not know how to exercise that right. Code of Civil Procedure section 1985.3, subdivision (e), provides the required notice mechanism to protect the rights of the person whose records are subpoenaed. When HTMMAS and HTHS served the SDTs, they were required to comply with the notice requirements of Code of Civil Procedure section 1985.3, subdivision (e), to ensure that Student was afforded the ability to contest the SDTs. Therefore, because HTMMAS and HTHS did not properly serve the SDTs, Student's motion to quash is granted.

ORDER

Student's motion to quash is granted.

Dated: July 25, 2008

PETER-PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings