

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2010080302

v.

RIPON UNIFIED SCHOOL DISTRICT,

---

RIPON UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2010090956

v.

PARENTS ON BEHALF OF STUDENT.

ORDER GRANTING IN PART AND  
DENYING IN PART STUDENT’S  
MOTION TO QUASH SUBPOENA  
DUCES TECUMS

On October 19, 2010, Student filed a motion to quash a subpoena duces tecums (SDTs) issued by the Ripon Unified School District’s (District) attorney and served on Student’s Mother, Student’s therapist, Marla Arata, and Genesis Behavior Center (Genesis), a nonpublic agency that had provided behavior services to Student. On October 22, 2010, the District filed an opposition to Student’s motion to quash, and Student filed a reply brief on October 25, 2010. This matter is presently set for hearing on November 23, 2010.

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, subds. (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, 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

### *Subpoena Issued to Student's Mother*

The District's October 13, 2010 SDT to Mother requests that she produce documents related to communication between Parents and Genesis and the District. The District served this SDT on Student's counsel. The SDT states that Mother is to produce the documents to the District's counsel by October 25, 2010. Because Student's counsel also represents Mother, Student's counsel has standing to raise the issue of when Mother is to produce the requested documents.

Parents may, before a hearing, obtain pupil records under Education Code section 56504 and related statutes, and are entitled to receive, five business days before the hearing, copies of all the documents the district intends to use at the hearing, and a list of all witnesses the district intends to call, with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).)

However, a party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of Title 20 of the United States Code. (20 U.S.C. § 1415(h).) Both of those subsections relate only to due process hearings, not to any prehearing procedures.

Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to "[a] party to a hearing held pursuant to this section ..." (Ed. Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. Section 56505, subdivision (a) provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Board of Education promulgated section 3082, subdivision (c)(2), of Title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and SDTs.

The District in its opposition does not address the issue of its authority to request the production of documents before the commencement of the due process hearing. While a party may voluntarily produce documents before hearing to avoid the need to testify, possible continuance requests, or the need to recall witness, applicable special education statutes and

regulations do not require this early production of documents. Accordingly, Student's motion to quash the SDT issued to Mother is granted.

*Subpoena Issued to Ms. Arata*

The District's October 13, 2010 SDT to Ms. Arata requests that she produce documents related to records of therapy, assessment information, evaluation information, counseling summaries, data collection, observation therapist and clinical notes and work samples. The District served this SDT on Ms. Arata and Student's counsel.<sup>1</sup> The SDT states that Ms. Arata is to produce the documents to District's counsel by October 25, 2010. Student objects to the District's SDT because the District is seeking prehearing discovery and that documents sought are protected by the patient-therapist privilege. (Evid. Code, § 1012.) The District contends that Student has waived the privilege by putting his mental and emotional state at issue in the amended complaint. (Evid. Code, § 1016.)

Regarding the timeliness of the District's SDT, Student does not have standing to raise this objection because the SDT was served on Ms. Arata and Student's counsel does not represent Ms. Arata. However, regarding whether the District's request violates the patient-therapist privilege, Student has standing to raise this issue because the privilege belongs jointly to Student and Ms. Arata. (Evid. Code, § 1013.)

The amended complaint alleges that Student has regressed behaviorally due to the District's termination of behavior services provided by Genesis during the summer of 2010. Student's amended complaint places his mental and emotional state at issue as Student asserts that the District's failure to provide needed behavior services caused him to regress. However, the District's SDT is overly broad in that the District requests all records, with no time limitation, and Student's amended complaint only alleges violations that occurred in the summer of 2010. The District failed to prove why it requires all of Student's records from Ms. Arata, and not just those records around the time of the alleged violations. Accordingly, Student's motion to quash is granted in part as the District's request for records from Ms. Arata is limited to those documents from April 1, 2010 through the present.

*Subpoena Issued to Genesis*

The District's October 13, 2010 SDT to Genesis requests that it produce documents related to Student, including communication between Genesis and Parents, District, and Student's legal counsel, assessment and evaluation information, observation notes and logs, a list and employment dates of Genesis personnel who worked with Student and records of a specified employee. The District served this SDT on Genesis and Student's counsel.<sup>2</sup> The

---

<sup>1</sup> Ms. Arata has not produced the requested documents as she has requested that the District obtain a release of records.

<sup>2</sup> Neither Genesis or the specified employee filed a motion to quash, or any documents in support or in opposition to Student's motion.

SDT states that Genesis is to produce the documents to the District's counsel by October 25, 2010.

Student objects to the SDT because the District is seeking prehearing discovery. Student does not raise any other objection to the District's SDT to Genesis. Student does not have standing to raise this issue as the decision whether to object to the SDT or to produce the requested documents belongs to Genesis. Unlike the patient-therapist privilege regarding Ms. Arata's records, Student has not raised any legal objection to the Genesis SDT that gives him standing to object. Therefore, Student's motion to quash the SDT served on Genesis is denied.

#### ORDER

1. Student's motion to quash the SDT served on Mother is granted.
2. Student's motion to quash the SDT served on Ms. Arata is denied in part and granted in part as the SDT is limited to only those responsive documents from April 1, 2010 through the present.
3. Student's motion to quash the SDT served on Genesis is denied.

IT IS SO ORDERED.

Dated: October 28, 2010

/s/  
\_\_\_\_\_  
PETER PAUL CASTILLO  
Administrative Law Judge  
Office of Administrative Hearings