

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DRY CREEK JOINT ELEMENTARY
SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2011090491

ORDER GRANTING IN PART AND
DENYING IN PART STUDENT'S
MOTION TO QUASH SUBPOENA
DUCES TECUM

On September 16, 2011, Dry Creek Joint Elementary District (District) filed a request for due process hearing. The complaint seeks to establish that the assessments conducted by the District were appropriate and that it has the right to conduct further assessments.¹

On May 1, 2012, Student filed a motion to quash subpoena duces tecum (SDT) issued by the District's counsel to require each of Student's parents (Parents) to produce (a) "any and all communications related to assessments or evaluations, diagnosis, special education eligibility, treatment, and services of Respondent between" [Parent] and Dr. Asaikar; Dr. Madar; Dr. Simun; the Speech and Language Center of Excellence; (b) correspondence with Susan Barton regarding assessment or evaluation of Student; (c) any communications relating to Central Auditory Processing Disorder assessments, evaluations and treatment; (d) proof of payment or denial of payment by insurance for assessments; (e) and all Central Auditory Processing Disorder assessments in possession of Parents. District justification for the subpoena is that the records are needed for the District to meet its burden of proof and that the records are necessary to disprove Student's affirmative defense that the District conducted assessments were not appropriate. As to the documents related to insurance payment, the District cites that the information may reduce the amounts that the District may be responsible for.

The Office of Administrative Hearings (OAH) has not received an opposition to Student's motion to quash.

APPLICABLE LAW

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

¹ The complaint contained five issues. The issues cited above are the issues which will be determined at the due process hearing as the District withdrew the other issues.

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. 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 SDT’s.

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 SDT’s. 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.

Section 3082, subsection (c)(2) of Title 5 of the California Code of Regulation (Section 3082) permits the issuance of SDT’s “upon a showing of reasonable necessity by a party.” This requirement mirrors that required by California Code of Civil Procedure section 1985, subdivision (b), which requires:

A copy of an affidavit shall be served with a subpoena duces tecum . . . , showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The Code of Civil Procedure also requires a similar affidavit in an SDT. Section 1985 requires that an SDT shall be served with an affidavit demonstrating good cause in “full detail” how the material being sought is material to the issues involved. The requirement to demonstrate good cause as to materiality is not met by the affiant’s legal conclusion. The good cause requirement is met by a factual showing of why the requested material is material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

DISCUSSION

Student in his motion seeks to quash the SDT’s on grounds that the requested documents violate Student’s expectation of privacy, the information is subject to the physician-patient privilege, the “[m]edical documents and related records and correspondence never seen by the District are **not relevant** to the District’s burden of proof regarding decisions it made in the past;”² and service was not timely.

The District affidavit is not sufficient to meet the standards of Section 3082 as it does not demonstrate fully the materiality to the issues involved in the case. The affiant makes the legal conclusion that the documents are relevant and material in order for the District to meet its burden of proof. Additionally, the affiant declares that the documents are material to defend Student’s anticipated affirmative defense that the District assessments were not appropriate, and that the District needs the documents to have all necessary information to show its assessments were appropriate. As to the insurance payment documentation, the affiant declares that the information is needed to reduce the District’s amount of financial responsibility.

The District had previously served subpoenas on Dr. Mader, Dr. Asaiker, and Dr. Simun. At the prehearing conference (PHC) in this case, the Administrative Law Judge noted that the subpoenas to Dr. Mader and Dr. Asaiker were withdrawn by the District as neither was to be called as witnesses by the Student. Thus, the District has failed demonstrate how the documents requested involving these two individuals are at all relevant. Since the PHC occurred prior to the issuance of the SDT’s in question, it would appear that the District has requested such documents in less than good faith.

The District has the burden of proof to demonstrate the appropriateness of its assessments conducted in May 2011. As Student points out in his motion, the appropriateness of the District assessments will be determined using the “snapshot” rule, taking into account what was, and what was not, objectively reasonable when the assessments were administered. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The District has failed to show how any of the requested documents would be relevant and material in this matter.

² Motion to Quash, p. 3:10-12 (Emphasis contained in original).

As to the insurance payment documents, OAH is unable to award reimbursement to Student or his parents as the only issue before it is the complaint of the District which requests a ruling only as to the appropriateness of its assessments and its right to assess. Since this is a District-filed case, even if the District fails to prevail at hearing, Student will not be entitled to a remedy in this proceeding. Thus, the requested documents are not material to the issue to be decided at the due process hearing.

Lastly, as to the requested documentation involving Dr. Simun, Parents shall produce for inspection any documents in their possession as to those areas delineated in the PHC order. Parents shall make these documents available on the first day of the due processing hearing for an in camera inspection by the ALJ as to materiality and relevance in the event that Dr. Simun does testify at the due process hearing.

ORDER

1. Student's motion to quash is granted as to all documents requested except for those regarding Dr. Simun.
2. Student's motion is granted in part and denied in part as to the documents involving Dr. Simun, which are limited to the areas delineated in the PHC order.
3. In the event that Dr. Simun testifies at the due process hearing, Parents shall present the documents for an in camera review by the ALJ on the first day of hearing.

Dated: May 4, 2012

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings