

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BERKELEY UNIFIED SCHOOL
DISTRICT AND ALAMEDA COUNTY
BEHAVIORAL HEALTH SERVICES.

OAH CASE NO. 2012010446

ORDER GRANTING MOTION TO
QUASH SUBPOENAS DUCES TECUM
AND DENYING PROTECTIVE
ORDER

On January 18, 2012, Parent, on behalf of Student, filed a request for a due process hearing (Complaint) with the Office of Administrative Hearings (OAH) naming the Berkeley Unified School District (District) and the Alameda County Behavioral Health Services (Behavioral Health) as the respondents. The case is set for hearing on May 14–17, 2012.

Student seeks reimbursement to his parents for costs associated with a unilateral placement in Texas in 2010 at The High Frontier (THF), a residential treatment center operated by Social Learning Environments (SLE) within the Fort Davis Independent School District (Fort Davis) in Texas.

On February 23, 2012, Behavioral Health, through its attorney, issued subpoenas duces tecum (SDTs) to the custodians of records for (i) THF, (ii) SLE, (iii) the 588 Learning Co-operative (Learning Co-Op) and (iv) Fort Davis, seeking production of “any and all educational records” related to Student. On February 28, 2012, counsel for District issued SDTs to the custodians of record for those same four witnesses, followed on February 29, 2012, with correspondence to each of those witnesses informally requesting the same documents. Both Behavioral Health and District identified in their SDTs that the custodians of record for the witnesses were located in Texas. District’s letters were addressed, and the SDTs served by mail, to the witnesses at addresses in Texas.

On March 5, 2012, Student filed a motion to quash the SDTs as beyond the jurisdiction of the OAH, and for a protective order prohibiting District from seeking confidential records in violation of Student’s right to privacy by letter. On March 8, 2012, District filed an opposition to that motion. On March 9, 2012, Behavioral Health filed a joinder in District’s opposition. Meanwhile, on March 12, 2012, Student filed a motion to disqualify District’s counsel, to which District filed opposition on March 14, 2012. A final order denying Student’s motion to disqualify District’s counsel was issued on March 22, 2012.

Student's Motion to Quash Subpoenas

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, subds. (e)(2), (3).) Special education law provides for the issuance of SDTs by a hearing officer upon a showing of reasonable necessity. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) Code of Regulations, title 5, section 3089, specifies that the subpoena provisions of the Administrative Procedure Act (APA) found in Government Code sections 11450.05 to 11450.30, do not apply in special education due process proceedings, and therefore OAH analogizes to the relevant portions of the Code of Civil Procedure to make orders quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the hearing officer shall declare, including protective orders. (See Code Civ. Proc., § 1987.1.)

Student contends that the Code of Civil Procedure, sections 1989 and 2026.010, subd. (c), provide that a nonresident, nonparty witness cannot be compelled to produce documents. District counters that those sections apply only to subpoenas seeking the attendance of a nonresident in California, as Code of Civil Procedure, section 1987.3, expressly states that if the witness's "personal attendance is not required by the terms of the subpoenas, Section 1989 shall not apply," and section 2026.010, subd. (c), by its terms, applies only to depositions. However, neither Student, District nor Behavioral Health cite any authority authorizing OAH to compel a nonparty nonresident of California to produce documents within this state.

In general, the authority of each State is limited to its territorial boundaries. (See *Burnham v. Superior Court* (1990) 495 U.S. 604, 609 [110 S.Ct. 2105, 109 L.Ed.2d 631]). Deviations to this rule have been permitted for courts to assert personal jurisdiction over nonresident party litigants with respect to suits arising out of that party's contacts with California (*Id.* at p. 610), but the moving papers have cited no rule, or exception thereto, extending the authority of California Administrative Law Judges over nonparties residing in other states.

The SDTs issued by counsel for District and Behavioral Health to persons in Texas each prominently state, in bold type, "Disobedience to this subpoena will be punished as contempt of court in the manner prescribed by law." Neither District nor Behavioral Health, having issued SDTs on behalf of OAH, address how OAH would impose a contempt sanction against a nonparty nonresident over which it has no personal jurisdiction.

A trial court may clearly require a party over whom it has personal jurisdiction to produce documents under their control, wherever situated. (*Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 810-811.) However, a review of the Code of Civil Procedure does not reveal such broad authorization to compel production from nonparties.

The mechanics of seeking production of documents are set forth at Code of Civil Procedure, sections 1985, et seq., however, the authority to obtain discovery from nonparties

is regulated by Article 6 of the Civil Discovery Act (Civ. Proc., section 2016.010, et seq.).¹ Such nonparty discovery is expressly limited to the boundaries of the State:

Any of the following methods may be used to obtain discovery *within the state* from a person who is not a party to the action in which the discovery is sought:

...

(3) A deposition for production of business records and things under Article 4 (commencing with Section 2020.410) or Article 5 (commencing with Section 2020.510).

(b) Except as provided in subdivision (a) of Section 2025.280 [seeking personal attendance], the process by which a nonparty is required to provide discovery is a deposition subpoena. (Code Civ. Proc., § 2020.010, subs. (a)(3) and (b), italics added.)

A respected treatise on California discovery questions whether a subpoena can reach business records located outside of the State, even if the nonparty itself is located in California. “It is unclear whether service of a “business records” subpoena on a *nonparty* corporation in California compels production of its records located *outside* the state...CCP § 2020.410(c) requires that the subpoena be directed to the records “custodian” (or someone authorized to certify the records). Whether “custodian” requires *actual custody* of the records is unclear. If it does, serving an officer or agent in California would not compel production of business records located elsewhere.” (Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (TRG 2012) 8:540.4, original italics.)

Lastly, although the APA does not apply to special education proceedings, it is instructive that the APA provision regarding issuance and service of subpoenas is expressly limited to the boundaries of the State. Under the APA, “[t]he [subpoena] process extends to *all parts of the state...*” (Gov. Code, § 11450.20, subd. (a), italics added.)

In light of the limitations on the authority of the courts of this State to exercise personal jurisdiction over nonparty nonresidents, and the parties’ failure to identify an exception to these limitations for purposes of documentary discovery beyond the territorial boundaries of this State, the ALJ finds that the OAH is not authorized to issue SDTs to, or enforce SDTs against, nonparty nonresidents.

¹ Student correctly asserts that generally there is no formal pretrial “discovery” in special education cases. Nothing in this order is intended to imply that there are broad rights to pretrial discovery in special education due process proceedings. However, the law specifically provides for subpoenas and SDTs in special education cases on a showing of reasonable necessity.

As independent grounds for ordering the SDTs quashed, neither Behavioral Health nor District have made the requisite showing of reasonable necessity for issuance of a SDT under California Code of Regulations, title 5, section 3082.

Student, as petitioner in this matter, has the burden of persuasion at hearing (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]), and will be required to produce evidence establishing the appropriateness of his residential placement to substantiate his reimbursement claim. (See 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c) (2006); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [105 S. Ct. 1996, 85 L.Ed.2d 385].) Behavioral Health and District have the right to receive a copy of all documents Student intends to present at hearing at least five business days prior to the due process hearing. (Ed. Code, § 56505, subd. (e)(7).) Until and unless Student fails to timely produce educational records relating to the residential placement in dispute, no reasonable necessity for seeking the documents from nonparty nonresident witnesses can be shown.

Student's Motion for a Protective Order

Student seeks a protective order pursuant to Code of Civil Procedure, section 2025.420, barring District from seeking production of documents by informal letter. However, Chapter 9 of the Civil Discovery Act (Code of Civ. Proc. § 2025.010, et seq.), of which that section is a part, applies only to oral depositions inside California. Thus, because the Code of Civil Procedure does not expressly apply to administrative hearings, and even if it did, the cited provision is inapplicable, Student's request for a protective order is denied.

ORDER

1. The subpoenas duces tecum issued through counsel for Behavioral Health and District, and directed to the custodians of record for The High Frontier, Social Learning Environments, the 588 Learning Co-operative and the Fort Davis Independent School District, are quashed.
2. This order is made without prejudice to Behavioral Health and District seeking issuance of SDTs by the ALJ assigned to hear this matter at the pre-hearing conference and upon a showing of reasonable necessity.
3. Student's motion for a protective order is denied.

Dated: April 5, 2012

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings