

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HIGH TECH HIGH AND DESERT/
MOUNTAIN SELPA.

OAH CASE NO. 2012020045

ORDER DENYING STUDENT'S
MOTION TO QUASH SUBPEONA
DUCES TECUM; DENYING
DISTRICT'S MOTION FOR
SANCTIONS

On February 2, 2012, Parents on behalf of Student (Student) filed a request for a due process hearing with the Office of Administrative Hearings (OAH) naming High Tech High and Desert/Mountain SELPA (collectively referred to as the District) as the respondents. After the initial hearing dates were set, the parties requested a continuance, and the case is currently set for hearing beginning on September 12, 2012.

On September 6, 2012, the District served a subpoena duces tecum (SDT) on the Balboa City School (Balboa), a non-public school, seeking production of documents related to Student. On September 7, 2012, Student filed a motion to quash the SDT. On September 7, 2012, the District filed an opposition to that motion and filed a motion for sanctions based primarily upon the belief that Student's motion to quash the SDT was frivolous.

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 SDT's 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. 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.

Special education law is also silent as to whether an SDT may be issued by an attorney and, if so, what requirements apply. Therefore OAH once again analogizes to the relevant portions of the Code of Civil Procedure. (See, e.g., Order Denying Student's

Motion to Quash Subpoenas in OAH Consolidated Case numbers 2009030672 and 2009050587.)

Code of Civil Procedure section 1985, subdivision (c), provides that an attorney of record in an action may sign and issue an SDT to require production of the matters or things described in the subpoena. OAH permits an attorney of record in a special education matter to sign and issue SDT's consistent with this provision. Code of Civil Procedure section 1985, subdivision (b), details the requirements for the issuance of an SDT:

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.

It has been held that a government agency has a constitutional obligation to take reasonable steps to notify the subject of the records request, the consumer, when seeking to obtain records. (*Valley Bank v. Superior Court* (1975) 15 Cal.3d 652, 656; *Sehlmeyer v. Department of Gen. Servs.* (1993) 17 Cal.App.4th 1072, 1078 (*Sehlmeyer*).

An ALJ in a special education due process matter may assess monetary sanctions to defray reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029.)

DISCUSSION

Student raises several arguments in her motion to quash. First, Student argues that the District failed to provide notification of the SDT to Student, a consumer.

Student argues that Code of Civil Procedure section 1985.3 provides that a person seeking to obtain personal records pertaining to a consumer in a civil action or proceeding must notify the consumer that the consumer's personal records are being sought. In its opposition, the District argues that it was under no obligation to provide notification to the Student of the SDT on Balboa. The District asserts that because 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, the Code of Civil Procedure section 1985 is inapplicable.

However, in *Sehlmeyer*, the court found that the Legislature's failure to incorporate the notice provisions of Code of Civil Procedure section 1985.3 into the Government Code authorizing issuances of SDT's in proceedings conducted pursuant to the Administrative

Procedure Act “could not and does not diminish rights created by the California Constitution,” which compel recognition of some form of protection for information which is indisputably confidential. (*Sehlmeyer, supra*, 17 Cal.App.4th at p. 1079.) Here, the District, a governmental agency, seeks to obtain Student’s confidential records from a private institution, Balboa. Therefore the District was required to provide Student notification of the SDT. Failure to do so would be a breach of Student’s rights under the State Constitution.

Nonetheless, Student’s argument fails because the District provided notification of the SDT. On September 6, 2012, the District provided Student a copy of the SDT it had served upon Balboa and the Student was able to timely object to the SDT. Student failed to allege or establish that she suffered any prejudice due to the timing of the notice of the SDT. As such, Student’s argument fails to support her motion to quash the SDT.

Secondly, Student argues that the District failed to serve the SDT in sufficient time to allow Balboa reasonable time to locate and produce the records. However, Student does not represent Balboa and failed to provide a declaration from Balboa which would support this claim. Consequently, this argument also fails to support Student’s motion to quash the SDT.

Finally, Student argues that she will provide the District with all relevant records. However, the law does not give Student’s counsel the final say as to what documents are or are not relevant.

For the forgoing reasons, Student’s motion to quash the District’s SDT for Balboa is denied.

The District moves for sanctions based primarily upon the belief that Student’s motion to quash was frivolous. As shown above, although unsuccessful, Student’s motion was not frivolous. Therefore the District’s motion is unmeritorious.

ORDER

1. Student’s motion to quash the subpoena duces tecum is denied.
2. The District’s motion for sanctions is denied.

Dated: September 11, 2012

/s/

PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings