

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

COUNTY OF SAN DIEGO OFFICE OF
EDUCATION.

OAH CASE NO. 2012110566

ORDER GRANTING IN PART AND
DENYING IN PART STUDENT'S
MOTION TO QUASH SUBPOENAS
DUCES TECUM, AND GRANTING
COE'S MOTION TO CONTINUE

On November 16, 2012, the Parent on behalf of Student (Student) filed a request for due process hearing. The complaint alleges that the San Diego County Office of Education (COE) is the local education agency operating the Sarah Anthony School, a juvenile court school. Student contends that he was denied a free appropriate public education (FAPE) when the COE failed to place him in a residential treatment center (RTC), provide appropriate mental health services, academic services and occupational therapy.

On or about December 13, 2012, COE, by its counsel, caused to be served subpoenas duces tecum (SDT's) on Dr. Thomas Jensen, Dr. Maria De Lima, Dr. Michael Trammel, Dr. Joachim Reimann, the San Diego Health and Human Services Agency (HHSA), and the San Diego County Probation Department (Probation) requesting all documents, including correspondence, email and bills, referring to Student, his mother (Mother), placement or relating to services Student received or services the deponent recommended for Student.

On December 24, 2012, Student filed a motion for an order quashing the SDT's. Student contends that the SDT's should be quashed as (1) they are overly broad and seek irrelevant records; (2) they violate the educational psychotherapist-patient privilege; and (3) discovery is not authorized in special education proceedings.

On December 27, 2012, COE filed an opposition to the motion.¹ On December 31, 2012, the parties participated in a Status Conference where it was agreed that Student's counsel would obtain the records sought by COE and would provide COE a copy of the

¹ COE's opposition also included Student's motion to quash an SDT dated December 19, 2012 addressed to Dr. Robert Kelin. That motion was denied by OAH in an order dated December 27, 2012.

records. Student's counsel would impose objections on the first scheduled day of hearing, January 22, 2013.

On January 7, 2013, Student's counsel, by written letter, informed COE counsel that Student would be asserting that the De Lima and Jensen records were privileged under the patient-psychotherapist privilege. Additionally, Student contended that these records are not relevant as the COE IEP team did not rely upon these records in making their FAPE offers. Student's counsel also informed COE counsel that he had not received the remaining records from Probation or HHSa.

Also on January 17, 2013, COE filed a Request for Ruling Compelling Production of Subpoenaed Records and Motion to Continue. Student did not file a written response.

On January 22, 2013, the due process hearing commenced, and the parties presented their positions as to the records subpoenaed and as to the continuance.

APPLICABLE LAW AS TO MOTION TO QUASH

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. 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 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, the Office of Administrative Hearings (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 SDTs “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 documents are 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’s contention that the records sought are not relevant to this matter is without merit. Student is contending that his mental and emotional state require placement in a therapeutic secured facility. Thus, Student’s mental and emotional states are relevant to the instant matter.

The District affidavit is sufficient to meet the standards of Section 3082 as COE does 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 its defense.

Student in his motion seeks to quash the SDT’s on grounds that the requested documents violate Student’s expectation of privacy and the information is subject to privilege. However, this due process case is itself a confidential proceeding. Should Student

feel that a particular document or portions of a document contain sensitive material too sensitive even for a confidential due process proceeding, he is free to seek a protective order.

Student also refers to the psychotherapist-patient privilege. Evidence Code section creates an educational psychologist-patient privilege which is the same as the patient-psychotherapist privilege created by Section 1010, subdivisions (d). But Evidence Code section 1016 states “[t]here is no privilege under this article as to a communication relevant to an issue concerning mental or emotional condition of the patient if such issue has been tendered (a) by the patient.” Thus, Student cannot claim this privilege because he has raised his mental state and his mental health needs as the primary issues in this case.

Student’s claim that discovery is not permitted in due process is not relevant here. COE is attempting to obtain documents which may be used in evidence or for impeachment. A party to a due process hearing, as is noted by Student in his motion, is permitted to present evidence and compel the testimony of witnesses. (20 U.S.C § 1415 (h)(2); Ed. Code, § 56505, subs. (e)(2) and (3).)

Student stated that Drs. De Lima and Jensen, who treated Student prior to the time involved herein, will not be witnesses in the matter. COE contends that their records are relevant as another report, made on behalf of HHSA, contains information obtained from interviews of the two and possibly from their records. Such information can be obtained from examining the author of the report and may be contained in HHSA records also subpoenaed.

As to the records of Drs. Trammel and Reimann and Ms. Zweig, these are relevant as these individuals provided, and continue to provide, counseling services to Student. The HHSA and Probation records also are relevant as both agencies are currently responsible for providing services to Student. Also, COE contends that the agency records may reveal motives behind these agencies’ recommendations that Student requires placement in a residential placement facility.

ORDER

1. Student’s motion to quash the SDT’s to Drs. Jensen and De Lima is **GRANTED**. In the event that either is called as a witness by Student, Student shall make arrangements for both to produce their files at the time that they testify.

2. Student’s motion to quash the SDT’s to Ms. Zweig, Dr. Trammel, Dr. Reimann, HHSA and Probation is **DENIED** and such documents shall be produced within seven days of the date of this order.

3. COE is directed to provide Student’s counsel with a copy of all documents produced within one day after the documents are produced at COE’s expense.

4. Student will have the opportunity to object to the admissibility of any of the documents at the time that COE attempts to introduce them into evidence.

5. COE's motion to continue the due process hearing is GRANTED. The due process hearing will commence on January 23, 2013 in order to permit Student's expert, Natalie N. Brown, Ph.D., to testify as Dr. Brown as traveled from Seattle, WA. The hearing will thereafter be continued until **February 11, 2013 at 1:30 p.m. at the Offices of OAH located at The State Building, 1350 Front Street, Suite 3005, San Diego, CA 92101.**

Dated: January 23, 2013

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings