

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

FREMONT UNIFIED SCHOOL DISTRICT,

Respondent.

OAH NO. N2006050433

**ORDER GRANTING PETITIONER'S
MOTION TO QUASH SUBPOENAS
DUCES TECUM; ORDER DENYING
PETITIONER'S MOTIONS FOR
SANCTIONS**

On May 11, 2005, the Office of Administrative Hearings (OAH) received a due process hearing complaint from attorneys Mandy Leigh and Emily Berg of the Leigh Law Group, on behalf of Petitioner Student (Petitioner), naming Fremont Unified School District (District) as the respondent. A due process hearing in this matter is scheduled to convene on July 6-7, 10-13, and 24, 2006.

On June 26, 2006, an attorney for the District, Kinnari Cowell-Shah of Miller, Brown & Dannis, issued Subpoenas Duces Tecum (SDTs) for records regarding Petitioner. Those SDTs were served on Jennifer Murphy at East Bay Therapy, Speech-Language Pathology, Traci Soder at Saratoga Instruction and Diagnostic Center, and Cheri Worchester at Advance Kids. Each of these individuals or agencies reportedly assessed and/or provided services to Student.

On June 29, 2006, the Office of Administrative Hearings (OAH) received Petitioner's motion to quash the SDTs and a motion for sanctions against the District.¹ On June 30, 2006, OAH received the District's opposition to the motion to quash from attorney Damara Moore of Miller, Brown & Dannis. On July 3, 2006, OAH received additional correspondence from Petitioner regarding the SDTs.

APPLICABLE LAW

California Code of Regulations, title 5, section 3082, subdivision (c)(2) provides that the hearing officer may issue SDTs upon a showing of reasonable

¹ On June 26, 2006, the District filed its own motion for sanctions against Petitioner's attorneys for conduct including filing two frivolous motions. OAH will address that motion separately.

necessity by a party. However, special education law does not specifically address whether an SDT may be issued by an attorney, or what requirements apply. Given that special education law is silent on this topic, OAH analogizes to the relevant portions of the California Code of Civil Procedure (CCP).² CCP 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 SDTs consistent with this provision.

CCP section 1985.3 (hereinafter section 1985.3) provides that anyone who seeks to obtain personal records pertaining to a consumer in connection with a civil action or proceeding must take certain steps to attempt to notify the consumer that the consumer's personal records are being sought. A “consumer” includes any individual, and student records fall within the definition of personal records of a consumer. (Cal. Code Civ. Proc. § 1985.3, subd.(a).) Section 1985.3, subdivision (k) states that “failure to comply with this section shall be sufficient basis for the witness to refuse to produce the personal records sought by a [SDT].”

Concerning the required notification, subdivision (b) of CCP section 1985.3 provides that, not less than ten days prior to the date called for in the subpoena for production of the records, the “subpoenaing party” shall serve on the consumer whose records are being sought a copy of the SDT, of the affidavit supporting the issuance of the subpoena, and of the notice described in subdivision (e).³ If the consumer is a party, service may be made upon his or her attorney of record. (Cal. Code Civ. Proc. § 1985.3, subd. (b)(1).) Subdivision (c) requires that, prior to the production of the records, the subpoenaing party shall either: (1) serve upon the witness a proof of service attesting to compliance with subdivision (b); or (2) furnish the witness a written authorization to release the records signed by the consumer or his or her attorney of record.

Section 1985.3, subdivision (e) describes the three required elements of the notice to consumer, as follows:

Every copy of the subpoena duces tecum and affidavit served on a consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must

² California Code of Regulations, title 5, section 3089 specifies that the subpoena provisions of the Administrative Procedure Act, found in California Government Code sections 11450.05 to 11450.30, do not apply in special education due process hearing matters.

³ The service shall include the additional time provided by CCP section 1013 if service is by mail.

file papers with the court prior to the date specified for production on the subpoena; and (3) if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or her rights to privacy.

Section 1985.3, subdivision (a)(3) (hereinafter, section 1985.3(a)(3)) provides that a “subpoenaing party means the person or persons causing a [SDT] to be issued or served in connection with any civil action or proceeding pursuant to this code, but shall not include the state or local agencies described in Section 7465 of the Government Code....” School districts are among the local agencies described in California Government Code section 7465, subdivision (f).

In 1994, the Fifth Appellate District of the California Court of Appeal held that section 1985.3(a)(3)’s exemption of state and local agencies was limited only to those agencies’ attempts to obtain records pursuant to proceedings governed by Government Code section 7460, et seq., which is the California Right To Financial Privacy Act. (*Lantz v. Superior Court of Kern County* (5th A.D. 1994) 28 Cal. App. 4th 1839, 1852, 34 Cal. Rptr. 2d 358, 365-366.) The *Lantz* court determined that the legislative history and purpose of section 1985.3(a)(3) did not intend to exempt state and local agencies from compliance with the procedural requirements of section 1985.3 in all circumstances, but rather only for subpoenaing financial records. (*Id.*) Hence, the Court found that, where a county sought to obtain non-financial records pursuant to an SDT, the county “was a ‘subpoenaing party’ within the meaning of [section 1985.3(a)(3)], and should have complied with the procedures prescribed by section 1985.3.” (*Id.*)

Regarding sanctions, an ALJ has the authority to shift expenses from one party to another, when a party acts in bad faith.⁴ (Govt Code section 11455.30 [hereinafter section 11455.30]). Section 11455.30 states that bad faith is defined in CCP section 128.5 [hereinafter section 128.5]. California cases applying section 128.5 hold that a trial judge must state specific circumstances giving rise to the award of expenses and articulate with particularity the basis for finding the sanctioned party’s conduct reflected tactics or actions were performed in bad faith and that they were frivolous, designed to harass, or designed to cause unnecessary delay. (*Childs v. Painewebber Incorporated* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.). Bad faith is shown when a party engages in actions or

⁴ This authority is modified by California Code of Regulations, title 1, section 1040, and title 5, section 3088 [hereinafter, section 3088]. Section 3088 treats contempt sanctions differently from sanctions shifting expenses from one party to another. Section 3088(c) requires that, “Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education [hereinafter, CDE].” Conversely, with regard to expenses, section 3088(b) specifically omits any requirement that an ALJ obtain approval from the CDE. Accordingly, section 3088(b) does not modify or limit the ALJ’s authority when presiding over a special education hearing from shifting expenses from one party to another when a party has acted in bad faith.

tactics that are without merit, frivolous, or solely intended to cause unnecessary delay. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) However, the bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*Id.*, at page 702).

DISCUSSION

SDTs

Preliminarily, there are no pending allegations or concerns about the relevance of the subpoenaed documents or privacy issues that could limit production of the documents.

In her motion to quash, Petitioner raises several arguments which do not succeed. For example, Petitioner argues that the disclosure of documents pursuant to the SDT is barred because the District has not disclosed those documents as proposed evidence five business days prior to hearing. (See Ed. Code § 56505, subd. (e)(7), (8); 34 C.F.R. § 300.509(a)(3).) This argument is unpersuasive because the District's ability to subpoena documents is separate from the rules regarding disclosure and admission of proposed documentary evidence; as the District points out, a party may use documents to prepare for examination of witnesses, even if those documents are not admitted into evidence. Similarly, Petitioner's citation to Code of Federal Regulations, title 34, section 300.509(b)(1), the requirement that a party shall disclose all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing, fails to constitute any basis to quash the District's SDTs. (See also Cal. Ed. Code § 56505, subd. (e)(7).)

However, Petitioner raises a valid point that the District failed to comply with the SDT procedures described in section 1985.3, in particular the District's failure to serve a copy of each SDT on Petitioner's attorney pursuant to section 1985.3, subdivision (b)(1). The District argues that it is not required to comply with the requirements of section 1985.3, because as a local agency described in Government Code section 7465, it is not a "subpoenaing party" as defined in section 1985.3(a)(3). As the Court explained in *Lantz v. Superior Court of Kern County, supra*, this exemption from the SDT procedures pertains only to local agencies' subpoenas of financial records.

The reasoning of the *Lantz* opinion applies here. The SDT process was designed to allow a consumer to receive notice of the personal records being sought, so that the consumer may exercise the option to seek to quash the SDT if necessary. As the *Lantz* court explained:

Nor can we think of any reason why the Legislature might have wished to enact a statute containing a wholesale exemption for cities, counties, and other state and local agencies. A consumer's

privacy interest in his or her personal records would still exist.
[Citation omitted.]

As discussed above, in the present case the Petitioner's underlying arguments for quashing the subpoena do not succeed. Nevertheless, the District's failure to comply with the procedural requirements of section 1985.3 invalidates the service of these SDTs.⁵ Because the SDTs were not properly served, Petitioner's motion to quash is granted.

Sanctions

In opposing the motion to quash, the District raised a colorable argument regarding why it is not subject to the procedural requirements for serving SDTs under section 1985.3(a)(3). While that argument did not ultimately succeed, it established that the District's failure to comply with those procedural requirements was based upon a reasonable, good-faith interpretation of section 1985.3(a)(3). There is no evidence that the District's failure to comply with the procedures constituted bad faith actions or tactics. Petitioner's motion for sanctions is denied.

IT IS SO ORDERED.

Dated: July 5, 2006

SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division

⁵ Nothing in this order precludes the District from re-serving the SDTs.