

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

In the Matter of:

STUDENT,

Petitioner,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2007060040

ORDER DENYING PETITIONER'S
MOTION IN LIMINE

On November 14, 2007, Petitioner Student, filed a written motion in limine (Motion) seeking to bar the use of testimony about, or documents related to, therapy that Student received while being educated and treated at Youth Care, Inc., a residential facility. Student argues that introduction of such evidence is barred by the psychotherapist-patient privilege in Evidence Code sections 1012 through 1014, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and is otherwise inadmissible under Evidence Code section 352 (discretion to exclude evidence that would result in undue prejudice or consumption of time). On November 19, 2007, Respondent, Long Beach Unified School District (District), filed a written opposition. Oral argument was heard during the course of the due process hearing on November 21, 2007. For the reasons set forth below, the Motion is denied.

First, on January 30, 2007, Student's father (Father) executed a release permitting the release to the District of Student educational records and "Psychiatric/Psychological records (e.g., Assessment, Diagnosis and Treatment/Program Recommendations). At the time Father signed the release and at the time Student was receiving treatment, Student was a minor. The release expressly stated that it could be revoked by delivering a written revocation to the District, and would not be effective to the extent the District had already relied on the release. At hearing, Student argued that the release signed by Father had the words "Psychiatric/Psychological" blacked out. However, this explanation is inconsistent with the District's production of a clean copy and appears to be the result of a photocopier and/or facsimile of a highlighted portion of the document. Student further argued that Father had revoked the authorization by sending a letter to Youth Care, Inc. just prior to the hearing. However, the revocation was not provided to the District until the second day of the hearing,

November 21, 2007, while the motion in limine was being argued. Accordingly, the revocation is ineffective due to the District's reliance on the release to obtain documents and prepare for the due process hearing. The release waived the privilege. (See Evid. Code, § 912, subd. (a).)

Second, the District is not a third party for purposes of the psychotherapist-patient privilege in Evidence Code sections 1012 through 1014. Evidence Code section 1012 states, in relevant part, that a

"confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, **or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted**, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship. [emphasis added.]

Here, the therapist was consulted as part of the District's obligation to provide Student with a free and appropriate education pursuant to the mandates of title 20, United States Code, section 1400 et seq. Accordingly, the therapy records and information obtained in therapy are discloseable to the District. (See *In re Pedro M.* (2000) 81 Cal.App.4th 550, 554 [psychotherapist-patient privilege inapplicable under Evidence Code section 1012 where court needed to monitor therapy imposed as a probation condition].)

Third, the psychotherapist-patient privilege does not apply to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by the patient, or any party claiming through the patient. (Evid. Code, § 1016, subs. (a) & (b).) Disclosure of information pursuant to Evidence Code section 1016 is limited to those mental conditions that the patient has put into issue. (*Tylo v. Superior Court* (1997) 55 Cal App.4th 1379, 1387.) Here, Student is making a "child find" claim for the year 2006, i.e., that the District should have assessed him for special education eligibility under the category of emotional disturbance and that as a result the District should reimburse Student for psychiatric expenses, substance abuse treatment expenses and residential facility tuition. In order to obtain reimbursement, Student must prove that he would have been eligible for services because in matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23 (Target Range)* (9th Cir. 1992) 960 F.2d 1479, 1484.) Student's eligibility for special education would be determined by applying the following:

Because of a serious emotional disturbance, a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors.
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (3) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations.
- (4) A general pervasive mood of unhappiness or depression.
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

(5 C.C.R. §3030, subd. (i).) In light of the above definition, and Student's request for reimbursement of psychiatric treatment costs, the psychotherapist-patient privilege is inapplicable because Student has put his mental condition at issue.

The above analysis demonstrates that evidence regarding Student's mental health is highly relevant to his claims, such that any consideration regarding consumption of time is outweighed by the probative value of the evidence. Further, because the due process hearing is closed and will result in an anonymous decision, Student will not be unduly prejudiced. (Evid. Code, § 352.)

Finally, HIPAA does not apply. HIPAA does not provide a private right of action. (*Webb v. Smart Document Solutions, L.L.C.* (9th Cir. 2007) 499 1078, 1082.) Moreover, HIPAA is inapplicable to Student's due process claim for reimbursement under the IDEA because it contains an exception that information may be disclosed for purposes of oversight of government benefit programs for which health information is relevant to beneficiary eligibility. (45 C.F.R. 164.512(d).) More importantly, HIPAA expressly provides that information may be disclosed pursuant to an order in an administrative proceeding. (45 C.F.R. 164.512(e)(1)(i).) This document is such an order. Accordingly, HIPAA does not bar documents or testimony from Student's therapists relating to Student's mental state during the year 2006.

IT IS SO ORDERED.

DATED: November 27, 2007

RICHARD T. BREEN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division