

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

In the Matter of:

STUDENT,

Petitioner,

v.

TEHACHAPI UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH 2005120939

**ORDER REGARDING PETITIONER'S  
MOTION FOR PROTECTIVE ORDER**

On January 20, 2006, attorney Joel S. Aaronson filed an amended due process hearing complaint (Amended Complaint) on behalf of Petitioner Student, against Respondent Tehachapi Unified School District (District). The Amended Complaint alleged, inter alia, that the District should have found Student eligible for special education for a time period beginning in summer 2004 until May 2005, and also that the District failed to offer Student a free appropriate public education (FAPE) beginning in May 2005.

On April 19, 2006, OAH received from the Student a motion for protective order prohibiting or limiting the District from obtaining records concerning the Student from the Student's treating psychotherapist.<sup>1</sup> The Student argued that Student's treating psychotherapist's records are not relevant, that the records cannot be disclosed due to psychotherapist-patient privilege and medical privacy, and that any privilege has not been waived because the Student "has not placed his emotional and/or psychological state in issue." In the alternative, the Student requested that the administrative law judge (ALJ) review the records in camera to determine whether any of the records should be subject to discovery.<sup>2</sup>

On April 26, 2006, OAH received from attorney Peter E. Denno the District's opposition to the Student's motion. The District argued that Student's treating psychotherapist's records fall under the patient-litigant exception to the

---

<sup>1</sup> The motion also suggested that the ALJ review the records to determine "whether any of the records should be allowed to be part of any evidence." To the extent that the Student is seeking a ruling prohibiting admission of the documents into evidence, such request is premature.

<sup>2</sup> In deciding this matter, the ALJ reviewed the records in camera.

psychotherapist-patient privilege. The District also asserted that the Student's attorney "made no legitimate good faith efforts to meet and confer" to resolve this disagreement prior to filing the motion. On April 27, 2006, OAH received the Student's reply to the District's opposition.

### **APPLICABLE LAW**

The rules of privilege are effective in a special education due process hearing to the same extent that they are otherwise required by statute to be recognized at hearing. (Gov. Code § 11513, subd. (e).) Among those privileges is the privilege regarding confidential communications between patient and psychotherapist. (Evid. Code § 1012.) The patient holds the privilege, and a psychotherapist is obligated to assert the privilege on behalf of his or her patient. (Evid. Code §§ 1013, 1014, 1015.) However, there is no privilege as to such 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.)

California Code of Regulations, title 5, section 3082, subdivision (c)(2) provides that the hearing officer may issue subpoenas duces tecum (SDTs) upon a showing of reasonable 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).<sup>3</sup> 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. Similarly, concerning motions to quash SDTs, OAH generally follows CCP section 1987.1, which 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. (Code Civ. Proc. § 1987.1)

### **DISCUSSION**

There is no dispute that Student's treating psychotherapist's records concerning Student constitute confidential communications between a psychotherapist and patient. Rather, the question is whether the Student waived the psychotherapist-patient privilege in this case. The Student's filings in this case assert that the District failed to identify him as eligible for special education "notwithstanding a Psychologist diagnosis of ADHD [attention-deficit/hyperactivity disorder]." As noted above, the Student's issues allege that the District should have determined Student eligible as of summer 2004, and that the District denied Student a FAPE after finding him eligible in May 2005. While the Student's Amended

---

<sup>3</sup> 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.

Complaint neglects to specifically identify the category under which he should have been found eligible as of summer 2004, it is reasonable to conclude from other facts and allegations that the Student is asserting that he was eligible due to other health impairment (OHI) related to his ADHD. Moreover, the May 13, 2005 individualized education program (IEP) notes indicate that the IEP team considered Student's treating psychotherapist's ADHD diagnosis when the team found Student eligible. In light of all of the above, it is clear that the Student has placed his ADHD condition at issue, and therefore has waived the psychotherapist-patient privilege as it pertains to Student's treating psychotherapist's records.

Given the above information and findings, the District has established reasonable necessity for production of Student's treating psychotherapist's records. (See Cal. Code Regs., tit. 5 § 3082, subd. (c).) Because the Student has put his ADHD diagnosis and condition at issue, any and all records relating to the diagnosis and treatment of the Student's ADHD shall be produced pursuant to the SDT.

IT IS SO ORDERED.

Dated: May 4, 2006

---

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