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OPINION :
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The Honorable Gary K. Hart, Assemblyman, Thirty-Fifth District, requests an opinion on a question that we have phrased as follows:

Must a school district produce pupil records, protected by Education Code section 49076, of pupils enrolled in a special education class but who are not parties in a hearing regarding another child's placement or continued enrollment in that class, when it is served with a subpena duces tecum issued by the Superintendent of Public Instruction ordering the production of such records?

## CONCLUSION

Pupil records, protected by Education Code section 49076, of pupils who are not parties to a hearing regarding another child's placement or continued enrollment in a special education class, may be produced by a school district in response to a subpena duces tecum issued by the Superintendent of Public Instruction only when a court has ordered the

school district to comply with the subpena in the manner provided by law or when the parents of the affected pupils consent in writing to the release of the pupil records of their children.

## ANALYSIS

The factual setting in which the issue is presented is of critical importance. We are advised that the relevant facts are as follows:

An autistic child (hereinafter "Mary")[1] was enrolled in a special education class with five other children, with one teacher and two "teacher's aides." Subsequently, that class was enlarged by the enrollment of eight other children, with the assignment of an additional teacher and two more "teacher's aides." It is alleged that the new class now contains four autistic children "including many other kinds and types of behavior problems," which kinds and types of "behavior problems" Mary has "learned and mimicked."

The parents of Mary desire to prove that Mary is not being provided with an education appropriate to her needs. The procedure utilized by the parents is to request an "administrative hearing" as authorized by Education Code section 56000 *et seq*.[2]

An attorney representing the parents then wrote a letter to the Department of Education requesting the issuance by the Superintendent of Public Instruction of a "subpena." The letter identifies the materials sought to be obtained pursuant to the subpena.

The subpena, issued by the Superintendent of Public Instruction, commands that the "Custodian of Records" of the school district "attend and . . . testify at the request of [name of attorney representing the child]" at the time, date and place specified. The subpena further commands that the custodian of records "bring with you at said time and place and there produce the following . . ." The subpena then identifies, among other items ". . . all I.E.P.'s ["Individual Education Program"],[3] notes, memoranda and behavior records of each child in the class' that was combined with Mary's special education class, identifying several pupils by name. Additionally, the subpena states that: "Disobedience to this subpena will be punished as contempt in the manner and form prescribed by law."

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[1] Not the pupil's real name, to protect her privacy.

[2] All unidentified section references are to the Reorganized Education Code.

[3] See sections 56340–56346.

The pupil records are sought to:

1. show that the effect of the other children on Mary was not considered by the school officials,

2. that the effect of such children was negative with respect to Mary,

3. that the records of the children's behavior maintained by the school were inadequate, and

4. that the school did not have conferences between school personnel adequate to formulate or to maintain a plan for Mary.

It is asserted that the pupil records, if obtained pursuant to the administrative subpena duces tecum would be used, if admissible, in a "hearing":

1. to cross-examine the teacher and teacher's aides of the children enrolled in the class,

2. to show to an expert in autism to permit that expert to form an opinion as to the effect of such problems and behavior on Mary and to evaluate the adequacy of the plan for Mary,

3. impeach the testimony of certain parents, whose children are enrolled in Mary's class,

4. as rebuttal to "letters" from certain parents praising the class, in a manner not specified.

In order to resolve the issue presented, we must examine the statutes pertaining to "access" to pupil records, the statutes establishing the duty of school officials maintaining such pupil records, and the statutes authorizing the issuance of an administrative subpena duces tecum by the Superintendent of Public Instruction.

Section 49076 provides that:

> *"A school district is not authorized to permit access to pupil records to any person without written parental consent or under judicial order except that:*

*"(a) Access to those particular records relevant to the legitimate educational interests of the requester shall be permitted to the following:*

"(1) School officials and employees of the district, members of a school attendance review board appointed pursuant to Section 48321, and any volunteer aide, 18 years of age or older, who has been investigated, selected, and trained by a school attendance review board for the purpose of providing followup services to students referred to the school attendance review board, provided that any such person has a legitimate educational interest to inspect a record.

"(2) Officials and employees of other public schools or school systems, including local, county, or state correctional facilities where educational programs leading to high school graduation are provided, where the pupil intends to or is directed to enroll, subject to the rights of parents as provided in Section 49068.

"(3) Authorized representatives of the Comptroller General of the United States, the Secretary of Health, Education, and Welfare, and administrative head of an education agency, *state education officials*, or their respective designees, or the United States Office of Civil Rights, *where such information is necessary to audit or evaluate a state or federally supported education program or pursuant to a federal or state law, provided that except when collection of personally identifiable information is specifically authorized by federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students or their parents by other than those officials*, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of federal legal requirements.

"(4) Other state and local officials to the extent that information is specifically required to be reported pursuant to state law adopted prior to November 19, 1974.

"(5) Parents of a pupil 18 years of age or older who is a dependent as defined in Section 152 of the Internal Revenue Code of 1954.

"(6) A pupil 16 years of age or older or having completed the 10th grade who requests such access.

"(b) *School districts may release information from pupil records to the following:*

"(1) Appropriate persons in connection with an emergency if the knowledge of such information is necessary to protect the health or safety of a student or other persons.

"(2) Agencies or organizations in connection with a student's application for, or receipt of, financial aid; provided, that information permitting the personal identification of students or their parents may be disclosed only as may be necessary for such purposes as to determine the eligibility of the pupil for financial aid[,] to determine the amount of the financial aid, to determine the conditions which will be imposed regarding the financial aid, or to enforce the terms or conditions of the financial aid.

"(3) Accrediting organizations in order to carry out their accrediting functions.

"(4) Organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students or their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted.

"(5) Officials and employees of private schools or school systems where the pupil is enrolled or intends to enroll, subject to the rights of parents as provided in Section 49068. Such information shall be in addition to the pupil's permanent record transferred pursuant to Section 49068.

"*No person, persons, agency, or organization permitted access to pupil records pursuant to this section shall perm it access to any information obtained from such records by any other person, persons, agency, or organization without the written consent of the pupil's parent;* provided, however, that this paragraph shall not be construed as to require prior parental consent when information obtained pursuant to this section is shared with other persons within the educational institution, agency or organization obtaining access, so long as such persons have a legitimate interest in the information." (Emphases added.)

Section 49074 provides that:

> "Nothing in this chapter shall preclude a school district from providing, in its discretion, statistical data from which no pupil maybe identified to any public agency or entity or private nonprofit college, university, or educational research and development organization when such actions would be in the best educational interests of pupils."

Section 49075 provides that:

> "A school district may permit access to pupil records to any person for whom a parent of the pupil has executed written consent specifying the records to be released and identifying the party or class of parties to whom the records may be released. The recipient must be notified that the transmission of the information to others without the written consent of the parent is prohibited. The consent notice shall be permanently kept with the record file."

Section 49076 is part of chapter 6.5, part 27 of the Education Code referred to herein as "chapter 6.5," enacted by chapter 1010, Statutes of 1976. Section 49060 of chapter 6.5 provides:

> "It is the intent of the Legislature to resolve potential conflicts between California law and the provisions of Public Law 93–380 regarding parental access to, and the confidentiality of, pupil records in order to insure the continuance of federal education funds to public educational institutions within the state, and to revise generally and update the law relating to such records.
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> "This chapter shall have no effect regarding public community colleges, other public or private institutions of higher education, other governmental or private agencies which receive federal education funds unless described herein, or, except for Sections 49068 and 49069 and subdivision [b][5] of Section 49076, private schools.
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> "The *provisions of this chapter shall prevail over the provisions of* Section 12400 of this code and Chapter 3.5 *(commencing with Section 6250) of Division 7 of Title I of the Government Code to the extent that they may pertain to access to pupil records*." (Emphases added.)

Section 6250 *et seq*. of the Government Code pertains to the Public Records Act. (See generally, 58 Ops. Cal. Atty. Gen. 65(1975); 58 Ops. Cal. Atty. Gen. 646 (1975).) See section 49061 for statutory definitions of the terms "parent," "pupil record" and "access," as those terms are used in section 49076.

Section 49076, *supra*, establishes limited categories of persons or institutions that may have access to pupil records in the absence of written parental consent of the pupil or in the absence of a *judicial order*.[4] It is apparent that the Superintendent of Public Instruction is a "state education official" within the meaning of subsection (a)(3) of section 49076. However, his right to access, without a judicial order, is therein limited to the situation where such information is necessary to audit or to evaluate a state or federally supported education program or pursuant to a federal or state law." In the situation where the Superintendent of Public Instruction seeks such access to pupil records, he is required to protect such information "in a manner which will not permit the personal identification of students or their parents by anyone other than himself (and, we assume, his staff). Further, "such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of federal legal requirements" (or, we assume, state legal requirements).

Thus, section 49076 does not provide expressly for access by a parent of a pupil of pupil records of a pupil not his or her child. Section 49076 does not provide express authority for the Superintendent to obtain such information pursuant to his subpena *for use by such a parent*. However, section 49076 does authorize access to pupil records by the Superintendent of Public Instruction without a judicial order, "pursuant to a federal or state law."[5] We turn to "state law" to ascertain whether there may exist authority to obtain access to pupil records under the factual circumstances set forth herein.

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[4] The syntax of this "negative" statutory sentence is such that, when read literally, it produces effect opposite to that intended in the context of a judicial order. If one deletes the first part of the disjunctive, the sentence reads: "a school district is *not authorized to permit access* to pupil records *to any person* (without parental consent or) *under judicial order* . . ." (Emphasis added.) Read literally, the operative effect is to prevent release of pupil records "under judicial order." However, its apparent meaning is made clear if we make the disjunctive parts read: "without written parental consent or *except when* under judicial order." (Underscored words added.) (See the language of former Ed. Code, § 10751 (Stats. 1974, ch. 1229) " . . . except under judicial process . . . ."

[5] Note, however, that subdivision (a)(3) of section 49076 authorizes access to pupil records "pursuant to a federal or state law, provided that any data collected by such officials shall be protected in a manner which will not permit the personal identification of students or their parents by other than those officials . . . ."

The only express subpena authority of the Superintendent of Public Instruction revealed by our research is that contained in article 2 (§§ 11180–11191), chapter 2, part 1, division 3, title 2 of the Government Code referred to herein as "article 2." Section 11180 of article 2 provides:

> " . . . The head of each department may make investigations and prosecute actions concerning:
>
> "(a) All matters relating to the business activities and subjects under the jurisdiction of the department.
>
> "(b) Violations of any law or rule or order of the department.
>
> "(c) Such other matters as may be provided by law."

The Superintendent of Public Instruction, as ex officio Director of Education (§ 33303), is the head of the Department of Education and authorized to make the investigations and prosecute the actions contemplated by Government Code section 11180. (§ 33305.)

Government Code section 11181 in article 2 provides:

> "In connection with these investigations and actions he may:
>
> "(a) Inspect books and records.
>
> "(b) Hear complaints.
>
> "(c) Administer oaths.
>
> "(d) Certify to all official acts.
>
> "(e) Issue subpenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding pertinent or material thereto in any part of the State."

Government Code section 11186 in article 2 provides:

> "The superior court in the county in which any hearing is held under the direction of the head of a department has jurisdiction to compel the

attendance of witnesses, the giving of testimony and the production of papers, books, accounts and documents as required by any subpena issued by the head."

Government Code section 11187 in article 2 provides:

"If any witness refuses to attend or testify or produce any papers required by such subpena the head of the department may petition the superior court in the county in which the hearing is pending for an order compelling the person to attend and testify or produce the papers required by the subpena before the officer named in the subpena.

"The petition shall set forth that:

"(a) Due notice of the time and place of attendance of the person or the production of the papers has been given.

"(b) The person has been subpenaed in the manner prescribed in this article.

"(c) He has failed and refused to attend or produce the papers required by subpena before the officer in the cause or proceeding named in the subpena, or has refused to answer questions propounded to him in the course of the investigation or hearing."

Government Code section 11188 in article 2 provides:

"Upon the filing of the petition the court shall enter an order directing the person to appear before the court at a specified time and place and then and there show cause why he has not attended or testified or produced the papers as required. A copy of the order shall be served upon him. If it appears to the court that the subpena was regularly issued by the head of the department, the court shall enter an order that the person appear before the officer named in the subpena at the time and place fixed in the order and testify or produce the required papers. Upon failure to obey the order, the person shall be dealt with as for contempt of court."

Thus, pursuant to Government Code section 11181, the Superintendent of Public Instruction, in his capacity as Director of Education, may "issue subpenas for the attendance of witnesses and the production of papers . . . in any inquiry, investigation, hearing or proceeding pertinent or material thereto . . ." Section 11180 authorizes the head

of the department to "make investigations and prosecute actions concerning":

> "(a) All matters relating to the business activities and subjects under the jurisdiction of the department.
>
> "(b) Violations of any law or rule or order of the department.
>
> "(c) Such other matters as may be provided by law."

In the light of these provisions, it is apparent that the Superintendent of Public Instruction as Director of the Department of Education might, by subpena and without a court order, obtain access to pupil records protected by Education Code section 49076 if he is making an investigation or prosecuting an action concerning any of the matters specified in subdivisions (a), (b) or (c) of Government Code section 11180.

Returning to the facts pertinent to the question presented for our resolution, it appears that the subpena has been issued by the Superintendent, not for his benefit, but for the benefit of a parent who wishes to obtain pupil records of pupils who are not his or her children, which pupil records identify such children.

The subpena we have examined does not, however, indicate on its face the jurisdictional basis for its issuance by the Superintendent of Public Instruction. Its language implies, however, that it is being issued for the benefit of a parent thus raising a serious question whether it has been issued pursuant to and *in accordance with* state law. We need not decide whether the subpena is validly[6] issued in order to resolve the issue presented. It is sufficient to note that there might, but might not, be a basis in law for its issuance. (See, e.g., §§ 56120–56133, 56500–56506 (Stats. 1980, ch. 797).)

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[6] The Office of Superintendent of Public Instruction is a constitutional office. (See Cal. Const., art. IX, § 2; Ed. Code, § 33100 *et seq*.) The Director of the Department of Education is a separate public office (see Ed. Code, § 33302), which the Superintendent of Public Instruction holds ex officio. (Ed. Code, § 33303.) The Education Code often imposes duties upon the separate offices, (Compare §§ 33115 and 33118 with 33116 and 33117.) The Education Code specifically provides: that it is the Director of Education that has the powers of a head of a department. (See Ed. Code, §§ 33304, 33305.) No mention is made therein of the Superintendent of Public Instruction. The Education Code provisions relating to "hearing" in respect to special education classes impose duties upon the Superintendent of Public Instruction expressly and not upon the Director of the Department of Education. The subpena at issue in this opinion was issued by the Superintendent of Public Instruction, not by the Director of the Department of Education. No provisions of the Education Code or of the Government Code of which we are aware address this hiatus. We do not consider the significance, if any, of this hiatus in connection with this opinion.

Section 56120 provides that "the superintendent shall administer the provisions of this part." Section 56133 provides that "the superintendent shall provide review to any parent, as specified in Section 56056, or a hearing,[7] as specified in Section 56507 [sic]." (The correct statutory reference should be section 56501.)

Section 56501(a) provides in part that "the due process hearing procedures prescribed by this chapter extend to the pupil, the parent, and the public education agency involved in any decisions regarding a child" under circumstances therein specified. Section 56502(a) provides in part that "all requests for a due process hearing shall be filed with the superintendent. . . ."

Section 56504 provides that:

> "The parent shall have the right and opportunity to examine all school records of the child and to receive copies pursuant to this section and to Section 49060 within five days after such request is made by the parent, either orally or in writing. A public educational agency may charge no more than the actual cost of reproducing such records, but if this cost effectively prevents the parent from exercising the right to receive such copy or copies the copy or copies shall be reproduced at no cost.

Section 56505 provides that:

> "(a) The state hearing shall be conducted in accordance with regulations adopted by the superintendent. Such hearing shall be conducted by a person knowledgeable in administrative hearings under contract with the department.
>
> "(b) Such hearing shall be held at a time and place reasonably convenient to the parent and the pupil.
>
> "(c) Such hearing shall be conducted by a person knowledgeable in the laws governing special education and administrative hearings under contract with the department.
>
> "(d) During the pendency of the hearing proceedings, including the actual state-level hearing, the pupil shall remain in his or her present

[7] The state Administrative Procedure Act (Gov. Code, § 11500 *et seq*.) does not apply to either the Superintendent of Public Instruction or to the Director of the Department of Education. (See Gov. Code, § 11501(b).)

placement unless the public agency and the parent agree otherwise.

"(e) Any party to the hearing held pursuant to this section shall be afforded the following rights consistent with state and federal statutes and regulations:

"(1) The right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of handicapped children.

"(2) The right to present evidence, written arguments, and oral arguments.

"(3) The right to confront, cross-examine, and compel the attendance of witnesses.

"(4) The right to a written or electronic verbatim record of the hearing.

"(5) The right to written findings of fact and the decision.

"(6) The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to the party at least five days before the hearing.

"(f) The hearing conducted pursuant to this section shall be completed and a written, reasoned decision mailed to all parties to the hearing within 30 days following completion of the mediation conference or within 45 days from the receipt by the superintendent of the request for a hearing, if the mediation conference is waived. Either party to the hearing may request the superintendent or his or her designee to grant a continuance. Such continuance shall be granted upon a showing of good cause. Any continuance shall extend the time for rendering a final administrative decision for a period only equal to the length of the continuance.

"(g) The hearing conducted pursuant to this section shall be the final administrative determination and binding on all parties.

"(h) Nothing in this chapter shall preclude a party from exercising the right to appeal the decision to a court of competent jurisdiction.

Thus, section 56505, subdivision (e)(3) provides to a parent who is a party to the hearing a right to "compel the attendance of witnesses." This right, however, is stated to be afforded to a party only when such a right is "consistent with state and federal statutes and regulations." (§ 56505(e).) None of these sections purport to allow the release of protected pupil records, contrary to section 49076, where neither the pupils nor their parents are parties to a hearing authorized by section 56501.

We turn to the duty of the school official served with such a subpena, which subpena purports to require the school official to disclose pupil records that he is charged with protecting. We have set forth hereinbefore section 49076, which section specifies the pupil records that are to be protected by the school.

Section 49077 provides that:

> "Information concerning a student *shall be furnished in compliance with a court order*. The school district shall make a reasonable effort to notify the parent and the pupil in advance of such compliance if lawfully possible within the requirements of the judicial order." (Emphasis added.)

Section 49078 provides that:

> "The service of a subpena upon a public school employee solely for the purpose of causing him to produce a school record pertaining to any pupil may be complied with by such employee, in lieu of personal appearance as a witness in the proceeding, by submitting to the court, or other agency issuing the subpena, at the time and place required by the subpena, a copy of such record, accompanied by an affidavit certifying that such copy is a true copy of the original record on file in the school or school office. The copy of the record shall be in the form of a photostat, microfilm, photographic copy or reproduction, or an enlargement thereof."

Section 49078, *supra*, provides that a public school employee, served with a subpena whose only purpose is to cause him to produce pupil records, may submit such records, in lieu of a personal appearance as a witness, "to the court, *or other agency issuing the subpena*." (Emphasis added.)

Section 49078, *supra*, permits him to do so but in doing so, it assumes the validity of the subpena. This section, however, cannot be interpreted as permitting him to do that which he is otherwise prevented from doing by another provision of law. We have noted that the facts set forth in this opinion reveal that the school official may not be authorized to permit access to these pupil records if the subpena is not issued pursuant to

and in accordance with law. Thus, section 49078 contains a condition precedent, to wit, that one must otherwise be authorized by law to produce such pupil records, in which instance one may submit them in response to the subpena without a personal appearance.

The factual recitals set forth herein indicate that the pupils whose records are sought are participating in a type of education denominated "special education." There may or may not be federal funds available to the school districts providing such special education. If such federal funds have been accepted by the school districts, there may be federal statutes and regulations forbidding access to such pupils' records even though state law may be permissive with respect to such access. (See generally, 58 Ops. Cal. Atty. Gen. 646 (1975).) Thus, even though state law might permit limited access to pupil records, federal law may prohibit such access if federal funds are involved. (See 58 Ops. Cal. Atty. Gen. 646 (1975).) In some instances, only the local school officials may know whether a particular program is federally funded. That school official thus may have a duty to refuse to permit access to pupil records, except as a court may allow, in order to maintain the school district's eligibility to receive federal educational funds. (See, e.g., tit. 45, C.F.R., § 121a.500 *et seq*.) Further, section 49076, *supra*, itself imposes a duty upon school officials irrespective of federal funding.

If the subpena did not seek to obtain protected pupil records, he could comply with it in the manner specified in section 49078. Since, however, the subpena does seek to obtain protected pupil records, he cannot rely upon the provisions of section 49078.

We return to the provisions of Government Code sections 11187 and 11188, *supra.*

Government Code section 11187 authorizes the public official issuing an administrative subpena to file a petition in superior court upon a witness refusing to attend or to testify or *to produce any papers* required by such subpena.

Government Code section 11188 provides that, upon the filing of the petition, the court shall enter an order directing the person to appear before the court and show cause why he has not attended or testified or produced the papers required. That section further provides that "if it appears to the court that *the subpena was regularly issued* by the head of the department, the court shall enter an order that the person appear before the officer named in the subpena and testify or produce the required papers." Upon failure to obey the order, the person shall be dealt with as for contempt of court." (Emphasis added.)

Thus, an issue concerning whether the administrative subpena was "regularly issued," i.e., issued in accordance with and pursuant to law, may be contested in the proceeding authorized pursuant to Government Code sections 11187 and 11188. (See

*Franchise Tax Bd. v. Barnhart* (1980) 105 Cal. App. 3d 274; *Fielder v. Berkeley Properties Co.* (1972) 23 Cal. App. 3d 30; *People v. West Coast Shows, Inc.* (1970) 10 Cal. App. 3d 462; *People v. Hutchings* (1977) 69 Cal. App. 3d Supp. 33.)

Neither school boards nor any other administrative agency may establish additional terms or conditions which frustrate rights created by statute. (*Burton v. Pasadena City Bd. of Ed.* (1977) 71 Cal. App. 3d 52.) An administrative subpena, in effect an "order" of a public official," can have no greater dignity than the "command" of a statute that provides a contrary "order" affecting that public official.

Thus, the school official, who has been served with an administrative subpena duces tecum that may require him to produce pupil records contrary to his duty to protect such records, may appear at the time and place specified in the administrative subpena and decline to produce the protected records on the basis that the subpena was not regularly issued, thereby complying with his duty to protect such pupil records. The record thereby established in that administrative proceeding should be made a part of any petition in the superior court seeking to have the subpena enforced. (See 11 Ops. Cal. Atty. Gen. 66, 70 (1948).)

If the school official appears at the administrative hearing in order to contest the validity of the subpena, the Superintendent may agree with him that the records should not be produced or he may modify the order if he determines that it should be modified. If the Superintendent concludes that he has properly issued the order, the school official may then make a record showing that the order requires him to disclose pupil records that he is prevented by law from disclosing. There would then be no issue concerning his failure to exhaust his administrative remedies upon the Superintendent proceeding to file his petition in superior court seeking to have the school official ordered to produce the pupil records. The Superintendent would then have to determine whether to seek such a petition.

Alternatively, the school official may notify the Superintendent that he will not produce the protected pupil records, on the basis that the subpena was not regularly issued, unless and until the Superintendent obtains a court order pursuant to Government Code sections 11187 and 11188. In the event that the school official thereafter is served with an order to show cause issued by a court, he may then at the time and place stated in the order to show cause defend his duty to protect such pupil records by showing why the records named in the subpena should not be produced. Issues concerning the authority of the Superintendent to conduct the "hearing" in connection with which the subpena was issued, the duty, if any, of the school official to produce the pupil records, the relevance of the records sought, to whom they might be made available, and similar issues, could be resolved by the court at the hearing to show cause. There might, in such an instance, be an issue concerning whether one or more of the issues thus raised by the school official should

first have been raised in the administrative proceeding in which he was subpenaed. However, no court decision of which we are aware has discussed whether a person raising a *defense* in a judicial proceeding, seeking to have an administrative subpena enforced, must have first raised any such defense in the administrative proceeding as a condition precedent to asserting it in the judicial proceeding. The doctrine of administrative exhaustion generally applies to a person seeking judicial review of administrative action. (See generally, Witkin, *Summary of California Law*, 8th Ed., Constitutional Law, § 317.) In this instance, it would be the Superintendent of Public Instruction instituting the proceeding, not the school official. Thus, it appears that the school official need not appear at the administrative hearing in order to be able to assert his defenses in the court proceeding.

Thus, under the facts presented to us, we conclude that Education Code section 49070 requires a court order before the school official may release the pupil records sought by the subpena, as therein set forth. While we find that the statutes presently applicable require a court order before pupil records may be made available under the facts herein considered, we do not express any view as to the appropriateness of this procedure. It is probable that the issue has not been brought to the attention of the Legislature so as to permit it to establish an appropriate procedure providing prompt judicial review, applicable to special education "hearings" when pupil records of other pupils are sought by a parent of one pupil.

We conclude that pupil records, protected by Education Code section 49076, of pupils who are not parties to a hearing regarding another child's placement or continued enrollment in a special education class, may be produced by a school district in response to a subpena duces tecum issued by the Superintendent of Public Instruction only when a court has ordered the school district to comply with the subpena in the manner provided by law or when the parents of the affected pupils consent in writing to the release of the pupil records of their children.

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