BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. TEMPLETON UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017051280 ORDER GRANTING MOTION TO QUASH SUBPOENAS *DUCES TECUM* SERVED SEPTEMBER 13, 2017 AND DENYING MOTION TO QUASH SUBPOENAS *DUCES TECUM* SERVED SEPTEMBER 14, 2017

PROCEDURAL BACKGROUND

Student filed a request for due process hearing (complaint) in case number 2017051280 on May 26, 2017. District filed case number 2017060886 on June 20, 2017, asserting that the functional behavior assessment Templeton had conducted was appropriate, and requested that it be consolidated with Student's case. The cases were ordered consolidated on July 10, 2017 at which time, the hearing on the consolidated cases was scheduled to begin on September 19, 2017. At the Prehearing Conference on September 11, 2017, Student dismissed all claims in his complaint except for the claim that the functional behavior assessment was inappropriate. On September 18, 2017, District dismissed case No 2017060886.

On September 7, 2017, Student's counsel, David Grey, sent an email to counsel for the District, Diane Willis, asking about the employment status of one of District's witnesses, Brooke Foster, and then stating "I want to subpoena certain documents from the District. Will you accept service, or should I serve directly on the District? Ms. Willis replied informing Mr. Grey that Ms. Foster was an independent contractor for the district and that the District would be calling her. She asked which documents Mr. Grey wanted to subpoena and ended her email, "You can send subpoena (*sic*) for documents to me".

Service of March 13, 2017 Subpoenas

On September 13, 2017, at 12:19 p.m., Student emailed District electronic copies of two subpoenas *duces tecum*. One was directed to District and one was directed to Ms. Willis' law firm. The email stated "Please let me know immediately if I should serve a hard copy. I can easily get it done today" Ms. Willis replied at 12:50 pm advising Mr. Grey that he would have to serve the subpoenas properly and that she was not accepting service of either subpoena via email. At 1:24 p.m. that same day, September 13, 2017, Mr. Grey sent an email to Ms. Willis asking her to disregard the earlier email noting that the subpoenas

needed to be corrected. He stated that corrected copies of the subpoenas were attached. Mr. Grey reminded Ms. Willis of the exchange in which he informed her that he wanted to subpoena documents from the district and her reply indicating he could send them to her. He ended his email, "I believe service is not effective based upon our agreement." At 1:34 p.m., Ms. Willis replied, "Dave: You still need to properly serve the SDTs which to my knowledge does not include email." At 5:07 on the evening of September 13, 2017, Ms. Willis sent another email stating, "Dave: Just to clarify, I never said I would accept email service of subpoenas for Templeton Unified School District . I also never said I would accept service of a subpoena for Lozano Smith."

Service of March 14, 2017 Subpoenas

On September 14, 2017 at approximately 10:15 a.m., a subpoena was personally served on Templeton by delivery to the receptionist at the district office. The subpoena was accompanied by a check made out to Templeton USD for $50.00 drawn on the account of E-Legal Services, Inc. Witness Fee Account. On September 14, 2017, Christine Cobabe, legal secretary for Lozano Smith accepted service of a subpoena. The subpoena was accompanied by a check for $50.00 drawn on the account of Central San Diego Attorney Service, Inc. Neither the subpoena form served on Templeton nor the subpoena served on Lozano Smith had a completed "method of delivery" section.

TEMPLETON SUBPOENA

The subpoenas served on the two different dates were worded identically. The subpoena to Templeton states that the "books, papers, documents and/or other things named below and requested by this subpoena are material to the proper presentation of this case, and good cause exists for their production by reason of the following facts:

> … "These items are material and necessary to show that the FBA conducted by Brooke Foster was not appropriate. These items are relevant to what information was communicated to and from Brooke Foster, about the child, with District folks staffing this case, as well as with his parents. The contract, invoices and payments are necessary to examine witnesses about the scope of the FBA, Brooke Foster's relationship with the District and how much she was paid, all of which also relate to potential bias. Finally, any information exchanged between Brooke Foster and the District's counsel regarding her FBA and her testimony is relevant and related to bias, or the influence impacting her testimony."

The Templeton subpoena requests access to: 1) the contract between Ms. Foster and Templeton for Student; 2) All letters, correspondence and emails between Ms. Foster and Templeton, Dee Mello Wisch, Lindsay Flatos and or Keley Moen regarding Student or his parents; 3) All letters, correspondence and emails between Ms. Foster and Ms. Cobabe, Ms. Willis and or Lozano Smith regarding Student or his parents; and 4) Invoices, billing statements, and payments regarding services rendered by Ms. Foster regarding Student.

LOZANO SMITH SUBPOENA

The subpoena to Lozano Smith states that the "books, papers, documents and/or other things named below and requested by this subpoena are material to the proper presentation of this case, and good cause exists for their production by reason of the following facts:

> … "These items are material and necessary to show that the FBA conducted by Brooke Foster was not appropriate. These items are relevant to what information was communicated to and from Brooke Foster, about the child, with District folks staffing this case, as well as with his parents. Any information exchanged between Brooke Foster and the District's counsel regarding her FBA and her testimony is relevant and related to bias, or the influence impacting her testimony."

The Lozano Smith subpoena sought access to all letters, correspondence and emails between Ms. Foster and Ms. Cobabe, Ms. Willis and/or Lozano Smith regarding Student or his parents.

Motions to Quash

On September 14, 2017 Templeton filed a motion to quash the subpoenas served via email. On September 15, 2017, Templeton filed a motion to quash the subpoenas served on September 14, 2017. On September 15, 2017, at approximately 1:25 p.m., Mr. Grey was contacted by OAH staff and instructed to file any opposition to Templeton's motions no later than 10 a.m. Monday, September 18, 2017. Opposition was timely received. Both motions will be addressed in this order.

Templeton argues that the subpoenas were untimely issued and served, improperly seek attorney-client privileged and/or work product materials, seek documents not relevant to the hearing, are deficient in specificity of relevancy and materiality of documents being sought and are overly broad and vague.

APPLICABLE LAW

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.). Both the IDEA and California law provide parties with the right to present evidence and compel the attendance of witnesses at a due process hearing. However, neither federal nor state law confers the right to prehearing discovery. ((20 U.S.C. § 1415(h); Ed. Code, § 56505, subd. (e).)

The provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) However, Subdivision (c)(2) of section 3082 of title 5 of the California Code of Regulations grants authority to an administrative law judge to issue subpoenas and subpoenas *duces tecum* upon a showing of "reasonable necessity by a party."

Special education law does not specifically address motions to quash subpoenas or subpoenas *duces tecum*. In ruling on such motions, the Office of Administrative Hearings 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.

LEGAL ANALYSIS

Subpoenas served electronically on September 13, 2017

The subpoenas served on September 13, 2017 were served via email. Service of process via electronic mail is only allowed if the party receiving the document has authorized service via electronic mail. (Code Civ. Proc. § 1010.6 (a)(1)(C)(2).) In this case, counsel for Templeton agreed to accept service of the subpoena on behalf of Templeton. She did not, however, agree to accept service via electronic mail. She diligently corrected opposing counsel's misunderstanding of her willingness to accept electronic service and counsel acknowledged that permission for electronic mail service has not been given. Service of the subpoenas sent via email was invalid. As service was invalid, no other aspects of the legal validity of the September 13, 2017 subpoenas need to be addressed.

Subpoenas served on September 14, 2017

SUBPOENA TO TEMPLETON UNIFIED SCHOOL DISTRICT

On September 14, 2017, Templeton was served with a subpoena at their district offices. The subpoena was accepted by the receptionist.

SUBPOENAS ARE NOT TIMELY SERVED:

Templeton argues that the subpoena was not timely served and cites California Code of Civil Procedure section 1985.3, (d) in support of that assertion noting that California Code of Civil Procedure, 202.410 would provide instruction regarding the definition of a "reasonable time" for service. Templeton, however, is referring to statutes pertaining to pre-trial discovery. Deposition subpoenas are different from subpoenas for documents for hearing. Special Education Due Process hearings do not allow for pre-hearing discovery. They do, however, allow for subpoenas for hearing, including subpoenas *duces tecum*. (Cal. Code Regs. tit. 5, §3082(c)(2).)

Application of timelines pertinent to civil trials in the context of a special education due process hearing is untenable and, as the technical rules of evidence do not apply to special education hearings, application of the time restrictions is also not required. (Cal. Code Regs. tit. 5, §3082(b).) Even civil trial subpoenas do not set a definitive rule for

advance service of trial subpoenas. Subpoenas must be served in time to allow a witness reasonable time for preparation and travel. (Cal. Code Civ. Proc. 1987(a.).)

Due process hearing rules require disclosure of evidence and witnesses only five business days prior to the hearing. (Ed.Code § 56505 (e)(7).) It is only at that time that a party may become aware that full disclosure of documents has not occurred. Here, document disclosures were due on September 12, 2017. Student attempted to serve the first subpoena to Templeton on September 13, 2017 and personally served the subpoena to require production of documents at hearing on September 14, 2017. Student asserts that documents disclosed for hearing indicate that a complete set of educational documents previously requested were not produced as evidenced by disclosures. Student diligently served the subpoena necessary to secure records needed to evaluate the circumstances surrounding the assessment in question and present his case at hearing. Application of the civil trial timelines would deprive Student of his opportunity to secure records needed to fully present his case. Therefore, Templeton did not show that he subpoenas should be quashed because they were untimely.

FAILURE TO ESTABLISH GOOD CAUSE OR REASONABLE NECESSITY

Templeton argues that Student should not be entitled to correspondence between Foster and Templeton's counsel because the correspondence cannot be relevant to the subject matter of the complaint. However, Templeton does not explain that argument and on its face it is difficult to support. The sole topic of the hearing is the appropriateness of the functional behavior assessment conducted by Ms. Foster. Student asserts that documents included in Templeton's prehearing disclosures included documents not previously produced pursuant to Student's request for his educational records. The subpoena was an attempt to obtain complete records prior to hearing. Student's subpoena adequately states a basis for connecting the requested documents to the subject matter of the hearing. As stated above the requests were specific enough to meet the required standard and were not overbroad as they were limited to only documents pertinent to Ms. Foster who conducted the functional behavior assessment at issue.

Templeton argues that Student fails to describe facts specific enough to constitute good cause or reasonable necessity for requesting the documents described. However, Student has noted a number of bases for the need to have the records requested to present his case at hearing: the need to know of the communications pertaining to the assessment between the time Ms. Foster was retained and the time she issued her report, the need to know the terms of the contract retaining Ms. Foster to conduct the assessment and the need to know the financial arrangements made for the assessment to occur. This meets the standard for a description of good cause and reasonable necessity for production of the documents.

Templeton further argues that Student failed to allege in this complaint that Foster's assessments were inappropriate because of bias or based on her payments from the District. Therefore, Student is not entitled to documents exploring bias as part of his subpoena *duces*

tecum. However, bias is a valid area of cross examination as to the credibility of any witness. Student is not required to detail every possible basis on which he believes the assessment was not appropriate in the complaint. It is conceivable that some information may be revealed at the hearing leading to bases upon which Student could argue that the assessment fails to meet standards that were not known prior to the time of the hearing. Notice pleading is not an exacting standard. District is on notice that Student is challenging the adequacy of the assessment performed. Student has demonstrated good cause for his request to have these documents produced so that he can present his case at hearing. He has also adequately described the necessity of the information in the documents to his case. Templeton has failed to establish that the request failed to meet the required standards.

VAGUE, OVERBROAD REQUESTS

Templeton further opposes the subpoena on the grounds that it is vague an overbroad. The subpoena is limited solely to documents pertaining to Ms. Foster's contract and communications between the District and Ms. Foster regarding Student. The request is narrowly tailored to request only documents that pertain to the issue to be heard and, thus, is not overbroad. Student has been very careful in his description of the documents sought: the contract between the district and Ms. Foster, emails, letters and other written correspondence between the district and Ms. Foster, and between District's law firm and the expert. The request is not vague or overbroad.

ATTORNEY CLIENT PRIVILEGED DOCUMENTS OR ATTORNEY WORK PRODUCT

Templeton argues that correspondence between Foster and Templeton's counsel would be protected work product "to the extent that the communications included impressions, conclusions, opinions, or legal research or theories citing as authority. California. Code of Civil Procedure section 2018.030 subd.(a). Student, however, makes a persuasive argument that such impressions, conclusions, opinions, legal research or theories disclosed to someone with whom Templeton's attorneys had no privileged relationship waives any privilege.

Ms. Foster was not a client of Lozano Smith. She was not an employee of the district. Furthermore, Ms. Foster was identified as a witness by Templeton so she did not meet the definition of an "expert consultant". Thus communications with her were not privileged. (*Williamson v. Sup.Ct (Shell Oil Co.)* (1978) 21 C3d 829, 838)

Work product is not an absolute privilege. Rather, it receives qualified protection. (Ca. Code Civ. Proc. 2018.010) The reports of a witness who will testify at a hearing are not protected work product and cannot be retroactively declared work product by an attorney. (*Jasper Construction, Inc. v. Foothill Junior College Dist. of Santa Clara County* (1979) 91 CA3d 1, 16, 153 CR 767, 776 (internal quotes omitted) (disapproved on other grounds in *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 C4th 739, 753, 112 CR3d 230, 240).

Here, Templeton disclosed their intention to call Ms. Foster as a witness in the case. Even though they the dismissed that case, that action would not allow the retroactive conversion of interactions with Ms. Foster into that of a protected expert consultant. Ms. Foster conducted the functional behavioral assessment which is the only issue remaining in the case. And when an attorney discloses her impressions and opinions to someone with whom she has no privileged relationship, the work product protections are waived. When the absolute protection for the work product of an attorney's impressions, conclusions, opinions, or legal research or theories do not apply, the question becomes whether the work product's qualified protections apply or whether on order denying their production would result in an injustice or be unfairly prejudicial.

Templeton has not specified any documents to which work product protection should be applied. A conclusory assertion that the documents are "work product" is not adequate to trigger the protection. Student has made a showing of the need for the documents and why not disclosing them would be unfairly prejudicial. The documents may have been subject to prior requests for educational records. In any event, Templeton has not met the standard for a motion to quash on the grounds of either attorney-client privilege or attorney work product protections.

SUBPOENA TO LOZANO SMITH

ATTORNEY CLIENT PRIVILEGED DOCUMENTS OR ATTORNEY WORK PRODUCT

Just as Templeton cannot claim that correspondence between Ms. Foster and their attorneys is privileged or that any work product contained in such correspondence is privileged, neither is Lozano Smith able to assert that basis for refusing to produce the requested documents.

FAILURE TO ESTABLISH GOOD CAUSE OR REASONABLE NECESSITY

As explained above, Student articulated a reasonable basis for the necessity of the documents in order to present his case at hearing. Good cause exists for the documents to be provided.

VAGUE, OVERBROAD REQUESTS

Also as explained above, the document requests were neither vague nor overbroad. The limitation of the request for documents to only those pertaining to Ms. Foster's contract or written communications between Ms. Foster and either Templeton or Lozano Smith pertaining to Student properly limited the documents requested.

ORDER

1. The motions to quash the subpoenas served via electronic mail without advance approval of Templeton or Lozano Smith are GRANTED.

2. The motions to quash the subpoenas personally served to Templeton and Lozano Smith on September 14, 2017 are DENIED. Templeton and Lozano Smith shall produce the described documents no later than noon on Tuesday, September 19, 2017.

DATE: September 18, 2017

DocuSigned by:
Penelope S. Pahl
B3DF836E5DA94F2...

PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings