BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018060471
v.	ORDER DENYING MOTION TO QUASH SUBPOENAS DUCES TECUM ISSUED TO DR. CAROLINE BAILEY AND JANE VOGEL
SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT.	

On October 1, 2018, Student filed a motion to quash subpoenas duces tecum issued by Saddleback Valley Unified School District respectively on Dr. Caroline Bailey and Jane Vocal, two of Student's expert witnesses. Saddleback Valley filed oppositions to each motion to quash on October 4, 2018.

On October 9, 2018, the Office of Administrative Hearings granted Student's motion to amend his complaint. The amended complaint clarifies some issues from Student's original complaint, but substantially raises the same allegations as in the first complaint. Based upon the amended complaint, OAH vacated the original hearing dates in this matter and issued a new scheduling order on October 9, 2018, setting new hearing dates.

APPLICABLE LAW

No Prehearing Discovery in Special Education Due Process Proceedings

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.). Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum. These regulations specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt.

Code, §§ 11450.05-11450.30 to due process hearing procedures].) While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code § 56504), and (ii) the parties are entitled to receive copies of all the documents the parties intend to use at hearing, not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)). These procedures do not encompass subpoenaing documents from a third party prior to a hearing.

Rather, in special education proceedings in California the hearing officer is given the authority to issue subpoenas for personal appearances and for the production of documents upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(b) [adopted into the Administrative Procedures Act at Gov. Code § 11450.20, subd. (a)], which requires:

> A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH has relied by analogy on the relevant portions of Code of Civil Procedure, 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.

The Reasonable Necessity Standard for Subpoena Duces Tecum Production

The standard for issuance of an SDT in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This standard is stricter than the general APA standard of "good cause" for issuance of SDT's, adopted from Code of Civil Procedure.

DISCUSSION

Saddleback Valley's subpoenas duces tecum to Dr. Bailey and Ms. Vogel are identical. Each subpoena requires them to appear at hearing on October 17, 2017, the first day originally scheduled for the hearing in this matter, and to produce all records in their possession relating to Student from the 2016-2017 school year to the present. The records are defined as those prepared, referenced, reviewed, or considered in developing opinions and/or recommendations regarding Student, including assessment data, protocols, notes, observation records, reports, charts, emails, and other electronic data. The subpoenas further define the requested records as any that relate to Student, his parents, his attorneys, and any related to Student's ability to access his curriculum and to function in an educational environment.

Student argues that at least some of the records requested may infringe of the work product privilege of Student's attorney because some of the records, particularly correspondence between Student's attorney and Dr. Bailey and/or Ms. Vogel were created in contemplation of litigation. In support of his argument, Student cites to Rule 26, sections (b)(3)(A) and (b)(3)(B) of the Federal Rules of Civil Procedure, for the proposition that documents and records prepared by or for a party or the party's representative, including the party's "attorney, consultant, surety, indemnitor, insurer, or agent" in anticipation of litigation are not subject to disclosure.

Student's argument is not persuasive for two reasons. First, the Federal Rules of Civil Procedure are not applicable to administrative due process proceedings in California. Second, assuming the applicability of the Federal Rules, Student has not demonstrated that either Dr. Bailey or Ms. Vogel fall into the category of any of the named representatives covered by the work product privilege. While Dr. Bailey or Ms. Vogel may have at one time been "consultants," their designation as Student's experts removes them from that category. As Saddleback Valley correctly points out in its opposition to Student's motions to quash once it is determined that an expert will be called as a witness to give his or her professional opinion on an issue in dispute, any attorney work product privilege that may have attached to documents prepared by the expert in no longer applicable. The expert's knowledge, opinions, and any reports the expert may have prepared are subject to discovery.

Dr. Bailey and Ms. Vogel observed Saddleback Valley's proposed placement for Student. Student acknowledges that both are expert witnesses he intends to call to testify. Saddleback Valley is entitled to any documents, reports, or other record which have informed Dr. Bailey's and Ms. Vogel's opinions, as well as any documents or other records in which they may have discussed their opinions with other individuals. For these reasons, Student's motions to quash the subpoens duces tecum to Dr. Bailey and Ms. Vogel are denied.

Student also asserts the subpoenas are overly burdensome because they require Dr. Baily and Ms. Vogel to appear on the first day of hearing. Student contends that it is improper to order them to appear on the first day of hearing, as it would then require them to testify on a day Student did not intend to call them, thus giving Saddleback Valley control over how and when Student calls witnesses in his case, or forcing the two witnesses to testify on two days. Student further contends that it is improper for Saddleback Valley to call these witnesses before Student has put on his case.

Student has not provided a declaration from either Dr. Bailey or Ms. Vogel indicating the reasons why they believe the subpoenas are overly burdensome. Student has not provided any indication that his attorney represents either witness and therefore has authority to make the arguments on their behalf.

However, Student's contention that he should not have to put on witnesses out of order and that Saddleback Valley should not have the ability to start its case before Student's, are valid concerns, as is Student's contention that witnesses should not have to appear twice. OAH specifically does not require witnesses to appear twice, as was stated in paragraph 6 of the Order Following Prehearing Conference, issued on October 5, 2018. Saddleback Valley contends that the parties will engage in the meet and confer process prior to hearing and that they will therefore jointly determine at that time the order in which witnesses shall appear. Saddleback Valley contends that it has properly subpoenaed the witnesses to appear, but does not address the fact that requiring Dr. Bailey and Ms. Vogel to appear on the first day of hearing as well as on the day they are scheduled to testify runs afoul of OAH's directive that witnesses only need appear once, unless called for rebuttal.

Saddleback Valley has a right to the documents on the first day of hearing. However, it does not have a right to call witnesses on its behalf on the first day of hearing. As stated above, the ALJ has the authority to modify the subpoenas. She will do so by modifying the subpoenas to state that Dr. Bailey and Ms. Vogel are not required to appear in person if they produce the records described in the subpoena at the Esperanza Education Center at 9:30 a.m. on December 4, 2018, the first day of hearing for Student's amended complaint. If Student does not call Dr. Bailey or Ms. Vogel as witnesses in his case, Saddleback Valley may call them to testify in its case.

ORDER

1. Student's motions to quash the subpoenas duces tecum issued to Dr. Caroline Bailey and Jane Vogel are denied.

2. The subpoenas duces tecum to Dr. Bailey and Ms. Vogel are hereby modified. The production date for the documents is modified from October 17, 2018, to December 4, 2018, the date scheduled for the first day of hearing on Student's amended complaint.

3. The subpoenas duces tecum are further modified as follows: Dr. Bailey and Ms. Vogel are not required to appear in person if they produce the records sought in the subpoenas issued to them by delivering them to the hearing room at the Esperanza School on December 4, 2018, at 9:30 a.m. Dr. Bailey and Ms. Vogel may either deliver the records in person or authorize another person to deliver the records on the first day of hearing.

4. If Student does not call either Dr. Bailey or Ms. Vogel to testify, Saddleback Valley may call them in its case-in-chief.

DATE: October 12, 2018

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Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings