BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

LONG BEACH UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2022110711

OAH CASE NUMBER 2022120572

ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO QUASH SUBPOENA

MAY 23, 2023

On November 23, 2022, Student filed with the Office of Administrative Hearings, called OAH, a request for due process hearing, called a complaint, in OAH case number 2022110711. Student's case named Long Beach Unified School District, called Long Beach.

On December 16, 2022, Long Beach filed a complaint in OAH case number 2022120572, naming Student.

On December 23, 2022, the cases were consolidated for hearing. On April 11, 2023, the hearing in these consolidated cases was continued to May 31, 2023.

On May 11, 2023, Student issued subpoenas to produce records, sometimes called a subpoena duces tecum, on Dr. Carlos Flores and Amelia Rogers. Long Beach's subpoena to produce records seeks from each of them:

1. Any and all documents and records prepared by and/or relied upon by [the recipient] in forming [the recipient's] opinions and recommendations regarding [Student's] educational program and services to which [the recipient] will testify during the above-captioned due process hearing.
2. Any and all records containing communications between [Parents] and/or [the recipient] or [the recipient's] office between November 23, 2020 and the present regarding [the recipient's] opinions and recommendations regarding Student's eligibility for special education and the appropriate educational program and services for Student; and
3. Any and all records containing communications between [the recipient] and Rosa Hirji/Diana Maltz/Jenny Chau/Law Office of Hirji & Chau, LLP between November 23, 2020 and the present regarding [the recipient's opinions and recommendations regarding Student's eligibility and the appropriate educational program and services for Student.

On May 12, 2023, Student filed a motion to quash the subpoenas to produce records on the grounds Long Beach seeks records protected by attorney work product, and that Long Beach did not establish a reasonable necessity for production of communications between Dr. Flores, Ms. Rogers, and Student's attorneys. On May 17, 2023, Long Beach filed an opposition.

A party to a due process hearing under the Individuals with Disabilities Education Act, called IDEA, has the right to present evidence and compel the attendance of witnesses in "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); see also Ed. Code, § 56505, subd. (e).)

In special education proceedings in California, the hearing officer has the right to issue subpoenas, or orders to appear and give testimony, and subpoenas to produce records, or orders to produce document, 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), 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 relies by analogy on the relevant portions of the Code of Civil Procedure. Code of Civil Procedure section 1987.1 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.

STUDENT'S COMPLAINT

Student's complaint alleges that Long Beach denied her a free appropriate public education, called a FAPE, by failing to offer appropriate services to meet Student's academic, behavioral, social emotional or mental health needs in a series of individualized education programs, or IEPs, from December 2020 through December 2022. Student also alleges a number of procedural claims, including that Long Beach impeded Parents' participation in the IEP process, failed to timely complete assessments, and failed to timely respond to Parent's November 2022 request for a mental health assessment. Student also claims she was mainstreamed without parental consent, and that Long Beach failed to respond appropriately to reports of Student being bullied from September to November 2022.

ATTORNEY WORK PRODUCT PROTECTION

California Code of Civil Procedure section 2018.030, subdivision (a), states that a writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. However, subdivision (b) of that section starts that the work product of an attorney, other than a writing described in subdivision (a), is discoverable if the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, or that a communication was made in the course of an attorney-client relationship. (*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60

Cal.2d 723, 729; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123 (*Wellpoint*).) Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 733 (*Costco*) ; Evid. Code, § 917, subd. (a); *Wellpoint, supra*, 59 Cal.App.4th at pp. 123–124.)

Waiver of work product protection, though not expressly defined by statute, is generally found under the same set of circumstances as waiver of the attorney client privilege, by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection. Waiver also occurs by an attorney's voluntary disclosure of a writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing. Disclosure to a third party will waive the work product privilege unless the disclosure was coerced. (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 678-679.)

Information which is not otherwise privileged does not become so merely by being communicated to an attorney. A litigant may not silence a witness by having him share his knowledge with the litigant's attorney. (*Costco, supra*, 47 Cal.4th at p. 735.)

CONSULTING AND TESTIFYING EXPERTS

An expert witness may be a consulting expert, retained only to assist counsel in the preparation of the case. Alternatively, an expert may be a testifying expert, retained only to give a professional opinion at trial. In many cases, an expert is retained both to consult and to testify. A consulting expert's report, prepared at the attorney's request

and with the purpose of assisting the attorney in trial preparation, constitutes work product (*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834 (*Williamson*)), entitled to conditional protection and barred from discovery in the absence of good cause. (*Kizer v. Sulnick* (1988) 202 Cal.App.3d 431, 440.)

However, the work product protection will not prevent disclosure of statements to, or reports from, a testifying expert. Once a testifying expert is designated as a witness, the attorney-client privilege no longer applies, because the decision to use the expert as a witness manifests the client's consent to disclosure of the information. (*Deluca v. State Fish Co., Inc*. (2013) 217 Cal.App.4th 671, 689 (*Deluca*), citing *Shadow Traffic Network v. Superior Court* 24 Cal.App.4th 1067, 1079.) Similarly, when an expert witness is expected to testify, the expert's report, which was subject to the conditional work product protection, becomes discoverable, as the mere fact that the expert is expected to testify generally establishes good cause for its disclosure. (*Deluca, supra*, 217 Cal.App.4th at p. 689, citing *Williamson, supra*, 21 Cal.3d at pp. 834–835.)

An expert may be both a consulting and testifying expert. The initial status of the expert, as consultant and possible witness, changes when it becomes reasonably certain an expert will give his professional opinion as a witness on a material matter in dispute. Then the expert's opinion becomes a factor in the cause. At that point, the expert has ceased to be merely a consultant and has become a witness in the litigation, one to be evaluated along with others. Such evaluation properly includes appropriate pretrial discovery. (*Deluca, supra*, 217 Cal.App.4th at pp. 689-90.) Case authority has drawn a bright line at the point where it becomes reasonably certain that the expert will testify, holding that the work product protection applies prior to the point, but not subsequent to it. (*Ibid., citing People v. Milner* (1988) 45 Cal.3d 227, 241; *Williamson, supra*, 21 Cal.3d at pp. 834–835; *Sanders v. Superior Court* (1973) 34 Cal.App.3d 270, 278–279.)

IN CAMERA REVIEW

The work product rule in California creates a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions, or legal theories. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1250.) However, an expert's opinion regarding the subject matter about which the expert is a prospective testifying expert is discoverable, but the expert's advice rendered to the attorney in an advisory capacity is still subject to conditional work product protection. Therefore, when an expert's written report was prepared both as a consulting expert and a testifying expert, a trial court is often required to conduct an in camera review of the report, to separate out the information provided as a consultant from the information provided as a testifying expert. The latter information is discoverable, but the former is discoverable only upon a showing of good cause. (*DeLuca, supra,* 217 Cal.App.4th at 690.)

An in camera inspection is the proper procedure to evaluate the applicability of the work product doctrine to specific documents and categorize whether each document should be given qualified or absolute protection. (*Wellpoint, supra*, 59 Cal. App.4th at p. 121.)

Evidence Code, section 915, prohibits disclosure of information claimed to be privileged in order to determine if a communication is privileged. But after the court has determined the privilege is waived or an exception applies generally, the court to protect the claimant's privacy may conduct or order an in camera review of the communication at issue to determine if some protection is warranted notwithstanding the waiver or exception.

Here, the sworn declaration of Student's attorney states that Student's attorneys

arranged and retained Dr. Flores and Ms. Rogers to conduct independent evaluations of Student, and later to serve as experts at hearing. The declaration does not state that Dr. Flores or Ms. Rogers were ever retained to advise or consult with Student's attorneys on preparing for trial. Additionally, Student cites only statutes protecting attorney work product, and does not assert that Dr. Flores or Ms. Rogers ever held the status of litigation consultants.

Student has not indicated when, or if, Dr. Flores and Ms. Rogers were retained as consultants prior to being designated as testifying witnesses. If they were not retained as consultant experts prior to being designated to testify, correspondence between Dr. Flores, Ms. Rogers, and Student's attorneys that pre-date the expert designation is not protected as attorney work product, because it was disclosed to a third party with no obligation to hold that information confidential and the attorney work product protection was waived. Communications between Dr. Flores, Ms. Rogers, and Student's attorneys that post-date the expert witness designation are not protected as attorney work product because the decision to use the expert as a witness manifests the client's consent to disclosure of the information. (*Deluca, supra,* 217 Cal.App.4th at p. 689.)

Long Beach argues the subpoenas to produce records request only records containing communications between Dr. Flores and Ms. Rogers regarding the experts' observations of Student and their opinions and recommendations regarding Student's abilities, educational needs, eligibility, and recommended educational program, placement, and services. It asserts the requests do not seek information about Student's attorney's theory of the case, impressions, conclusions, opinions, legal research, or any other information that would implicate the attorney work product doctrine. However, it is reasonably foreseeable that communications that address the heart of Student's case would contain both types of information, particularly if Dr. Flores and Ms. Rogers were

retained initially as consultants regarding the viability of Student's due process claims.

Student, as the holder of the protection, has not clearly met the burden of establishing the preliminary facts necessary to support non-discoverable communications between the subpoenaed assessors and Student's attorneys. However, the facts are close enough, and the protection so important as a matter of law, that the Administrative Law Judge conducting the due process hearing, called the ALJ, will grant the motion in part, and deny the motion in part, by ordering production but also conducting an in camera review for protected documents prior to release on the first day of hearing. Student may have waived the attorney work product protection by disclosure to a third party, and the ALJ will conduct an in camera review of the communications at issue to categorize whether each document should be given qualified or absolute protection.

Long Beach argues if protection is granted to a document, Long Beach will be unfairly prejudiced and there will be resulting injustice. However, Student's experts must disclose the basis of their opinion, and if Dr. Flores or Ms. Rogers testify that they relied on information communicated to them by Student's attorneys, any documents not released after the in camera inspection but including such information will be released during the expert's testimony, with a break for Long Beach's attorneys to review those documents. Long Beach may then question Dr. Flores or Ms. Adams about this basis of their opinions and recommendation, avoiding any injustice to Long Beach.

REASONABLE NECESSITY FOR THE RECORDS

Student argues that the subpoena to produce records should be quashed because it fails to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the material and relevant information

sought. (*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.) Student contends that preparation for defense in the due process hearing does not explain why Long Beach requires communications between Student's experts and attorneys, as expressly requested at Category No. 3 of the subpoenas to produce records.

Long Beach's declaration in support of the subpoena to produce documents states:

> Student has identified Dr. Carlos Flores as an expert witness who will testify as to his opinion regarding the District's psychoeducational and functional behavior assessments, his observations of Student, Student's eligibility for special education, and an appropriate educational program for Student. Except through this subpoena, the District has no access to the relevant information, documents, and records Dr. Flores utilized and relied upon in observing Student and preparing recommendations regarding Student's abilities, educational needs, eligibility, and recommended educational program, placement, and services. Accordingly, the District requests production of all documents relied upon by Dr. Flores in forming the opinions and recommendations upon which he will testify at the above-captioned due process hearing, as it is critical for the District to be able to prepare their defense in this case and the District has demonstrated reasonable necessity and is entitled to such information pursuant to 5 C.C.R. § 3082.

As discussed at length above, once an expert witness is designated, the opposing party is entitled to discovery of information upon which the expert relied. (*DeLuca, supra,* 217 Cal.App.4th at p. 689.) Long Beach has established reasonable necessity for

communications between Dr. Flores, Ms. Rogers, and Student's attorneys that were not provided in an advisory capacity.

ORDER

1. Student's motion to quash is granted in part and denied in part.
2. The records sought by the subpoenas to produce records served on Dr. Flores and Ms. Rogers will be produced in accordance with the instructions on the subpoenas to produce records. They must upload responsive documents into OAH's electronic exhibit system, Case Center, and those documents will only be accessible to the ALJ until and unless released to Long Beach.
3. The ALJ will conduct an in camera review of the documents produced to evaluate the applicability of the work product doctrine to specific documents and categorize whether each document should be given qualified or absolute protection. The ALJ will also determine if some protection is warranted notwithstanding the waiver or exception, prior the release of documents to Long Beach on the first day of hearing that are not subject to the attorney work product protection.

Alexa Hohensee

Alexa Hohensee
Administrative Law Judge
Office of Administrative Hearings