BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENTS ON BEHALF OF STUDENT

and

CLOVIS UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2024041077

OAH CASE NUMBER 2024060139

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

NOVEMBER 26, 2024

On April 26, 2024, Student filed a request for due process, OAH Case No. 2024041077, naming Clovis Unified School District, with the Office of Administrative Hearings, called OAH. On May 24, 2024, OAH granted Student's request to file an amended complaint. On June 4, 2024, Clovis Unified School District, called Clovis, filed a request for due process, OAH Case No. 2024060139, naming Student. On July 29, 2024, OAH granted Clovis' motion to consolidate its and Student's case.

The consolidated cases have been continued a number of times, due to the unavailability of an interpreter or at the request of the parties. The due process hearing is now scheduled for December 3, 4, and 5, 2024.

On or about November 13, 2024, Clovis issued three subpoenas duce tecum, upon: Laurice Seely, M.S., BCBA; David Gilbertson, Ph.D., and Christine Villareal, Ph.D. The subpoenas directed the production of records, described in attached declarations, on December 3, 2024, on the first day of hearing. OAH uses an electronic exhibit program, called Case Center, for the parties' proposed exhibits and the production of records in response to subpoenas duces tecum. The issued subpoenas included directions of how the respondent would upload the subpoenaed documents to Case Center. Clovis sent notices to consumer to Student advising Student of the three subpoenas.

On November 20, 2024, Student filed a motion to quash the three subpoenas duces tecum. Clovis filed its opposition to the motion to quash on November 22, 2024. On November 25, 2024, Administrative Law Judge Clifford H. Woosley convened the prehearing conference for the upcoming hearing. The parties argued Student's motion to quash and Clovis' opposition to the motion. ALJ Woosley indicated he would subsequently issue this Order.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act 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).)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, Office of Administrative Hearings, referred to as OAH, relies by analogy on the relevant portions of the Code of Civil Procedure, 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.)

However, in special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) Therefore, the subpoenaing party must demonstrate the "reasonable necessity" of the requested document, which is a higher standard than being "material and relevant to the litigated issues."

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.

REASONABLE NECESSITY FOR THE RECORDS

Student argues that the subpoenas duces tecum should be quashed because they fail to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the reasonable necessity of 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 asserts the subpoenas are overly broad, unduly burdensome, duplicative, and vague. Clovis claims that its subpoenas are not overly broad, vague or unduly burdensome, but reasonably necessary for its ability to respond to Student's claims and prove up its case against Student.

Student has identified Ms. Seely, Dr. Gilbertson., and Dr. Villareal as expert witnesses for the upcoming hearing. Clovis stated that they have each conducted independent educational evaluations of Student, during the 2023-2024 school year, which have been submitted as proposed exhibits in support of Student's contentions. The evaluations included observations, interviews with teachers, and consultation with Parent regarding Student's educational program. All three assessors previously testified on behalf of Student in a prior due process hearing, filed by Student against Clovis (OAH Case No. 2024010630), calling into question Clovis' decisions about Student's education program, including eligibility, nature of Student's deficits, Clovis' program to address Student's educational needs, behavior, auditory processing, functional behavior assessment, and the formation and implementation of Student's behavioral intervention plan. Clovis asserts that the three assessors have information relevant to the current due process proceeding, at which they will provide expert testimony, largely based upon their assessments.

Exhibit 1 to Clovis' declarations in support of the three subpoenas describe the same 10 classes of documents sought for production, beginning with the general statement that Clovis seeks copies of records, including electronic records, regarding Student. Each class of documents are for the three subpoenas.

1. Assessment and evaluation reports, including draft reports, that reference Student, Israel Wences, or Ruth Aguirre or Ruth Aguirre Terrones ("Parent") by name, initials, or identification number.

During the 2023-2024 school year, Dr. Gilbertson conducted a psychoeducational independent evaluation of Student, Ms. Seely conducted an independent functional behavior assessment, and Dr. Villereal performed an independent speech-language assessment, of Student. Here, Clovis seeks any assessments regarding Student. Though this may be duplicative of the reports the assessors already produced, it may include other assessments of Student, than those to be introduces at hearing.

However, the description includes "draft report," apparently written by the assessor in working toward the final report. Clovis has not demonstrated how such draft reports are reasonably necessary to present its case. It is the final opinion of the assessor, in the reports and testimony, that will be weighed by the trier of fact. Clovis can challenge the assessors' findings and conclusions during cross-examination.

Therefore, Category 1 is amended to exclude "draft reports." Otherwise, the description of documents is sufficiently clear, not overly burdensome, and reasonably necessary.

2. Special education documents that reference Student or Parent by name, initials, or identification number.

3. Assessments, report cards, progress reports, and testing data that reference Student or Parent by name, initials, or identification number;

Category 2 and Category 3 include all special education documents, assessments, reports cards, progress reports, and testing data related to Student. This is unnecessarily burdensome and duplicative because it is likely that the described documents are those produced by, or originated with, Clovis. Documents which the assessors utilized in forming an opinion or conclusion can me reasonably necessary to Clovis in addressing the assessors' expert opinions. However, there is no reasonable basis for having the assessor produce documents that came from or originated with Clovis.

Therefore, Category 2 and Category 3 are amended to only include documents that did not originate or come from Clovis. However, the responding assessor must list these documents in the assessor's possession, and produce the list in response to the subpoena, with any other documents that fall within the description.

4. Assessment and test protocols that reference Student or Parent by name, initials, or identification number.

6. Observation notes that reference Student or Parent by name, initials, or identification number.

Category 4 and Category 6 seeks protocols of tests or assessment instruments, and observation notes, involving Student, which the assessors used in their evaluations. Documents which the assessors utilized in forming an opinion or conclusion, or scoring or interpreting assessment instruments, are reasonably necessary to Clovis in addressing the assessors' expert opinions. The motion to quash or amend Category 4 and Category 6 is denied.

5. Communication logs that reference Student or Parent by name, initials, or identification number.

"Communication logs" is undefined. Does this refer to a formal log of communications, like those required in an IEP? Does it describe lists of email, phone calls, or texts, maintained by office staff. Category 5 is unclear and overly broad. Student's motion to quash Category 5 is granted.

7. Correspondence, including, but not limited to, letters and emails between:

    a. [Assessor] and Parent regarding Student;
    b. [Assessor] and Andrea Marcus or staff of the Law Offices of Andrea Marcus regarding Student; and
    c. [Assessor] and any District staff, including but not limited to staff at Copper Hills Elementary School and staff at Kastner Intermediate School.

Category 7 seeks communication between each of the three assessors and Parent, Student's attorney Marcus, and any of Clovis staff. Student asserts that this production request is overly burdensome and not reasonably necessary for Clovis ability to present its case.

Here, Clovis has demonstrated reasonable necessity as to communications with Student and Clovis staff. Such communication may include information used by the assessors in rendering their expert opinions.

However, Clovis has not demonstrated reasonable necessity as to communications with Student's attorney. At the prehearing conference, Clovis' attorney argued that these communications are related to possible bias, because of possible

long-standing relationship between Student's attorney and the assessors. However, Clovis' desire to see these communication does not demonstrate reasonable necessity.

Student motion to quash is granted as to Category 7, subsection b, which involved communication with Student attorney. Otherwise, Clovis has demonstrated reasonable necessity for the described documents' production.

8. Contracts for service, enrollment records, and registration documents that reference Student or Parent by name, initials, or identification number;

9. Attendance records that reference Student or Parent by name, initials, or identification number; and

10. Billing records that reference Student and Parent by name, initials, or identification number.

Category 8, Category 9, and Category 10 appear to seek documents regarding the assessors' retention to conduct independent assessments of Student. However, some of the descriptions do not appear to have been drafted for this situation. For example, in Category 8, why would there be enrollment records and registration documents or, in Category 9, attendance records, if the assessors were retained to assess Student. Clovis presented no evidence or argument that these assessors were providing services to Student or sponsored programs that Student attended. Student's motion to quash Category 8 and Category 9 is granted, as not reasonably necessary for Clovis to present its case.

Category 10 seeks billing records from the assessors. If Student seeks reimbursement, Student will have to produce billing records. If Student does not seek reimbursement of expenses associated with the assessors' independent evaluations,

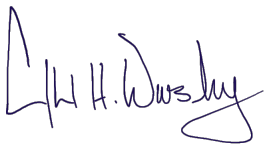
Clovis had not demonstrated reasonable necessity for the billing records. Clovis can ask the assessors when they testify at hearing.

Student's motion to quash Category 10 is granted, as not reasonably necessary for Clovis to present its case.

ORDER

Student's motion to quash the subpoenas to Laurice Seely, M.S., BCBA; David Gilbertson, Ph.D., and Christine Gilbertson, Ph.D., is:

1. Granted as to Category 5, Category 7(b), Category 8, Category 9, and Category 10.
2. Denied as to Category 4, Category 6, and Category 7(a) and 7(b). The records shall be produced Ms. Seely, Dr. Gilbertson, and Dr. Gilbertson.
3. Amended as to Category 1, to not include "draft reports." All other described documents shall be produced Ms. Seely, Dr. Gilbertson, and Dr. Gilbertson.
4. Amended as to Category 2 and Category 3, to only include documents that did not originate or come from Clovis. However, Ms. Seely, Dr. Gilbertson, and Dr. Gilbertson must list the documents in the assessor's possession, and produce the list in response to the subpoena, with any other documents that fall within the description.



Clifford H. Woosley
Administrative Law Judge
Office of Administrative Hearings