BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. IRVINE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018100702 ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO QUASH SUBPOENAS DUCES TECUM TO MICHAEL FORSBERG

On February 25, 2019, Student filed a motion to quash subpoenas duces tecum, issued by Irvine Unified School District to Michael Forsberg. On February 28, 2019, Irvine filed an opposition.

APPLICABLE LAW

Prehearing Discovery in Special Education Due Process Proceedings

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 due process hearing. (20 U.S.C. § 1415(h).) The California Education Code 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), states 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 for other administrative hearings that provide broader authority for the use of subpoenas. (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].)

Although subpoenas duces tecum are available in special education due process proceedings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only to two types of documents: (i) educational records, which parents have the right to request and receive within five

business days at any time (Ed. Code § 56504), and (ii) all documents which the opposing party intends to present at hearing, which must be provided not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)).

Reasonable Necessity for Production

The standard for issuance of a subpoena duces tecum in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), requiring 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 Administrative Procedure Act standard of "good cause," adopted from the civil procedure code. That standard requires the moving party to specify by affidavit "the exact matters or things desired to be produced, [and set] forth in full detail the materiality thereof to the issues involved in the case..." (Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

Special education law does not specifically address motions to quash subpoenas. In ruling on such motions, the OAH relies 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. OAH employs this process in ruling on motions to quash, as modified by special education's unique procedures and standards.

DISCUSSION

The Party under Subpoena

Student's complaint alleges that Irvine has failed to meet Student's needs in a variety of areas, including his behavior needs. Michael Forsberg is a board certified behavior analyst whom Student has designated as an expert for the due process hearing.

Irvine seeks production of documents from Mr. Forsberg. In general, the requested documents are those records prepared by or relied upon by Mr. Forsberg in forming his opinions and recommendations regarding his report on Student's needs and for his testimony at hearing. Those documents are clearly relevant to the proceedings here and should be produced to Irvine at the start of hearing.

Two additional types of documents are requested in the subpoena duces tecum. Irvine also seeks communications between Student's Parent and Mr. Forsberg. Those communications are limited to those concerning Mr. Forsberg's observation of Student and Mr. Forsberg's recommendations regarding Student's needs and appropriate educational plan. Those communications are also relevant and should be produced.

In addition, Irvine seeks communications between Mr. Forsberg and Student's counsel regarding the formation of his opinions and recommendations regarding his report on Student's needs and his testimony at hearing. Irvine states that such production is necessary to weigh Mr. Forsberg's possible bias as an expert witness testifying for Student. Communications between counsel and an expert witness in preparation for hearing are generally protected as attorney work product. Irvine has not provided any explanation as to how such communications would not be so protected.

Student seeks to have the subpoena quashed on two grounds. First, he asserts that the subpoena constitutes pre-hearing discovery, which is not allowed in actions under the IDEA. Student does not explain how a subpoena returnable at the start of hearing constitutes prehearing discovery, except to say that "to the extent that the [subpoena] allows a party to produce the records prior to hearing, the [subpoena] should be modified or quashed." The subpoena is properly made.

Student also argues that the subpoena is unnecessary and overbroad. Student asserts that he has produced to Irvine all documents "all documents upon which Mr. Forsberg will testify at hearing," so the subpoena is unnecessary. This misreads the request in the subpoena, which seeks the source documents from which Mr. Forsberg developed his opinions. Irvine is entitled to these records to assess the witness's depth and source of knowledge about Student, and its ability to gather information to prepare its defense is not limited to using those documents Student chooses to put into evidence. Those documents are properly sought and should be produced.

Student contends that the subpoena is overbroad because it seeks health-related confidential medical information and communications with Student's counsel. Student has put his health concerns at issue, and the information that was shared with Mr. Forsberg, who is not a medical doctor, must also be shared with Irvine. All such records reviewed by Mr. Forsberg should be provided.

The request for communications between Mr. Forsberg and counsel is not justifiable and is overbroad. No explanation is provided by Irvine as to why the communications are necessary to show that a retained expert has bias. No specific concerns or allegations are introduced that might possibly justify the request. Student asserts that the request constitutes the classic "fishing expedition," and Irvine has not refuted the allegation. That part of the subpoena that seeks Mr. Forsberg's communications with Student's counsel is quashed.

ORDER

Student's motion to quash Irvine's subpoena duces tecum is denied as to items One through Three in Attachment A to the subpoena and granted as to item Four. The respondent to the subpoena shall produce the documents described therein on the first day of hearing, currently set as March 5, 2019.

DATE: March 1, 2019

DocuSigned by:
Chris Butchko
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings