BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018060471 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENAS DUCES TECUM AND SUBPOENAS FOR TESTIMONY ISSUED TO KELLIE WALDERS, MICHAEL DAVID RAMOS, THE PERSON MOST KNOWLEDGEABLE AT WAYFINDER FAMILY SERVICE, AND THE PERSON MOST KNOWLEDGEABLE AT THE CALIFORNIA DEPARTMENT OF EDUCATION

On October 1, 2018, Student filed a motion to quash subpoenas duces tecum and subpoenas for testimony issued by Saddleback Valley Unified School District on Kellie Walders and Michael David Ramos, teachers at Wayfinder Family Service also known as Junior Blind of America; the Person Most Knowledgeable at Wayfinder; and the Person Most Knowledgeable at the California Department of Education, Special Education Division, Non-Public Schools Unit. Student attached as exhibits to his motion the subpoenas issued to Ms. Walders and Mr. Ramos, but did not attach the subpoenas issued to the Person Most Knowledgeable at Wayfinder or the Person Most Knowledgeable at the Department of Education. 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 a subpoena duces tecum 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 subpoenas duces tecum, adopted from the Code of Civil Procedure.

DISCUSSION

Subpoenas Duces Tecum

Saddleback Valley's subpoenas duces tecum to Ms. Walders and Mr. Ramos are basically the same. Each subpoena requires them to produce all records relating to Student's educational program, including service logs, reports, office notes, progress notes, charts, files, assessment data, protocols, emails, electronic documents, and other writings related to Student; and any documents referring or related to the professional licenses, certifications, and credentials held by Ms. Walders and Mr. Ramos from the 2016-2017 school year to the present. The subpoenas require Ms. Walders and Mr. Booth to produce the records and appear in person on October 17, 2018, which previously was the first day of hearing.

The subpoena duces tecum directed to the Person Most Knowledgeable at Wayfinder requests all records regarding educational programming for Student; all qualifications and credentials held by Wayfinder staff members; and all documents concerning Wayfinder's certification as a non-public school, including all records or documents relating to Wayfinder's suspension, termination, and conditional certification as a non-public school. The request for all records is for the period of the 2016-2017 school year to the present.

The subpoena duces tecum directed to the Person Most Knowledgeable at the California Department of Education solely seeks all documents concerning Wayfinder's certification as a non-public school, including all records or documents relating to Wayfinder's suspension, termination, and conditional certification as a non-public school. The request for all records is for the period of the 2016-2017 school year to the present.

Student argues that the documents requested in the four subpoenas are not relevant to the issues raised in his complaint and thus there is no reasonable necessity for the documents subpoenaed. Student argues that he has not alleged a violation of his right to a free appropriate public education for the 2016-2017 school year, and therefore records for that school year are not relevant. He argues that his complaint does not allege any issue regarding his placement at Wayfinder, where he attended school pursuant to his

individualized education plan for approximately seven years, but rather alleges that Saddleback Valley's proposed IEP placing him at its Esperanza Education Center failed to procedurally and substantively provide him a FAPE. Student provided as exhibits the declarations of Ms. Walders and Mr. Ramos who state that they did not attend Student's individualized education program team meetings that occurred in April and May, 2018, and which are at issue is this case. Ms. Walders further states that she is blind and therefore does not drive, so that complying with the subpoenas would be overly burdensome to her. Mr. Ramos states that he did not start working for Wayfinder until the 2018-2019 school year. There are no declarations provided from the Persons Most Knowledgeable at either Wayfinder or the Department of Education.

Student's contention that the documents subpoenaed are not reasonably necessary to Saddleback Valley's defense of Student's case is not persuasive. The factual discussion in Student's original complaint and his amended complaint reference Student's position that Wayfinder was an appropriate placement, that he made progress there, and that Saddleback Valley had no reason to propose changing his placement to one of its own schools.

Significantly, Student specifically requested an order from OAH that Saddleback Valley be required to continue Student's placement at Wayfinder should he prevail at hearing. Since Student is requesting a prospective placement at Wayfinder, whether Student made progress there and whether Wayfinder staff are and were properly certified and able to meet Student's needs are fully relevant to this case. Additionally, Student's allegations that Saddleback Valley should not have proposed changing his placement puts at issue whether he made meaningful progress at Wayfinder. The documents requested are therefore potentially relevant and reasonably necessary to Saddleback Valley's defense in this case.

Student contends that the subpoenas are overly broad because they request documents for the 2016-2017 school year, which he has not put at issue. Saddleback Valley has limited its subpoena to the school year previous to the one at issue in Student's complaint, and to only the two years covered by the statute of limitations. With regard to documents requested relating to Student and his education at Wayfinder from the 2016-2017 school year to the present, the documents may or may not be relevant to this case. However, such a determination can only be made once a party asks a witness to reference the document and/or moves to admit them into evidence. The documents only apply to the two-year statutory period covered by this case, and relate to whether Wayfinder's program permitted Student to make meaningful progress. The documents requested are therefore reasonably necessary to Saddleback Valley's defense of Student's amended complaint.

However, Saddleback Valley has given no persuasive reason why it requires documentation of Ms. Walders's, Mr. Ramos's, or Wayfinder's certifications, licenses, and/or credentials from the 2016-2017 school year. Mr. Ramos has declared that he was not employed at Wayfinder prior to the 2018-2019 school year. Therefore, his certifications, licenses, or credentials prior to that time are not relevant to this case. Since Wayfinder's ability to provide Student with a FAPE for the 2016-2017 school year is not at issue, there is

also no relevant reason to subpoena Ms. Walder's or Wayfinder's certifications, licenses, or credentials prior to the 2017-2018 school year.

The issue is whether Ms. Walders, Mr. Ramos, and/or Wayfinder itself had the proper credentials, licenses, and/or certifications during the 2017-2018 school year when Saddleback Valley proposed changing Student's placement. Also highly pertinent is whether they hold the proper credentials, licenses, and/or certifications at the time of the hearing, as that will inform potential remedies in this case should Student prevail on any of his issues. Student's motion to quash is therefore partially granted as to the subpoena's request for evidence of credentials, licenses, and/or certifications of Ms. Walders and Wayfinder prior to the 2017-2018 school year, and for that same documentation for Mr. Ramos for any time prior to the beginning of the 2018-2019 school year.

Subpoenas for Testimony

Student asserts the four subpoenas requiring the four subpoenaed individuals to appear to testify on the first day of the hearing are overly burdensome. Student contends that the subpoenas are improper because Ms. Walders, Mr. Ramos, and the Persons Most Knowledgeably did not attend Student's April and May 2018 IEP team meetings or observe Saddleback Valley's proposed placement. Student argues these subpoenaed individuals therefore have no relevant testimony to offer.

As stated above, Student's characterization of the issues fails to acknowledge that Student has put his placement at Wayfinder at issue. Therefore, questions about Student's performance while there, as well as Wayfinder's past and present ability to educate Student, are potentially relevant to the issues raised in Student's complaint.

Student also argues that requiring Ms. Walders to testify at hearing is overly burdensome because she is blind and does not drive. Ms. Walders attested to this in the declaration she provided in support of Student's motion to quash.

Saddleback Valley has a right to the documents subpoenaed 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 this is a student-filed case and Student will present his witnesses first. As stated above, the ALJ has the authority to modify the subpoenas. She will do so by modifying the subpoenas so that the production date is the first day of hearing on Student's amended complaint and modifying it by granting Student's motion to quash as to any requested certifications, licenses, or credentials for Ms. Walders and Wayfinder prior to the 2017-2018 school year, and for Mr. Ramos prior to the 2018-2019 school year. The subpoenas duces tecum will also be modified to state that Ms. Walders, Mr. Ramos, and the Persons Most Knowledgeable are not required to appear in person if they produce the records described in the subpoena, as modified by this order, at the Esperanza Education Center at 9:30 a.m. on December 4, 2018, the first day of hearing for Student's amended complaint, or if they arrange for someone else to deliver the records on that date and at that time.

Finally, Student's motions to quash the subpoenas for testimony for Ms. Walders, Mr. Ramos, and the two Persons Most Knowledgeable are granted. Saddleback Valley may not subpoena its own witnesses to testify the first day of the hearing. Saddleback Valley may subpoena Mr. Ramos, Ms. Walders and, if necessary the Persons Most Knowledgeable, to testify on the date Saddleback Valley anticipates it will start its case-in-chief, not the date Student will present his case. As regards the subpoena for testimony of Ms. Walders, she has stated that it is overly burdensome for her to appear in person for hearing based on her disability. Saddleback Valley acknowledged in its opposition that her testimony may be taken telephonically. Any future subpoena for her testimony therefore should indicate that her testimony shall be taken telephonically. At the next prehearing conference in this case, the parties should be prepared to discuss the issue of the testimony of these four witnesses, as well as that of all witnesses anticipated to be called to testify.

ORDER

1. Student's motion to quash the subpoenas duces tecum issued to Kellie Walders for her licenses, credential, or certifications is partially granted. Ms. Walders is required to produce those records only as they pertain to the 2017-2018 school year to the present.

2. Student's motion to quash the subpoenas duces tecum issued to Michael David Ramos for his licenses, credential, or certifications is partially granted. Mr. Ramos is required to produce those records only as they pertain to the 2018-2019 school year to the present.

3. Student's motion to quash the subpoenas duces tecum issued to the Person Most Knowledgeable at Wayfinder Family Services and the Person Most Knowledgeable at the California Department of Education is partially granted. The Persons Most Knowledgeable at both entities are only required to produce the requested licenses, credential, or certifications as they pertain to the 2017-2018 school year to the present.

4. Student's motions to quash as to all other records subpoenaed to these four parties is denied. However, the subpoenas duces tecum 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.

5. The subpoenas duces tecum are further modified as follows: Ms. Walders, Mr. Ramos, and the Persons Most Knowledgeable 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. The records may either be delivered in person or through another person authorized to produce the records on the first day of hearing.

6. Student's motions to quash the subpoenas for testimony issued to Ms. Walders, Mr. Ramos, and the two Persons Most Knowledgeable are granted. If Saddleback

Valley wishes to call these four people to testify, it will select a date on which it will be presenting its case-in-chief. The subpoena for Ms. Walders's testimony shall indicate that her testimony will be taken telephonically.

7. The remainder of Student's motions to quash as to the subpoenas issued to Ms. Walders, Mr. Ramos, the Person Most Knowledgeable at Wayfinder, and the Person Most Knowledgeable at the Department of Education, is denied.

DATE: October 15, 2018

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Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings