BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

APPLE VALLEY UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2022070781

OAH CASE NUMBER 2022080051

ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUMS

OCTOBER 27, 2022

On July 25, 2022, Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings, called OAH, naming Apple Valley Unified School District, called Apple Valley. On August 1, 2022, Apple Valley filed a request for due process hearing with OAH, naming Student. On August 5, 2022, OAH granted Apple Valley's request to consolidate the cases.

On October 7, 2022, Apple Valley issued subpoenas duces tecums on CenterPointe for Children, Collaborative Autism Management Program, Betty Lyttle, and

Speech Point Therapy. A notice to consumer was sent to Student advising Student of the subpoenas directed to each of the foregoing.

On October 11, 2022, Student filed a motion to quash the subpoena duces tecums on the grounds they were overbroad in scope, failed to show reasonable necessity for the information sought, and sought records protected by medical privilege and attorney work product. Student does not dispute the service of the subpoenas were proper.

On October 20, 2022, Apple Valley opposed the motion arguing the subpoena duces tecums were not overly broad, were reasonably necessary to Apple Valley's defense against Student's claims, and did not seek privileged records or attorney work product.

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).)

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).) 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.

SCOPE AND REASONABLE NECESSITY

Student argues the subpoena duces tecums should be quashed because they are overbroad in the scope of records sought and fail to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the information sought was material and relevant. (*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.)

Apple Valley responds the scope of the requested records was not overbroad because they seek information from February 26, 2021, to November 1, 2022, and only

seek records relevant to its defense against Student's issues. Additionally, each subpoena duce tecum included an attachment that provided a requisite showing of reasonable necessity for the requested documents and that the requested records were material and relevant to the issues alleged in Student's complaint.

Student complaint alleged three issues. Student's first issue alleged Apple Valley discriminated against Student by failing to appropriately administer assessments and programming. There was no time frame alleged for this issue. Issue two alleged Apple Valley denied Student a FAPE by failing to conduct appropriate triennial assessments in the areas of psychoeducation, functional communication, occupational therapy, and physical therapy. While the issue did not denote a date, the factual statement contained in the complaint shows the triennial assessments were completed in April 2022. Issue three alleged Apple Valley denied Student a FAPE pursuant to Student's April 27, 2022 IEP, by failing to offer appropriate placement, goals, and services, including for academics, speech and language, occupational therapy, physical therapy, and communication.

Student's complaint requested remedies, including reimbursement for Student's private services, independent educational evaluations funded by Apple Valley, compensatory education, and other remedies.

CenterPointe for Children provides private occupational therapy to Student, funded by Parents. Lyttle provides private instructional services to Student, funded by Parents. Speech Point Therapy provides private speech therapy to Student, funded by Parents. Collaborative Autism Management Program provides behavior intervention services to Student, pursuant to Student's individualized education program, called IEP.

The subpoenas to CenterPointe for Children, Collaborative Autism Management Program, Lyttle, and Speech Point Therapy sought records pertaining to Student, including assessment reports, draft assessments, special education records, progress reports, report cards, goals, draft goals, interview notes, observation notes, registration forms, billing records, and services logs. The subpoenas also sought correspondence regarding Student, including between the providers and Student's attorneys, Parents, and each other. The subpoenas denoted a specific time-period, February 26, 2021, to November 1, 2022, for the records sought.

For CenterPointe for Children, Apple Valley adequately described its need to defend itself from allegations it did not conduct an appropriate occupational therapy assessment and offer appropriate occupational therapy goals and services. Student's complaint cites to CenterPointe for Children's recommendations in support of these allegations. Apple Valley reasonably anticipates it will have to defend itself from expert testimony and reports by individuals from CenterPointe for Children, and will be unable to obtain the subpoenaed information absent the subpoena duces tecum.

For Speech Point Therapy, Apple Valley adequately described its need to defend itself from allegations it did not conduct an appropriate functional communication assessment and offer appropriate goals and services to address Student's speech and language needs. In Student's complaint, Student cites progress reports from Speech Point Therapy to support these allegations. Apple Valley reasonably anticipates it will have to defend itself from expert testimony and reports by individuals from Speech Point Therapy, and will be unable to obtain the subpoenaed information absent the subpoena duces tecum.

For Lyttle, Apple Valley adequately described its need to defend itself from allegations it failed to offer an appropriate placement and academic program. These

allegations are supported by recommendations by Student's expert, Lyttle. Apple Valley reasonably anticipates it will have to defend itself from Lyttle's expert testimony and will be unable to obtain the subpoenaed information absent the subpoena duces tecum.

For Collaborative Autism Management Program, Apple Valley adequately described its need to defend itself from allegations it did not appropriately administer assessments and programs. These allegations are supported by recommendations by Student's private program provider Collaborative Autism Management Programs. Apple Valley reasonably anticipates it will have to defend itself from expert testimony and reports by individuals from Collaborative Autism Management Programs, and will be unable to obtain the subpoenaed information absent the subpoena duces tecum.

Given the two years statue of limitations for special education claims, and the failure to denote a time period for Student's first issue, the scope of the frame, February 26, 2021, to November 1, 2022, for the records sought by the subpoena duce tecum is appropriate. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2) (2006); Ed. Code, § 56505, subd. (l).) Moreover, it is reasonable for Apple Valley to rely on records during this time frame to defend against claims that arose in April 2022. Additionally, Apple Valley established the requested records are reasonably necessary to defend against claims alleged in Students complaint and are material and relevant to its defense. Consequently, Student's motion is denied as to the scope and reasonable necessity of the subpoena duces tecums.

PRIVLEGE AND ATTORNEY WORK PRODUCT

MEDICAL PRIVACY

Student motion alleges the records sought by Apple Valley's subpoena duces tecums to CenterPointe for Children and Speech Point Therapy are medical records

protected by the Health Insurance Portability and Accountability Act of 1996, called HIPAA. Student does not contend information sought by Appel Valley's subpoena duces tecums to Lyttle and Collaborative Autism Management are protected medical records.

California law recognizes a constitutional right to privacy in an individual's medical history. (See, *Pettus v. Cole*, (1996) 49 Cal. App. 4th 402, 440.["the 'zones of privacy' created by Article 1 , section 1 of the California Constitution extend to the details of one's medical history"]; *Palay v. Superior Court, (1993)* 18 Cal. App. 4th 919, 932, ["Fundamental to the privacy of medical information is the ability to control its circulation …"] The constitutional right of privacy is not absolute, but is subject to invasion where a compelling public interest is involved. (*Freed v. Home Depot U.S.A, Inc.* (S.D. Cal. 2019) 2019 W.L. 183833, *5; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37.) State law governs an individual's right to privacy in a civil matter. (Fed. Rule Evid. 501; *Freed v. Home Depot U.S.A.* (S.D. Cal. 2019) 2019 WL 183833.)

Here, Student failed to establish that CenterPointe for Children, a private occupational therapy provider, and Speech Point Therapy, a private speech and language therapy provider, are entities covered by HIPPAA or have medically protected records. Consequently, Student failed to show the information requested by Apple Valley's subpoena duces tecums are protected medical records.

ATTORNEY WORK PRODUCT

Student's motion contends that any communications between Student's attorney and Lyttle, CenterPointe for Children, and Speech Point Therapy constitute protected attorney work product.

Attorney work product is defined by California Code of Civil Procedure section 2018.030, and provides a protection to a writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories. (Code Civ. Proc. § 2018.030.) The protection for an attorney's work product is not automatic or absolute. (*Id.* at sub. (b); see Coito v. Super. Ct. (2012) 54 Cal.4th 480 (*Coito*).) "An attorney resisting discovery of a witness statement based on absolute privilege must make a preliminary or foundational showing that disclosure would reveal his or her 'impressions, conclusions, opinions, or legal research or theories.'" (*Coito*, supra.) If an adequate showing is made, the trial judge "should then determine, by making an in-camera inspection, if necessary, whether absolute work product protection applies to some or all of the material." (*Id.*)

Here, Apple Valley's subpoena duces tecums seeks correspondence from Lytlle, CenterPointee for Children, and Speech Point Therapy. Student failed to make a preliminary or foundational showing that the correspondence sought in the subpoena duces tecums reflect Student's attorneys' impressions, conclusions, opinions, or legal research or theories. (See Cal. Code Civ. Proc. § 2018.030.) Therefore, Student failed to establish that the information sought in the subpoena duces tecums constitute protected attorney work product.

ORDER

1. Student's motion to quash Apple Valley's subpoena duces tecums to Lyttle, Collaborative Autism Management Program, CenterPointe for Children, and Speech Point Therapy is denied
2. The subpoenaed records shall be produced by Lyttle, Collaborative Autism Management Program, CenterPointe for Children, and Speech Point Therapy to the Administrative Law Judge no later than the first day of the hearing in this matter.

IT IS SO ORDERED.



Paul H Kamoroff

Administrative Law Judge

Office of Administrative Hearings