BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

CITRUS SPRINGS CHARTER SCHOOL AND EMPIRE SPRINGS CHARTER SCHOOL.

OAH CASE NUMBER 2020090157

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENA DUECES TECUM ON JAN CASTEEL

OCTOBER 30, 2020

On September 3, 2020, Student filed a request for due process naming Citrus Springs Charter School and Empire Springs Charter School. On October 15, 2020, an order granting a continuance in this matter from October 27, 2020 to November 3, 2020 was granted.

On October 20, 2020, Citrus Springs and Empire Springs issued a subpoena duces tecum on Jan Casteel, a private licensed psychologist designated as an expert witness in

Student's prehearing conference statement. A notice to consumer was sent to Student advising Student of the subpoena. A copy of the subpoena was sent to Student with the notice to consumer. The subpoena duces tecum contained a category of documents that is the subject of this motion, referred to as section 5, requesting:

> Any and all correspondence between New Vista and Family's representatives, including Family's attorney, Danielle Augustin, Ms. Augustin's employees, expert witness hired by the Family's attorney, or any other attorney or advocate representing the Family.

On October 23, 2020, Student filed a motion to quash the subpoena as to section 5 on the ground that it improperly seeks attorney work product privileged information.

On October 28, 2020, Citrus Springs and Empire Springs opposed the motion.

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, the hearing officer shall have the right to issue subpoenas duces tecum to produce documents or papers upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).)

MOTIONS TO QUASH

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 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.

ATTORNEY WORK PRODUCT

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, i.e., a communication made in the course of an attorney-client relationship. (*D.I. Chadbourne, Inc.* (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. Sup. Ct. (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 reveal his knowledge to 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, supra,* 24 Cal.App.4th at p. 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 counter 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.) 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.

DISCUSSION

Student moves to quash or modify the subpoena duces tecum because section 5 seeks production of correspondence between Student's counsel and his designated expert, Jan Casteel.

Student's motion to quash asserts that section 5 seeks attorney work product protected by Federal Rules of Civil Procedure (FRCP), section 26(b)(3)(A), and to the extent the information sought was prepared by or for a party or their attorney in anticipation of litigation, the documents are not subject to disclosure. Student also asserts the protection of FRCP, section 26(b)(3)(B), that bars discovery of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representatives concerning the litigation. However, the federal rules apply to federal courts, and not to OAH, which conducts State proceedings. California law applies to due process hearings.

Citrus Springs and Empire Springs oppose the motion to quash by contending that Casteel has been identified as an expert, and the attorney work product protection does not apply as to the documents sought by section5 of the subpoena duces tecum.

Student's counsel does not contend to be a patient of Casteel, and it can reasonably be inferred that any communication with Student's counsel was made on behalf of Student as his attorney and potentially subject to attorney work product protection. However, Student has not indicated when, or if, Casteel was retained as a consultant prior to being designated as testifying witnesses. If Casteel was not retained as consultant expert prior to being designated to testify, correspondence between Casteel and Student's counsel and representatives that pre-dates the expert designation, if any, is not protected as attorney work product, because it was disclosed to a third party with no obligation to hold that information confidential.

Communications between Casteel and Student's counsel and representatives after the date of designation is not protected as attorney work product.

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. Here, where waivers by disclosure to a third party and a designated expert exception have been identified, the Administrative Law Judge conducting the hearing, referred to as the ALJ, will conduct an in camera review of the communications at issue to determine if some protection is warranted notwithstanding the waiver or exception.

ORDER

1. Student's motion to quash or modify is granted in part and denied in part.
2. The records sought by the subpoenas duces tecum served on Casteel will be produced in accordance with the instructions on the subpoena duces tecum, by uploading responsive documents into Caselines, and which documents will

only be accessible to the ALJ until released to Citrus Springs and Empire Springs.

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 to release of the documents to Citrus Springs and Empire Springs.

Alexa Hohensee
Alexa Hohensee (Oct 30, 2020 16:42 PDT)

Alexa Hohensee
Administrative Law Judge
Office of Administrative Hearings