

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014080645

ORDER GRANTING IN PART AND
DENYING IN PART STUDENT'S
MOTION TO QUASH SUBPOENA
DUCES TECUM

On November 12, 2014, Student filed a motion to quash a subpoena duces tecum issued by San Francisco Unified School District (San Francisco), and served on Michelle Limon-Freeman, Ph.D. The subpoena duces tecum requires Dr. Freeman to produce at hearing on December 8, 2014, "all records relating to [Student], including, but not limited to, drafts of assessments, protocols, observation notes, communication between [Student's] attorney or guardian and Dr. Freeman, invoices, bills, and proofs of payment." On November 14, 2014, San Francisco filed an opposition to the motion to quash the subpoena duces tecum.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities Education Act (IDEA) 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 (SDT) (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) (Section 1985(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.) 3

Special education law does not specifically address motions to quash subpoenas or subpoenae duces tecum. In ruling on such motions, the OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which provide 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. Consistent with the Code of Civil Procedure, OAH permits an attorney of record in a special education matter to sign and issue SDT's.

DISCUSSION

Student's attorney has argued that the request for records in the subpoena is overly broad, and that most of the records requested are protected by the psychotherapist/patient privilege (Evid. Code § 1010 et seq.), the attorney/client privilege (Evid. Code § 950 et seq.), or the attorney work-product privilege (Code Civ. Proc. § 2018.020). Student concedes "that Dr. Freeman's assessment report, data, testing protocols and materials directly related to the neuropsychological evaluation of [Student]" are not protected.

In her Declaration for Subpoena Duces Tecum, the attorney for San Francisco claims that "[Student] has placed at issue Dr. Freeman's assessment of [Student]. . . ." In her opposition to Student's motion to quash, the attorney for San Francisco claims that Student has placed her mental and emotional condition at issue, and therefore the psychotherapist/patient privilege does not apply. (Evid. Code, § 1016.)

At the prehearing conference on October 27, 2014, the parties' attorneys and this ALJ discussed and defined the issues for hearing in this matter. The first two issues are concerned with San Francisco's refusal to find Student eligible for special education at individualized education program team meetings on May 28, 2013, and in April 2014. Student asserts in her first amended complaint, filed on August 28, 2014, that she should have been found eligible for special education and related services under the criteria of either specific learning disability and/or other health impairment. (First Amended Complaint, page 10.) She does not contend that she meets eligibility criteria as a student with an emotional disturbance. Accordingly, Student did not place her mental and emotional health at issue. Any communications between Dr. Freeman and Student and her guardian, and any evidence of them, to the extent that they were for psychotherapeutic purposes, are irrelevant to the issues that are to be decided at hearing. Also, they are protected by the psychotherapist/patient privilege, and should not be produced at hearing.

In her Declaration for Subpoena Duces Tecum, the attorney for San Francisco claims that “the District’s payment for [Dr. Freeman’s] assessment” is also at issue in this case. However, during the PHC on October 27, 2014, the parties agreed that the guardian had been reimbursed by San Francisco for Dr. Freeman’s independent educational evaluation, and Student withdrew the issues related to the process of procuring and paying for Dr. Freeman’s services. Therefore, invoices, bills, and proofs of payment are irrelevant and need not be produced.

San Francisco’s attorney argues in her opposition to the motion to quash and her supporting declaration, that because San Francisco paid Dr. Freeman for the independent evaluation of Student, and Student intends to call Dr. Freeman as an expert witness, the attorney/client privilege and work product privilege do not apply to any communication between Student’s attorney and Dr. Freeman. In support of this contention she cites *National Steel Products Co. v. Superior Court*(1985) 164 Cal.App.3d 476. Although this decision finds that certain privileges may not apply to some communications between an expert witness and an attorney who intends to have that expert testify at trial, the court does not say that every communication between the expert and attorney must be revealed. Rather, communications that form the basis of the expert’s opinion are subject to discovery, but not communications between the expert and the attorney when the expert was acting as an advisor to the attorney. If there were communications between Dr. Freeman and Student’s attorney, the ALJ must conduct an in camera review of those communications to determine the nature of the discussion or writing, and whether it is relevant, or protected by either the attorney/client privilege, or the attorney work-product privilege. Accordingly, on the first day of hearing, if such documents or conversations exist, the ALJ will review them in camera.

ORDER

1. Student’s motion to quash the subpoena duces tecum is granted in part and denied in part.
2. Student’s motion is denied insofar as it seeks to prevent disclosure of Dr. Freeman’s assessment report, data, testing protocols and materials directly related to the neuropsychological evaluation of Student.
3. Any conversations or communications between Student or her guardian and Dr. Freeman of a psychotherapeutic nature are privileged pursuant to the psychotherapist/patient privilege. To the extent that there was communication between Dr. Freeman and Student’s attorney, the ALJ shall examine it in camera at the commencement of the hearing to determine whether it is relevant, and/or protected.

DATE: November 26, 2014

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings