

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:
PARENT ON BEHALF OF STUDENT,

and

MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT,
OAH CASE NUMBER 2021100658
OAH CASE NUMBER 2021100595

ORDER DENYING MOTION TO QUASH SUBPOENA

FEBRUARY 1, 2022

On October 21, 2021, Monterey Peninsula Unified School District filed a request for due process hearing naming Student as respondent. On October 22, 2021, Student filed a request for due process hearing naming Monterey as respondent. The cases were consolidated and continued on November 3, 2021, and hearing was scheduled for February 15, 16, and 17, 2022.

On January 25, 2022, Monterey issued a subpoena for witness testimony to Mary Peitso of Mary Peitso Education Consultation Services, L.L.C.. The subpoena did not request that Peitso produce documents or things.

On January 27, 2022, Student filed a motion to quash the subpoena on the grounds that Peitso's testimony was protected by the attorney client privilege and, further, that her testimony is irrelevant to the issues to be decided at hearing. Student argues that Monterey has provided no justification supporting the materiality of Peitso's testimony as to any topic. Student contends, without explanation, that the testimony would be an unreasonable invasion of his family's right to privacy.

On January 31, 2022, Monterey opposed the motion to quash the subpoena on the grounds that the attorney-client privilege was inapplicable to Peitso pursuant to the legal authorities cited by Student. Monterey also asserts this motion is premature, arguing that Peitso's presence at some meetings with Student's counsel does not operate as a blanket prohibition to her testimony at hearing.

SUBPOENA FOR ATTENDANCE OF WITNESS(ES)

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).)

California Code of Regulations, title 5, section 3082, subdivision (c)(2), specifies the right of the parties in a special education hearing to compel the attendance of witnesses at hearing. That regulation states, "[t]he hearing officer shall have the right to issue subpoenas (order to appear and give testimony.) Thus, subpoenas are available to require the production of testimony that is reasonably necessary for a party to present their case at hearing.

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 CLIENT PRIVILEGE

PEITSO'S PRIVILEGE BASED ON HER STATUS AS AN ADVOCATE

Student argues that the attorney-client privilege bars Peitso's testimony because she was present for settlement discussions and the provision of legal advice by Student's attorney. Student argues that confidentiality is not waived by her presence because she was acting as Student's advocate at the time, as allowed by state and federal special education law; and has worked as a paralegal. Student argues that requiring Peitso's testimony regarding Student on advice given by counsel would undermine the candor between attorneys and their clients which is protected by the California Evidence Code.

Student cites to *Welfare Rights Organization v. Crisan*, (1983) 33 Cal. 3d, 766 in support of his assertions. Monterey contends that the *Crisan* case does not support Student's assertion of broad confidentiality as to Peitso's involvement in the case. Monterey argues Peitso had a number of interactions with the district that did not involve Student's attorney. Peitso requested educational documents from Monterey on the family's behalf and attended three IEP team meetings with the family. She was copied on emails sent by Parent to district representatives. However, Peitso did not attend the mediation in this case and was not copied on letters from Student's counsel to the district. Moreover, Monterey argues, even if some of Peitso's communications with Parents or knowledge of information from Student's attorney are privileged, such a

privilege does not prohibit calling Peitso to testify as to non-privileged matters. Monterey analogizes to calling Parents to the stand to testify despite their confidential communications with their attorneys.

The case of *Welfare Rights Organization v. Crisan, supra*, does not support Student's assertion of a blanket prohibition against calling Peitso, due to the application of attorney-client privilege to her communications with Parents. *Crisan* involved the application of the attorney-client privilege to lay advocates authorized to represent clients in administrative fair hearings under the former program called Aid to Families with Dependent Children or AFDC. The California Supreme Court determined that, because the advocates were authorized by state and federal law to represent the program participants in fair hearings, the attorney-client privilege applied. (*Crisan, supra*, 33 Cal. 3d at p. 770.)

The court noted the law had changed from a claimant's ability to appear with "counsel" to being allowed to be represented by "authorized representatives." Acknowledging the vital importance of the attorney-client privilege to the effective administration of justice, the Court determined that the Legislature must have implied the existence of the attorney-client privilege as an integral part of the right to representation by lay persons. Otherwise, the circumstances would have been a trap that could induce confidential communications that would be subject to use against the Claimant. (*Crisan, supra*, 33 Cal. 3d at pp. 770-771.)

The Court noted the scope of the privilege was not determined by its decision. Furthermore, the Court specifically declined to extend this ruling to other statutes permitting lay representation before certain tribunals which, the Court declared, would require examination against their own statutory, historical, and constitutional backgrounds. (*Crisan, supra*, 33 Cal. 3d at pp. 770-771.) This case does not support a

bar to Peitso's testimony. Nor did Student's citation to *Woods on Behalf of T.W. v. New Jersey Department of Educ.*, (D.N.J. 1993) 858 F. Supp. 51, support his broad claim of privilege, as that case relied on New Jersey law which allows advocates to perform different roles in IDEA hearings than California law.

Nor has Student established that attorney-client privilege bars Peitso's testimony based on her presence in the room during attorney-client discussions or based on Peitso's role as a paralegal. While further evidence of Peitso's role might form the basis for an objection to some questions based on attorney client privilege at hearing, Student has failed to establish a basis for completely prohibiting Peitso to be called as a witness. It is conceivable that Monterey has questions for Peitso that would fall entirely outside the realm of the attorney client privilege.

DEMONSTRATION OF MATERIALITY FOR WITNESS TESTIMONY

Student also asserts that Monterey's subpoena has not established that Peitso's testimony would be material to any issue in the case. Monterey argues that such a showing is premature. Student has failed to offer any legal authority requiring that Monterey establish the materiality of Peitso's anticipated testimony in advance of hearing.

While California regulation requires a statement of materiality when subpoenaing documents, no similar requirement is attached to a subpoena for testimony. (Cal. Code Regs., tit. 5, § 3082 (c)(2).) The regulation that affords California special education hearing participants additional rights to those provided by the IDEA and its regulations, and the California Education Code, provides that parties to a special education hearing shall have the right to call witnesses including adverse witnesses, and cross examine witnesses for the other party (Cal. Code Regs., tit. 5, § 3082 (c)(1).); and to compel the

attendance of witnesses. (Cal. Code Regs., tit. 5, § 3082 (c)(2).) To compel the attendance of witnesses, Administrative Law Judges have the right to issue subpoenas ordering witnesses to appear and give testimony. (*Ibid.*) The same regulation requires a showing of reasonable necessity if a party pursues a subpoena *duces tecum*. (*Ibid.*)

An advance showing of materiality is not required to support this subpoena. However, should questions posed to a witness seem irrelevant or violative of Student's privacy, Student has the right to object. An Administrative Law Judge would then make a ruling determining whether to proceed with the questioning, possibly based on an offer of proof. Student has failed to establish a legal basis to quash the subpoena for witness testimony due to a lack of a statement of materiality.

Student's motion to quash Monterey Unified School District's subpoena to Mary Peitso of Mary Peitso Education Consultation Services, L.L.C. is DENIED.

IT IS SO ORDERED.

Penelope S. Pahl

Penelope S. Pahl

Administrative Law Judge

Office of Administrative Hearings