BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

CLASSICAL ACADEMY HIGH SCHOOL.

OAH CASE NUMBER 2023100812

ORDER GRANTING IN PART MOTIONS TO QUASH SUBPOENAS DUCES TECUM FOR DR. SUZANNE SMITH ROLEY, CHRISTY HIMSTREET, AND ERIN SENSIBAUGH AND MODIFYING SUBPOENAS

MAY 6, 2024

On October 20, 2024, Parent of behalf of Student filed a due process hearing request, called a complaint, with the Office of Administrative Hearings, naming Classical Academy High School, El Dorado County Charter Special Education Local Plan Area or SELPA, and El Dorado Union High School District. The Office of Administrative Hearings is called OAH.

On November 8, 2023, OAH dismissed El Dorado County Charter SELPA and El Dorado Union as parties in this matter. OAH granted a continuance of the due process hearing on November 15, 2023, and again on February 5, 2024, scheduling this matter for hearing to begin on April 30, 2024. The due process hearing was held on April 30, and May 1 and 2, 2024, and continued to May 7, 2024.

On April 26, 2024, Classical Academy issued subpoenas duces tecum on Dr. Suzanne Smith Roley, Christy Himstreet, and Erin Sensibaugh for testimony and documents. Notices to Consumer were sent to Student advising Student of the subpoenas duces tecum directed to Dr. Smith Roley, Himstreet, and Sensibaugh. A copy of the subpoenas were sent to Student with the Notices to Consumer. The subpoenas to Dr. Smith Roley, Himstreet, and Sensibaugh sought:

1. all drafts and final versions of all formal or informal assessment and evaluation reports of Student completed by the witness;
2. all documents the witness considered when assessing/evaluating Student's strengths and weaknesses, academics, and to assist with diagnostic clarity and appropriate treatment and intervention planning;
3. all documents the witness considered regarding Student's educational history, background and placement;
4. all documents related to Student's progress or lack of progress, including but not limited to progress reports and test scores;
5. all documents related to Student's behaviors;
6. all documents related to remedies, including research-based programs and interventions and related services;
7. all documents pertaining to the witness being retained as an expert witness related to the due process hearing in OAH case number

2023100812, including but not limited to all invoices and contracts or agreements;

8. all documents used by the witness in the course of preparing her opinion as a percipient or expert witness, in OAH case number 2023100812;
9. all documents, including notes and emails, of communications with Parents, Family's attorney, Alexander F. Rodriguez, Rodriguez's firm, the Law Offices of Hirji and Chau, LLP;
10. all testing protocols, including observation notes, related to all assessments and evaluations, both informal and formal, of Student completed by the witness;
11. all notes related to any meetings held regarding Student;
12. all notes of any observations of Student;
13. all data collected regarding Student; and
14. all invoices and payment records related to the witness's services.

The subpoenas duces tecum ordered Dr. Smith Roley, Himstreet, and Sensibaugh to produce the requested documents on May 7, 2024. Classical Academy included an affidavit by Classical Academy's attorney with each subpoena duces tecum that described the records sought and why the records sought are relevant and material. Classical Academy's attorney also asserted there is a reasonable necessity for the documents and things described in the subpoena duces tecum.

On April 25, 2024, Student filed motions to quash the subpoenas duces tecum for Dr. Smith Roley, Himstreet, and Sensibaugh on the grounds that the requests were vague, overboard, burdensome, and oppressive. Student also contends Classical Academy failed to establish the records sought were reasonably necessary. Furthermore, Student contends request number 9 for each subpoena duces tecum

regarding Dr. Smith Roley's, Himstreet's, and Sensibaugh's communications with Student's attorney and the attorney's firm, seeks improper production of records protected by the attorney work product doctrine. Student's motions to quash included an affidavit by Student's attorney, the Notices to Consumer, and the subpoenas duces tecum. On April 30, 2024, Classical Academy filed an opposition to the motions to quash.

Student's due process hearing request, called a complaint, states that Dr. Smith Roley completed an independent occupational therapy evaluation of Student on November 14, 2022. Dr. Smith Roley's findings, conclusions, and recommendations were presented in an evaluation report and reviewed by the individualized education program, called IEP, team on February 8, 2023. Student intends to rely on Dr. Smith Roley's report at hearing. At the hearing, Student confirmed he intends to have Dr. Smith Roley testify as an expert. Dr. Smith Roley is scheduled to testify on May 8, 2024.

Student's complaint states that Himstreet completed an independent speech and language evaluation on March 16, 2023. Himstreet's findings, conclusions, and recommendations were presented in an evaluation report and reviewed by the IEP team on March 20, 2023. Student intends to rely on Himstreet's report at hearing. At the hearing, Student confirmed he intends to have Himstreet testify as an expert. Himstreet is scheduled to testify on May 9, 2024.

Student's complaint states that Learning for All completed a functional screening observation of Student and prepared a report of the observation reviewed by the IEP on April 3, 2023. Sensibaugh conducted the observation and authored the report. Student identified Sensibaugh's report as an exhibit he may rely on at hearing. Classical

Academy intends to call Sensibaugh to testify about Sensibaugh's findings and recommendations.

A party to a due process hearing under the Individuals with Disabilities 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 a subpoena, which is an order to appear and give testimony, and a subpoena duces tecum which is an order to produce documents or papers 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.

RECORDS PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE

Student contends requests number 9 of the subpoenas duces tecum seeks records that may include the impressions, conclusions, opinions, or legal research or theories of Student's attorneys, which are protected by the attorney work product doctrine, and are therefore, not discoverable. Classical Academy did not offer in its opposition, an argument against Student's contention.

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 states 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 attorney 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.)

Student's motions to quash is granted in part to the extent request number 9 of the subpoena duces tecum seeks production of writings containing the impressions, conclusions, opinions, or legal research or theories of Student's attorneys. Such records are barred from discovery under any circumstances. (Code of Civ. Proc., § 2018.020, subd. (a).) Accordingly, Student's motions to quash the subpoenas duces tecum for Dr. Smith Roley, Himstreet, and Sensibaugh are granted in part and the requests for records containing the impressions, conclusions, opinions, or legal research or theories of Student's attorneys are quashed.

REASONABLE NECESSITY FOR THE RECORDS

The affidavit in support of the subpoenas duces tecum claims the records sought are reasonably necessary to challenge Dr. Smith Roley's, Himstreet's, and Sensibaugh's findings, conclusions, and recommendations, which Student intends to rely on to support his claim that Classical Academy denied him a free appropriate public education. Student argues that the subpoenas duces tecum should be quashed because it fails to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the material and relevant information sought. (*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.) In its opposition, Classical Academy contends the records sought are reasonably necessary to challenge Dr. Smith Roley's, Himstreet's, and Sensibaugh's findings, conclusions, and recommendations, which Student intends to rely on to prove Classical Academy denied him a free appropriate public education.

The affidavit in support of the subpoenas duces tecum for Dr. Smith Roley, Himstreet, and Sensibaugh established the records sought, with the exception of the privileged writings protected by the attorney-work product doctrine as described above,

are reasonably necessary for Classical Academy to challenge Dr. Smith Roley's, Himstreet's, and Sensibaugh's findings, conclusions, and recommendations. The denial of discovery of the non-privileged requested records would unfairly prejudice Classical Academy in preparing its defense. Accordingly, Student's motions to quash the subpoenas duces tecum for Dr. Smith Roley, Himstreet, and Sensibaugh on the grounds that the subpoenas failed to establish good cause for production of the records, with the exception of privileged attorney work product, are denied.

SCOPE OF THE SUBPOENA

Student contends the requests for any and all documents of the records described in the supporting affidavit are vague, overly broad, burdensome, and oppressive. In its opposition, Classical Academy contends the subpoenas are sufficiently specific, and compliance not unduly burdensome.

The supporting affidavit describes with sufficient specificity the documents sought to be produced. Classical Academy's requests for any and all documents related to Student within the control of Dr. Smith Roley, Himstreet, and Sensibaugh are not overly broad. Further, locating and copying the requested documents is not so burdensome or oppressive to warrant quashing the subpoenas. Accordingly, Student's motions to quash the subpoenas duces tecum on the basis that the subpoenas are vague, overly broad, burdensome, and oppressive are denied.

ORDER

1. Student's motions to quash Classical Academy's subpoena duces tecum for Dr. Smith Roley, Himstreet, and Sensibaugh are granted in part and the subpoenas are hereby modified. Dr. Smith Roley, Himstreet, and Sensibaugh shall produce documents as described in the subpoenas duces

tecum with the exception of documents that contain the impressions, conclusions, opinions, or legal research or theories of Student's attorneys. Dr. Smith Roley, Himstreet, and Sensibaugh shall not produce any records containing the impressions, conclusions, opinions, or legal research or theories of Student's attorneys.

2. Counsel for Classical Academy shall immediately serve a copy of this Order on Dr. Smith Roley, Himstreet, and Sensibaugh.

Rommel P. Cruz

Rommel P. Cruz

Administrative Law Judge

Office of Administrative Hearings