BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018090473 ORDER DENYING STUDENT'S MOTION TO QUASH SUBPOENAS DUCES TECUM

On January 8, 2019, Student filed a motion to quash subpoenas duces tecum, issued by Newport-Mesa Unified School District to Dr. Perry Passaro, Ph.D., the custodian of records for Butterfly Therapies, Inc., Aaron Ross of Lindamood-Bell, and the custodian of records for The Johnson Academy. On January 11, 2019, Saddleback Valley filed an opposition.

On January 14, 2019, a prehearing conference was held before Administrative Law Judge Chris Butchko. Timothy Adams and Lauren-Ashley Caron, Attorneys at Law, appeared on behalf of Student, and S. Daniel Harbottle, Attorney at Law, appeared on behalf of Saddleback Valley. The parties presented argument on the motion to quash at the PHC, which was denied on the record. This order follows.

APPLICABLE LAW

Prehearing Discovery in Special Education Due Process Proceedings

There is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.). Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at a due process hearing. (20 U.S.C. § 1415(h).) The California Education Code provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), states that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Department of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum. These regulations specifically disallow the provisions of the Administrative

Procedures Act for other administrative hearings that provide broader authority for the use of subpoenas. (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].)

Although subpoenas duces tecum are available in special education due process proceedings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only to two types of documents: (i) educational records, which parents have the right to request and receive within five business days at any time (Ed. Code § 56504), and (ii) all documents which the opposing party intends to present at hearing, which must be provided not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)).

Reasonable Necessity for Production

The standard for issuance of a subpoena duces tecum in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), requiring a specific showing that the requested documents are reasonably necessary for the requesting party to present a case at hearing. This standard is stricter than the general Administrative Procedure Act standard of "good cause," adopted from the civil procedure code. That standard requires the moving party to specify by affidavit "the exact matters or things desired to be produced, [and set] forth in full detail the materiality thereof to the issues involved in the case..." (Code of Civ. Proc., § 1985, subd. (b) [adopted into the APA at Gov. Code § 11450.20, subd. (a)].)

Special education law does not specifically address motions to quash subpoenas. In ruling on such motions, the OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which 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. OAH employs this process in ruling on motions to quash, as modified by special education's unique procedures and standards.

DISCUSSION

The Parties under Subpoena

Student's complaint alleges that Dr. Perry Passaro, a psychologist, was retained by Parents to observe and evaluate the appropriateness of the programs offered to Student by Saddleback Valley after the August 31, 2016 and May 31, 2018 IEP team meetings. Student alleges that Parents rejected the May 31, 2018 IEP based on Dr. Passaro's recommendations. Dr. Passaro recommended the type of educational program and reading remediation methodology Student now seeks as remedies. Student has designated Dr. Passaro as an expert for the due process hearing.

Similarly, Saddleback Valley seeks production of documents from the custodian of records of the Johnson Academy. Parents placed Student at the Johnson Academy after they rejected Saddleback Valley's offer of FAPE and are seeking reimbursement for his cost of attendance in this action. Saddleback Valley contests the assertion that the Johnson Academy was an appropriate placement for Student, and seeks information about the services provided there, the school's understanding of Student's needs, goals, and abilities, and his educational progress while attending. In addition, Student has designated Cathy Johnson, the founder of the Johnson academy, as an expert witness in this matter.

Lindamood Bell Instruction, a literacy tutoring agency, was also subpoenaed by Saddleback Valley. Saddleback Valley seeks production from Aaron Ross, Lindamood Bell's Center Director, because Student received daily instructional services from Lindamood Bell and because Student asserts that continued service from that agency is necessary to his appropriate education. Saddleback Valley requests information about what instructional services were provided to Student, the agency's knowledge of Student's needs, goals, and abilities, and his performance and progress in the instructional program. Student has also designated Mr. Ross as an expert for testimony.

Saddleback Valley has also subpoenaed records from Butterfly Therapies, which is an occupational therapy provider which has provided service to Student. Student is seeking reimbursement of the cost of those services, and for that reason Saddleback Valley seeks information about the occupational therapy services provided, the provider's knowledge of Student's needs and educational goals, and student's progress with therapy. Student's therapist at Butterfly Therapies (also known as Buky Occupational Therapy) was Karyn Buky, who has been designated as a testifying expert by Student.

The Substance of the Subpoenas

The subpoena to Dr. Passaro seeks records and documents dating from December 2016 "which were prepared, referenced, reviewed, or considered in developing any opinions and/or recommendations presented regarding Student. Such records shall include but are not limited to, assessment data, protocols, notes, observation records, reports, charts, and any and all documents, including emails and other electronic documents, related to communications with [Student], his parents, and attorneys, and any other documents related to [Student's] ability to access his curriculum and to function in an educational environment."

The subpoenas to the service providers are substantially similar. They seek "any and all educational records" for Student "including but not limited to educational records, enrollment data/paperwork, therapy records [of the provider], behavior data, discipline record/entries, progress on goals, report cards, assessment protocols, assessment reports completed by [the provider], internal and external communications (including email, letters phone logs, communication logs, invoices and/or billing, and proof of payment) regarding [Student's] academic, social/emotional/behavioral needs and/or educational progress and attendance" between Parents and the providers. The subpoena to Ms. Johnson seeks records

from August 2018, and those to Mr. Ross and Ms. Buky seek documents from February 2018.

Motion to Quash

Student contends that the requests lack reasonable necessity, are duplicative, and are overbroad.

Saddleback Valley argues that it needs the requested materials to prepare for and counter the testimony of Dr. Passaro, Ms. Johnson, Mr. Ross, and Ms. Buky. It rejects Student's contentions that Saddleback Valley already has letters from the subpoenaed witnesses regarding this matter and will be provided with other documentation as part of Student's production and presentation at hearing. Student further argues that his production of the documents he intends to rely upon at hearing pursuant to Educ. Code §56500 renders the subpoena request duplicative.

Student's arguments are not persuasive. Saddleback Valley is entitled to these records to assess the witnesses' depth of and source of knowledge about Student. Further, it is entitled to information about Student's needs and progress to evaluate his assertions about the inadequacy of Saddleback Valley's offer of FAPE and the justification for the services provided by Parents. In addition, these witnesses have been designated as experts, and Saddleback Valley has the right to review the information before them that was used to reach their opinions. Saddleback Valley's ability to gather information to prepare its defense is not limited to using those documents Student chooses to put into evidence. The subpoenas demonstrate reasonable necessity and are not excessively duplicative.

Student argues that Saddleback Valley's subpoenas are overbroad because they seek information not typically kept in an educational file and because they may include privileged materials. The subpoenas to Ms. Johnson and Mr. Ross begin with the term "any and all educational records" and the subpoenas to those two and Ms. Buky then refine the request as "including but not limited to educational records." It is not a commonsense reading of the subpoena to interpret it as limited to only those documents typically maintained by a school district. The request lists, as noted above, lists types of records, data, assessments and communications immediately following the citation of educational records. The "internal and external communications (including email, letters phone logs, communication logs, invoices and/or billing, and proof of payment)" specially raised by Student as not part of a typical educational file are material, relevant, and necessary to Saddleback Valley's defense of this action. Any objection based on relevancy or privilege may be made upon presentation at hearing. As noted by Saddleback Valley, the designation of these witnesses as experts for testimony at hearing undoes the protections of the attorney work-product privilege. *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 654-655.

Saddleback Valley has demonstrated that the requested documents are reasonably necessary to defend this matter and to present its case. The requests are neither overbroad nor duplicative. Student's motion to quash the subpoenas is denied.

ORDER

Student's motion to quash Saddleback Valley's subpoenas duces tecum are denied. The respondents to the subpoenas shall produce the documents described therein on the first day of hearing, currently set as January 23, 2019.

IT IS SO ORDERED.

DATE: January 22, 2019

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Chris Butchko
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings