BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018060471
v.	ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENAS DUCES TECUM ISSUED TO NANCY BERGER AND LOIS BOOTH
SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT.	

On October 1, 2018, Student filed a motion to quash subpoenas duces tecum issued by Saddleback Valley Unified School District respectively on Lois Booth, the school principal at Wayfinder Family Service also known as Junior Blind of America, and Nancy Berger, an assistant principal at Wayfinder. Saddleback Valley filed oppositions to each motion to quash on October 4, 2018.

On October 9, 2018, the Office of Administrative Hearings granted Student's motion to amend his complaint. The amended complaint clarifies some issues from Student's original complaint, but substantially raises the same allegations as in the first complaint. Based upon the amended complaint, OAH vacated the original hearing dates in this matter and issued a new scheduling order on October 9, 2018, setting new hearing dates.

APPLICABLE LAW

No Prehearing Discovery in Special Education Due Process Proceedings

In general, 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 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).) California 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), provides 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 that provide broader authority for the use of subpoenas in other administrative hearings (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].) While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to only two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code § 56504), and (ii) the parties are entitled to receive copies of all the documents the parties intend to use at hearing, not less than five business days prior to the hearing (Ed. Code § 56505, subd. (e)(7)). These procedures do not encompass subpoenaing documents from a third party prior to a hearing.

Rather, in special education proceedings in California the hearing officer is given the authority to issue subpoenas for personal appearances and for the production of documents 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) [adopted into the Administrative Procedures Act at Gov. Code § 11450.20, subd. (a)], 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 has relied 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.

The Reasonable Necessity Standard for Subpoena Duces Tecum Production

The standard for issuance of an SDT in a special education due process proceeding is "reasonable necessity" (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2)), which requires 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 APA standard of "good cause" for issuance of SDT's, adopted from Code of Civil Procedure.

DISCUSSION

Saddleback Valley's subpoenas duces tecum to Ms. Booth and Ms. Berger are basically the same. Each subpoena requires them to produce all records relating to Student's educational program, including service logs, reports, office notes, progress notes, charts, files, assessment data, protocols, emails, electronic documents, and other writings related to Student; any documents referring or related to the professional licenses, certifications, and credentials held by Ms. Booth and Ms. Berger from the 2016-2017 school year to the present; and any documents referring or related to Wayfinder's certification as a non-public school by the California Department of Education, including any suspension, termination, and conditional certification, from the 2016-2017 school year to the present. The subpoenas require Ms. Booth and Ms. Berger to appear in person on October 17, 2018, which previously was the first day of hearing.

Student argues that there is no reasonable necessity for the documents requested. Student argues that he has not alleged a violation of his right to a free appropriate public education for the 2016-2017 school year, and therefore records for that school year are not relevant. He argues that his complaint does not allege any issue regarding his placement at Wayfinder, where he attended school pursuant to his individualized education plan for approximately seven years, but rather alleges that Saddleback Valley's proposed placement at its Esperanza Education Center failed to procedurally and substantively provide him a FAPE.

Student's contention that the documents subpoenaed are not reasonably necessary to Saddleback Valley's defense of Student's case is not persuasive. The factual discussion in Student's original complaint and his amended complaint references Student's position that Wayfinder was an appropriate placement, that he made progress there, and that Saddleback Valley had no reason to propose changing his placement to one of its own schools. Additionally, and perhaps more significantly, Student specifically requested an order from OAH that Saddleback Valley be required to continue Student's placement at Wayfinder should he prevail at hearing. Since Student is requesting a prospective placement at Wayfinder, whether Student made progress there and whether Wayfinder itself and/or its staff are and were properly certified and able to meet Student's needs are fully relevant to this case. Additionally, Student's allegations that Saddleback Valley should not have proposed changing his placement puts at issue whether he made meaningful progress at Wayfinder. The documents requested are therefore reasonably necessary to Saddleback Valley's defense in this case.

Student contends that the subpoenas are overly broad because they request documents for the 2016-2017 school year, which he has not put at issue in this case. Saddleback Valley has limited its subpoena to the school year previous to the one at issue in Student's complaint, and to only the two years covered by the statute of limitations. With regard to documents requested relating to Student and his education at Wayfinder from the 2016-2017 school year to the present, the documents may or may not be relevant to this case. However,

such a determination can only be made once a party asks a witness to reference the document and/or moves to admit them into evidence. The documents only apply to the two-year statutory period covered by this case, and relate to whether Wayfinder's program permitted Student to make meaningful progress. They are therefore, on their face, reasonably necessary to Saddleback Valley's defense of Student's amended complaint.

However, Saddleback Valley has given no concrete reason why it requires documentation of Ms. Booth's or Ms. Berger's certifications, licenses, and/or credentials from the 2016-2017 school year, or documentation on Wayfinder's status as a non-public school during that school year. The issue is whether Ms. Booth, Ms. Berger, and/or Wayfinder had the proper credentials, licenses, and/or certifications during the 2017-2018 school year when Saddleback Valley proposed changing Student's placement. Also highly pertinent is whether they hold the proper credentials, licenses, and/or certifications at the time of the hearing, as that will inform potential remedies in this case should Student prevail on any of his issues. Student's motion to quash is therefore partially granted as to the subpoena's request for evidence of credentials, licenses, and/or certifications of Ms. Booth, Ms. Berger, or Wayfinder for the 2016-2017 school year.

Student also asserts the subpoenas are overly burdensome because they require Ms. Booth and Ms. Berger to appear on the first day of hearing. Student contends that it is improper to order Ms. Booth or Ms. Berger to appear on the first day of hearing, as it would then require them to testify on a day Student did not intend to call them, thus giving Saddleback Valley control over how and when Student calls witnesses in his case, or forcing the two witnesses to testify on two days. Student further contends that it is improper for Saddleback Valley to call these witnesses before Student has put on his case.

Student has not provided a declaration from either Ms. Booth or Ms. Berger indicating the reasons why they believe the subpoenas are overly burdensome. Student has not provided any indication that his attorney represents either witness and therefore has authority to make the arguments on their behalf.

Student's contention that he should not have to put on witnesses out of order and that Saddleback Valley should not have the ability to start its case before Student's, are, however, valid concerns, as is Student's contention that witnesses should not have to appear twice. OAH specifically does not require witnesses to appear twice, as was stated in paragraph 6 of the Order Following Prehearing Conference, issued on October 5, 2018. Saddleback Valley contends that the parties will engage in the meet and confer process prior to hearing and that they will therefore jointly determine at that time the order in which witnesses shall appear. Saddleback Valley contends that it has properly subpoenaed the witnesses to appear, but does not address how their appearance to testify on its behalf regarding the subpoenas does not place its case ahead of Student's.

Saddleback Valley has a right to the documents on the first day of hearing. However, it does not have a right to call witnesses on its behalf on the first day of hearing. As stated above, the ALJ has the authority to modify the subpoenas. She will do so by modifying the

subpoenas so that the production date is the first day of hearing on Student's amended complaint, modifying it by granting Student's motion to quash as to any requested certifications, licenses, or credentials for Ms. Booth, Ms. Berger, or Wayfinder for the 2016-2017 school year, and modifying the subpoena to state that Ms. Booth and Ms. Berger are not required to appear in person if they produce the records described in the subpoena, as modified by this order, at the Esperanza Education Center at 9:30 a.m. on December 4, 2018, the first day of hearing for Student's amended complaint. If Student does not call Ms. Booth or Ms. Berger as witnesses in his case, Saddleback Valley may call them to testify in its case.

To the extent Student has included a motion for protective order in his motion to quash, the motion is denied. Student may object to any questions posed to the witnesses by Saddleback Valley at the hearing on the basis of relevance at which time the ALJ will rule on the objection.

ORDER

1. Student's motion to quash the subpoenas duces tecum issued to Lois Booth and Nancy Berger as to records of their licenses, credential, or certifications, or those of Wayfinder, for the 2016-2017 school year, is granted. Ms. Booth and Ms. Berger are required to produce those records only as they pertain to the 2017-2018 school year to the present.

2. The subpoenas duces tecum to Ms. Booth and Ms. Berger are hereby modified. The production date for the documents is modified from October 17, 2018, to December 4, 2018, the date scheduled for the first day of hearing on Student's amended complaint.

3. The subpoenas duces tecum are further modified as follows: Ms. Booth and Ms. Berger are not required to appear in person if they produce the records sought in the subpoenas issued to them by delivering them to the hearing room at the Esperanza School on December 4, 2018, at 9:30 a.m. Ms. Booth and Ms. Berger may either deliver the records in person or authorize another person to produce the records on the first day of hearing.

4. If Student does not call either Ms. Booth or Ms. Berger to testify, Saddleback Valley may call them in its case-in-chief.

5. The remainder of Student's motions to quash as to the subpoenas issued to Ms. Booth and Ms. Berger is denied.

6. Student's motion for a protective order is denied.

DATE: October 11, 2018

DocuSigned by:
Darrell Lepkowsky
A228E8201132499...

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings