BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

STANISLAUS UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2022040227

# ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUM

MAY 18, 2022

On April 6, 2022, Parent on behalf of Student filed a request for due process with the Office of Administrative Hearings, called OAH, naming Stanislaus Union School District.

On April 22, 2022, Stanislaus issued a subpoena duces tecum on Dr. Mitchel D. Perlman, a private licensed psychologist designated as an expert witness in Student's prehearing conference statement.

On May 10, 2022, Student filed a motion to quash the subpoena duces tecum in part. Student's objection is limited to the production of correspondence between

Dr. Perlman and Parents, and between Dr. Perlman and Student's attorney, on the grounds the correspondence is protected attorney work product.

On May 13, 2022, Stanislaus opposed the motion, arguing the correspondence is not protected attorney work product because Dr. Perlman was hired by Parents to conduct an independent educational evaluation of Student, was not hired as a consulting expert by the attorney, and is designated as a testifying expert. In addition, Stanislaus argues the requested records are reasonably necessary to defend against Student's allegations.

## APPLICABLE LAW

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).)

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 (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), 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, 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 WORK PRODUCT

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 starts 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 party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. (*D.I. Chadbourne*, Inc. *v. Superior Court* (1964) 60 Cal.2d 723, 729; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123 (*Wellpoint*).) Once that party establishes facts necessary to

support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. (*Costco Wholesale Corp. v. Sup. Ct*. (2009) 47 Cal. 4th 725, 733; Evid. Code, § 917, subd. (a) (*Costco*); *Wellpoint*, *supra*, 59 Cal.App.4th at pp. 123–124.)

Waiver of work product protection, though not expressly defined by statute, is generally found under the same set of circumstances as waiver of the attorney-client privilege - by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection. Waiver also occurs by an attorney's voluntary disclosure of a writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing. Disclosure to a third party will waive the work product privilege unless the disclosure was coerced. (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 678-679.) Information which is not otherwise privileged does not become so merely by being communicated to an attorney. A litigant may not silence a witness by having him reveal his knowledge to the litigant's attorney. (*Costco*, *supra*, 47 Cal.4th at p. 735.)

## CONSULTING AND TESTIFYING EXPERTS

An expert witness may be a consulting expert, retained only to assist counsel in the preparation of the case. Alternatively, an expert may be a testifying expert, retained only to give a professional opinion at trial. In many cases, an expert is retained both to consult and to testify. A consulting expert's report, prepared at the attorney's request and with the purpose of assisting the attorney in trial preparation, constitutes work product (*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834 (*Williamson*)), entitled to conditional protection and barred from discovery in the absence of good cause. (*Kizer v. Sulnick* (1988) 202 Cal.App.3d 431, 440.)

However, the work product protection will not prevent disclosure of statements to, or reports from, a testifying expert. Once a testifying expert is designated as a witness, the attorney-client privilege no longer applies, because the decision to use the expert as a witness manifests the client's consent to disclosure of the information. (*Deluca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 689 (*Deluca*), *citing Shadow Traffic Network v. Superior Court* ( (1994) 24 Cal.App.4th 1067, 1079.) Similarly, when an expert witness is expected to testify, the expert's report, which was subject to the conditional work product protection, becomes discoverable, as the mere fact that the expert is expected to testify generally establishes good cause for its disclosure. (*Deluca*, *supra*, 217 Cal.App.4th at p. 689, citing *Williamson*, *supra*, 21 Cal.3d at pp. 834–835.)

The initial status of an expert as a consultant changes when it becomes reasonably certain an expert will give his professional opinion as a witness on a material matter in dispute. (*Deluca*, *supra*, 217 Cal.App.4th at pp. 689-90.)

## DISCUSSION

Student moves to quash Stanislaus's subpoena duces tecum because it seeks production of correspondence between Students' expert Dr. Perlman and Parents, and between Dr. Perlman and Student's attorney.

In its subpoena duces tecum and opposition, Stanislaus persuasively explained the requested records were necessary. Production of the documents are reasonably necessary because a dispute exists between Student and Stanislaus regarding the school district's provision of a free appropriate public education, called FAPE. Student cites to Dr. Perlman's' private psychoeducation evaluation of Student, dated December 2020, in the due process complaint and, ostensibly, attempts to rely upon Dr, Perlman's expert testimony to show that Stanislaus denied Student a FAPE. As a remedy, Parents seek

reimbursement for expenses they incurred in obtaining Dr. Perlman's assessment. Dr. Perlman is designated as a testifying expert witness for this matter, to support the allegations contained in Student's complaint. Stanislaus has the right to defend itself against these accusations, the requested records are relevant to that defense, and it is not possible to obtain the requested documents outside of the subpoena duces tecum. In sum, Stanislaus made the requisite showing of reasonable necessity, including why the requested documents 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.)

Student failed to present any persuasive argument that the requested records were not reasonably necessary.

Rather, Student contended the correspondence between Dr. Perlman and Student's attorney constituted privileged attorney work product and was therefore protected from the subpoena duces tecum. Student failed to cite any legal authority to explain why the subpoena duces tecum should be quashed as to the correspondence between Parents and Dr. Perlman. Student bore the burden of establishing the preliminary facts necessary to support a privilege, but failed to do so. Consequently, Student's request to quash the subpoena duces tecum as to the correspondence between Dr. Perlman and Parents is denied.

In addition, the correspondence between Dr. Perlman and Student's attorney does not fall under the privilege of attorney work product. Dr. Perlman was retained by Parents, not the attorney, and is a testifying expert for this matter. Per the above authority, the work product protection will not prevent disclosure of statements to, or reports from, a testifying expert. Once a testifying expert is designated as a witness, the attorney-client privilege, if it applied, no longer applies, because the decision to use the

expert as a witness manifests the client's consent to disclosure of the information. (*Deluca*, *supra*, 217 Cal.App.4th at p. 689, *citing Shadow Traffic Network v. Superior Court*, *supra*, 24 Cal.App.4th at p. 1079.) Consequently, because Dr. Perlman is expected to testify, his records become discoverable. (*Deluca*, *supra*, 217 Cal.App.4th at p. 689, citing *Williamson*, *supra*, 21 Cal.3d at pp. 834–835.) For these reasons, Student's motion to quash as to Dr. Perlman's correspondence is also denied.

## ORDER

1. Student's motion to quash Stanislaus's subpoena duces tecum to Dr. Mitchel Perlman is denied.
2. The records sought by the subpoena duces tecum shall be produced in accordance with the instructions on the subpoena duce tecum, by uploading the documents into Case Center.

Paul H. Kamoroff (May 18, 2022 08:19 PDT)

Paul H Kamoroff

Administrative Law Judge

Office of Administrative Hearings