BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019060916

ORDER GRANTING MOTION TO QUASH SUBPOENA DUCES TECUM

On June 20, 2019, Parent on behalf of Student filed a request for due process naming Newport-Mesa Unified School District. On November 1, 2019, an order granting a continuance in this matter was granted scheduling the case for hearing on December 17, 2019 through December 19, 2019.

On November 19, 2019, Student issued a subpoena(s) duces tecum on Newport-Mesa, seeking seven categories of documents. On December 2, 2019, Newport-Mesa filed a motion to quash the subpoenas. On December 5, 2019, Student filed an opposition to the motion to quash, withdrawing four of the seven categories of documents subpoenaed, and seeking three remaining categories of documents:

1. A copy of a February 5, 2019 email to parent from Mrs. Carpenter "from the NMUSD server with the time and date stamped on the email and authenticated by the district…;"

2. Copies of all emails from 18 individuals and the school board "regarding [Student] or any person in [Student's] family…from February 1, 2015 through November 18, 2019"; and

3. Copies of all text messages between Kimberly Carpenter and Todd Schmidt during the time of Student's June 6, 2018 IEP team meeting;

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.

REASONABLE NECESSITY FOR THE RECORDS

Newport-Mesa argues that the categories of documents in the subpoena duces tecum should be quashed because Student 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.)

Student's amended due process request alleges that Newport-Mesa denied Parent meaningful participation in the individualized education program, also called IEP, process through actions at a June 2018 IEP team meeting. He also alleges that Newport-Mesa restricted Parent's communication with school staff from June 2018 through February 2019, and unilaterally changed Student's IEP between September 2018 and October 2018. He alleges that Newport-Mesa failed to provide Parent with reports or to identify speech issues in 2018, blocked access to the school board and

failed to address Parent's complaints about staff to Human resources. Lastly, Student alleges that the actions of Kimberly Doyle from June 2018 through the IEP team meeting in June 2019 impeded Parent's participation in the development of Student's educational program.

As to Category 1, Newport-Mesa also contends that a copy of Ms. Carpenter's February 5, 2019 email has already been produced, and the request is moot. A copy of the email was attached to Newport-Mesa's moving papers. Student contends that he needs a copy of the email printed from Newport-Mesa's server to "authenticate" the date that the document was sent, as Parent claims not to have received the document until June 2019. Student has failed to demonstrate why a copy of the email printed from a server is necessary to prove his case. The copy attached to the motion clearly states the date and time it was sent, and Mrs. Carpenter can be called as a witness to authenticate the document. Parent may also testify as to when she received the document.

More importantly, the IEP team meetings at issue occurred in June 2018 and November 2018. Student makes no showing of why an email written many months after the IEP team meetings in question is relevant, let alone material, to the litigated issue. Similarly, Student has failed to show how receipt of a February 2019 email in June 2019 is material or relevant to the issues in this case.

As to Category 2, including emails from 18 individuals and the school board referencing Student or his family from February 1, 2015 through November 19, 2018, Newport-Mesa also objects that the category of documents sought is vague, overbroad and irrelevant. Student responds by reiterating his request for "any and all emails generated by District personnel which specifically identifies Student and is not protected by privilege." The category of documents is not vague, and that objection is overruled.

However, the scope of documents sought is overbroad, seeking documents well outside the time period at issue and regarding other family members, and which are irrelevant to the issues in this case. Newport-Mesa's overbroad and irrelevant objections are sustained. Student may seek issuance of a subpoena duces tecum for a more limited category of documents material and relevant to the specific issues and time periods at issue in Student's complaint.

As to Category 3, including text messages between two Newport-Mesa staff members during the June 6, 2019 IEP team meeting, Student's opposition limits his request to only those text messages sent over district-issues cell phones. However, neither the declaration accompanying the subpoena duces tecum, nor Student's opposition, make a showing of how text messages exchanged during a meeting in June 2019 are material or relevant to the issue of whether Newport-Mesa interfered with Parent's participation in any IEP team meeting, including the June 2019 IEP team meeting. The declaration of Parent accompanying the subpoena duces tecum speculates that texting during the meeting was unprofessional and showed a lack of interest, which is insufficient to demonstrate that Student requires text messages to prove whether or not Parent was prevented from participating in the IEP team meeting. In addition, Parent's declaration states that the June 2019 IEP team meeting was recorded, and Parent can offer the audio recording of the meeting to establish what occurred during that meeting.

PRE-HEARING DISCOVERY

Newport-Mesa also objects to the subpoena as a whole because it seeks production on November 27, 2019, and constitutes pre-hearing discovery.

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act, known as the IDEA. (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 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. Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District,* (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing 5 business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

Student's subpoena directs Newport-Mesa to produce the subpoenaed records to Parent on November 27, 2019, which is which is 20 days prior to the first day of hearing. Student has no statutory right to pre-hearing discovery. Student's subpoena should have been returnable on the first day of hearing. Section 1987.1 of the Code of Civil Procedure, provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it. Here, Newport-Mesa's objections to each remaining category of Student's subpoena duces tecum has been sustained, but should Student seek issuance of another subpoena duces tecum, that subpoena duces tecum shall have a date of production of December 17, 2019. In the event another subpoena duces tecum is sought, Student shall indicate on the subpoena duces tecum that the documents shall be produced to the Administrative Law Judge hearing this matter at the hearing location, and not to Parent directly.

ORDER

Newport-Mesa's motion to quash Student's subpoena duces tecum to Newport-Mesa is GRANTED. The subpoena duces tecum for records to Newport-Mesa, dated November 19, 2019, hereby quashed in its entirety.

DocuSigned by:
Alexa Hohensee
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DATED: December 9, 2019

Alexa Hohensee
Administrative Law Judge
Office of Administrative Hearings