BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

NEWMAN-CROWS LANDING UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022040545

ORDER DENYING MOTION TO QUASH SUBPOENA

AUGUST 15, 2022

On April 18, 2022, Student filed a request for due process naming Newman-Crows Landing Unified School District. On May 18, 2022, an order granting a continuance in this matter was granted scheduling the case for hearing on September 7, through September 8, 2022.

On July 22, 2022, Newman-Crows Landing issued a subpoena duces tecum on the custodian of records for Dr. Sunny Kim, Sunny's Behaivor Services. A notice to consumer was sent to Student advising Student of the subpoena directed to Dr. Kim. Copies of the subpoena were sent to Student with the notice to consumer. The subpoena to Dr. Kim sought copies of records regarding Student from April 15, 2020, through September 7, 2022, including:

1. Assessment and evaluation reports, including draft reports that reference Student or Parents;

2. Educational documents, including special education documents that reference Student or Parents;

3. Assessment, report cards, progress reports, work samples, and testing data that reference Student or Parents;

4. Assessment and test protocols that reference Student or Parents;

5. Observation data and notes that reference Student or Parents;

6. Communication logs that reference Student or Parents;

7. Any documents that reference Student's attendance or enrollment at any private school, public school, charter school or educational program;

8. Any and all documents provided to Dr. Kim by Parents;

9. Any and all documents provided to Dr. Kim by Andrea Marcus;

10. Any and all documents provided to Dr. Kim by Carlos Villa-Negrete;

11. Any and all documents provided to Dr. Kim by anyone from the Law Office of Andrea Marcus;

12. Correspondence, including but not limited to, letters and emails between: Dr. Kim and the following persons: Parents, Andrea Marcus, Carlos Villa-Negrete, and the staff at Law Offices of Andrea Marcus, regarding Student. Dr Kim and any educational program, school, charter school, and/or private school regarding Student and or/his Parents.

13. Contracts for service and registration documents that reference Student or Parents;

14. Counseling, therapy, tutoring, speech and language, or any related services logs that reference Student or Parents; and

15. Billing records that reference Student or Parents.

The subpoena duces tecum instructed the custodian of records for Dr. Sunny Kim, Sunny's Behavior Services, to produce the documents on August 30, 2022, to the Office of Administrative Hearings by uploading the documents to the electronic evidence program. The subpoena also required the custodian of records to testify at the due process hearing scheduled for September 7, and 8, 2022.

On August 11, 2022, Dr. Kim filed a motion to quash the subpoenas on the grounds that producing the records would violate "FERPA/HIPPA" (sic) laws. On August 12, 2022, Newman-Crows Landing opposed the motion arguing that compliance with the subpoena duces tecum is not prohibited by HIPAA or FERPA laws. Newman-Crows Landing also contended that the documents sought by the subpoena duces tecum are material to the issues in the matter and argued it established reasonable necessity for the records.

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.

HEALTH INSURANCE PORTABILITY AND ACOUNTABILTY ACT

The Health Insurance Portability and Accountability Act (HIPAA) is a law that provides for a national standard for the protection of certain health information. Generally, consent is required to disclose medical records. (45 C.F.R. § 164.508(a).) However, federal regulations provide for circumstances under which an authorization to the medical provider by the individual whose records are sought, or opportunity for the individual to agree or object to disclosure of documents by the medical provider is not required. One of those circumstances involves disclosures to an administrative tribunal pursuant to a subpoena. (45 C.F.R. § 164.512(e)(1)(ii).)

So long as the medical provider receiving the subpoena has satisfactory assurance that the party seeking the documents has either given notice of the request to the individual whose records are being sought; or that the party seeking the documents has secured an appropriate protective order pertaining to the records being sought, disclosure of documents is allowed without authorization or consent. (45 C.F.R. § 164.512(e)(1)(ii)(A) and (B).) Satisfactory assurance is attained if the medical provider receives documentation demonstrating a good faith attempt to provide notice to the individual whose records are being sought; that the notice included information about the proceeding in which the protected health information is requested to be used to permit the individual to object; and that sufficient time elapsed for an objection to be made and that either no objections were filed, or the objections filed were resolved by the administrative tribunal. (45 C.F.R. § 164.512(e)(1)(iii).)

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA) to include "records, files, documents and other materials"

containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed. Code § 49061, subd. (b); 34 C.F.R. § 99.3.)

DISCUSSION

Dr. Kim states they were hired as a contractor by the Newman-Crows Landing School District to conduct an independent educational evaluation of Student. Prior to beginning the assessment, Dr. Kim received Parent's consent and authorization to release/exchange information to Newman-Crows Landing. After Dr. Kim completed the assessment, Student's counsel informed Dr. Kim that Parent revoked their consent for release/exchange information to Newman-Crows Landing. Subsequently, Newman-Crows Landing asked Dr. Kim for a copy of the final assessment. But based upon Parent's revocation of consent Dr. Kim declined the request to send the report or data collected during the assessment to Newman-Crows Landing.

Dr. Kim contends that although Newman-Crows Landing had a contract to fund the independent educational evaluation, it did not pay for the assessment. Rather Parents paid Dr. Kim for the services, and Dr. Kim considers the independent educational evaluation to be privately funded. Dr. Kim asserts that since the contract with Newman-Crows Landing is null and the evaluation is privately funded, Dr. Kim believes they must adhere to HIPAA and FERPA laws and Parent's request to not disclose the report to Newman-Crows Landing. Dr. Kim believes that Parents will request an IEP team meeting to review the assessment results. Dr. Kim thinks that Newman-Crows Landing will receive a copy of the evaluation report when the IEP team meets. Dr. Kim asserts that the assessment results would not indicate if the district failed to provide FAPE to Student. Dr. Kim claims that their findings would primarily suggest improvements to

Student's educational program. Dr. Kim objects to Newman-Crows Landing's request for the documents and moves to quash the subpoena.

Newman-Crows Landing argue that compliance with the subpoena duces tecum does not violate HIPAA laws. Newman-Crows Landing asserts that compliance with the subpoena duces tecum does not require Parent's consent to release the health records. Newman-Crows Landing claims that Dr. Kim's motion failed to include a declaration that establishes Dr. Kim is a covered entity such that the disclosure rules under HIPAA would apply. Newman-Crows Landing also argues that even if Dr. Kim were a covered entity, Parent's consent is not required because the subpoena duces tecum is a court order that would require Dr. Kim to provide the requested records without consent. Newman-Crows Landing argues that it provided a copy of the Notice to Consumer with the subpoena duces tecum to Dr. Kim and Student's counsel received it. Newman-Crows Landing asserts it has complied the regulations which provides for circumstances under which an authorization is not required by the individual whose records are sought. Lastly, Newman-Crows Landing argued that according to the OAH's instructions for the subpoena duces tecum, the administrative law judge assigned to the hearing may conduct an in camera review of the documents to ensure they are relevant to one or more of the claims being adjudicated, prior to producing them to Newman-Crows Landing.

Newman-Crows Landing argues that Dr. Kim's compliance with the subpoena duces tecum does not violate FERPA because the records being sought from Dr. Kim are not protected by FERPA. Newman-Crows Landing claims the records are not educational records subject to the protections under FERPA. Newman-Crows Landing also contends that even if the records were protected by FERPA, the provision of FERPA specifically allows for the disclosure of educational records, without parent consent,

when disclosure is made in response to a judicial order or lawfully issued subpoena, when parents are made aware of the request for information. Newman-Crows Landing alleges that it provided the Notice to Consumer with the subpoena duces tecum to Student and Dr. Kim.

Lastly, Newman-Crows Landing contends that the records are material and relevant to this case. Newman-Crows Landing asserts that Dr. Kim's independent educational evaluation is directly on point to the issues raised in this matter. Newman-Crows Landing alleges that it agreed to an independent educational evaluation by Dr. Kim after Parent disagreed with the assessment it conducted. Newman-Crows Landing also claims that Student's counsel intends to introduce Dr. Kim's assessment in evidence at hearing.

Here, Newman-Crows Landing established that the documents it requested from Dr. Kim in the subpoena duces tecum were material and relevant to the issues to be adjudicated at the due process hearing. Student alleged a denial of FAPE by Newman-Crows Landing failing to assess them in all areas of suspected disability and related need. Dr. Kim's independent educational evaluation and the other documents requested are material and relevant to the issue raised in Student's complaint. Newman-Crows Landing's request for documents related to Dr. Kim's contracts for service and billing records for Student is relevant if Parent seeks reimbursement for the independent educational evaluation. Newman-Crows Landing established that Student intended to seek reimbursement for the assessment based upon Student's counsel's email indicating such.

In this matter, Newman-Crows Landing lawfully requested documents from Dr. Kim by serving the subpoena duces tecum and notice to consumer on the custodian of records. In OAH's instructions describing how to respond to the subpoena duces

tecum, Newman-Crows Landing appropriately requested for Dr. Kim to provide the requested documents to OAH by August 30, 2022, by uploading them to the electronic evidence program. Dr. Kim's compliance with the subpoena duces tecum is not a violation of HIPAA or FERPA laws. Newman-Crows Landing's request for the documents from Dr. Kim via subpoena duces tecum is the only way Newman-Crows Landing can obtain the records. Parental consent is not required prior to Dr. Kim's compliance with the subpoena duces tecum. Nothing in this order limits the ALJ presiding from conducting an in camera review of the documents to ensure they are relevant to the claims being adjudicated, prior to giving copies to the parties' legal representatives.

ORDER

1. Dr. Sunny Kim's motion to quash Newman-Crows Landing's subpoena to the custodian of records for Dr. Sunny Kim, Sunny's Behavior Services, is DENIED.
2. The records shall be produced by the custodian of records for Dr. Sunny Kim, Sunny's Behavior Services to OAH by August 30, 2022, as described in the Instructions for Responding to an OAH Subpoena by uploading the documents into the electronic evidence program CaseCenter, formerly called CaseLines.

Marlo Nisperos

Marlo Nisperos
Administrative Law Judge
Office of Administrative Hearings