BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ALAMITOS UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021050241

ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO QUASH SUBPOENA

JUNE 22, 2021

On May 6, 2021, Student filed a request for due process naming Los Alamitos Unified School District, referred to as Los Alamitos, with the Office of Administrative Hearings, called OAH. On May 10, 20201, OAH issued a scheduling order setting the first day of hearing in this matter on June 29, 2021.

On June 4, 2021, Los Alamitos served letters on Student notifying Student of Los Alamitos' intent to serve subpoenas duces tecum on the custodians of record of the Prentice School and Pride Learning Center, and on individuals Jamie Heraver and Katrina Reeser, requesting they produce documents in their possession relating to Student. Los

Alamitos served a separate letter on Student regarding each subpoena recipient, and attached to each letter a copy of the subpoena to be served, and a notice to consumer advising Student that Student could file a motion to quash the subpoena. On June 11, 2021, Los Alamitos served the subpoenas on all four recipients via email, and also served the custodian of records of the Prentice School personally. Los Alamitos prepared the subpoenas by filling in OAH's subpoena form DGS OAH 55. The subpoenas advised each recipient that the recipient would not be required to appear at hearing on June 29, 2021 if the recipient provided the requested documents by uploading them to OAH's Caselines electronic evidence system no later than five business days before June 29, 2021, which would be June 22, 2021. The subpoenas included instructions for uploading the documents to be produced.

On June 14, 2021, Student filed a motion to quash Los Alamitos' subpoenas, on grounds that Los Alamitos' service of the subpoenas was defective because none on the recipients had consented to receive email service. Student also objected that the subpoenas were defective because they failed to provide the recipients 15 days to respond to the subpoena, as required by law. Student also objected the subpoenas were overbroad and sought categories of documents not relevant to the issues in this action, including documents protected by rights of privacy, such as Student's medical records, and Parent's private financial information such as credit reports, bank statement, and credit card information.

On June 16, 2021, Los Alamitos filed an opposition to Student's motion to quash. Los Alamitos contended Student did not have standing to object to Los Alamitos' subpoenas to third parties. Los Alamitos also contended it had adopted service by email rather than in-person service as a safety measure during the Covid-19 pandemic, and in a prior matter involving the same parties had obtained permission from Heraver

and Reeser to send them information via email. Los Alamitos did not contend that Prentice School or Pride Learning Center ever consented to service by email. Los Alamitos contended it substantially complied with the Code of Civil Procedure and directions in OAH's subpoena form when it gave the subpoena recipients 11 days' notice to produce the requested documents. Los Alamitos also contended its subpoenas requested relevant documents reasonably necessary to defend against Student's allegations and proposed remedies, and that any objections based on relevancy or privilege of documents containing private medical or financial information could be addressed at hearing.

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, 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.

A student's school records are considered personal records of a consumer under the Code of Civil Procedure, and special rules apply to subpoenas used to obtain them. (Code Civ. Proc. § 1985.3.) A subpoena duces tecum directed to a third party and seeking a student's school records may be served personally, or by first class mail, or electronically if the third party has expressly consented to receive electronic service in that specific action. (Code Civ. Proc. §§ 1985.3, subd. (b) and 1016.6, subd (a)(2)(A)(ii); see also, OAH subpoena form DGS OAH 55, page 10.) Express consent to electronic service may be accomplished either by serving a notice on all the parties and filing the notice with the court, or by manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with that consent for the purpose of receiving electronic service. (Code Civ. Proc. § 1010.6, subdivision (a)(2)(A)(ii).)

California Code of Civil Procedure section 1985.3, subdivision (d), states that a subpoena dues tecum requesting the production of personal records must be served "in sufficient time to allow the witness reasonable time to locate and produce the records or copies thereof." Code of Civil Procedure section 2020.410, subdivision (c) defines sufficient time as "no earlier than 20 days after the issuance, or 15 days after the service" of the subpoena, whichever is later. (See also, OAH subpoena form DGS OAH 55, page 9.)

A student or other person whose personal records are sought by a subpoena duces tecum and who is a party to the proceeding in which the subpoena duces tecum is served may, prior to the date for production, bring a motion to quash or modify the subpoena duces tecum. (Code Civ. Proc., § 1985.3, subd. (g); see also, OAH subpoena form DGS OAH 55, page 9.)

PRIDE LEARNING CENTER, HERAVER, AND REESER

Los Alamitos' service of its subpoenas duces tecum on Pride Learning Center, Heraver, and Reeser via email was defective because none of these subpoena recipients expressly consented to receive electronic service in this specific action. Los Alamitos did not cite to any authority suspending the Code of Civil Procedure provisions requiring such express consent during the Covid-19 pandemic, and the deficiency is not one which may be corrected by modifying the terms or conditions of the subpoenas. Student has standing to object to the subpoenas, and Student's motion to quash is granted as to these subpoena recipients.

THE PRENTICE SCHOOL

Los Alamitos' personal service of its subpoena duces tecum on the custodian of records of the Prentice School was effective service. Los Alamitos declaration of

necessity and description of the documents to be produced showed good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case. Los Alamitos requested:

> Any and all records for [Student] generated for or by Prentice School . . . and its employees from May 2020 to date, including but not limited to educational records, enrollment/intake paperwork, therapy and service records, behavior data, discipline records/entries, progress on goals, report cards, assessment protocols and data, formal and informal assessment reports completed by Prentice and its staff, internal and external communications (including emails, letters, phone logs, communication logs, contracts, individual service agreements, invoices and/or billing, and proof of payment) regarding Student's educational needs and/or educational progress and attendance, as between Prentice and/or with Student's parents or their attorneys.
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> The records requested are material to the issues in dispute and are reasonably necessary for the District to defend against Student's Request for Due Process Complaint and proposed remedies therein. Student's Complaint alleges that the District denied Student a FAPE and seeks reimbursement for compensatory education and prospective placement. Parents have notified the District that Student has been privately enrolled at Prentice in March 2021. The District's ability to respond to Student's requested remedies requires information about what Prentice has provided to Student, which goals or areas of need Prentice has identified

and is addressing, and Student's educational performance and progress at Prentice. These records, and any other records that Prentice has in its possession regarding Student from May 2020 to the present, are necessary to effectuate effective cross-examination of Parents and any Prentice staff that may testify.

The categories of documents Los Alamitos requested were appropriate to address the issues raised by Student's complaint, and not overbroad. Los Alamitos did not specifically request any irrelevant medical records or financial documents. If the Prentice School were to produce irrelevant medical records not related to Student's education, or private financial information such as credit reports, bank statement, and credit card information, those documents could be excluded, redacted, or made subject to a protective order at the hearing, following the in-camera review by the Hearing Judge of the documents uploaded by the Prentice School into the Caselines system, discussion with the parties, and, if appropriate, formal motions made at hearing.

Los Alamitos' subpoena duces tecum to the Prentice school was defective because it failed to give the Prentice school at least 15 days to produce the requested documents, as required by the Code of Civil Procedure. Los Alamitos did not cite any authority for its proposition that its failure to give the specified notice could be excused because it substantially complied by giving 11 days' notice. However, this defect in Los Alamitos' subpoena may be corrected by modifying the terms and conditions of the subpoena to allow the Prentice School to produce the requested documents by uploading them into the Caselines system no later than June 28, 2021, which is the day before the start of hearing. This would allow the Prentice School 17 days to respond to the subpoena.

ORDER

1. Student's motion to quash Los Alamitos' subpoenas duces tecum to Pride Learning Center, Jamie Heraver, and Katrina Reeser is GRANTED. The subpoenas for records directed to these recipients are hereby quashed.
2. Student's motion to quash Los Alamitos' subpoena to the Prentice School is granted as to Student's contention that insufficient time was provided to the Prentice School for production of the documents. Los Alamitos' subpoena duces tecum is modified to change the date of production of the documents by requiring that the Prentice School upload documents responsive to the subpoena to OAH's Caselines system no later than June 28, 2021. OAH will keep the Caselines system open for the receipt of the Prentice School's documents, only, until 5:00 PM on June 28, 2021.
3. Student's motion to quash Los Alamitos' subpoena to the Prentice School on all other grounds is denied.

4. Counsel for Los Alamitos shall immediately serve a copy of this Order by mail or personal service on the Prentice School, Pride Learning Center, Jamie Heraver, and Katrina Reeser. Counsel for Los Alamitos may also provide the Prentice School, Pride Learning Center, Heraver, and Reeser a courtesy copy of this Order via email.



Robert G. Martin

Administrative Law Judge

Office of Administrative Hearings