BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021030132

ORDER OVERRULING PRENTICE SCHOOL'S OBJECTIONS TO NEWPORT-MESA UNIFIED SCHOOL DISTRICT'S SUBPOENA TO PRODUCE REORDS

JULY 30, 2021

On February 26, 2021, Student filed a request for due process naming Newport-Mesa Unified School District. On April 8, 2021, an order granting a continuance in this matter was granted scheduling the case for hearing on August 3, 4, and 5, 2021.

On July 19, 2021, Newport-Mesa issued a subpoena duces tecum on Prentice School. A notice to consumer was sent to Student advising Student of the subpoena directed to the Custodian of Records for Prentice School. Copies of the subpoena were sent to Student with the notice to consumer. Newport-Mesa's subpoena to Prentice School sought records for Student generated for or by Prentice school from March 13,

2020 to present. Newport-Mesa requested education records, therapy records, behavior data, and communication records between Prentice School and Student's parent or their attorneys.

The subpoena duces tecum instructed the Custodian of Records for Prentice School to produce the documents on August 3, 2021, the first day of hearing, by uploading or delivering the documents to the Office of Administrative hearings. Newport-Mesa provided Prentice School with the Office of Administrative Hearings', called OAH, instructions on how to upload the requested documents.

On July 23, 2021, Prentice School served upon Newport-Mesa and Student Objections to District's Subpoena to Produce Records on the grounds that the request was not timely, the request was vague, ambiguous, and overbroad, and the request seeks disclosure of private information that are protected, and information that is protected from disclosure by the attorney-client privilege and the attorney work product doctrine. On July 26, 2021, Newport-Mesa filed an opposition to Prentice Schools objections arguing the subpoena was properly served and timely, the request was appropriately tailored seeking documents that are necessary and relevant to the matter before OAH, and the request did not seek communications that were private or were shielded by the attorney-client privilege or work product doctrine.

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.)

INSUFFICIENT NOTICE TO COMPLY

California Code of Civil Procedure section 1985.3, subdivision (d), stated that service of a subpoena dues tecum must be made "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 of the issuance, or 15 days after the service" of the subpoena, whichever is later. Under these two code sections, Newport-Mesa has provided The Prentice School with sufficient time to respond to the subpoena.

Newport-Mesa's subpoena duces tecum instructed the Custodian of Records for Prentice School to produce copies of the listed records for Student, generated for or by Prentice School, to OAH by delivering or uploading the documents no later than August 3, 2021 at 9:30 a.m.

Prentice School contends that OAH's instructions for the Party Requesting a Subpoena required it to upload the requested documents by July 27, 2021 or July 31, 2021. Prentice School argues that the documents were required to be produced prior to August 3, 2021, because OAH requires documents to be delivered at least five business days before the hearing and OAH prevents documents from being uploaded to the electronic evidence system three days prior to the start of the hearing. Prentice School concluded that it was required to upload the documents less than 15 days after it received notice of the request.

Newport-Mesa served Prentice School with the subpoena duces tecum on July 19, 2021 by personal service and via email. Newport-Mesa instructed Prentice School to deliver the requested documents to OAH in person or by uploading them to the electronic evidence program on August 3, 2021. OAH's Instructions for Responding to a Subpoena does not inform the individual responding to the subpoena to upload them on a date prior to that indicated on the subpoena. Prentice School's reliance on the instructions to the persons requesting documents pursuant to a subpoena duces tecum was misplaced. Newport-Mesa served Prentice School with the request for documents 15 days before the first day of hearing. Newport-Mesa's subpoena duces tecum was timely. Accordingly, The Prentice School's objection to the subpoena as untimely is overruled.

SCOPE OF THE SUBPOENA

Prentice School objects to Newport-Mesa's subpoena duces tecum as being vague, ambiguous, and overbroad. Prentice School alleges the subpoena duces tecum does not designate the business records to be produced by stating the exact documents to be produced or by reasonably particularizing each category of item. Prentice School also claims the request seeks disclosure of protected private information, including information protected by attorney-client privilege and attorney work product doctrine.

Newport-Mesa argues that the request for records is appropriately tailored and seeks records in Prentice School's possession which are specifically related to Student and relevant to Student's Request for Due Process Complaint, for a set period of time, and the records are appropriately described. Newport-Mesa contends the request does not seek records which are protected by attorney-client privilege or attorney work product. Newport-Mesa states that if documents contain information that has limited relevance or contain privileged information, an objection may be made by the parties at hearing.

Newport-Mesa's attachment to the subpoena duces tecum states that it is seeking any and all records for Student including educational records, enrollment paperwork, therapy records, behavior data, discipline records, assessment protocols and reports, and communications between Prentice School regarding Student's educational needs, progress or attendance, between the school and Student's parents or their attorneys. Newport-Mesa's attachment establishes that the documents requested are material and relevant to this proceeding. Newport-Mesa requested the documents because they 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 the proposed remedies therein.

Newport-Mesa's attachment to the subpoena duces tecum states with adequate specificity and particularity the records that are being sought. The description of the records being sought are not vague, ambiguous, or overbroad. Any objections to the relevancy of the evidence or privilege may be made at hearing. As a result, Prentice School's objections to Newport-Mesa's subpoena duces tecum are overruled.

ORDER

1. Prentice School's objections to Newport-Mesa's subpoena duces tecum are OVERRULED. The records shall be produced by Custodian of Records for Prentice School to the Administrative Law Judge on the first day of the hearing in this matter.
2. Counsel for Newport-Mesa shall immediately serve a copy of this order on the Custodian of Records for Prentice School and if that is a school district, on the school site from which documents would be found as well.

Marlo Nisperos

Marlo Nisperos
Administrative Law Judge
Office of Administrative Hearings