



MEMORANDUM

September 2018

To: Administrators, directors, licensed employees, registrars and secretaries

From: Christine Nesbit, In-House Counsel/ *cn*

Re: Frequently Asked Questions -- Subpoenas and testifying

It is not uncommon for school employees to receive subpoenas or informal requests for documents and information from attorneys representing parents and others. The district wants to support employees in meeting legal obligations, consistent with student confidentiality laws, as well as to prevent undesired incursions on employees' time. Below are answers to frequently asked questions about how to respond to subpoenas and informal requests for information or documents from attorneys.

What is a subpoena?

A subpoena is a formal, court-authorized order that requires you to testify at a legal proceeding to testify or to produce documents, or both.

If a subpoena compels you to produce documents, but not appear in court, it will usually direct you to respond to the subpoena by mailing a copy of the documents with a statement certifying that the copies are accurate. These types of subpoenas must be served on you at least 14 days in advance of the deadline given in the subpoena to comply.

How are subpoenas served?

Service of a subpoena to appear at trial or hearing is made by personally handing a copy of the subpoena to a witness and providing witness fees. Service by mail of a subpoena to appear at trial or hearing is acceptable only if the witness is willing to attend and prior arrangements have been made. Service of a subpoena to produce documents, but not testify, may be made by mail. Witness fees must be provided when the subpoena is served for any type of subpoena.

Should I accept service of a trial subpoena by mail?

School employees are frequently called upon to testify, whether they possess relevant information or not. In addition, parents will often perceive school employees as "taking sides" in

a dispute in which they are a party. For these reasons, the district's general practice is to require formal service of subpoenas – meaning personal service on the employee. Employees who are asked by an attorney to simply agree to show up at trial should contact their supervisor. One option is to your supervisor to email the attorney to explain that formal service of a subpoena will be required.

Do I have to comply with subpoenas? What happens if I don't?

You must comply with a properly served subpoena, and could be held in contempt of court if you do not. You could be jailed or fined if you are found in contempt of court.

Service of a subpoena to appear at court must be made so as to allow the witness a “reasonable time for preparation and travel.” There is not a fixed amount of advanced notice a witness must receive for a trial subpoena. That said, if you are subpoenaed under circumstances that are unreasonable and will cause you great difficulty, please contact me so we can discuss options. We may be able to discuss modification of the subpoena with the lawyer who issued it, or ask the court to invalidate it.

In addition, if 4J staff members are issued invalid subpoenas, such as a subpoena without the witness fee, my office will call the attorney who issued the subpoena and inform them of the flaw and of your intention not to comply with the subpoena.

If student records are subpoenaed, what should I do?

Many people assume that if a subpoena for student records is issued, they must comply without notifying a student's parent or student at least 18 years of age. That is inaccurate. In fact, FERPA requires that before we disclose student records pursuant to a subpoena, we must make a reasonable effort to notify the parent or eligible student that we have received a subpoena for records and intend to comply with it. The reason for this rule is to allow the parent or eligible student the opportunity to ask the court to nullify or limit the subpoena. An exception to this notice requirement is made when a court orders that the existence or contents of the subpoena not be disclosed.

When you receive a subpoena commanding the production of student records, please send me a complete copy by email right away, including any correspondence from the attorney who issued the subpoena, along with the names of the parent(s) and their address(es). My office will handle the notice to the parents. If the student is on an IEP, you also need to email the subpoena to Deanna Finn in SSD. Under no circumstances, should you produce the records immediately to the person issuing the subpoena.

The building administrator is the “Records Custodian” of records maintained at the school and, in general, would be expected to testify in response to a subpoena directed to the “Records Custodian” of a school.

An attorney representing a parent has asked me for student records. What should I do?

Under FERPA, in order to produce student records to an attorney, we must have advanced written consent of a parent, or produce the records in accordance with the subpoena with advanced notice requirement. If you do not have written consent from the parent to produce records to an attorney, you can decline the request. You may wish to remind the parent that the parent has a right to the student records, and the parent may provide the records directly to the attorney.

Even when you have been subpoenaed to trial along with a command to produce documents at trial, you should not provide documents to an attorney in advance of trial, unless you have explicit written permission of a parent.

An attorney has contacted me to ask about testifying. What should I do?

If an attorney contacts you to ask about a student, you may not talk with the attorney without the written permission of the parent, as doing so may violate FERPA. I recommend that the school administrator may contact the attorney to explain that staff will comply with properly issued subpoenas, but are restricted by student confidentiality laws from discussing students with third parties.

If you are subpoenaed to appear at trial, you still may not discuss the substance of your testimony or provide documents to the attorney. However, you may discuss logistical matters with the attorney, such as arranging the exact time of your court appearance, or providing your contact information so that you may be notified if there is a cancellation. You may also allow the attorney to ask you yes/no questions about whether you have information about certain subjects so as to allow the attorney to determine if you are an appropriate witness. For example, the attorney may ask you if you are a person who has met with the child regularly, to which you could provide a yes/no response. However, if the attorney went on to ask you to describe the substance of those meetings, you should not respond.

I've been subpoenaed to testify. What should I consider and do as a witness?

Do:

- Inform your supervisor right away.
- If you receive a subpoena requiring you to produce documents, email me a copy right away, along with the names and addresses of the parents or student if 18 or older.
- If the student is on an IEP, email Deanna Finn in SSD a copy of the subpoena also.
- Arrange for a substitute, if applicable.
- Bring the documents subpoenaed with you, and take them to the witness stand when you are called to testify.
- Contact my office if you are unsure if you were served properly or in a timely manner or if you are particularly worried about your testimony.

- When testifying, tell the truth. Listen carefully to the question, and answer that question. Keep your testimony factual and based on your personal knowledge. Listen carefully to the question. Follow the judge's directions. If you are ever confused as to whether you may answer a question, ask the judge.
- Remember that Oregon law protects the confidentiality of certain communications. Licensed staff should review the school employee-student privilege (see last page). When licensed staff testify, they should say the following to the judge before questioning starts:

“I have been advised to ask you if this information is privileged under ORS 40.245, which I believe is the school employee/student privilege rule?”

Then allow the judge to answer, and after the judge answers, ask the following question.

“Will you please tell me if I need to answer these questions?”

The judge will likely respond, yes, you do. You should then answer questions, as failure to do so may lead to your being held in contempt of court and jailed or fined.

Do not:

- Communicate in advance with either party to the case for which you are being called to testify or with their attorney (or paralegal or investigator) about the substance of your testimony. You may give your phone number or email to the attorney who subpoenaed you so that the attorney can notify you of a last minute cancellation, change in schedule, or exact location of the courtroom.
- Provide documents in advance of the hearing to the party that subpoenaed you. (Parents may always request school records through the school office).
- Bring school documents with you to the proceeding *unless* you have been ordered to do so (the subpoena will indicate if you are required to bring documents).
- When testifying, do not speculate, offer opinions, or testify to things outside your role or that you do not know.

If you have questions or concerns regarding this memo, please do not hesitate to contact me.

Thank you.

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ORS 40.245; Rule 504-3. School employee-student privilege

(1) A certificated staff member of an elementary or secondary school shall not be examined in any civil action or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of the student, and which if disclosed would tend to damage or incriminate the student or family. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(2) A certificated school counselor regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in the official capacity of the counselor in any civil action or proceeding or a criminal action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs, controlled substances or alcoholic liquor. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional school counselor as provided in ORS 342.175, 342.177 and 342.180. However, in the event that the student's condition presents a clear and imminent danger to the student or to others, the counselor shall report this fact to an appropriate responsible authority or take such other emergency measures as the situation demands.

ORS 419B.040 Certain privileges not grounds for excluding evidence in court proceedings on child abuse

(1) In the case of abuse of a child, the privileges created in ORS 40.230 to 40.255, including the psychotherapist-patient privilege, the physician-patient privilege, the privileges extended to nurses, to staff members of schools and to regulated social workers and the spousal privilege, shall not be a ground for excluding evidence regarding a child's abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 419B.010 (Duty of officials to report child abuse) to 419B.050.