BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SAN MATEO FOSTER CITY SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018020682 ORDER FOLLOWING PREHEARING CONFERENCE, GRANTING CHANGE OF DATE AND TIME OF HEARING, DENYING PARENT'S CLAIM OF LACK OF RIGHT TO REPRESENT STUDENT AT HEARING, DENYING NOTICE OF INSUFFICIENCY, AND DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION

On March 5, 2018, a telephonic prehearing conference was held before Administrative Law Judge Rita Defilippis, Office of Administrative Hearings. Parent, appeared on behalf of Student. Mr. Naum Morgovsky, Non-Attorney Advocate, was present with Parent. Lenore Silverman, Attorney at Law, appeared on behalf of San Mateo-Foster City School District. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Student's Motion to Change the Date of Hearing. On February 28, 2018, Student filed a motion to change the date of the due process hearing to March 12, 2018, due to her employment schedule and concern that taking time off for the hearing on the date scheduled would jeopardize her employment. San Mateo-Foster City did not file an opposition and agreed at the prehearing conference to schedule the hearing on the requested date. The undersigned ALJ ordered the exchange of evidence to be extended one day, which is no later than 5:00 p.m. on March 6, 2018, which would have been the date for evidence exchange on the originally scheduled date for hearing.

2. Student's Notice of Limited Appearance. On February 28, 2018, Student filed a notice of limited appearance asserting that OAH lacks jurisdiction to add Parent as representative for Student as she was not a named Party in the complaint and she is not an attorney. Mateo-Foster City argued at the prehearing conference that the Individuals with Disabilities Education Act only requires the complaint to include the name of the student and there is no such requirement to name the Parent in a due process complaint. Furthermore, San Mateo-Foster City alleged that there was no indication that Parent is not Student's educational rights holder.

There is no procedure for limited appearance in a special education administrative proceeding. Parent's argument that she has no legal right to represent Student, as a non-attorney Parent is rejected on the basis that students and parents have procedural due process rights under the IDEA and educational rights holders are authorized to represent the student for whom they hold educational rights. Lastly, Parent asserted that Student has a right to have an attorney appointed, at no cost to Student or Parent, to represent her in this special education due process hearing. Student provided no legal authority establishing a right to be appointed counsel in special education due process hearings. Accordingly, the request was denied. Parent agreed to proceed with the prehearing conference. Parent did not deny that she is the educational rights holder for Student.

3. Student's Notice of Insufficiency of Due Process Complaint. On March 1, 2018, Student filed a notice of insufficiency. On March 2, 2018, San Mateo-Foster City filed an opposition. Based on these documents, Student's notice of insufficiency is denied.

A complaint is sufficient if it contains: (1) a description of the nature of the problem of the child relating to the proposed initiation or change concerning the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child; (2) facts relating to the problem; and (3) a proposed resolution of the problem to the extent known and available to the party at the time. (20 U.S.C. § 1415(b)(7)(A)(ii)(III) & (IV).) These requirements prevent vague and confusing complaints, and promote fairness by providing the named parties with sufficient information to know how to prepare for the hearing and how to participate in resolution sessions and mediation. (See H.R.Rep. No. 108-77, 1st Sess. (2003), p. 115; Sen. Rep. No. 108-185, 1st Sess. (2003), pp. 34-35.)

San Mateo's complaint is sufficient as it gives Student notice of the alleged issues in this case; it set forth facts to support the alleged issues; and it includes proposed resolutions to resolve the issues. The complaint was therefore sufficient to allow Student to prepare for and participate in a mediation and a due process hearing.

4. Student's Motion to Dismiss for Lack of Jurisdiction. On February 28, 2018, Student filed a motion to dismiss for lack of jurisdiction. Student asserts that the resolution of this case is a question of constitutional law and OAH is without authority to grant the requested relief without infringing Student's constitutional right to privacy. On March 2, 2018, San Mateo-Foster City filed an opposition to Student's motion asserting that the issues alleged involve special education placement and FAPE which are within the jurisdiction of OAH.

20 U.S.C. 1415 (b)(6)(A) provides that a party may present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education. The issue asserted by San Mateo-Foster city is that Student's lack of consent to the sending of referral packets to potential placements for Student is infringing its ability to provide Student with a FAPE. As such,

OAH has jurisdiction to hear this matter, and Student's motion to dismiss for lack of jurisdiction is denied.

5. Hearing Dates, Times, and Location. San Mateo-Foster City requested a change of location to the Office of Administrative hearings in Oakland, California, for the due process hearing due to lack of appropriate facilities at San Mateo-Foster City's offices and for safety and security concerns due to past interactions between the parties. Student objected as the Office of Administrative hearings is not convenient and the commute to the location is burdensome.

A hearing shall be held at a time and place reasonably convenient to the parent or guardian and the pupil. (Ed. Code § 56505(b)). To accommodate the respective concerns of the parties, the hearing shall take place on March 12, 2018, continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Office of Administrative Hearings located at **1515 Clay Street, Suite 206, Oakland, California, 94612**. The hearing shall begin at 10:30 a.m. the first day of the hearing and at 10:30 a.m. all other days, unless otherwise ordered. Given the later starting time, the hearing time and place are reasonably convenient to Parent.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

6. Issues and Proposed Resolutions. The issues to be determined at the due process hearing, and the proposed resolutions, are listed below:

Issues

1. May San Mateo-Foster City School District send referral packets to potential residential placements without Parent consent and without Parent editing of the referral packet information?

2. If San Mateo-Foster City is not permitted to send referral packets without Parent consent and without Parent editing, is it relieved from its obligation to provide Student with a free appropriate public education?

Proposed Resolutions

1. San Mateo-Foster City seeks an order finding that it may send referral packets to prospective placements over Parent objection and without Parent editing.

2. If San Mateo-Foster City is not permitted to send the referral packet without Parental consent or editing, San Mateo-Foster City requests a finding that it is relieved of its obligation to provide Student with a FAPE.

7. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible. Evidence must be exchanged no later than 5:00 p.m. on March 6, 2018, pursuant to the undersigned ALJ's order extending the exchange of evidence.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

8. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

9. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party

shall be limited in examining the witness to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

10. Telephonic Testimony. Neither party has requested that a witness appear by telephone at this time. Any party seeking to present a witness by telephone shall move in advance for leave to do so. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

11. Electronic Recording of Hearing.

a. Audio Recording. Student requested to audio record the hearing. Student's motion to make an audio recording of the hearing is granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; 3) the recording device will be removed by the party recording during any recess where the party leaves the room; and 4) that operation of the party's recording mechanism will not be allowed to delay the hearing. Should San Mateo-Foster City wish to record the hearing, it shall make the request in advance of the hearing. Such requests are routinely granted on the conditions set forth above.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

12. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (Schaffer v. Weast (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, San Mateo-Foster City requested the hearing and shall present their case-in-chief first, followed by Student.

13. Motions. No pretrial motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made three business days prior to the prehearing conference.

14. Stipulations and Exhibits. Stipulations to pertinent facts, contentions or resolutions are encouraged to promote hearing efficiency. Stipulations to routine foundational facts and avoiding duplicative exhibits are particularly favored. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

15. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times.

Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

16. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for the services of an interpreter. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.]

17. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

18. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

19. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: March 6, 2018

DocuSigned by:
Rita DeFilippis
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RITA DEFILIPPIS
Administrative Law Judge
Office of Administrative Hearings