BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN MATEO-FOSTER CITY SCHOOL DISTRICT.	OAH Case No. 2016090418 ORDER FOLLOWING PREHEARING CONFERENCE; DENYING CHALLENGE FOR CAUSE; DISCHARGING ORDER TO SHOW CAUSE; AND DENYING MOTION TO DISMISS

On February 10, 2017, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Advocate Naum Morgovsky appeared on behalf of Parent and Student. Attorney Lenore Silverman appeared on behalf of San Mateo-Foster City School District.[1] The PHC was recorded.

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

1. Student's Notice of Discharge of Attorney. On February 10, 2017, prior to the start of the continued PHC, Student filed a Notice of Discharge of Attorney.[2] Therefore, the ALJ convened the PHC with Mr. Morgovsky who remains Student's Advocate.

2. Student's Challenge for Cause. At the start of the PHC, Student challenged the ALJ for cause because of what Student perceived as biased and prejudicial conduct against her which disregarded her rights based on the following actions of the ALJ: (a) issuing an Order to Show Cause as to why this matter should not be dismissed for the failure of Student's attorney of record to advance this case to hearing by failing to file a PHC statement and appear for the scheduled PHC on February 6, 2017; (b) failing to recognize Mr. Morgovsky's representation of Student as Attorney-in-Fact pursuant to Probate Code section 4401; (c) failing to acknowledge Mr. Morgovsky's PHC statement filed on February 2, 2017, and his desire to appear at the initial PHC in lieu of Student's attorney of record who was ill; (d) convening the February 6, 2017 PHC with only Ms. Silverman; (e) issuing an

[1] Ms. Silverman's paralegal, Lauren Thomas was also present.

[2] OAH received Student's Notice after 5:00 p.m. on February 9, 2017. Therefore, it is deemed filed as of the next business day.

OSC that had errors[3] and included San Mateo-Foster City's verbal representation that it would not consent to a request by Student to amend her complaint; (f) denying San Mateo-Foster City's Motion to Dismiss Complaint without prejudice; and (g) acting in concert with San Mateo-Foster City by seeking dismissal of the case. Student further contends that she was compelled to discharge her attorney because of the ALJ's prejudicial conduct in not allowing Mr. Morgovsky to represent Student as lead counsel.

San Mateo-Foster City opposed Student's Challenge for Cause contending that Student was represented by counsel at the time the ALJ issued the OSC, and that counsel is bound by the California Code of Civil Procedure and Rules of Professional Conduct, and is required to comply with court rules.

An ALJ may be disqualified for bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.40, subd. (a).) The following, without further evidence of bias, prejudice, or interest, are not by themselves grounds for disqualification: 1) the ALJ is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group; 2) the ALJ has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding; or 3) the ALJ has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. (Gov. Code, § 11425.40, subd. (b).)

In other words, to disqualify an ALJ for cause, a factual showing of actual bias or prejudice is required. (See *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, 472.) For example, in order to be a basis for disqualification, the financial interest of the ALJ in the outcome of the case must be direct, personal, and substantial, rather than slight. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 031.) Similarly, personal involvement in the case by the ALJ or familial connections may warrant disqualification based solely on the probability of bias. (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-1173.) However, in most other cases, including claims of bias arising from the hearing officer's personal or political views, disqualification will not occur absent a showing of actual bias. (*Haas, supra*, at p. 1032.)

Student failed to allege or establish any facts showing actual bias or prejudice. The undersigned finds that she is free from bias or prejudice in this due process proceeding and

[3] Student contends that the OSC erroneously states that OAH staff contacted him on February 3, 2017, to advise him that he must appear for the PHC on February 6, 2017. The OSC correctly indicates that OAH staff contacted both *counsel* of record. Mr. Morgovsky is not recognized as counsel of record; the Probate Code does not govern OAH proceedings; nor does Probate Code section 4401 allow Mr. Morgovsky to practice law. (*Drake v. Superior Court* (1994) 21 Cal. App.4th 1826.) The ALJ acknowledged on the record that her footnote number three in the OSC incorrectly states that Mr. Morgovsky filed his PHC on February 3, 2017. OAH received this filing after hours on February 1, 2017, and therefore it is deemed filed as of February 2, 2017.

will be free and impartial in the conduct of, and rendering a decision in, this proceeding. Therefore, Student's challenge for cause was denied.

3. Discharge of Order to Show Cause. Student's prior attorney of record complied with the OSC by filing a PHC statement and timely written response to the OSC. Student discharged her attorney prior to the scheduled OSC hearing. The ALJ discharged the OSC, and declined to dismiss the complaint or to order the attorney to pay expenses.

4. San Mateo-Foster City's Motion to Dismiss. San Mateo-Foster City filed a Motion to Strike and Motion to Dismiss on February 3, 2017. On February 8 and 9, 2017, it submitted supplemental evidence in support of its motion to dismiss Student's complaint for failure to prosecute and failure to timely exchange evidence. During the PHC, San Mateo-Foster City withdrew its motion to strike the PHC statement submitted by Student's Advocate. Both parties were heard as to the motion to dismiss. Student opposed the motion.

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to 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 to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].)

Education Code section 56505, subdivision (e) (7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing.

San Mateo-Foster City contends that Student has failed to timely advance this matter to hearing; has indicated multiple times her intent to file an amended complaint yet failed to do so resulting in a need for a continuance; that her attorney of record was required to file a PHC statement and appear for a PHC and failed to do so; and that Student has failed to exchange evidence within the statutory time frame. San Mateo-Foster City contends that Student's actions or inactions have prejudiced it in preparing for hearing, and that its counsel still does not have Student's evidence. Student argues that her advocate had the authority to file pleadings and appear in lieu of her former counsel of record; that San Mateo-Foster City failed to produce records which resulted in delays in this matter; and that even if Student failed to timely exchange evidence, this should not resulted in dismissal.

San Mateo-Foster City's motion to dismiss Student's complaint was denied. Student's Advocate attended the PHC. There is no indication that Student will not proceed

to hearing as scheduled on the remaining issues and has a right to a full hearing. That Student may have failed to timely exchange her evidence does not warrant a dismissal of this matter. San Mateo-Foster City reserves the right to object to any evidence as untimely at the time of hearing.

5. Hearing Dates, Times, and Location. The hearing shall take place at the Office of Administrative Hearings located at 1515 Clay Street, Suite 206, Oakland, California, 94612, on February 14, 15, and 21, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

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.[4] The issues at the due process hearing, and the proposed resolutions, were discussed and clarified at the PHC and are listed below.[5]

Issue 1: From September 6, 2014, through September 6, 2016, did San Mateo-Foster City deny Student a free appropriate public education by failing to include Parent in the development of the referral packets provided to potential residential treatment centers and failing to remove and/or correct inaccurate, false, and misleading information from the referral packets?

Issue 2: Beginning September 6, 2014, through September 6, 2016, did San Mateo-Foster City deny Student a FAPE by offering placement at Edgewood which failed to comply with Student's operative individualized education program and without consultation with Parent?

Issue 3: Beginning September 6, 2014, through September 6, 2016, did San Mateo-Foster City fail to implement Student's operative IEP in terms of providing her with mental health therapy services?

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[4] San Mateo-Foster City sought to limit Student's issues to November 5, 2014, as specified in the body of Student's complaint. This request was denied and District's objection was noted for the record. Student's request to extend the time frame of all issues to October 2016 was denied.

[5] The ALJ has re-organized, re-numbered, and re-worded some of the issues in accord with the PHC discussions. An ALJ has the authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Proposed Resolutions: Student seeks: (1) reimbursement for any and all expenditures for Student to attend the California Virtual Academy in the 2014-2015 school year and tuition paid by Parent to Esther B. Clark School for the 2015-2016 school year; and (2) compensatory mental health services.

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 exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

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. At Student's request, San Mateo-Foster City agreed to make Mr. Bartfield and Mr. Montgomery available. San Mateo-Foster City objected to making the superintendent available. During the PHC, the ALJ ruled that Student would need to subpoena the superintendent. After further reflection, the ALJ reverses this decision. **San Mateo-Foster City is ordered to make the superintendent reasonably available for hearing, although it reserves the right to object to her being called as a witness at the time of hearing.** OAH will not order San Mateo-Foster City's counsel to testify at hearing as Student failed to provide a sufficient offer of proof as to the need for their testimony.

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. Student shall provide San Mateo-Foster City's counsel with a proposed witness schedule by close of business February 10, 2017. The parties shall attempt to reach agreement on a witness list for the first day of hearing. Student shall have witnesses available in case agreement on a witness list is not reached. At the commencement of the due process hearing, the parties shall present a proposed written witness schedule with time estimates to the ALJ. 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.

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.

10. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. 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. Neither party has indicated a need for any witness to appear telephonically.

11. Electronic Recording of Hearing.

a. Audio Recording. Both parties' motions to make an audio recording of the hearing are 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; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

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, Student is the petitioning party. Accordingly, Student shall present her case-in-chief, followed by San Mateo-Foster City. The order in which the parties present their cases-in-chief shall be subordinate to the need for each witness to appear only once.

13. Contemplated Motions. Student intends to file a motion to correct what she believes to be a typographical error in ALJ Hohensee's December 30, 2016 Order Granting Motion to Dismiss and: (1) Dismissing Issue 1,4, and 5 in Their Entirety; and (2) Dismissing Those Portions of Issues 2 and 6 Beyond the Statute of Limitations. Student contends this Order incorrectly references September 6, 2014 as the beginning of the statutory period, as opposed to September 5, 2014. Student was not prepared to orally argue this motion and

was ordered to file this motion by close of business February 10, 2017. No further pretrial motions are pending or contemplated. Student's motion to correct the December 30, 2016 Order, and any other 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 prior to or during the prehearing conference of February 10, 2017.

14. Compensatory Education and Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

15. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form at the time of hearing.

16. 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.

17. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar staff, identified in the scheduling order, at (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.

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

19. 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.

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

IT IS SO ORDERED.

DATE: February 10, 2017

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings