BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SAN FRANCISCO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2019020551 ORDER DENYING STUDENT'S MOTION IN LIMINE WITHOUT PREJUDICE

On March 5, 2019, Student filed a "motion to preclude testimony by Laura Fisher," a therapist Student represents works for "Access," on the grounds of privilege and patient-therapist confidentiality pursuant to California Evidence Code section 1014. The motion also included a request to bar the introduction of any mental health records generated by Ms. Fisher as a result of a therapist relationship with Student. This be being considered a motion in limine.

On March 7, 2019, San Francisco filed an opposition to Student's motion on the grounds that Student had placed his mental state at issue by responding to District's request for due process hearing, by participating in Student's psychoeducational evaluation and by identifying personal therapists who will testify at hearing.

APPLICABLE LAW

Generally, all relevant evidence is admissible in a special education hearing. (Evid. Code §350.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, §210.) Further, "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or stature rule which might make improper the admission of the evidence over objections in civil actions." (Govt. Code §11513, subd. (c).)

Privileges, however, can result in relevant evidence being inadmissible pursuant to a statutory or constitutional protection of another societal interest. Privileges exempt a person from testifying or prohibit testimony or evidence if an objection is raised by a person who holds the privilege being asserted. In this case, the question is whether the statutory privilege protecting the communications of a patient to a psychotherapist apply to prohibit disclosure of conversations and the documents produced as a result of those conversations during the course of the scheduled special education hearing in this case.

The Psychotherapist-patient privilege was instituted by California Evidence Code section 1014. That code section states that, subject to Evidence Code section 912 governing a waiver, a patient has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between patient and psychotherapist if the privilege is claimed by the holder of the privilege or a person authorized to claim the privilege. (Evid. Code §1014(a) and (b).) Patients and their guardians are holders of the privilege. (Evid. Code § 1013.) The psychotherapist may also claim the privilege unless there is no holder of the privilege in existence or unless the therapist is instructed by a person authorized to permit disclosure to disclose the requested information. (Evid. Code §1014(c).) A communication between a patient and an educational psychologist is privileged to the same extent as a communication between a patient and a licensed clinical social worker, a credentialed school psychologist or a licensed marriage and family therapist. (Evid. Code §1010.5; Evid. Code §1010 (c)(d)(e).)

A "confidential communication between patient and psychotherapist is defined as information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship, and in confidence, by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the consultation or to those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted and includes a diagnosis and the advice given in the course of the relationship. (Evid. Code. §1012)

In their comments to the statue establishing this psychotherapist–patient privilege, the Senate Committee on the Judiciary emphasized their intention to establish a privilege that is broader than that enjoyed by patients and physicians in an effort to promote candid disclosures between psychotherapists and patients for the protection of society and individuals and the promotion of accurate psychological research. As a result, the privilege applies in criminal and administrative proceedings. (Sen. Com. On Judiciary, Comment to Evid. Code 1014, reprinted in Thompson-Reuters' 2018 California Evidence Code, Desktop Ed.)

Applicability of the Privilege

Student has failed to establish that the privilege applies to communications with Ms. Fisher. No evidence has been submitted establishing the relationship between Ms. Fisher and Student or the circumstances of the communications between them (that is, whether they were actually made in confidential circumstances.) Nor has any evidence been submitted establishing Ms. Fisher's credentials or licensure. Therefore, the motion is denied at this time. However, the protection of Student's privileges is important. Student shall be entitled to raise claims of privilege at the time of hearing.

Waiver of Privilege

San Francisco argues that Student waived his right to object to the testimony of Ms. Fisher by his Parents' participation in his assessment, their filing of a "response" to the complaint herein and by identifying private therapists as potential witnesses. San Francisco's objections on those grounds are overruled. The "response" San Francisco has identified is Student's own request for due process hearing. However, even had Student responded to the complaint, an unverified response is not evidence and statements made in a response would not operate to establish a fact without evidence being produced at hearing.

Nor would parents' participation in Student's assessment necessarily place Student's mental health at issue as argued by San Francisco. No evidence has been provided regarding Parents' motivation for participating in the assessment of their child. Nor has evidence been provided regarding the circumstances of that participation.[1] This does not foreclose the possibility that Student could place his mental health at issue during the hearing, which circumstance, if it arises, will be addressed at the time of the hearing. Nor does it foreclose the possibility that Ms. Fisher could be asked to testify to information that was not confidential pursuant to the applicable statutes.

Finally, Student's identification of potential witnesses does not constitute an automatic waiver of the psychotherapist-patient privilege. There could be areas of testimony relevant to the case that would not constitute a waiver of the privilege, such as commenting on the appropriateness of goals or accommodations. It also conceivable that the identified psychotherapists would not testify at all. Finding a waiver of Student's privileged communications to Ms. Fisher on this basis is premature.

ORDER

Student's Motion in Limine to exclude Dr. Fisher's testimony and documents produced in conjunction with her communications with Student is DENIED without prejudice.

DATE: March 13, 2019

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings

[1] While San Francisco has offered a copy of the psychoeducational report, this hearsay document is not conclusive evidence of motivation, circumstances or substance. While hearsay is admissible in an administrative hearing, the trustworthiness of the specific information offered must be established prior to its admission. (5 Ca.Code Regs. §3082.)