BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of: | |
| PARENT ON BEHALF OF STUDENT, | OAH Case No. 2017010439 |
| v. | ORDER GRANTING CLOVIS UNIFIED SCHOOL DISTRICT'S MOTION TO STRIKE |
| CLOVIS UNIFIED SCHOOL DISTRICT AND ALUM ROCK UNION ELEMENTARY SCHOOL DISTRICT. | |

On January 13, 2017, Student filed with the Office of Administrative Hearings a Request for Due Process Hearing (complaint) naming Clovis Unified School District (Clovis) and a Motion for Stay Put.[1] On January 20, 2017, OAH issued an order denying Student's Motion for Stay Put. On January 24, 2017, Student filed a Motion for Reconsideration of the Order Denying Stay Put, and a Motion to File an Amended Complaint. On January 27, 2017, OAH granted Student's request to file an amended complaint, which added Alum Rock Union Elementary School District (Alum). On January 30, 2017, OAH denied Student's request for reconsideration of the Order Denying Stay Put.

On January 17, 2017, Clovis filed a Motion to Dismiss Petitioner's Motion for Stay Put and Request for Due Process. OAH denied the motion on January 23, 2017.

On January 18, 2017, Clovis filed a Motion to Strike Portions of Petitioner's Motion for Stay Put asserting that Student improperly included exhibits which were protected by attorney-client and attorney work product privileges and/or contained information in violation of the Family Educational Rights and Privacy Act (FERPA). On January 19, 2017, Student filed a Response. On January 23, 2017, Clovis filed a Reply.

On February 8, 2017, Clovis filed an Addition to Clovis's Motion to Strike, requesting that portions of Student's amended complaint be stricken. OAH considered the filing to be an amendment to the motion to strike and informed the other parties that they were entitled to respond. On February 13, 2017, Alum filed a Notice of Non-Opposition. On February 14, 2017, Student filed a Response and Clovis filed a Reply.

Clovis's motion to strike is granted in part and denied in part, as discussed below.

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[1] Student provided OAH with the stay put motion on January 10, 2017. The motion was deemed filed concurrently with the complaint on January 13, 2017.

## APPLICABLE LAW

*Motion to Strike*

There are no statutory provisions governing a motion to strike in a special education proceeding. Therefore, like other administrative agencies in similar situations, OAH looks to the Code of Civil Procedure for guidance.

Code of Civil Procedure section 436 provides that a court in its discretion may, upon terms it deems proper, strike "any irrelevant, false, or improper material inserted in any pleading . . . or any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court." As explained in *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528, *as modified on denial of reh'g (Apr. 24, 2008)*, the purpose of section 436 is to authorize "the excision of superfluous or abusive allegations," and "the striking of a pleading due to improprieties in its form or in the procedures pursuant to which it was filed," such as a pleading "filed in violation of a deadline, court order, or requirement of prior leave of court." Consistent with this authority, OAH will grant motions to strike on various grounds; for example, striking references to matters discussed in mediation that violate the mediation privilege (Cal. Code Regs., tit. 5, § 3086, subd. (b)(1)) (parties forbidden from referring to any aspect of mediation proceedings).

*Attorney-Client Privilege*

A client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by the holder of the privilege or by a person authorized to claim the privilege (Evid. Code, § 954). The "holder of the privilege" includes the client (Evid. Code, § 953). Evidence Code section 953 defines a confidential communication between client and lawyer as one transmitted between client and his or her lawyer, in the course of that relationship, by a means which does not disclose the information to third parties. The lawyer who received or made a communication subject to the privilege is legally required to claim the privilege when the communication is sought to be disclosed (Evid. Code, § 955).

"Confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship (Evid. Code, § 952).

The fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599). In applying its *Mitchell* decision, the California Supreme Court found

that the attorney-client privilege entirely covered a corporate attorney's opinion letter (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 735). Such confidential communication includes the legal opinion formed and the advice given by the lawyer, including a general counsel (see *Costco Wholesale Corp., supra*, 47 Cal.4th 725).

Whenever a lawyer ascertains that he or she has privileged attorney-client material that another inadvertently provided, that lawyer must notify the party entitled to the privilege (*State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656).[2]

*Attorney Work Product Privilege*

A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances (Code Civ. Proc., § 2018.030, (a)). Also, other work product of an attorney is not discoverable unless the court determines that denial of discovery would unfairly prejudice the party seeking discovery or will result in an injustice (Code Civ. Proc., § 2018.030, (b)). (See *Coito v. Superior Court* (2012) 54 Cal.4th 480, 488-494 (the Supreme Court reviews the origins and development of California's work product privilege).)

*Waiver of Attorney-Client Privilege*

Evidence Code section 912, subdivision (a), states that the right to claim the attorney-client privilege is waived if any holder of the privilege, without coercion, disclosed a significant part of the communication. Courts have consistently held that the disclosure of the privileged communication must be intentional and does not include accidental, inadvertent disclosure.

For example, inadvertent release of documents is not a "disclosure" of the documents waiving the attorney-client privilege under the Public Records Act (Cal. Const. art. 1, § 3(b)(2); Gov. Code, § 6254.5; Evid. Code, § 912,(a)). "[J]udicial interpretation of Evidence Code section 912 dating back nearly two decades holds that the inadvertent disclosure of documents covered by these privileges does not effect a waiver. (Citations omitted.)" (*Newark Unified School Dist. v. Superior Court.* (2015) 25 Cal.App.4th 887, 904.)

*Student Privacy*

The Family Educational Rights and Privacy Act (FERPA) requires that personally identifiable information in a student's records be kept confidential (20 U.S.C. § 1232g).

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[2] Clovis's motion cites law supporting the disqualification of an attorney who does not return inadvertently sent attorney-client privileged documents but, instead, uses the documents to the detriment of the other party. OAH does not have jurisdiction to consider disqualification of Student's attorney. This Order, therefore, focuses on whether the privileged documents may remain part of the record in documents Student's attorney filed with OAH.

Similarly, state law prohibits public disclosure of pupil records except in limited circumstances (Ed. Code §§ 49060-49079). Pupil records include information directly related to an identifiable pupil that is maintained by a school district or employee, such as a teacher, in the performance of duties (Ed. Code, § 49061,(b)).

## DISCUSSION

*Exhibits D and G to Motion for Stay Put*

Exhibit D to Student's Motion for Stay Put is an October 14, 2016 email from Clovis's general legal counsel, Karen E. Samman, to four Clovis employees, with a copy to attorney Kathleen McDonald, whose law firm was retained by Clovis to represent its interests regarding claims being made by Parents. The letter begins by thanking the recipients for attending a lengthy meeting the night before to discuss strategy and appropriate responses to Parents' expressed concerns, including Student's IEP. The email letter reviews the meeting and includes directions and recommendation from Clovis's general counsel to the employee recipients. Additionally, Clovis's general counsel invites attorney McDonald to provide additional input regarding the matters reviewed in the email.

Exhibit G to Student's Motion for Stay Put consists of an October 18, 2016 email exchange between Clovis's general counsel and Student's RSP teacher. Attorney Samman stated she had been talking to Clovis's outside counsel. She reviews the substance of the conversation and that, as a result, Ms. Samman requests that the RSP teacher provide Student's RSP schedule and RSP minutes log. Ms. Samman specifically stated that she was going to send the documentation to outside counsel. The resource teacher responded the same day, summarizing her schedule with Student in the email's narrative. She also attached copies of her block plans and RSP schedule, containing information pertaining to both Student and many other students identified by first name.

Clovis contends that Student's Motion for Stay Put improperly includes these two exhibits which are protected by the attorney-client privilege and attorney work product doctrine, and includes information in violation of FERPA. Clovis asserts that Exhibit D and Exhibit G, with attachments, were inadvertently produced by District employees on November 8, 2016, in response to Parents' statutory request for Student's records. Clovis requests that the two exhibits and attachments be stricken from the Motion for Stay Put and, further, that any citation, quote, or reference to the exhibits in the motion also be stricken.

In her response, Student argues that the exhibits are not attorney-client privileged documents because they are not marked as an attorney-client communication, Parents were not represented by counsel at the time of the emails, Student had not yet filed a due process request, Ms. McDonald had not sent a notice of representation, and that Exhibit D was a response to Parents' requests and Exhibit G referred to documents to which Student was entitled. Student also argues that Clovis general counsel's conclusions and recommendations in Exhibit D were contrary to the law. Therefore, Student's counsel contends that Exhibit D

and G are not protected as attorney-client privileged communication or attorney work product.

These arguments are unpersuasive. The attorney-client confidential communication nature of the exhibits are not dependent upon or affected by whether Parents had yet obtained counsel, if Student had filed a due process request, if Ms. McDonald gave notice of representation or if the attorney's recommendation were correct. Further, the argument that this email was in actuality a response to Parents' requests is nonsensical. If the letter was meant for Parents, they would have been recipients.

Here, Clovis's general counsel met with employees to discuss and strategize regarding requests or concerns made my Parents in a confidential meeting. The general counsel then summarized the meeting, including her legal recommendations in the October 14, 2016 letter (Exhibit D). Ms. Samman was clearly identified as Clovis's general counsel. Further, Ms. Samman referred to attorney Ms. McDonald by name, sent her a copy, and invited her further input. Recipients did not include any third party; all were Clovis employees or attorneys. A cursory review of the letter, especially by an attorney and member of the California state bar, would reveal Exhibit D's confidential nature. Exhibit D falls within the statutory definition of an attorney-client confidential communication.

In Exhibit G, general counsel indicated she had been in communication with outside counsel and, as a result, was asking the resource teacher for specific information, which she intended to forward to outside counsel. Again, the email clearly reads as if the parties relied upon the confidential nature of the communication. Exhibit G falls within the statutory definition of an attorney-client confidential communication.

Exhibits D and G contain Ms. Samman's impressions, conclusions, opinions, and/or legal research or theories and is, therefore, not discoverable under any circumstances (Code Civ. Proc., § 2018.030, (a)). Exhibit D listed the general counsel's impressions, conclusions, and opinion based upon a meeting with the recipients. In Exhibit G, general counsel seeks additional information and documentation based upon a conversation with outside counsel, to whom she intended to forward the requested materials. Exhibits D and G are protected attorney work product.

Clovis demonstrated that the disclosure of Exhibits D and G was inadvertent. The Special Education Local Plan Area Administrator for Clovis SELPA, Theresa Pafford, provided a declaration stating that Clovis maintained its students' records in accordance with state and federal law. Clovis's policy was that any documents protected by attorney-client privilege or work product doctrine were not included in or part of student files. She first became aware that privileged or protected documents were in Student's file when Student's attorney attached them as exhibits to Student's motion for stay put. The inclusion of these two documents in Student's file was a mistake and, as a consequence, they were inadvertently transmitted to Parents when Clovis sent Student's file to Parent. Also, the content of Exhibits D and G indicate that the writer and recipients had an expectation of confidentiality in their communication and that the emails were not intended for any person

other than Clovis attorneys and employees. Therefore, Clovis did not waive the attorney-client privilege, as envisioned by Evidence Code section 912, subsection (a). As noted in *Newark Unified School District, supra*, 239 Cal.App.4th 33, inadvertent disclosure of an attorney-client privileged document is not a waiver. Here, the disclosure of the Exhibits D and G was inadvertent and the privilege has not been waived.

In Exhibit G, the resource teacher included two documents with her October 18, 2016 responsive email to Clovis's general counsel – 13 weekly RSP block plans for all her students (with the teacher's notes and students' attendance) and Student's two-page RSP schedule. The RSP block plans identify students, including Student and others, by first name. Student is the only pupil name on her RSP schedule. Since the documents produced here were part of a confidential attorney-client communication, which was also attorney work product, the attachments are similarly stricken.[3]

Clovis's motion to strike Exhibits D and G is granted. OAH shall not consider the exhibits, any reference to the exhibits, or any argument based upon the exhibits and their contents, because they are attorney-client confidential communication and attorney work product.

However, Education Code section 56504 gives parents an opportunity to examine all of their student's school records and to receive copies within five business days of parents' request for records. Parents are entitled to see and review Student's RSP schedule regarding Student's resource services and attendance. Also, Student is entitled to the RSP block plans, but only after redaction of other pupils' names and identifiable confidential educational information. Clovis is therefore ordered to provide Student within five days of this order, with her RSP schedule and the properly redacted RSP block plans.

*Motion to Strike References to, and Argument Based upon, Exhibits D and G, in Motion for Stay Put*

Clovis seeks to strike those portions of Student's Motion for Stay Put that quote or refer to the protected privileged communications of Exhibits D and G. Student quotes and cites Exhibit D throughout her Motion to Strike. She similarly refers to Exhibit G, and its attachments. The exhibits are protected confidential attorney-client communications and attorney work product, have been stricken from the motion, and may not be introduced as evidence in this hearing. Further, consistent with the protections accorded by the Evidence Code discussed above, Student may not cite, quote, refer, or make argument based upon the excluded documents.

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[3] Student's use of the RSP block plans in their present form improperly reveals private educational information and violates the privacy protections of FERPA and the Education Code. Before attaching the RSP block schedule plans to a motion, Student should have redacted the other pupils' names. Though the other students are identified by first name only, anyone familiar with Student's class could identify the other students.

Therefore, Clovis's motion to strike those portions of Student's Motion for Stay Put that quote or otherwise refer to Exhibit D or Exhibit G is granted.

Those portions of the Motion for Stay Put which are hereby stricken are as follows:

- Page 5, lines 7 through 12.
- Page 6, lines 7 through 14.
- Page 9, lines 3 through 19.
- Page 11, line 22, through page 12, line 22.
- Page 13, lines 1 through 5.
- Page 15, lines 14 through 16.
- Exhibit D.
- Exhibit G, in its entirety.

*Clovis's Proposed Redacted Student's Motion to Stay Put*

Clovis provided a copy of Student's Motion for Stay Put that has portions of the motion redacted and is without Exhibits D and G. Clovis's proposed redactions to the Motion for Stay Put and the removal of Exhibits D and G are consistent with the ruling herein.

*Student's Amendment to Motion, Seeking to Strike References to Exhibits D and G in Student's Amended Complaint*

Before OAH ruled upon its motion to strike, Clovis filed an "addition" to its motion. Clovis seeks to strike portions of Student's amended complaint, as follows: p. 17, lines 14 through 16; page 19, lines 19 through 20; and page 39, lines 16 through 25. Clovis asserts that these sections of the amended complaint specifically cite, quote, or refer to Exhibit D, Exhibit G, and/or the attachments to Exhibit G.

Student contends that Clovis cannot move to strike portions of the amended complaint because it filed a notice of nonopposition to Student's motion to file the amended complaint, that the request does not sufficiently state the basis for the request, and that Student has a right to assert issues in her complaint that she wants determined in the due process.

Student's arguments are unpersuasive. Clovis agreed it would not oppose Student filing an amended complaint; it did not indicate it otherwise agreed with the amended complaint or its contents. Also, Clovis clearly states in its addition to its motion that the basis for the request is that Student improperly uses the confidential and privileged material referred in its motion to strike; namely, Student's Motion for Stay Put's Exhibits D and G.

While Student is correct that she is entitled to assert the issues alleged in the complaint, Student may not refer to the confidential and privileged communications. These three portions of the amended complaint, as discussed below, are stricken.

At page 17 of the amended complaint, on line 14, from "This information was also confirmed . . ." to line 27, ending with ". . . RSP services." This section improperly cites, quotes, and refers to the confidential communications in Exhibit G, which has been stricken and which cannot be used by Student as evidence in this due process. Therefore, this section is properly stricken.

At page 19, Student makes a parenthetical cite to the confidential attorney-client communication contained in Exhibit D, which begins at the end of line 19. This section is similarly stricken.

At page 39, Clovis seeks to have lines 16 through 25 (the entire paragraph) stricken because Student cites and discusses the contents of the confidential attorney-client communication in Exhibit D. Student begins the paragraph by asserting that District predetermined its offer, without making direct reference to the Exhibit D email. This section is not stricken. However, the remainder of the paragraph, beginning at line 19 with "however, the District IEP team . . ." to the end of the paragraph at line 25, specifically cites, summarizes, and argues the Exhibit D email and its contents and is accordingly stricken.

The stricken portions of Student's Amended Complaint are redacted, as shown in the attachment to this order.

Though these sections have been stricken, all of the issues alleged in Student's 45-page amended complaint remain.

ORDER

1. Clovis's motion to strike the Motion for Stay Put's Exhibits D and G is granted.

2. Clovis shall provide Student with her RSP schedule and the properly redacted RSP block plans, as described above, within five business days from the date of this Order.

3. Clovis's motion to strike portions of Student's Motion to Stay Put that contain references to, and argument based upon, Exhibits D and G, is granted. Those portions of the Motion for Stay Put that are hereby stricken are as follows:

- Page 5, lines 7 through 12.
- Page 6, lines 7 through 14.
- Page 9, lines 3 through 19.
- Page 11, line 22, through page 12, line 22.

- Page 13, lines 1 through 5.
- Page 15, lines 14 through 16.
- Exhibit D.
- Exhibit G, in its entirety.

4. Clovis' motion to strike portions of Student's Amended Complaint that contain references to, and argument based upon, the privileged and protected information contained in Student's Motion to Stay Put's Exhibits D and G, is granted. Those portions of the Amended Complaint that are hereby stricken are as follows:

- Page 17, line 14, from "This information was also confirmed . . ." to line 27, ending with ". . . RSP services."
- Page 19, parenthetical cite to the confidential attorney-client communication contained in Exhibit D, which begins at the end of line 19.
- Page 39, line 19 from "however, the District IEP team . . ." to the end of the paragraph at line 25.

5. Student's Motion to Stay Put is hereby sealed and may be unsealed only by further order of OAH, federal court, or state court.

6. The redacted version of Student's Motion for Stay Put, with exhibits, shall be filed as if filed on January 17, 2017.

7 Student's Amended Complaint, filed January 27, 2017, is hereby sealed and may be unsealed only by further order of OAH, federal court, or state court.

8. The redacted version of Student's Amended Complaint (as shown in the attachment hereto) shall be filed as if filed on January 27, 2017.

IT IS SO ORDERED.

DATE: March 1, 2017

DocuSigned by:

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CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings

Attachment of Order

OAH Case No. 2017010439

Redacted Portions of Student's Amended Complaint

Parent also explained her concerns about Yasmin's grades, which were all **"Fs"** by that time, and the lack of counseling for Yasmin's Anxiety. The general teacher, Ms. Stilson, provided to Parent a "STAR Reading computer-adaptive reading test" score, which shows that Yasmin is at a *11%ile rank*, the instructional reading level (IRL) shows that Yasmin is at a *3rd grade level*, and her Zone of Proximal Development (ZPD) is between a 2nd and 3rd grade (2.6 - 3.6) level. The teacher explained that there were concerns with spelling, capitalization and punctuation, and that she struggles with math, multiplying two numbers by two numbers, and subtraction with regrouping. However, their new goals were for 5th grade level, which do not properly measure Yasmin's academic's needs.

The District also informed Parent that they were eliminating the "social emotional" goal because they *did not believe* Yasmin needed it. Parent disagreed and explained that the 1/5/16 IEP calls for a goal in this area and a school psychologist was responsible for helping Yasmin with this goal. District ignored Parent's concerns and eliminated the social emotional goal.

The District also informed Parent that it was not obligated to give her the whole 60 minutes of Resource in one class. Parent explained that her daughter was not even receiving all 60 minutes a day as called for by the 1/15/2016 IEP.

[redacted]

*"...except only on Thursday for three times the 8:30-9:00 block), they have an 8:30 am. Thus, only receiving 15 minutes of RSP on Tuesdays and that for RSP was also not reflective the "appropriate" time of her Monday time during math intervention."*

[redacted]

*previous IEP*." Parent's counsel explained to Ms. Samman that no one "*owns*" the IEP; Parent's counsel was familiar with Ed Code §56325 and that there is NO place in the Ed Code §56325 that gives such authority to the District to do what Ms. Samman was stating, and that the IEP was developed to help the Student, not the District. Parent's counsel explained to Ms. Samman that Parent only wanted the District to implement the last agreed-upon and implemented IEP of 1/5/2016 and was hoping that the District would comply with Parent's request and to follow the Regulations as mandated by IDEA, and provide FAPE to Yasmin, *without the necessity of litigation*. Parent's counsel emailed District's counsel a copy of the last agreed-upon and implemented IEP of 1/5/2016 and a copy of the CUSD's IEP of 9/9/2016, which clearly showed the changes to the Offer of FAPE, goals, and services without Parent's consent. Parent's counsel once again requested that the District simply implement the 1/5/2016 IEP. The District's counsel stated that she would look into it and get back to Parent's counsel. She never did. The District's answer to Parent's concerns stated in her letter dated 9/25/2016 were obviously confusing and deceiving.

**3. The CUSD October 21, 2016 IEP meeting**

Per the CUSD, this 10/21/2016 IEP meeting was a "continuation of the 09/19/2016 IEP meeting." At this IEP meeting, all the IEP members were present, although Mr. John Logan, the District's Lead Psychologist, was present, but his main role at the meeting was as the "note taker." The District's attorney, Ms. Kathleen McDonald from Fagen, Friedman and Fulfrost, and Parent's counsel were present. It became obvious to Parent's counsel that the District had no intention of "continuing" the 9/19/2016 IEP meeting, but rather to simply *respond* to Parent's letter of 9/25/2016 [redacted] The 10/21/2016 IEP contained exactly the same 'changes' the District had made at the 9/19/2016 IEP, and the same Offer of FAPE, with their new goals and services, to which Parent had already disagreed. The only detail that the District wanted to add was weekly "check in" by school psychologist with teachers (*not* Yasmin). Parent again disagreed, and again requested that the District conduct a psychological assessment on Yasmin. Also, since Yasmin was still struggling academically and still had **"Fs"** in all her subject areas, Parent requested that Yasmin be provided with a 1:1 aide, since Parent was also frustrated and did not know how to help Yasmin with her homework because Yasmin "had forgotten" the class instructions, and Parent is *not* a teacher. The District informed Parent that they would wait until Yasmin's annual IEP meeting in December to see if Yasmin was still struggling. At the end of the meeting, Mr. Logan read the IEP notes, and Parent

to avoid. The Clovis District needed to conduct new assessments if they believed that such services noted in the 1/5/2016 IEP were not necessary, and Parent's concern was sufficient to warrant the District's duty to further assess Yasmin.

Therefore, the District failed to implement and provide services such as the one described in the January 5, 2016 IEP, after Parent's verbal and written requests, thus denying Yasmin a FAPE and an educational opportunity.

***Issue 4b.*** **By predetermining its September 19, 2016 IEP offer?**

Under the Individuals with Disabilities Education Act (IDEA), parents of a child with a disability must have an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A district must fairly and honestly consider the views of parents expressed in an IEP team meeting, including information from private assessors. While school officials may discuss a child's programming in advance of the IEP team meeting, they may not arrive at an IEP team meeting with a "*take it or leave it*" attitude, having already decided on the program to be offered. A district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process.

Here, Student claims that the District IEP team members' meeting before the October 21, 2016 IEP meeting was to develop a *predetermined* offer. Student understands that the fact that the District IEP team members met before the IEP meeting does not automatically mean that the District predetermined its IEP offer; [redacted]

The District IEP members failed to propose changes to their already predetermined IEP offer of 9/19/2016; in fact the CUSD informed Parent that their 9/19/2016 offer was "final," and did not fully consider information presented by Yasmin's mother and/or the IEP of 1/5/2016.