BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LOS ANGELES UNIFIED SCHOOL DISTRICT .	OAH Case No. 2018030412 ORDER DIRECTING PARTIES TO PRESENT EVIDENCE AT START OF HEARING ON DISTRICT'S PENDING MOTIONS BASED ON ATTORNEY-CLIENT PRIVILEGE

Student filed his due process hearing request against Los Angeles Unified School District on March 9, 2018, alleging that District predetermined Student's eligibility category for special education as autism/autistic-like behavior, by the time of Student's individualized education program team meeting held February 8, 2018. Student contends this denied Student a free appropriate public education by significantly impeding Parent's opportunity to participate in the decision making process, and causing Student to be deprived of educational benefits. Student's complaint alleges that Mother left a recording device running during the lunch break at Student's IEP team meeting held February 8, 2018, and recorded a conversation among District's in-house counsel and employees that evidences District's predetermination. The complaint includes alleged excerpts of that conversation, and contends that the attorney-client privilege did not apply to the conversation because a third party, Father, was present during the entire lunch meeting.

On April 17, 2018, District filed four motions arising from Student's alleged surreptitious recording and misuse of attorney-client communications between District counsel and District employees. The motions, numbered here for ease of reference, were:

(1) Motion to strike Student's due process request in its entirety based on Student's alleged surreptitious recording and misuse of attorney-client communications between District counsel and District employees during a lunch break at Student's IEP held on February 8, 2018;

(2) Motion in limine to exclude the introduction of any recordings, transcripts of recordings, or testimony or other references to conversations held during the lunch breaks of Student IEP team meetings, including, but not limited to, the lunch break on February 8, 2018;

(3) Motion to disqualify Student's counsel for misuse of surreptitious recordings of attorney-client communications between District employees and District counsel; and

(4) Motion to bifurcate hearing to first hear evidence on, and rule on, District's motions based on Student's alleged surreptitious recording and misuse of attorney-client communications between District counsel and District employees, followed by a hearing on the issue of predetermination, if permitted in the order on District's motions.

In support of its motions, District submitted the sworn declaration of District in-house counsel Mary Kellogg. Ms. Kellogg declared that she was present during the February 8, 2018 lunch conversation. She declared that Father was present at the beginning of the conversation, but left after "a few exchanges" when Ms. Kellogg's requested he leave so that she could have a private conversation with her clients. District also submitted the sworn declaration of District's outside counsel Sue Ann Salmon Evans. Ms. Evans declared that she wrote Student's counsel a March 15, 2018 letter, attached as an exhibit, demanding that counsel cease and desist using lunch break recordings of conversations between District employees and counsel made without their knowledge, and return the recordings and destroy all copies. Ms. Evans declared that Student's counsel refused to comply with District's cease and desist demand, and had not provided a copy of the recordings at issue.

Student filed a consolidated opposition to District's motions on April 20, 2018. Student again contended that Father had been in the room during the entire February 8, 2018 lunch break conversation, but stated that, if District provided "credible and reliable evidence that Father was not in the room, [Student's counsel] would not use that section [of the recording] as impeachment evidence."

Student's consolidated opposition included as an exhibit a sworn declaration of Student's counsel filed April 16, 2018 in United States District Court Case No. 2:18-CV-01582-AB-AFM. Counsel declared that District held IEP team meetings for Student on January 30, 2018, February 5, 2018, February 8, 2018, and February 28, 2018. Counsel declared Mother had recorded the lunch break at Student's February 8, 2018 IEP due to accidental oversight, and counsel had reviewed the recording. Counsel declared that she and Mother had left the room at 12:05 p.m. and returned at 12:50 p.m., but Father had stayed in the room and spoke "during that lunch." Counsel's declaration did not state whether Father stayed in the room during the entire lunch, as alleged in the complaint, or only some of the lunch, as District contends. The declaration did not state the times at which Father spoke. Exhibit F to counsel's declaration included a March 7, 2018 email from counsel to Father, in which she asked "do you remember staying in the IEP meeting with the district, after [Mother] and I went to lunch," and asked if Father remembered a discussion about classifying Student as autistic. Counsel did not identify which IEP meeting she was referencing. Father responded to counsel by email on March 23, 2018, stating only that he "told all Reseda District in the meeting that [Student] did not have autism."

At the PHC held April 23, 2018, the ALJ and parties discussed that District's motion was supported by a sworn declaration from a participant in the February 8, 2018 lunch break with personal knowledge of the events at issue, while Student's opposition was not supported by a similar declaration. Student's counsel indicated that she had only briefly reviewed the

February 8, 2018 recording, and had difficulty communicating with Father, whom Student had subpoenaed to appear at the start of the first day of hearing on May 3, 2018.

The ALJ ordered Student to provide a copy of the February 8, 2018 recording to District counsel by 5:00 p.m. on April 23, 2018. The ALJ also ordered both parties to file supplemental briefs on District's motions by 5:00 p.m. on April 25, 2018, after each party had a further opportunity to obtain a declaration from Father, and to review the February 8, 2018 lunch break recording to determine if it clearly identified when Father was present.

Each party filed supplemental briefs on April 25, 2018. Neither party submitted a declaration from Father. Student had provided District a copy of the February 8, 2018 lunch break recording. The parties disagreed what that recording demonstrated. In her declaration in support of District's motions, District's in-house counsel Ms. Kellogg declared that the recording showed that Father left the room shortly after counsel asked if he could wait outside, and returned to the room approximately 48 minutes later at the end of the lunch break. In her opposing declaration, Student's counsel Ms. Weissburg declared that the lunch break recording showed that District's counsel did not ask Father to leave the room, and that Father stated on a recording of the IEP that he stayed in the room during the break.

The factual dispute between the parties' sworn supporting declarations whether and when Father was present with District counsel and employees at the February 8, 2018 lunch break must be resolved at hearing.

ORDER

1. Hearing of this matter will commence as scheduled on May 3, 2018 at 9:30 a.m.

2. At the start of the hearing, prior to opening statements, District may present testimony from Ms. Kellogg, Father, and other persons present in the room during the February 8, 2018 IEP lunch break, on the factual issues of who was present in the room during the break, and, in particular, when Father was in the room during the break. Student will have an opportunity to cross-examine District's witnesses on that issue, only. Student may then present additional witnesses on the same issue, and District will have an opportunity to cross-examine any witnesses presented by Student.

3. District's motions will be ruled on prior to the parties' opening statements on the remaining issues for hearing, if the ruling permits the hearing to go forward.

4. The parties shall be prepared to proceed with the hearing immediately following testimony on District's motions.

IT IS SO ORDERED.

DATE: May 02, 2018

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ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings