BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016100430
v.	ORDER FOLLOWING PREHEARING CONFERENCE AND GRANTING MOTION TO DISMISS A PORTION OF STUDENT'S ISSUES
SAN MATEO-FOSTER CITY SCHOOL DISTRICT.	

On November 4, 2016, a telephonic prehearing conference was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Parent appeared on behalf of Student. 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 and the parties' written motion and response, the ALJ issues the following order:

1. San Mateo-Foster City's Motion to Dismiss and Identification of Issues.

On October 28, 2016, San Mateo-Foster City filed a motion to dismiss Issues two through seven, as pled in Student's due process hearing complaint. The motion argued that OAH lacked jurisdiction to decide these issues. On November 3, 2016, Parent on behalf of Student filed his response to San Mateo-Foster City's motion. During the PHC, the parties argued their respective positions regarding the issues listed in his complaint. After considering arguments, the following issues remain for hearing in this matter:

Issue One: Did Student experience bully such that he was denied a free appropriate education, from April 21, 2016 to the date of hearing?

Issue Two: Did San Mateo-Foster City deny Student a FAPE from April 21, 2016, to the date of hearing, by failing to intervene appropriately in the bullying of Student?

Parent clarified that Issues two through six were duplicative of the above referenced issues and Issue seven was not an actual issue, but instead an example of the alleged denial of a FAPE. As part of Parent's proposed resolutions, he asked that OAH make a determination as to whether San Mateo-Foster City was "negligent in fulfilling its fundamental duty to protect from harm one of its students, and thereby denied the student [a] FAPE" and "whether the school should be held legally liable for any future acts of bullying

by [Student B] against [Student] in the event the District not take immediate measures to prevent said acts from occurring again." Although, Parent has not listed these as issues, he is asking for OAH to make a legal determination.

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" 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].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

"Negligence" is a legal standard that is used in tort actions and not a standard used in deciding special education cases under the IDEA. However, Student framed the remainder of the identified proposed resolution as a denial of FAPE. To address this discrepancy, the issue was reframed to fit the law by removing the standard of negligence. The only issues to be decided at the hearing are those identified above as Issue One and Issue Two. All other issues listed in the complaint filed by Parent on behalf of Student are dismissed as they are duplicative or outside of OAH's jurisdiction.

2. Hearing Dates, Times, and Location. The hearing shall take place on November 10, 2016 and November 15, 2016, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 1170 Chess Drive, Foster City, California 94404. 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.

As ordered in the scheduling order, the named local educational agency was to provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency failed to certify that it would provide a facility for this case that complied with the law. The local educational agency shall inform OAH within one day of the date of this order it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, District shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for District's legal representative and special education

representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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.

3. Proposed Resolutions. Parent's proposed resolutions from his PHC statement are summarized below.[1]

On behalf of Student, Parent requests that OAH order that San Mateo-Foster City:

a. stop the violence against Student;

b. separate Student and Student B, the student whom Parent alleges to bullied Student, by placing Student B on a separate bus and in a separate classroom from Student;

c. conduct a behavior assessment of Student and amend his IEP according to the findings of the assessment;

d. temporarily reduce Student's mainstreaming time from 23 percent to 16 percent;

e. conduct a behavior assessment of Student B and modify his IEP to correct his behavioral deficiencies;

f. provide Student B with private, professional, behavioral counseling outside of school;

g. pay for private educational/therapy sessions for Student. The cost of the therapy sessions should not exceed $6000 a year and the sessions end 12 months after they begin;

h. send a formal apology to all students at the school of attendance;

i. amend its current practices regarding bullying;

[1] Parent was informed that a number of his proposed resolutions appeared to fall outside of OAH's jurisdiction and that he should be prepared at the hearing to provide legal support to establish OAH's jurisdiction to order such remedies. No ruling was made at the time of the PHC regarding OAH's jurisdiction to order any of the proposed resolutions.

j. temporarily remove from its web page the statement, "all students will be safe, be respectful of people;"

k. convene a group parent meeting to discuss the school's recent failure to protect students' safety;

l. ask the parents of Student's classmates whether they have been victims of bullying by Student B; and

m. allow Parent access to Student B's academic records for the purpose of reviewing past aggressiveness and response by San Mateo-Foster City to it.

On behalf of Student, Parent asks that OAH make the following orders:

a. determine whether San Mateo-Foster City should be held legally liable for any future acts of bullying by Student B; and

b. review all incidents from the past 12 months to determine whether San Mateo-Foster City properly intervened and forward its findings to an independent body for review and recommendations for policy changes.

4. 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 included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. 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.

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. The District shall have witnesses available in case agreement on a witness list is not reached. 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.

5. 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.

6. Telephonic Testimony. Neither party requested to have any witnesses appear by telephone.

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.

7. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested to make an audio recording of the hearing. In the event that at a later time, either of the parties requests to make an audio recording of the hearing, and is given leave to do so by the ALJ, the following conditions shall apply: 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.

8. 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 its case-in-chief, followed by San Mateo-Foster City.

9. 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 prior to or during the prehearing conference of November 4, 2016.

10. Compensatory Education/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.

11. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

12. 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.

13. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or 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.

14. Hearing Will Be Closed to the Public. The hearing will be closed to the public unless Student requests it be open.

15. 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.

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

IT IS SO ORDERED.

DATE: November 9, 2016

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Andrea Miles
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B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings