BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016090418
v.	ORDER FOLLOWING PREHEARING CONFERENCE; GRANTING REQUEST TO CONTINUE HEARING DATES
SAN MATEO FOSTER CITY SCHOOL DISTRICT.	

On February 24, 2017, a telephonic prehearing conference was held before Administrative Law Judge Dena Coggins, Office of Administrative Hearings. Naum Morgovsky, Advocate, appeared on behalf of Student. Lenore Silverman, Attorney at Law, appeared on behalf of San Mateo Foster City School District. Melanie Larzul, Attorney at Law, and Lauren Thomas, paralegal, were present in the room with Ms. Silverman during the PHC. The PHC was recorded.

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

1. San Mateo-Foster City's Objection to Issue No. 3 in February 10, 2017 Order Following Prehearing Conference. On February 10, 2017, OAH issued an order following prehearing conference listing the issues to be heard at the due process hearing. On February 13, 2017, San Mateo-Foster City filed a written objection to the framing of the issue in the February 10, 2017 order, arguing the order expanded the scope of the issue as framed in Student's request for due process hearing. San Mateo-Foster City requested the framing of the issue in the February 10, 2017 order be corrected to reflect the issue as contained in the request for due process hearing.

In the February 14, 2017 order notifying parties of recusal, OAH vacated the February 10, 2017 order following prehearing conference. Therefore, the District's request to correct the issue as framed in the February 10, 2017 order following PHC is denied as moot, as the issues have been reframed below.

2. Student's Motion to Reschedule Date of Commencement of Due Process Hearing. On February 17, 2017, Student filed a motion to continue the first day of hearing, scheduled for February 28, 2017, to a date other than February 28, 2017. A scheduling conflict exists because Student's advocate has been ordered to appear in district court on February 28, 2017 at the same time. San Mateo-Foster City opposed the motion, and

requested the hearing commence on the afternoon of February 28, 2017, after Student's advocate's appearance in district court.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

Good cause exists to grant Student's request to continue the hearing. February 28, 2017 is vacated as the first day of hearing. The hearing will begin on **March 1, 2017**, and continue on **March 2**, and **March 7, 2017**. If additional hearing days are needed, the hearing will continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing will start at 9:30 a.m., on the first day, and 9:00 a.m., on all other days. The hearing shall take place at the Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, CA 94612.

3. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Student's Issues

Issue 1: Did San Mateo-Foster City commit the following procedural violations in the September 5, 2015 individualized education program resulting in a denial of a free appropriate public education through November 5, 2014[1]:

(a) failing to sufficiently identify the members of the IEP team in the August 28, 2014 notice of meeting;

[1] Student requested the relevant time period extend through October 2016. However, in his request for due process hearing, Student specifically alleged that the District's violations of the Individuals with Disabilities Education Act were continuous between February 27, 2014, and November 5, 2014.

(b) excluding Student's special education teacher from the IEP team and replacing her with a teacher who was unfamiliar with Student;

(c) permitting several members of the IEP team to participate in the September 5, 2015 IEP meeting by telephone without Parent's prior knowledge and without Parent's consent;

(d) predetermining Student's IEP;

(e) developing the IEP with false, misleading, and outdated present levels of performance;

(f) failing to include an adequate description of the manner in which Student's progress toward meeting her annual goals would be measured;

(g) failing to state when periodic reports on Student's progress would be provided;

(h) failing to provide measurable goals; and

(i) failing to include a statement of the special education and related services and supplementary aids and services based on peer-reviewed research to any extent they were to be provided to Student?

Issue 2: Did San Mateo-Foster City deny Student a FAPE from September 5, 2014, through November 5, 2014, by offering Student a placement at Edgewood in the September 5, 2014 IEP?

Issue 3: Did San Mateo-Foster City deny Student a FAPE, from September 5, 2014, through November 5, 2014, by failing to include Parent in the development of the referral packet and failing to remove and/or correct inaccurate, false, and misleading information from the referral packet?

Issue 4: Did San Mateo-Foster City deny Student a FAPE, from September 5, 2014, through November 5, 2014 by Edgewood's failure to provide the therapy mandated by Student's September 6, 2013 IEP and May 14, 2014 amended IEP?

Proposed Resolutions

1. An order requiring San Mateo-Foster City to reimburse Parent for any and all expenditures necessary for Student to attend California Virtual Academy for the 2014-2015 school year.

2. An order requiring San Mateo-Foster City to reimburse Parent for tuition paid to Esther B. Clark School for the 2015-2016 school year.

3. An order requiring San Mateo-Foster City to provide compensatory therapy to Student.

4. An order requiring San Mateo-Foster City to discontinue its discriminatory policies in violation of section 504 and other provisions of the Americans with Disabilities Act.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties are to use different colored binders for the convenience of the witnesses. 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 timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

By noon on February 27, 2017, Student will provide the District with a detailed table of contents to allow the District to add tabs to Student's exhibit binder, previously provided to the District. Student's table of contents provided to the District shall reflect only one single document per exhibit tab, with the exception of an email chain with the same subject line.

5. 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. Neither party shall be permitted to call any witnesses not timely disclosed, unless the ALJ rules the witness may testify.

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.

By 5:00 p.m., on February 27, 2017, the parties are to meet and confer regarding the order of witnesses and the projected length of testimony to ensure the best use of hearing time. 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. 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.

6. 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.

7. Telephonic Testimony. Student requested Christopher Harris, Jody Miller, and Amy Tsai, representatives from Esther B. Clark, appear telephonically due to their geographic proximity from the hearing location. San Mateo-Foster City opposed the request.

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.

Student's motion to allow Christopher Harris, Jody Miller, and Amy Tsai testify telephonically is granted. Student shall provide the telephonic witnesses with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing.

8. Electronic Recording of Hearing.

a. Audio Recording. Student's and San Mateo-Foster City's 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; 3) anytime the parties leave the hearing room they must take the recording device with them; and 4) 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.

9. 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.

10. Motions. Student orally moved for OAH to deem the December 30, 2016 order granting motion to dismiss and: (1) dismissing issues 1,4 and 5 in their entireity, and (2) dismissing those portions of issues 2 and 6 beyond the two-year statute of limitations void. Student must file a written motion to support his request that OAH deem the order void **by noon on February 27, 2017**. Any response from the District must be in writing and submitted before the commencement of the hearing.

No other 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 February 24, 2017.

11. 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.

12. 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.

13. 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.

14. 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.

Student requested OAH issue a document excusing Parent from work on the hearing days. This order provides the dates the hearing will take place, and Parent can share those dates with her employer. Parent may attend any or all of the hearing dates if she so chooses.

15. Hearing Closed To the Public. The hearing will be closed to the public unless Student requests it be open.

16. 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.

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

IT IS SO ORDERED.

DATE: February 28, 2017

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DENA COGGINS
Administrative Law Judge
Office of Administrative Hearings