

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
M.G., *et al.*

Plaintiffs,

-against-

13-cv-4639 (SAS)

NEW YORK CITY DEPARTMENT OF EDUCATION,

et al.,

Defendants.
----- x

**STIPULATION OF
CONFIDENTIALITY AND
PROTECTIVE ORDER**

WHEREAS the plaintiffs in the above-captioned action ("Plaintiffs") submit that they have filed this action using initials to protect their identities from public disclosure;

WHEREAS the parties agree that the nature of this case will require the parties to seek and produce documents and information, including documents and information concerning Plaintiffs and non-parties, and to elicit deposition testimony that the parties believe to be confidential;

WHEREAS the parties agree that entry of a confidentiality stipulation and protective order limiting disclosure of such materials as provided herein is necessary to assure appropriate protection of privacy interests and other legitimate interests in confidentiality;

WHEREAS good cause exists for the entry of such an order;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by, between, and among the parties to this Stipulation of Confidentiality and Protective Order (the "Stipulation and Protective Order") -- Plaintiffs; defendants New York City Department of Education ("NYCDOE"), New York City Board of Education. and Carmen Fariña, in her official

capacity as Chancellor of the New York City School District (collectively, the "City Defendants"); and defendants New York State Education Department ("NYSED") and Commissioner John B. King, in his official capacity as Commissioner of the New York State Education Department¹ (collectively, the "State Defendants") -- through their respective counsel, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, as follows:

1. This Stipulation and Protective Order shall apply to all information and/or materials produced and/or disclosed during the course of the Litigation and in relation to the Litigation by any party or non-party, including but not limited to information produced or disclosed:
 - (a) In any pleading, letter, memorandum of law, affidavit, affirmation, declaration, interrogatory answer, responses to requests for admission, brief, motion, transcript, or any other document or writing;
 - (b) In any statement made by counsel in a court hearing and before the Court during any appearance that is recorded or is open to the public;
 - (c) In testimony given in a deposition, court hearing, or trial, and any copies, or summaries of such information; or
 - (d) Through releases, discovery requests, subpoenas or any manner or means of discovery, including entry onto land or premises and inspection of books, records, documents, and tangible things.

2. As used herein, the term "Discovery Material" refers to that information and/or materials described in Paragraph 1 above. A party that designates Discovery Material as Confidential ("Confidential Material") is the "Designating Party."

3. As used herein, the term "Litigation" refers to all proceedings in the above-captioned action, including any motions, hearings, trials, appeals and/or the implementation of any remedy agreed to by the parties or ordered by the Court.

¹ Dr. King resigned as Commissioner of Education effective January 2, 2015.

4. Subject to Paragraph 18 below, the following documents and information produced, provided by, or used by the parties or non-parties during the course of this action, shall be designated as Confidential Material and shall be treated by all parties as Confidential Material²:

- (a) All Education Records³, other student records, and all documents and things, whether or not also education records or student records, that contain identifying information about Plaintiffs or any current or former child with a disability⁴ who resides in New York City or any of their family members, including but not limited to name, address, social security number, Medicaid number, phone number, New York City Identification (IDNYC) number, or Office of Student Information System (OSIS) number, or any other personally identifiable information as that term is defined pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 C.F.R. Part 99;
- (b) all documents and information containing personal health or disability information of any party hereto, or any other person, including but not limited to such documents and information covered by the IDEA, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and such records disclosed by a party or non-party pursuant to any Authorization to Release Medical Records executed by the Plaintiffs or non-parties in this action;
- (c) all documents and information containing mental health or psychiatric information of any party hereto, or any other person, including but not limited to documents and information covered by HIPAA and records disclosed by a party or non-party pursuant to any Authorization to Release Psychotherapy Notes executed by the Plaintiffs or non-parties in this action; and
- (d) any documents and information which counsel for all parties agree should be Confidential Material pursuant to this Paragraph 4;
- (e) any Discovery Material that the Court directs to be produced as Confidential subject to this Paragraph 4 of the Stipulation and Protective Order; and
- (f) testimony about the documents and information covered by Paragraph 4(a)-(e).

² Confidential Material does not include statistical compilations unless they are so designated pursuant to Paragraphs 4(d)-(e) and/or 5 of this Stipulation and Protective Order.

³ The term "Education Records" means the type of records covered by 34 C.F.R. Part 99 and 34 C.F.R. §§ 300.611 through 300.625 for education records.

⁴ The term "current or former child with a disability" means an individual who is or was eligible for special education services under the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*

5. The following documents and information produced or provided by the parties or non-parties during the course of this action, except information which is publicly available, may be designated by any party as Confidential Material:

- (a) all documents and information that relate to the personnel records, reviews, or evaluations for any individual employee or employees of the State Defendants or the City Defendants;
- (b) all documents and information relating to the private, personal, and non-public information of parties and/or non-parties to the Litigation, except that any such documents covered by paragraph 4 above are independently subject to the provisions of paragraph 4; and
- (c) any other documents and/or information which counsel believes in good faith to be Confidential Material that can be protected from disclosure pursuant to Federal Rule of Civil Procedure 26(c).

6. To designate the Discovery Material as Confidential, the party producing the Confidential Material (the "Producing Party") shall mark the document with the words "CONFIDENTIAL," "CONFIDENTIAL – SUBJECT TO STIPULATION OF CONFIDENTIALITY AND PROTECTIVE ORDER," or with a similar legend. So-marked documents and the information contained therein, shall not be disclosed to anyone by the party receiving the Confidential Material ("the Receiving Party"), except as provided in this Stipulation and Protective Order or in any order of the Court. The designation of Discovery Material as Confidential constitutes a representation by the Producing Party that counsel has adequately reviewed the Discovery Material and has determined that there is good cause for the designation under this Stipulation and Protective Order.

7. Any party, through its attorney, may designate as Confidential any deposition testimony that the attorney believes in good faith discusses or discloses Confidential Material, except that, subject to Paragraph 18 below, all depositions containing information described in Paragraph 4 shall be deemed Confidential Material. Such designation may be made orally on the

record of a deposition or by written notice within 30 days from the receipt of the final (*i.e.*, not "draft" or "rough") transcript. The court reporter shall be notified of any confidentiality designations made after the final transcript is sent to the parties. Upon receipt of a confidentiality designation, all parties in possession of the deposition transcript shall be required to mark the designated pages accordingly on all copies of the transcript and treat those pages of the transcript appropriately. Subject to any requirements of the Court, the reporter for any deposition or hearing shall affix a legend of "CONFIDENTIAL," to pages that contain testimony designated as such. All transcripts shall be treated as "CONFIDENTIAL," until the time to designate has expired.

8. In the event that any party obtains documents or information from a party or non-party that it believes are confidential, any party may designate such documents or information as Confidential Material pursuant to this Stipulation and Protective Order and it shall be treated as such in accordance with this Stipulation and Protective Order.

9. Any person making copies of Confidential Material must ensure that the copies adequately reflect the "Confidential" designation.

10. In the event of a disclosure to an unauthorized party of information designated under this Stipulation and Protective Order as Confidential, the disclosing party shall without delay (a) notify the Producing Party of the disclosure; (b) without delay take all reasonable steps to recover the document, material or other information, and (c) report to the Producing Party immediately upon recovery or failure to recover the Confidential Material.

11. Subject to the other provisions of this Stipulation and Protective Order and subject to each party's independent obligations to maintain the confidentiality of any Confidential

Material produced or disclosed in this Litigation, any party asserting that any such Confidential Material must be used solely for purposes of this Litigation must apply to the Court on notice to all parties for an order to that effect and, upon the making of such an application, it may not be used for any other purpose pending further order of the Court. Notwithstanding the foregoing, the parties may use such Confidential Material in any individual due process hearing or appeal therefrom under the IDEA or the New York Education Law or any court action concerning special education services to the child who is the subject of that hearing or appeal.

12. All Confidential Material shall be maintained by the Receiving Party in a confidential manner, and shall not be given, shown, or described to any persons other than those described in Paragraph 13, and only pursuant to the procedures in Paragraph 14.

13. Unless otherwise ordered by the Court or agreed to by the Parties in writing, Confidential Material, including information contained in the Confidential Material or testimony concerning the Confidential Material, may be disclosed by the Receiving Party only to:

- (a) counsel to the parties in the above-captioned action (including in-house counsel for the State Defendants and the City Defendants) and the attorneys, legal assistants, paralegal, clerical, and other support staff who are employed by such counsel or are independent contractors of counsel and who are actually involved in assisting in the Litigation;
- (b) the parties to this Litigation and officers or employees of any named party who are either required by such party or requested by counsel to assist in the prosecution or defense of the Litigation;
- (c) any expert or consultant who has been retained by any party or its counsel for purposes of the Litigation, and any necessary assistants or employees under the expert's or consultant's direct supervision;

- (d) for purposes of investigation, preparation, deposition, or trial in this action only, any deponent, witness, or potential deponent or potential witness who authored or otherwise had or should have had access to, familiarity with, or knowledge of the facts and circumstances to which the Confidential Material relates, including but not limited to current or former employees of the State Defendants or the City Defendants;
- (e) the Court, subject to Paragraph 15 below;
- (f) court reporters, as necessary for the conduct of the Litigation;
- (g) any other person pursuant to Court order, or upon the written agreement of the party or non-party who produced or disclosed the Confidential Material, except that (i) subject to Paragraph 18 below, and absent a court order, the disclosure pursuant to this sub-paragraph 13(g) of any document covered by Paragraph 4 above also requires the permission of the (a) individual Parent or guardian or (b) student or former student, if they are over the age of minority, as to whom the Confidential Material pertains; and (ii) individual Plaintiffs and other children with disabilities, and their Parents, guardians and counsel, who receive from the City Defendants and/or State Defendants through this Litigation their own Education Records and/or their own other documents are not restricted in the use of those documents in any manner including but not limited to pursuant to this paragraph, except for any manner otherwise required by law; and
- (h) any non-named class members after any classes are certified

14. Prior to the disclosure of any Confidential Material by a Receiving Party to a person identified in subparagraphs 13(c), or (d), or (g), or (h), who is not also identified in another subparagraph of paragraph 13, counsel for the party proposing to make such disclosure shall ensure that a copy of this Stipulation and Protective Order has been delivered to such person, and shall obtain that person's written agreement to be bound by the terms of this Stipulation and Protective Order and consent to the Court's jurisdiction for the purpose of enforcing this Stipulation and Protective Order in the form of the Non-Disclosure Agreement annexed hereto as Exhibit A. Counsel of record shall maintain a list of the names of all persons to whom such materials or information is disclosed and such list shall be available for inspection by counsel for the party claiming confidentiality upon order of the Court following a showing of good cause.

15. No Confidential Material shall be filed in the record of this Litigation or with the Court except as follows:

- (a) Except upon agreement of all parties, if a party uses any Confidential Material covered by Paragraph 4 above (subject to Paragraph 18 below), in a pleading, motion, letter, or other submission filed with the Court, such Confidential Material covered by Paragraph 4 shall be filed under seal upon order of the Court before it is filed with the Court or used in any manner that may make it accessible to the public, except that such Confidential Material covered by Paragraph 4 may be submitted to the Court as necessary for purposes of reviewing documents on an *in camera* basis.
- (b) If a party uses any Confidential Material not covered by Paragraph 4 in a pleading, motion, letter or other submission filed with the Court, the party using the Confidential Material shall redact such Confidential Material from the submission filed in the public file, but will provide an un-redacted complete courtesy copy to the judge or magistrate judge herein with a request that the courtesy copy not be included in the public file. If redaction of only the Confidential Material as set out above would be both significantly impractical and likely to be unduly burdensome, the filing party may request an order from the Court directing the sealing of such Confidential Material, or placing the entire pleading, motion or submission under seal, provided, however, that any delay in filing occasioned by the need for such a court order shall not result in a default by the party seeking such order or otherwise prejudice the party's rights.

- (c) Subject to Paragraph 18 below, the parties agree that they shall request that the Court seal the courtroom in any situation in which a party intends to use or elicits testimony concerning Confidential Material covered by Paragraph 4 above at trial or in open court on any occasion in a manner that will disclose the identity of any individual or any personally identifiable information (as defined in Paragraph 4 above) contained in that Confidential Material, unless permission to so disclose is obtained from the individual Plaintiff or non-party whose information would be disclosed. For all other Confidential Material, the party intending to so use Confidential Material shall take all steps reasonably required to protect the material's confidentiality during such use. Subject to any contrary directive from the Court, such party will notify the Producing Party and, if different, the party which designated the Confidential Material as Confidential of his or her intent to introduce Confidential Material and give that party an opportunity to request that the Court seal the courtroom. Nothing herein shall preclude a party from offering Confidential Material into evidence or otherwise alter its trial strategy. Nothing contained herein shall be deemed to restrict the Court's handling of Confidential Material or to cause a party to be in breach of this Stipulation and Protective Order when acting in compliance with an order or direction of the Court.
- (d) Any delay in filing occasioned by the need for such a court order described in this Paragraph 15 directing the sealing of Confidential Material, or placing the entire pleading, motion, or submission under seal, shall not result in a default by the party seeking such order or otherwise prejudice any party's rights.

16. Nothing in this Stipulation and Protective Order shall be construed to limit, modify, or interfere in any manner with:
- (a) The disclosure obligations of the State Defendants and/or the City Defendants under the New York Freedom of Information Law ("FOIL"), New York Public Officers Law Article 6, and related state law, regulations, and judicial decisions;
 - (b) The interpretation, application, and implementation by the State Defendants and/or the City Defendants, their public access officers, and state courts, of FOIL and related state law, regulations, and judicial decisions as well as other laws and regulations, such as FERPA;
 - (c) State Defendants' and/or City Defendants', or any of their employees' or officials', use in the ordinary course of business and as permitted by law outside of this Litigation of documents and information designated as Confidential Material in this Litigation that they legally have in their possession and which were not received through discovery in this Litigation or through releases or authorizations signed by Plaintiffs;
 - (d) State Defendants' and/or City Defendants', or any of their employees' or officials', use of their own Confidential Material and/or Discovery Material other than, subject to Paragraph 18 below, any documents covered by Paragraph 4 above. (Notwithstanding any provision set forth herein, any Defendant may use without restriction information that is in its possession by means other than receipt of a production pursuant to this Stipulation and Protective Order, except that, subject to Paragraph 18 below, Defendants are bound by this Stipulation and Protective Order with respect to any document covered by Paragraph 4 above, and are otherwise bound by any applicable rule or law regarding confidential treatment of such Confidential Material and/or Discovery Material used in this Litigation.); or
 - (e) Any Plaintiffs' or current or former child with a disability's use of his or her own Education Records and/or his or her own other documents that constitute Confidential Material covered by Paragraph 4 above. (Notwithstanding any provision set forth herein, any Plaintiff or non-party may use without restriction information that is in its possession by means other than receipt of a production pursuant to this Stipulation and Protective Order, except that Plaintiffs and non-parties are bound by any applicable rule or law regarding confidential treatment of such Confidential Material and/or Discovery Material used in this Litigation.)
17. Inadvertent failure to appropriately designate a document as Confidential shall not be deemed a waiver of a party's claim of confidentiality. Such inadvertent failure to designate

may be corrected by written notice to the other parties and a supplemental production, each given as soon as practicable. Thereafter, the disclosed document or information shall be treated as Confidential Material.

18. A Confidentiality designation by one party shall not be deemed an acknowledgment of confidentiality by any other party except for purposes of this Stipulation and Protective Order. At any time, a party may object to a Confidential designation of Discovery Material (including any such designation pursuant to Paragraph 4 above), in whole or in part, by communicating the objection in writing to the Designating Party and stating the reasons for the objection. Within fourteen (14) days after receiving an objection, the Designating Party shall respond in writing to the objecting party, either withdrawing the designation or providing the reasons why the designation will not be withdrawn. If the objecting party is not satisfied with the response, it may then move the Court for an order that the Confidential designation be removed. The party designating the material as Confidential shall bear the burden of establishing the confidentiality of the material at issue. The Discovery Material shall continue to be treated as Confidential while such a motion is pending. Any party may request an *in camera* review of the information that is the subject of a dispute regarding a confidentiality designation.

19. This Stipulation and Protective Order does not preclude a party from raising or preserving objections to discovery and does not waive any party's right to assert attorney-client privilege, attorney work product doctrine, or any other privilege or immunity as the Litigation proceeds.

20. This Stipulation and Protective Order does not require production of documents as to which objections or privileges apply.

21. The inadvertent or unintentional disclosure of Confidential Material or documents without the "Confidential" designation shall not be deemed a waiver of confidentiality by the Producing Party, either as to the specific information disclosed or as to any other information on the same or related subject matter. A party's inadvertent or unintentional production to a Receiving Party during the course of this Litigation of Confidential Material or documents without the "Confidential" designation shall not be deemed a violation of Paragraph 4 above or any other provision of this Stipulation and Protective Order. A party's production to a Receiving Party during the course of this Litigation of Discovery Material without the "Confidential" designation that counsel believes in good faith is not Confidential Material (including pursuant to Paragraph 4 above) shall not be deemed a violation of Paragraph 4 above or any other provision of this Stipulation and Protective Order. The inadvertent or unintentional production and/or disclosure of Confidential Material and/or documents may be corrected by providing supplemental written notice to the Receiving Party as soon as practicable. Thereafter, the inadvertently disclosed item or information shall be treated as Confidential.

22. Fed. R. Civ. P 26(b)(5)(B) shall govern the return and use of materials produced in discovery which are subject to a claim of privilege or of protection as trial preparation material and the determination of claims of privilege and/or protection regarding such documents.

23. Disclosure in the pending case of documents or information that is privileged or constitutes protected attorney work product does not waive the privilege or work product protection in that case or in any other state or federal proceeding.

24. The Defendants agree that no Plaintiff, parent, or child with a disability has waived any right to maintain confidentiality of their documents and records that are otherwise

protected under FERPA, the IDEA, HIPAA or New York State law due to their participation in the Litigation.

25. The parties agree to adhere to the suggested requirements and procedures set forth in Rule B (Document Production) of the Court's Suggested Rules of Discovery Practice.

26. If any party is served with a subpoena or other notice in another proceeding or from a regulatory or other governmental agency requesting or compelling the production of materials produced by another party and designated as Confidential, the party so requested shall give immediate written notice to the party that has designated such material as Confidential (the "Designating Party") of such subpoena or other notice. Upon receipt of such notice, the Designating Party so notified shall bear the burden of opposing, if appropriate, the subpoena or other notice on grounds of confidentiality. In no event shall production or disclosure be made before reasonable notice is given to the Designating Party.

27. Within thirty (30) days of the final conclusion of this Litigation, including any post-trial motions or appellate proceedings, upon request of counsel, all matter designated as Confidential (including all copies of the same documents or identifiable portions thereof and all documents reflecting the documents or their contents) that has been produced by another party shall be returned promptly by the Receiving Party to the Producing Party, or, in lieu of their return, they may be destroyed (as by shredding) and the destruction of all such documents (except those returned) promptly certified by the Receiving Party, who shall notify the Producing Party in writing promptly of such destruction. *However*, counsel may retain their work product, copies of court filings and official transcripts and exhibits, or documents that they are otherwise entitled to retain by law, provided any and all retained documents that had been received by

another party or non-party through the course of this litigation and designated as Confidential pursuant to this Stipulation and Protective Order are treated pursuant to the terms of the Stipulation and Protective Order.

28. Non-parties from whom discovery is sought by the parties to this Stipulation and Protective Order may designate materials as Confidential, consistent with the terms of this Stipulation and Protective Order, provided that such non-parties agree in writing to be bound by the terms of this Stipulation and Protective Order prior to the production of any such materials by executing the Non-Disclosure Agreement annexed hereto as Exhibit A. Under such circumstances, all duties applicable to the parties that are signatories to this Stipulation and Protective Order shall apply to such non-parties.

29. This Stipulation and Protective Order is intended to be contractual in nature and may not be modified or changed orally. All changes or modifications shall be made in writing executed by the parties.

30. The foregoing is without prejudice to the right of the parties to apply to the Court for a further protective order relating to any documents and/or information provided pursuant to this Stipulation and Protective Order.

31. This Stipulation and Protective Order shall become effective as to the parties upon complete execution by the counsel for the parties below. Counsel for the parties executing this Stipulation and Protective Order represent and warrant that he or she has the authority to execute this Stipulation and Protective Order on behalf of his or her client(s) and to bind his or her clients to the terms and conditions of this Stipulation and Protective Order set forth herewith.

32. Nothing in this Stipulation and Protective Order shall prejudice the rights of any party to contest the alleged relevance, admissibility, or discoverability of any Confidential Material and/or Discovery Material sought.

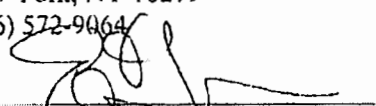
33. Nothing in this Stipulation and Protective Order shall negate or obviate any requirement or obligation of confidentiality independent of this Stipulation and Protective Order, including but not limited to the provisions of FERPA, 20 U.S.C. § 1232g(b); the IDEA, HIPAA, 20 U.S.C. § 1417(c); 34 C.F.R. §§ 99.32, 300.602(b)(3), 300.622(a), 300.623(a), 300.614; N.Y. Educ. Law § 4402(7)(b); 8 N.Y.C.R.R. § 200.5(e).

34. The parties reserve the right to seek modification of this Stipulation and Protective Order by application to the Court for good cause shown.

35. Until such time as this Stipulation and Protective Order has been entered by the Court, the parties agree that upon execution by the parties, the parties will treat this Stipulation and Protective Order as though it had been "So Ordered."

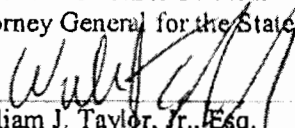
Dated: New York, New York
May 1, 2015

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Dated: New York, New York
May 1, 2015

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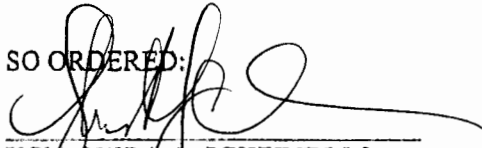
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Dated: New York, New York
May 1, 2015

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SO ORDERED:


HON. SHIRA A. SCHEINDLIN
U.S. DISTRICT JUDGE

enc 5/4/15

EXHIBIT A

I, _____, the undersigned, hereby certify that I have read and understood the Stipulation of Confidentiality and Protective Order (the "Stipulation and Protective Order") dated May __, 2015 and entered in the United States District Court for the Southern District of New York in the action entitled *M.G. v. The New York City Department of Education, et al.*, 13 Civ. 4639 (SAS), and I hereby agrees to abide by the terms and conditions of that Stipulation and Protective Order. I understand that Confidential Material and any copies, notes or other records that may be made regarding Confidential Material shall not be used by me or disclosed to others, except in conformity with this Stipulation and Protective Order, and that I may be held in contempt of court if I violate the terms of the Stipulation and Protective Order.

Dated: _____

Signature

Name (Printed)

Sworn to before me this ___ day
of _____, 20__.

NOTARY PUBLIC