BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT,	OAH Case No. 2018070108
TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018081019 ORDER FOLLOWING PREHEARING CONFERENCE

On September 17, 2018, a telephonic prehearing conference was held before Administrative Law Judge Linda Johnson, Office of Administrative Hearings. Wendy Housman, Attorney at Law, appeared on behalf of Student. Amy Rogers, Attorney at Law, appeared on behalf of Temecula Valley Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on September 25, 26, and 27, 2018, and October 2, and 3, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Temecula Valley Unified School District's offices located at 31350 Rancho Vista Road, Temecula, California 92592. 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.

State and federal law require a local education agency to respond to a due process complaint within 10 days of receiving the complaint. (Ed. Code, § 56502, subd. (d)(2)(A); 20 USC § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508.); *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) Temecula filed its response to Student's complaint on July 12, 2018, which permits the hearing to go forward.

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 two days 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, Temecula 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 Temecula's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Temecula 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.

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

Student's Issues[1]:

(1) Did Temecula deny Student a free appropriate public education by failing to properly assess her in all areas of suspected disability in its Fall 2017 triennial assessment by inappropriately identifying Student's unique academic, communication, and social and emotional needs and improperly exiting her from special education, specifically:

(a) By failing to properly assess Student during the triennial testing in Fall 2017 by using inappropriate and incomplete analyses of the testing data, mis-scoring tests, omitting numerous subtests, failing to properly interpret testing data consistent with the author's instructions and yielding invalid results, failing to take into account Student's unsuccessful response to intervention and

[1] The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

During the PHC OAH granted Temecula's motion to dismiss Student's issue six.

history of inadequate achievement to inappropriately find that Student no longer qualified for special education services;

(b) By misrepresenting Student's present levels of performance at the November 2, 2017 IEP team meeting by incorrectly reporting that Student was making passing grades therefore able to access grade level curriculum despite having a language based disability including definitive processing deficits;

(c) By failing to timely and/or appropriately assess Student in all areas of suspected disability including the areas of auditory processing and communication, failing to perform requisite follow up testing or reassessment in the area of vision information processing, or assessing in the area of social emotional functioning?

(2) Did Temecula deny Student a FAPE during the 2017 triennial individualized education program team meeting when individual IEP team members failed to give independent consideration of Student's eligibility, failing to appropriately weigh all statutory factors as to Student's specific learning disability disabling category, and uncritically adopting the assessor's recommendations to deny Student special education eligibility?

(3) Did Temecula deny Student a FAPE by failing to properly implement or timely revise, when appropriate, pertinent portions of Student's IEP during the 2016/2017 and 2017/2018 school years?

(4) Did Temecula deny Student a FAPE by failing to file for due process when Student's Parents did not consent to Student's IEPs between June 2016 through Fall 2017?

(5) Did Temecula deny Student a FAPE by intentionally or improperly inflating Student's grades to reflect passing grades and determine she did not need special education and related services to be able to access grade level curriculum?

Student's Proposed Resolutions:

Student seeks an order that she was improperly exited from special education and continues to meet eligibility criteria for special education, reimbursement for New Bridge nonpublic school's summer program, prospective placement at New Bridge nonpublic school with transportation, reimbursement expenses and transportation, independent educational evaluations in assistive technology

and educationally related mental health services, compensatory education, and training for Temecula staff.

Temecula's Issue:

Does Temecula's November 2, 2017 multidisciplinary assessment, that was amended on June 1, 2018, meet all legal requirements such that Student is not entitled to an independent educational evaluation at public expense?

Temecula's Proposed Resolution:

Temecula seeks an order that its November 2, 2017 multidisciplinary assessment, that was amended on June 1, 2018, met all legal requirements and that Student is not entitled to an independent educational evaluation at public expense

3. 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 Temecula Valley Unified School 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.

If the parties intend to rely on IEPs, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence. That portion of the audio record transcribed shall be provided to the opposing party along with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter.

Temecula shall include in its exhibits, the school calendar(s) for each school year (including extended school year) at issue.

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. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties shall meet and confer by **5:00 p.m. on September 21, 2018**, regarding the schedule of witnesses for the hearing. The parties are to coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled. The parties shall discuss a time estimate for the length of each witness' direct and cross examination testimony, and identify those witnesses the party no longer intends to call.

On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with one detailed hour-by-hour schedule of all witnesses expected to testify at the hearing. The list shall also include an estimate of time for each party's direct and cross-examination. The ALJ has discretion to revise the witness schedule, as needed to maintain the flow and efficiency of the hearing. The parties shall be prepared at the end of each day of hearing to discuss the witnesses appearing on the next day and the time the testimony of each such witness is expected to take.

Temecula shall also provide a meeting room for Student's representatives to be available a half hour prior to the start of the hearing, during hearing breaks, and during the lunch break.

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.

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. 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. Parties' motion to make an audio recording of the hearing is 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, 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, both Student and Temecula filed for a due process hearing, but Student's case is lead. Accordingly, Student shall present her case-in-chief, followed by Temecula.

9. Motions.

Temecula's Motion to Dismiss Student's Issues Five and Six

On September 13, 2018, Temecula filed a motion to dismiss issues five and six from Student's complaint on the basis that they are outside OAH's jurisdiction. Student opposed Temecula's motion to dismiss issue five, but did not opposed the motion to dismiss issue six.

Although OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction (e.g., civil rights claims, section 504 claims, enforcement of settlement agreements, incorrect parties, etc…..), special education law does not provide for a summary judgment procedure.

Here, Temecula argues OAH does not have jurisdiction to hear issue five because it is a challenge to Student's grades or Temecula's grading policy. Student alleged a denial of FAPE on the basis that Temecula inflated Student's grades to show she was accessing grade level curriculum. During the PHC Student argued she was not challenging Temecula's grading policy or asking that OAH change Student's grade but was alleging that the improper grading amounted to a denial of FAPE. Student is alleging a denial of FAPE therefore OAH has jurisdiction to hear the issue. Temecula's motion to dismiss issue five is denied.

Temecula argues that OAH does not have jurisdiction to hear issue six because it is an allegation that Temecula should have provided Student a 504 Plan. Student does not oppose

this motion to dismiss. OAH does not have jurisdiction to hear section 504 claims. Temecula's motion to dismiss issue six is granted.

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 three days prior to the prehearing conference on September 17, 2018.

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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Open to the Public. At the request of Student, the hearing will be open to the public.

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 **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.applications.dgs.ca.gov/oah/oahsftweb**.**

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: September 17, 2018

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Linda Johnson
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LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings