BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018060323
v.	ORDER FOLLOWING PREHEARING CONFERENCE, AND DENYING DISTRICT'S MOTION FOR CONTINUANCE
GOLETA UNIFIED SCHOOL DISTRICT.	

On October 5, 2018, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. Attorney David German appeared on behalf of Student. Attorney Melissa Hatch appeared on behalf of Goleta Unified School District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Goleta's Request for Continuance. Student filed his complaint on June 1, 2018. Student alleged Goleta's May 31, 2018 individualized education program offer for Student's 2018-2019 third grade school year denied him a free appropriate public education by reducing his time in general education, thereby failing to offer him placement in the least restrictive environment appropriate for his needs. On June 27, 2018, hearing of the matter was continued to October16, 2018 at the parties' joint request. On October 4, 2018, Goleta filed a motion to further continue hearing of this matter until mid-November, 2018. Goleta based its motion on the unavailability of Student's second grade special education teacher, due to medical issues. Student waived written briefing, and the parties argued Goleta's motion on the record at the PHC.

Goleta contended it would be prejudiced if required to defend the matter without testimony from Student's second grade special education teacher, primarily because of her familiarity with the modifications made to Student's curriculum and classroom materials in second grade, and with the services provided by Student's inclusion support specialist from a non-public agency. Student contended Goleta would not be significantly prejudiced, because Student's complaint did not challenge his second grade placement and services, and Student's second and third grade general education teachers, his third grade special education teacher, and others, were available to testify concerning Students ability to make progress in the general education environment. Both attorneys were unavailable for a continued hearing until at least November 22, 2018, and Goleta was uncertain whether Student's second grade teacher would be available even at that time.

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).)

Given the availability of other Goleta personnel familiar with Student and his ability to make progress in a general education environment, Goleta did not demonstrate that the testimony of Student's second grade teacher was essential to Goleta's defense of its May 31, 2018 FAPE offer to Student. Student's complaint was filed four months ago, and a further five- week continuance will not ensure the witness' testimony. Under the circumstances, a further continuance is not warranted, and Goleta's request for a continuance of the hearing dates is denied.

2. Hearing Dates, Times, and Location. The hearing shall take place on October 16, 17, 18, and 22, 2018, and continue day to day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Goleta Union School District, 401 North Fairview Ave., Goleta, CA 93117. The hearing will commence at 9:30 a.m. on October 16, 2018, and at 9:00 a.m. on all other days, unless otherwise ordered.

As ordered in the scheduling order, Goleta 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. Goleta failed to certify that it would provide a facility for this case that complied with the law. Goleta 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, Goleta 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 Goleta' legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Goleta shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

Goleta shall provide Student reasonable access to a room in which Parents and counsel can communicate confidentially during breaks in the hearing.

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. Student's Issues and Proposed Resolutions. Student's issue to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, is:

> Did Goleta deny Student a free appropriate public education in Student's May 31, 2018 individualized education program, by offering Student a more restrictive program and placement than his prior IEP under which he was making progress, thereby failing to offer Student a program and placement in the least restrictive environment appropriate to meet his needs?

Student's Proposed Resolutions: An order finding Student to be the prevailing party on all issues, and directing Goleta to:

(1) Provide Student full-time placement in a general educational classroom with: an appropriately modified curriculum; an individual instructional assistant trained in inclusion best practices; four hours a week of in-class support and consultation from an independent inclusion expert; and four hours a week of individual academic instruction through an non-public agency; and

(2) Reimburse Parents for the costs, including transportation costs, of any services, interventions, programs, therapies, and assessments found to be necessary and appropriate to meet Student's, and obtained at private expense.

3. Exhibits. Student identified five exhibits, plus witness resumes, that Student intends to present at hearing. Goleta identified nine exhibits, plus witness resumes, that Goleta intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall place a single exhibit behind each binder tab, except where it would be more efficient at hearing to have category of documents behind a single tab; as with, for example, resumes organized alphabetically, receipts, or email strings on a single subject, and shall place the exhibits in chronological order, generally. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., Goleta shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own

copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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. Each party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination.

4. Witnesses. Student identified 28 percipient witnesses and three expert witnesses whom Student intended to present at hearing. Goleta identified 13 percipient witnesses, and no expert witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Goleta agreed to make witnesses under its control reasonably available to Student without the need for subpoena. Goleta will also inform Student of the identity of, and available contact information (including last known address) for any witness identified by Student as an employee of Goleta who has left Goleta' employ, by 5:00 p.m. on Wednesday, October 10, 2018. The parties will 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.

5. Timely Disclosure of Exhibits and Witnesses. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five business days prior to the hearing, a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing. The parties shall exchange copies of their final witness lists and exhibit binders on or before 5:00 p.m. on Tuesday, October 9, 2018.

Except for good cause shown, witnesses and documents not disclosed by that time may be excluded at the request of the other party from introduction at the hearing. Each party reserves the right to present additional witness and documents for purposes of rebuttal or impeachment.

a. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Thursday, October 11, 2018, at 5:30 p.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to Goleta' counsel to initiate the meet and confer. The parties shall 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 of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

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. Student shall have witnesses available in case agreement on a witness list is not reached. On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ a written hour-by-hour schedule of all witnesses expected to testify at the hearing, which list shall include an estimate of time for each party's direct and cross-examination. The ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses and the ALJ will finalize the witness schedule. 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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. 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. 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 witness testifies from a private location with no other persons present, on a landline or by other means allowing a clear two-way connection. The hearing room shall have 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.

8. Electronic Recording of Hearing.

a. Audio Recording. Student's request for leave to make an audio recording of the hearing is granted, subject to the following conditions: (1) OAH's recording is the only official recording; (2) 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) the tape recording will not be shared with any witness or third parties; and (4) operation of the party's recording mechanism will not be allowed to delay the hearing. Goleta may also make an audio recording under the same conditions.

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 Student's case-in-chief, followed by Goleta.

10. Motions. The parties indicated that they were not contemplating any additional prehearing motions. In the event that any motion, other than a challenge to a newly-assigned ALJ for the hearing, is brought after this date, it 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 PHC.

12. 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.

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

14. 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.

15. Special Needs and Accommodations. Neither party requested any accommodations for a party or witness in this matter. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

16. Hearing Closed To the Public. The hearing will be closed to the public.

17. 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.dgsapps.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.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: October 5, 2018

DocuSigned by:

ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings