BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016050013
v.	ORDER FOLLOWING PREHEARING CONFERENCE AND DISMISSING A PORTION OF STUDENT'S ISSUES FOR LACK OF JURISDICTION
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.	

On June 10, 2016, a telephonic prehearing conference was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Maureen Tabari, Attorney at Law, appeared on behalf of Student. Jessi Gasbarro, Attorney at Law, appeared on behalf of Sacramento City 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 June 16, 20, 21, 22, and 23, 2016, at the District's offices located at 5735 47th Avenue, Sacramento, California 95824. 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 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, 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.

2. Sacramento City's Motion to Dismiss Three of Student's Issues.

On June 7, 2016, Sacramento City filed a motion to dismiss Student's issues A(5), B(8), and G from Student's complaint for a lack of jurisdiction. In Student's PHC statement, she renumbered those issues as 1(e), 2(h), and 7. During the PHC, Student was provided the opportunity to be heard regarding the motion to dismiss, but chose to submit without argument.

The purpose of the Individuals with Disabilities Education Act (IDEA) 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.)

Two of the issues that Sacramento City seeks to dismiss allege violations of Section 504 of the Rehabilitation Act. The third alleges that Sacramento City discriminated against Student and disregarding Student's rights under federal law, but does not allege a violation of the IDEA. OAH lacks jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973, Section 1983, the ADA, and related state and federal civil rights laws. Accordingly, Sacramento's motion to dismiss such claims for lack of jurisdiction is granted. As those issues have been dismissed they will not be included in the Issue portion of this order.

3. Issues and Proposed Resolutions.[1] The issues at the due process hearing, and the proposed resolutions, are listed below.

[1] The ALJ has the authority to redefine a party's issues providing no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) On the first day of hearing, the ALJ will address rewording and reorganization of the

Issue 1: Whether in the 2013-2014 school year, beginning April 21, 2014, Sacramento City violated the IDEA by:

a. Failing to conduct appropriate assessments in all areas of suspected disability;

b. Failing to find Student eligible for special education supports and services;

c. Failing to provide an appropriate (safe) education by allow another student, who attacked Student, in the same class; and

d. Failing to provide Student a free appropriate public education (necessary supports, services, and goals under the IDEA)?

Issue 2: Whether in the 2014-2015 school year Sacramento City violated the IDEA by:

a. Failing to refer Student for an IDEA assessment even though it was evident the 504 Plan was insufficient to meet her needs;

b. Failing to assess Student in January 2015, in response to Parents' request;

c. Failing to provide Parents an assessment plan within 15 days of Parent's request;

d. Intentionally misrepresenting the IEP process by telling Parents that in order for Student to be found eligible under the category of emotional disturbance under the IDEA, they would have to go through a process separate from the IEP process;

e. Predetermining placement prior to the IEP team meeting;

f. Having a policy of determining the eligibility outside the IEP team meeting;

g. Having a policy of hinging supports, services, and accommodations on eligibility, rather than a Student's unique needs; and

h. Failing to offer or provide Student a FAPE at the May 20, 2015 IEP team meeting[2] (under the IDEA) by failing to offer appropriate goals or services, including failure to offer extended school year services?

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issues with the parties. The ALJ will provide the parties and opportunity to be heard on the proposed rewording at that time.

[2] The ALJ added the phrase "IEP team meeting" for clarification purposes.

Issue 3: Whether Sacramento City denied Student a FAPE in the 2014-2015 school year and extended school year, resulting in a deprivation of education benefit by:

a. Unilaterally reducing educational accommodations when a suspected disability required special education;

b. From September 2014 to May 19, 2015, failing to provide appropriate supports and services to Student (failure to provide appropriate math and English language arts supports);

c. From September 2014 to May 19, 2015, failing to reevaluate Student until May 20, 2015;

d. From September 2014 to May 19, 2015, failing to call an IEP team meeting and develop appropriate supports, services, and setting;

e. Failing to conduct a full initial evaluation of Student in all areas of suspected disability in in the May 20, 2015 psychoeducational study;

f. Denying Parents meaningful participation in the IEP process at the May 20, 2015 IEP team meeting;

g. Failing to develop appropriate goals at the May 20, 2015 IEP team meeting;

h. Failing to offer appropriate services and supports at the May 20, 2015 IEP team meeting;

i. Failing to offer an appropriate placement at the May 20, 2015 IEP team meeting; and

j. Failing to consider emotional disturbance as an eligibility category and failing offer appropriate services to meet Student's needs in that area; and

k. Failing to appropriately investigate and address bullying?

Issue 4: Whether in the 2015-2016 school year, Sacramento City violated the IDEA by:

a. Failing to timely identify Student's eligibility under emotional disturbance (having an illegal policy of giving eligibility decision to another team);

b. Failing to convene an IEP team meeting in the face of evidence that Student was not making appropriate progress;

c. Having a policy of determining eligibility outside the IEP team meeting;

d. Having a policy of hinging supports, services, and accommodations on eligibility rather than Student's unique needs;

e. Failing to provide appropriate supports and services to meet Student's unique needs (individualized support) and having a policy of not providing one-to-one instruction for educational needs;

f. Failing to provide appropriate social and emotional services to Student to meet her unique needs;

g. Having a policy of not tailoring curriculum to meet a student's individual needs;

h. Inappropriately excluding Parents' input to IEP team, failing to consider Parents' input;

i. Failing to offer or provide a response to Parents' request for home instruction and/ or home hospital instruction; and

j. Concealing conversations with Student's doctor regarding her needs?

Issue 5: Did Sacramento City deny Student a FAPE during the 2015-2016 school year by:

a. Failing to reconvene an IEP team meeting when evidence showed that Student was not making appropriate progress;

b. Failing to implement the May 20, 2015 IEP;

c. Failing to offer appropriate goals, services, and placement;

d. Failing to offer appropriate supports, services, and placement at the December 15, 2015 IEP team meeting[3];

e. Failing to allow Parents to meaningfully participate in the December 15, 2015 IEP team meeting;

f. Failing to offer Student home hospital support;

g. Failing to offer Student home hospital instruction when Student could not access her education at school;

[3] The ALJ added the phrase "IEP team meeting" for clarification purposes.

h. Failing to call an IEP team meeting within 60 days of the signed assessment plan;

i. Failing to call an IEP team meeting when Parents advised Sacramento Student that Student could no longer attend school;

j. Failing to call an IEP team meeting when Parent's request one on March 3, 2016;

k. Failing to make an appropriate offer of placement at the April 18, 2016 IEP team meeting;

l. Failing to allow Parents to meaningfully participate in the April 18, 2016 IEP team meeting (not asking Parents any questions all regarding any topic; inappropriately disregarding Student's need for one-to-one education, therapeutic intervention and need for residential therapy; inappropriately disregarding Dr. Gross's recommendations and evaluations and Elizabeth Cowie's recommendations; failing to disclose that Sacramento City had been considering "HJ"[4] as a placement prior to the IEP team meeting, etc.);

m. Refusing to find Student eligible under the category of emotional disturbance and the April 18, 2016 IEP team meeting;

n. Misrepresenting Dr. Chiu's conversation regarding Student's needs to Parents at the April 18, 2016 IEP team meeting; and

o. Predetermining placement at Hiram Johnson's learning disabled class in the April 18, 2016 IEP team meeting?

Issue 6: Whether Sacramento City violated the IDEA when it failed to either agree to fully fund or file for due process after Student's parents requested an independent education evaluation?

Proposed Resolutions: Student requests that OAH order the following:

a. Placement at an appropriate residential nonpublic school;

b. Transportation to and from the residential nonpublic school, including travel expenses;

[4] The meaning of "HJ" was not been identified in Student's issues and is not a common acronym in special education.

c. Transportation of family members for recommended and/or required visits to Student's residential nonpublic school, including all of Parents' travel expenses;

d. Reimbursement for costs associated with all private placements in an amount to be proven at hearing;

e. Services of a one-to-one therapeutic tutor as needed at the residential nonpublic school;

f. Compensatory education for the 2013-2014, 2014-2015, and 2015-2016 school years;

g. School psychological counseling in an amount to be proven at hearing;

h. Appropriate family/parent counseling as needed;

i. Transportation;

j. Payment of fee and expenses to Dr. Kristin Gross to observe Sacramento City's recommended placements and attend Student's IEP team meeting;

k. Pay of expense for Parents to visit potential residential nonpublic school placements to determine if appropriate;

l. Payment of reasonable attorney's fees and costs; and

m. Any and all appropriate remedies as supported by law.

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.

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.

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.

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. 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 Student, Jen Sommers, and McKaye Treanor to testify telephonically is granted. Student shall provide all witnesses appearing telephonically with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing. Sacramento City indicated that the designated hearing has sound equipment that allows everyone in the room to hear the witness.

8. Electronic Recording of Hearing.

a. Audio Recording. Both parties' 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; 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.

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 Sacramento City.

10. 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 June 10, 2016.

11. 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.

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

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 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.

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: June 13, 2016

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