BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN MARINO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017040077 ORDER FOLLOWING PREHEARING CONFERENCE

On August 14, 2017, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. Attorney Mark Woodsmall appeared on behalf of Student. Attorney Gabrielle Ortiz appeared on behalf of San Marino Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on August 29, 30, and 31, 2017, and continuing day to day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at San Marino Unified School District, 1665 West Drive, San Marino, California 91108. 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, District 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. District failed to certify that it would provide a facility for this case that complied with the law. District 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.

a. District Response to Student's Due Process Hearing Request. State and federal law require a local education agency to respond to a due process complaint. (Ed. Code, §56502, subd. (d)(2)(A); 20 USC § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508.); *M.C. by and through his guardian ad litem M.N. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) District did not file a response to Student's due process complaint with OAH. Accordingly, District shall file with OAH either a response to Student's due process hearing request or a declaration attaching prior written notice previously sent to Parent regarding the subject matter contained in Student's due process complaint, no later than 10:00 a.m. on August 23, 2017.

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

(1) Did District deny Student a free appropriate public education by failing to appropriately assess him in all areas of known or suspected disability in his triennial assessment presented at Student's March 17, 2016 individualized education program team meeting, specifically, by failing to conduct a functional behavior assessment?

(2) Did District deny Student a FAPE by failing to accurately state Student's present levels of performance in his IEP's for the 2015-2016 and 2016-2017 school years?

(3) Did District deny Student a FAPE by failing to craft appropriate and measurable annual goals in his IEP for the 2015-2016 and 2016-2017 school years?

(4) Did District substantively fail to offer Student a FAPE at Student's March 17, 2016 and March 24, 2016 IEP team meetings, by:

a. Failing to offer Student an appropriate learning environment;

b. Failing to offer Student research-based intervention;

c. Failing to offer Student adequate speech and language therapy;

d. Failing to provide Student occupational therapy;

e. Failing to provide Student a behavior support plan for the 2015-2016 and 2016-2017 school years;

f. Failing to provide Student social skills support;

g. Failing to provide Student a one-to-one aide; and

h. Failing to provide Student appropriate extended school year services?

(5) Did District substantively fail to offer Student a FAPE by failing to offer Student any educational placement from March 2017 to the filing of the complaint?

(6) Did District violate the procedural requirements of the Individuals with Disabilities Education Act, and as a result deny Student a FAPE, by:

a. Failing to timely convene Student's annual IEP team meeting in March 2017;

b. Impeding Parents' right to participate in the IEP process during Student's March 17, 2016 and March 24, 2016 IEP team meetings by providing an unclear offer of FAPE;

c. Impeding Parents' right to participate in the IEP process during Student's March 17, 2016 and March 24, 2016 IEP team meetings by ignoring Parents' concerns and questions regarding Student's services and placement;

d. Failing to consider the findings of Parents' private expert at the March 17, 2016 and March 24, 2016 IEP team meetings; and

e. Failing to provide Parents appropriate prior written notice of District's refusal to provide Student speech and language services through a non-public agency?

Student's Proposed Resolutions: An Order directing District to:

(1) Provide Student a placement appropriate to his needs which may include a nonpublic school that has a small, highly structured environment with the appropriate aids, supports and therapeutic interventions.

(2) Provide Student intensive, one-to-one applied behavior analysis intervention services through a highly trained and highly qualified non-public agency throughout Student's school day.

(3) Fund supervision hours for Student's intensive, one-to-one applied behavior analysis intervention program.

(4) Provide Student social skills training.

(5) Provide Student appropriate extended school year services.

(6) Provide Student an appropriate behavior support plan.

(7) Provide Student speech and language services through a highly-trained and highly-qualified non-public agency with expertise in treating children with autism.

(8) Provide Student clinic-based occupational therapy services through a highly-trained and highly-qualified non-public agency with expertise in treating children with autism.

(9) Fund an independent functional behavior analysis of Student. Fund and reimburse Parents for the following out of pocket expenses in an amount according to proof:

a. Speech and language therapy at Cornerstone;

b. Language and Educational services by Janel Umfress;

c. Psychological services for Student;

d. Psychiatric support for Student;

e. Services provided by Dr. Douglas Stephey and Dr. Mona Delahooke; and

f. Services provided by Meaningful Growth.

(10) Provide compensatory education, including reimbursement, if any, according to proof.

(11) Develop an appropriate IEP with all necessary team members included.

(12) Reimburse Parents' attorney's fees incident to the development of an appropriate IEP pursuant to 2 U.S.C. § 1415(i)(3)(D)(ii).

(13) Pay costs of suit and attorney's fees herein incurred.

(14) Provide such other and further relief as the Court may deem just and proper.

3. Exhibits. Student identified 24 exhibits that Student intends to present at hearing. District identified 20 exhibits that District 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., District 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 27 percipient witnesses and one expert witness whom Student intended to present at hearing. District identified 12 percipient witnesses, seven of whom may also offer expert testimony. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed to make witnesses under its control reasonably available to Student without the need for subpoena. District will also inform Student of the identity of, and available contact information for, any witness identified by Student as an employee of District who has left District's employ, by 5:00 p.m. on Wednesday, August 23, 2017. 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, August 22, 2017.

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, August 24, 2017 at 9:00 a.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to District's 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. The District 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 with one detailed hour-by-hour schedule of all witnesses expected to testify at the hearing, which list shall also 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. 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. Neither party requested that a witness be permitted to appear telephonically at hearing in this matter. 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.

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. District 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 District.

10. Motions. The parties indicated that no prehearing motions were presently anticipated. In the event that any other 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.

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. Neither party requested any 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 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.

15. Hearing Open to the Public. At Student's request, the hearing will be open to the public.

16. Settlement. The parties are encouraged to continue working together to complete 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. 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 AND SHALL 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. 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.

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

IT IS SO ORDERED.

DATE: August 21, 2017

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ROBERT G. MARTIN
Administrative Law Judge
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Office of Administrative Hearings