BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SAN MARCOS UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2013101083
SAN MARCOS UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2013110340 ORDER FOLLOWING PREHEARING CONFERENCE

On January 10, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Robert Helfand, Office of Administrative Hearings (OAH). Ava Nawy Weitzen, Attorney at Law, appeared on behalf of Parent on behalf of Student (Student). Jonathan P. Read and Tiffany M. Santos, Attorneys at Law, appeared on behalf of the San Marcus Unified School District (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 January 28-30, 2014 and February 4, 2014 at the District's offices located at 255 Pico Avenue, # 150, San Marcos, CA 92069. The hearing shall begin at 9:30 a.m. the first day of 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.

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

District Issue:

(I.) Whether the District's May 3, 2013 Individualized Education Program (IEP) offer, as amended on August 28, 2013, constitutes a free appropriate public education (FAPE) in the least restrictive environment?

District's Proposed Resolution:

OAH issue an order that it may implement the May 3, 2013 IEP, as amended on August 28, 2013.

Student Issues:

(II,) Whether the District denied Student a FAPE at the January 14, 2013 IEP meeting by:

(a) Failing to offer an appropriate placement; and

(b) Committing procedural violations of the Individuals with Disabilities Education Act (IDEA) by denying Student's parent (Parent) to meaningful participate in the IEP decision-making process?

(III.) Whether the District denied Student a FAPE at the May 3, 2013 IEP meeting by:

(a) Failing to offer an appropriate placement and services which would meet Student's unique needs;

(b) Denying Parent to meaningfully participate in the IEP decision-making process by predetermining placement, failure to consider alternative placement options, failing to properly review Student's January 2, 2013 speech and language assessment, failure to administer the CST to Student in Spring 2013; and failing to to report and evaluate Student's progress;

(c) Failed to provide a Vision Therapy Assessment as recommended by a visual therapist?

(IV.) Whether the District denied Student a FAPE at the August 29, 2012 IEP meeting by:

(a) Failing to have in attendance a general education teacher;

(b) Failing to conduct an appropriate occupational therapy (OT) assessment;

(c) Failing to provide OT services; and

(d) Failing to timely file for due process hearing?

(V.) Whether the District denied Student a FAPE at the March 26 and May 23, 2012 IEP meetings by:

(a) Failing to offer an appropriate placement to provide services in the area of social pragmatics/skills; and

(b) Interfering with Parent's right to meaningfully participate in the IEP decision – making process when the District eliminated social pragmatics/skills services without discussion at the IEP meeting?

(VI.) Whether the District denied Student a FAPE at the May 23, 2012 IEP meeting by:

(a) Failing to provide an appropriate placement and services, including in the areas of social pragmatics/skills, OT and physical education, to meet Student's unique needs;

(b) Failing to discuss alternative placement options;

(c) Failing to adopt a Behavior Support Plan;

(d) Failing to have appropriate goals in speech and language, reading, recall, and social pragmatics; and

(e) Failing to include accurate Present Levels of Performance in the area of social/emotional/behavior?

(VII.) Whether the District denied Student a FAPE at the February 13, 2012 IEP by:

(a) Failing to develop a Behavior Support Plan and appropriate behavior goals; and

(b) Eliminating counseling services and goals?

Student's Proposed Resolutions:

Student requests that OAH order the District to provide compensatory education by (1) Reimbursement for all costs incurred in Student's attendance at ARCH Academy; and (2) Placement at ARCH Academy.

Parties may file requests to amend the issues no later than January 16, 2014.

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 District exhibit (for example, "S-5, S-6, or D-1, D-2"). [If there are other parties, give then an alphabet designation as well, M for Mental Health, etc.). 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 represent that they have served 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. The parties are urged to confer so as to eliminate duplicate exhibits.

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 are ordered to meet and confer by January 22, 2014, as to the schedule of witnesses. 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. 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 following witnesses will be called to testify by the District: Jeff Adams, Heather Chamberlain, Dawn Dully, Lola Harlan, Monique Frost, Carrie Goodwiler, Nancy Harris, Rana Holcom, Melyssa Johnson, Laurie Leigh, Barbara Moore, Erin Morrison, and Grace Ridgeway. The District reserves the right to call as witnesses: Marilea Brock, Parent, Sara Frampton, Student, Ronald Janiuk, Laura Johnson, Jeff Kozlowski, Jessica Lawler, Leann Polulak, Amy Spitter, and Danielle (Language Arts teacher from Banyan Tree Academy). If the District intends to call Student as a witness, the District shall make an offer of proof the day prior to her testimony.

The following witnesses will be called to testify by Student: Laurie Leigh, Dawn Dully, Rana Holcomb, Lola Harlan, Monique Frost, Parent, Melyssa Johnson, and Nancy Harris. Student has designated Christine Constantinou as an expert.

The witness schedule will be finalized at the commencement of the due process hearing.

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. 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.

Some of the witnesses are listed by both parties. In light of the fact four days have been scheduled for the hearing in this matter, it would be difficult to complete the hearing as scheduled. Therefore, by January 24, 2014 at 5:00 p.m., each party shall serve on the other party and on OAH a tentative witness list, including a time estimate of the length of each witness's direct examination testimony, and notations as to the witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence. Prior to the commencement of the due process hearing, 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

5. **Scope of Witness Examination**. 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.

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. **Order of Presentation of Evidence**. This matter is consolidated. The order of presentation of evidence shall be as follows: Student will present her case first

8. **Motions.** At present no prehearing motions are pending or contemplated, except for the District's pending motion concerning attorneys' fees. Student may file one or

more motions *in limine* at hearing. Any motions filed must be served three business days prior to the first day of hearing.

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

10. **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.

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. **Special Needs and Accommodations**. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

13. **Hearing Closed To the Public**.

14. **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.

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

IT IS SO ORDERED.

Dated: January 10, 2014

/s/
ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings