BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: BARSTOW UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017040083 ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING MOTIONS FOR CHANGE OF VENUE AND TELEPHONIC TESTIMONY

On June 5, 2017, a telephonic prehearing conference was held before Administrative Law Judge Linda Johnson, Office of Administrative Hearings. Vivian Billups, Attorney at Law, appeared on behalf of Barstow Unified School District. Parent, appeared on behalf of Student. 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 14 and 15, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Barstow Unified School District Office, 551 South Avenue H, Barstow, California 92311. 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. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Issue:

(1) Does District's April 13, 2017 individualized education program offer Student a free and appropriate public education in the least restrictive environment?

Proposed Resolution:

(1) An order stating District's April 13, 2017 IEP offers Student a FAPE in the LRE.

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"). 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.

The parties shall meet and confer by **5:00 p.m. on June 12, 2017**, to delete duplicate exhibits from the exhibit binders. The parties are not required to renumber exhibits if they delete exhibits after the exchange of documents. In the event of duplicate exhibits, the most legible version will be used.

If the parties intend to rely on IEP's, 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.

District 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. Unless Student can show good cause, he will be limited to District's evidence as he did not submit a PHC statement identifying any evidence he intends to use during the hearing.

4. Witnesses. 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 a subpoena. Further, District agreed to work with Student to secure a witness Student identified during the PHC. Said witness is an aide at the nonpublic school Student currently attends. 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. Student will be limited to calling witnesses on District's list, and the nonpublic school aide Student identified during the PHC, as Student did not submit a PHC statement with a witness list.

The parties shall meet and confer by **5:00 p.m. on Friday, June 12, 2017**, 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.

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. Neither party requested telephonic testimony.

District's motion[1] to allow all witnesses from the nonpublic school to testify telephonically is denied. District asked that witnesses from Student's current nonpublic school be allowed to testify telephonically because they are located approximately 25 miles away from the district office, and due to a California Department of Education investigation it is critical that the employees remain on school grounds at all times. Student opposed the motion. Although District stated it did not want to put the nonpublic school employees in a position to have to choose between following Department of Education directives and testifying, District has the ability to subpoena said witnesses.

7. Electronic Recording of Hearing.

a. Audio Recording. District's motion to audio record 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, to avoid recording conversations while off the record; 3) operation of the party's recording mechanism will not be allowed to delay the hearing; 4) the parties shall not play any part of the recording for any prospective witness(es) and the recording shall not be disseminated; 5) the parties shall not use the recording in any subsequent due process hearing; 6) the recording is subject to the same confidentiality as the due process hearing and; 7) such recording shall be for counsel's personal use only and only for review and preparation of the hearing. If Student desires to make such a recording the same conditions shall apply.

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.

[1] In District's May 11, 2017 PHC statement it stated it filed a motion for telephonic testimony, however, OAH did not receive that motion. District asked for leave to file the motion and was given until 8:00 a.m. on June 6, 2017. OAH received a written motion from District at 10:02 p.m. on June 5, 2017, without any explanation for why it was dated June 5, 2017, when it represented it was already filed on May 11, 2017.

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, District is the petitioning party. Accordingly, District shall present its case-in-chief, followed by Student.

9. Motions. During the PHC District moved for a change of venue to a location closer to the non-public school Student currently attends. The proposed location was roughly 25 miles from the District office. District asked for a change of venue for convenience for the witnesses as a substantial number of witnesses work at the non-public school. Parent opposed the change of venue as it would be inconvenient for her to travel to the proposed location. The place for conducting a due process hearing must be reasonably convenient to the parents and student involved in the proceeding. California Education Code section 56505, subdivision (b), directs the place for a due process hearing. That code section provides that a due process hearing shall be held at a time and place reasonably convenient to the parent or guardian and the student. District did not establish good cause for the change of venue therefore its motion is denied.

District also moved for an order allowing witnesses who are employed by the nonpublic school Student attends to testify telephonically. That motion is addressed in section 6 above.

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 5, 2017.

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

11. 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.

12. Special Needs and Accommodations. Neither party indicated a need for any accommodations in this case. 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.

13. Hearing Closed To the Public. At the request of Student, the hearing will be 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 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.

DATE: June 6, 2017

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Linda Johnson
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LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings