BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

v.

REDONDO BEACH UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2019020379

and

REDONDO BEACH UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2019020539

ORDER FOLLOWING PREHEARING CONFERENCE

On September 20, 2019, Administrative Law Judge Ted Mann Office of Administrative Hearings held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH. Prehearing conference is referred to as PHC.

Devan Brothers, Attorney at Law, appeared on behalf of Student. Sundee Johnson, Attorney at Law, appeared on behalf of Redondo Beach Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on October 1, 2, and 3, 2019 and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at Redondo Beach's offices located at 1401 Inglewood Ave., Redondo Beach, CA 90277.

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.

District facilities shall fully comply 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. Districts are required to file written certification with OAH that the facilities District provides comply with these laws.

Counsel for Redondo Beach has verbally assured the undersigned that the facilities to be used for this case comply with the law and shall file the required certification of compliance no later than Tuesday, September 24, 2019 at 5:00 pm. Redondo Beach shall inform OAH within two days of the date of this Order if it is unable to provide facilities which comply with this Order.

Before the beginning of the hearing, Redondo Beach shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for Redondo Beach's legal representative and special education representative;
- a table for the witness;
- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and
- water and tissue available for the participants.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. Redondo Beach shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

Redondo Beach shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, Redondo Beach's attorneys, and witnesses.

ISSUES AND PROPOSED RESOLUTIONS

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the prehearing conference are:

STUDENT'S ISSUES

1. Did Redondo Beach deny Student a free appropriate public education, called a FAPE, by failing to fulfill its Child Find obligations by:
   a. Failing to offer a timely assessment plan; and or
   b. Failing to timely identify Student as a child with a disability under the Individuals with Disabilities Education Act?
2. Did Redondo Beach deny Student a FAPE by failing to properly evaluate Student for special education both procedurally and substantively by:
   a. Failing to assess Student in a timely manner;
   b. Failing to perform assessments in a legally sufficient manner; and or
   c. Failing to assess Student in all areas of suspected disability?
3. Did the September 27, 2018 individualized educational program, called an IEP, deny Student a FAPE by:
   a. Failing to make Student eligible for special education and related services under the IDEA; and or
   b. Failing to offer Student an IEP?
4. Did the June 4, 2019 IEP deny Student a FAPE by:
   a. Failing to include a statement of updated present levels of performance;
   b. Offering inadequate goals in the areas of social-emotional needs and executive functioning;
   c. Failing to offer goals in all areas of unique need;

d. Failing to offer a special education program and related services that was individualized and or reasonably calculated to remediate Student's executive functioning; and or

e. Failing to offer related services in the form of psychotherapy and in an amount and frequency reasonably calculated to address Student's social-emotional needs?

5. Did Redondo Beach deny Student a FAPE by failing to implement Student's identified accommodations?

STUDENT'S PROPOSED RESOLUTIONS

The resolutions requested by Student include Parent reimbursement for Dr. Simun's neuropsychological evaluation; Parent reimbursement for educationally-related, out-of-pocket expenses, compensatory education; and a legally compliant IEP in keeping with proof at hearing.

REDONDO BEACH'S ISSUE

1. Was Redondo Beach's September 27, 2018 initial psychoeducational assessment legally sufficient so as to preclude public funding of the neuropsychological independent educational evaluation requested by Student?

REDONDO BEACH'S PROPOSED RESOLUTION

The resolution requested by Redondo Beach is that Student's requested IEE not be publicly funded.

Redondo Beach filed its response to Student's Second Amended complaint on September 13, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties shall place a letter followed by a number on each tab to identify each exhibit. Student shall use the letter S before the number to identify Student's exhibits. Redondo Beach shall use the letter D before the number to identify Redondo Beach's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Redondo Beach's exhibit tab 1. Each page of each binder shall be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering.

CONTENT

Each exhibit shall consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. Exhibits in the binders should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the

requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Redondo Beach's binder shall include a color copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party shall bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their 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 timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers

the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The parties are ordered to meet and confer no later than Wednesday, September 25, 2019 at 5 p.m. The parties shall discuss the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this consolidated matter, Student's case-in-chief shall be presented first, followed by Redondo Beach.

WITNESS LISTS

The parties shall give the ALJ a joint proposed witness list for the first day of hearing. The list should include dates and time estimates of expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Student shall have witnesses available in case there is no agreement. Before the hearing

begins, 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. The ALJ will finalize the witness schedule. Parties shall be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time the testimony each witness is expected to take.

SCOPE OF WITNESS EXAMINATION

Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties presents their case in chief.

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 request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness shall provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness shall ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony shall ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. Redondo Beach shall ensure that the hearing room has telephone speaker equipment that allows everyone in

the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

At the prehearing conference, neither party anticipated the need for telephonic testimony by any of their witnesses at hearing.

ELECTRONIC RECORDINGS

Audio Recording

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties shall turn the recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be used to prepare the testimony of a witness in the hearing;
- the recording shall not be shared with any non-party, possible witness, or through social media;
- the parties shall not use the recording in any subsequent due process hearing;

- the recording is subject to the same confidentiality as the due process hearing; and
- the parties shall dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Student's counsel's request is granted, and the opportunity to record the hearing is also extended to Redondo Beach's counsel, both subject to the foregoing conditions.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

Recordings as exhibits

Excerpts of an audio record of an individualized education program team meeting must be transcribed and offered as documentary evidence. The portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter. Electronic recording of the excerpts of the audio record shall be included with the transcript, at the ALJ's discretion, to allow the ALJ to listen to the recording as well as read the transcript.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

REDONDO BEACH'S REQUEST FOR CONTINUANCE

On September 17, 2019, Redondo Beach filed a Request for Continuance along with its prehearing conference statement, and Student filed an Opposition to Redondo Beach's Request along with her prehearing conference statement. Redondo Beach argued it has another hearing with OAH set at the same time and, therefore, has a calendar conflict. Both Student and Redondo Beach presented oral argument on the Request during the prehearing conference.

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. (Ed. Code, § 56505, subd. (f)(3); 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 or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

The conflicting case cited by Redondo Beach, OAH Case No 2019020957, is a more recent filing than the instant cases, and has priority to proceed to hearing. Similarly, Student's objection regarding prejudice to Student from further delay is well taken, as Student is a high school senior expected to graduate at the conclusion of the current school year.

STUDENT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

On September 16, 2019, Student filed a Motion to Compel the Production of Documents seeking educational records and other documents related to Student. On September 18, 2019, Redondo Beach filed an Opposition to Student's Motion to Compel Production. Both Student and Redondo Beach presented oral argument on the Motion during the prehearing conference.

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq. (IDEA)). Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

Education Code, section 56505, subdivision (a), provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Department of Education promulgated section 3082, subdivision

(c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and subpoenas duces tecum, referred to as SDT's. These regulations specifically disallow the provisions of the Administrative Procedures Act that provide broader authority for the use of subpoenas in other administrative hearings (5 Cal. Code Regs., tit. 5, § 3089, [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].) Although the subpoena form created by the Office of Administrative Hearings (has options for production of documents under subpoena, not all of them may apply to special education matters, as OAH has jurisdiction over many types of non-IDEA disputes. While SDT's are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to two types of documents: parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code § 56504), and the parties are entitled to receive copies of all the documents the educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).)

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act, referred to as FERPA, to include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) Education records do not include "records of instructional, supervisory, and administrative personnel…which are in the sole possession of the maker thereof and which are not

accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896], referred to as *Falvo*, after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their reasons for doing so." (*Falvo, supra,* 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Id.*) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar…" (*Id.* at pp. 434-435.)

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record, the Court of Appeal conducted an analysis of the "scant" judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that "the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like."

(*Id.* at pp. 751-754.) The Court of Appeal then found that the investigative report, "which was not directly related to the private educational interests of the student," was not an education record, "as the report was not something regularly done in the normal course of business," and "was not the type of report regularly maintained in a central location along with education records…in separate files for each student." (*Id.* at p. 755.)

In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653 (*S.A.*), the district court found that documents such as school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not "maintained" by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

Here, Redondo Beach has asserted that all educational records maintained by Redondo Beach for Student have previously been provided to Student. Redondo Beach's Opposition is accompanied by a Declaration under penalty of perjury from Jessica Silberling, Redondo Beach's Executive Director of Special Education, to that effect. Student presented no legal authority allowing OAH to order the pre-hearing production of educational records or other records by Redondo Beach. As such, Student's Motion is denied.

Student also noted her objection to testifying as a witness at hearing. The parties are ordered to meet and confer on this issue, in keeping with the above order to meet

and confer. Student shall be allowed to raise this issue at time of hearing, following the meet and confer, and at such time as the issue is ripe for determination.

No other prehearing motions are pending or contemplated. Any motion that was not filed three business days before the Prehearing Conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

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

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, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

Neither party requested an interpreter for the hearing, and neither party was aware of any reasonable accommodations needed for hearing.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional

information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING CLOSED TO THE PUBLIC

The hearing is closed to the public. Special Education hearings are closed to the public unless Student requests the hearing to be open to the public.

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 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.

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 before the hearing.

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

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DocuSigned by:
Ted Mann
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DATED: September 20, 2019

Ted Mann
Administrative Law Judge
Office of Administrative Hearings