BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT,	OAH Case No. 2016100111
TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016120478 ORDER FOLLOWING PREHEARING CONFERENCE

On March 27, 2017, a telephonic prehearing conference was held before Administrative Law Judge Tara Doss, Office of Administrative Hearings. Attorney Rhonda Krietemeyer, appeared on behalf of Student. Attorney Dorothy McLaughlin, appeared on behalf of 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 April 11, 12, and 13, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 31350 Rancho Vista Road, Temecula, California 92592. The hearing shall begin at 9:30 a.m. on the first day and at 9:00 a.m. on 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 ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (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 provide drinking water and tissue to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night.

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 to be resolved at the due process hearing, and the proposed resolutions, as alleged in Student's and District's complaints, respectively, and clarified by the parties and the ALJ at the PHC, are as follows:

Student's Issues and Proposed Resolutions

Issues:

(1) Did District deny Student a free appropriate public education during the 2014-2015 school year by:

a. Failing to conduct an occupational therapy assessment?

b. Failing to conduct an educationally related mental health assessment?

c. Failing to conduct an assistive technology assessment?

d. Failing to offer appropriate goals in the area of behavior and learning at school, at the September 30, 2014 individualized education program, and any amendments occurring this school year?

e. Failing to offer appropriate goals in the area of behavior and learning at home, at the September 30, 2014 IEP, and any amendments occurring this school year?

f. Failing to offer appropriate goals in the area of reading at the September 30, 2014 IEP, and any amendments occurring this school year?

g. Failing to offer appropriate goals in the area of written language at the September 30, 2014 IEP, and any amendments occurring this school year?

h. Failing to offer appropriate goals in the area of math at the September 30, 2014 IEP, and any amendments occurring this school year?

i. Failing to offer appropriate behavior and academic support, at the September 30, 2014 IEP, and any amendments occurring this school year, to allow Student to be successful in the least restrictive environment?

j. Failing to offer appropriate behavior supports at home at the September 30, 2014 IEP, and any amendments occurring this school year?

k. Failing to offer appropriate services and supports in reading at the September 30, 2014 IEP, and any amendments occurring during this school year?

l. Failing to offer appropriate services and supports in written language at the September 30, 2014 IEP, and any amendments occurring this school year?

m. Failing to offer appropriate services and supports in math at the September 30, 2014 IEP, and any amendments occurring this school year?

n. Failing to offer appropriate academic instruction at the September 30, 2014 IEP, and any amendments occurring this school year?

o. Failing to offer appropriate occupational therapy services at the September 30, 2014 IEP, and any amendments occurring this school year?

p. Failing to offer placement, services, and supports that are research-based for autism at the September 30, 2014 IEP, and any amendments occurring this school year?

q. Failing to offer educationally related mental health services at the September 30, 2014 IEP, and any amendments occurring this school year?

r. Failing to offer assistive technology services at the September 30, 2014 IEP, and any amendments occurring this school year?

s. Failing to offer appropriate inclusion supports at the September 30, 2014 IEP, and any amendments occurring this school year?

t. Failing to offer extended school year services at the September 30, 2014 IEP, and any amendments occurring this school year?

(2) Did District deny Student a FAPE during the 2015-2016 school year by:

a. Failing to conduct an occupational therapy assessment?

b. Failing to conduct an educationally related mental health assessment?

c. Failing to conduct an assistive technology assessment?

d. Failing to offer appropriate goals in the area of behavior and learning at school, at the September 29, 2015 IEP, and any amendments occurring this school year?

e. Failing to offer appropriate goals in the area of behavior and learning at home, at the September 29, 2015 IEP, and any amendments occurring this school year?

f. Failing to offer appropriate goals in the area of reading at the September 29, 2015 IEP, and any amendments occurring this school year?

g. Failing to offer appropriate goals in the area of written language at the September 29, 2015 IEP, and any amendments occurring this school year?

h. Failing to offer appropriate goals in the area of math at the September 29, 2015 IEP, and any amendments occurring this school year?

i. Failing to offer appropriate behavior and academic support, at the September 29, 2015 IEP, and any amendments occurring this school year, to allow Student to be successful in the least restrictive environment?

j. Failing to offer appropriate behavior supports at home, at the September 29, 2015 IEP, and any amendments occurring this school year?

k. Failing to offer appropriate services and supports in reading at the September 29, 2015 IEP and any amendments occurring during the school year?

l. Failing to offer appropriate services and supports in written language at the September 29, 2015 IEP, and any amendments occurring this school year?

m. Failing to offer appropriate services and supports in math at the September 29, 2015 IEP, and any amendments occurring this school year?

n. Failing to offer appropriate academic instruction at the September 29, 2015 IEP, and any amendments occurring this school year?

o. Failing to offer appropriate occupational therapy services at the September 29, 2015 IEP, and any amendments occurring this school year?

p. Failing to offer placement, services, and supports that are research-based for autism, at the September 29, 2015 IEP, and any amendments occurring this school year?

q. Failing to offer educationally related mental health services at the September 29, 2015 IEP, and any amendments occurring this school year?

r. Failing to implement assistive technology accommodations and services from the September 29, 2015 IEP, and any amendments occurring this school year?

s. Failing to offer appropriate inclusion supports at the September 29, 2015 IEP, and any amendments occurring this school year?

t. Failing to offer extended school year services at the September 29, 2015 IEP, and any amendments occurring this school year?

u. Failing to make a clear, written offer of services at the September 29, 2015 IEP, and any amendments occurring this school year?

v. Failing to allow parent to meaningfully participate in the IEP process by providing vague progress reporting?

w. Failing to allow parent to meaningfully participate in the IEP process by not scheduling the IEP meetings at a mutually agreeable date and time?

x. Failing to offer placement in the least restrictive environment at the September 29, 2015 IEP, and any amendments occurring this school year?

(3) Did District deny Student a FAPE during the 2016-2017 school year by:

a. Failing to conduct an educationally related mental health assessment?

b. Failing to conduct an assistive technology assessment?

c. Failing to offer appropriate goals in the area of behavior and learning at school, at the September 23, 2016 IEP, and any amendments occurring this school year?

d. Failing to offer appropriate goals in the area of behavior and learning at home, at the September 23, 2016 IEP, and any amendments occurring this school year?

e. Failing to offer appropriate goals in the area of reading at the September 23, 2016 IEP, and any amendments occurring this school year?

f. Failing to offer appropriate goals in the area of written language at the September 23, 2016 IEP, and any amendments occurring this school year?

g. Failing to offer appropriate goals in the area of math at the September 23, 2016 IEP, and any amendments occurring this school year?

h. Failing to offer appropriate behavior and academic support, at the September 23, 2016 IEP, and any amendments occurring this school year, to allow Student to be successful in the least restrictive environment?

i. Failing to offer appropriate behavior supports at home, at the September 23, 2016 IEP, and any amendments occurring this school year?

j. Failing to offer appropriate services and supports in reading, at the September 23, 2016 IEP, and any amendments occurring during the school year?

k. Failing to offer appropriate services and supports in written language at the September 23, 2016 IEP, and any amendments occurring this school year?

l. Failing to offer appropriate services and supports in math at the September 23, 2016 IEP, and any amendments occurring this school year?

m. Failing to offer appropriate academic instruction at the September 23, 2016 IEP, and any amendments occurring this school year?

n. Failing to offer appropriate occupational therapy services at the September 23, 2016 IEP, and any amendments occurring this school year?

o. Failing to offer placement, services, and supports that are research-based for autism at the September 23, 2016 IEP, and any amendments occurring this school year?

p. Failing to offer educationally related mental health services at the September 23, 2016 IEP, and any amendments occurring this school year?

q. Failing to offer appropriate inclusion supports at the September 23, 2016 IEP, and any amendments occurring this school year?

r. Failing to implement assistive technology accommodations and services from the September 23, 2016 IEP, and any amendments occurring this school year?

s. Failing to make a clear, written offer of services at the September 23, 2016 IEP, and any amendments occurring this school year?

t. Failing to allow parent to meaningfully participate in the IEP process by providing vague progress reporting?

u. Failing to allow parent to meaningfully participate in the IEP process by not scheduling IEP meetings at a mutually agreeable date and time?

v. Failing to allow parent to meaningfully participate in the IEP process by predetermining placement at the September 23, 2016 IEP?

w. Failing to offer placement in the least restrictive environment at the September 23, 2016 IEP, and any amendments occurring this school year?

Student's Issue 13 in its first amended prehearing conference statement regarding whether District violated Section 504 of the Rehabilitation Act of 1973 is dismissed. Section 504 claims are outside OAH jurisdiction.

Proposed Resolutions:

(1) Fund Student's placement and transportation at COOK program at the Institute for Effective Education through at least August 2018, along with inclusive social activities and facilitation during the time of his placement in that school, unless COOK staff and his parents agree that he is ready to return to a District placement before June 2018.

(2) Provide Non Public Agency aide and Applied Behavioral Analysis supervision, to cover Student's entire time at school, with at least eight hours per month of supervision, and to provide a general education placement, when Student's parents and ABA provider deem him ready to return to a public school.

(3) Provide compensatory ABA therapy to address areas of specific need.

(4) Reimburse Student's family for costs associated with, and time spent securing, ABA which should have been provided as part of a FAPE.

(5) Provide compensatory and ongoing speech and language therapy to address areas of specific need.

(6) Reimburse Student's family for expenditures for costs associated with, and time spent securing, speech and language therapy.

(7) Provide compensatory and ongoing occupational therapy to address areas of specific need.

(8) Reimburse Student's family for expenditures for costs associated with, and time spent securing, occupational therapy.

(9) Reimburse Student's family for expenditures and costs, and time spent purchasing educational materials and services.

(10) Provide Student with an independent assistive technology assessment and computer with appropriate software and training; implement recommendations of District assessment properly, with provisions for AT support that do not limit academic instruction.

(11) Fund and/or reimburse for inclusive recreation and socialization along with ABA support for participation in such programs.

District's Case

Issue:

(1) Did District offer Student a FAPE in the least restrictive environment at the September 23, 2016 IEP and as modified at the January 26, 2017 IEP, such that, it may be implemented without parental consent?

Proposed Resolution:

(1) Order allowing District to implement, without parental consent, the goals, modifications/accommodations, placement, and related services that were offered by District in the September 23, 2016 IEP, most recently modified on January 26, 2017.

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 Monday, April 3, 2017, to discuss and eliminate duplicate exhibits from the exhibit binders.

Each exhibit shall consist of one document. Separate documents may not be combined into one exhibit.

If the parties intend to rely on any individualized education program documents, the parties shall attach all pages of the IEP, including a copy of the original signature page (irrespective of whether it has been signed), and any typewritten or handwritten notes or comments, if any, included in the IEP.

Excerpts from an audio recording of an IEP team meeting, if any, should be transcribed and offered as documentary evidence. The portion of the audio recording transcribed and the transcript shall be provided to the opposing party to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter.

Each party shall include in its exhibits current curriculum vitae or resumes for any expert or percipient witnesses whose education and employment is expected to be subjects of direct examination.

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.

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. **District shall inform Student of the identity of, and available contact information for, any witness identified by Student who is a former District employee, by 5:00 p.m. on Tuesday, April 4, 2017.** 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 5:00 p.m. on Friday, March 31, 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 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 presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

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 case-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. The proponent of the witness shall ensure the witness testifies from a private location with no other persons present using a "land-line" 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. Electronic Recording of Hearing.

a. Audio Recording. Student's motion to make an audio recording of the hearing is granted. Either party may make an audio recording of the hearing with the permission of the ALJ and subject to the following conditions: (1) Such recording shall be for counsel's personal use only and only for review and preparation of the hearing; (2) The recording device shall be turned on only when the ALJ states that the matter is on the record, and shall be turned off when the ALJ states that the matter is off the record; (3) Operation of a personal recording device will not 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) The parties shall dispose of the unofficial recording when the time for appeal of the ALJ's decision in this matter has expired. Any recording made by either party is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ. The OAH recording made by the hearing ALJ is the official record unless otherwise ordered.

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.

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, Student's case and District's case is secondary, in the consolidated matter. Accordingly, Student shall present its case-in-chief, followed by District, provided however that 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.

9. 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 March 27, 2017.

10. 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.

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

12. 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.

13. 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 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.

14. Hearing Open/Closed To the Public. At the request of Student, the hearing will be closed to the public.

15. 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.

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.

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

IT IS SO ORDERED.

DATE: March 27, 2017

DocuSigned by:
Tara Doss
0D223C0D8032412...

TARA DOSS
Administrative Law Judge
Office of Administrative Hearings