BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SOUTHERN KERN SCHOOL DISTRICT.	OAH Case No. 2018090934 ORDER FOLLOWING PREHEARING CONFERENCE

On March 11, 2019, a telephonic prehearing conference was held before Administrative Law Judge Alexa J. Hohensee, Office of Administrative Hearings. Parent appeared on behalf of Student. Darren J. Bogié, Attorney at Law, appeared on behalf of Southern Kern School District. The PHC was recorded.

Southern Kern filed its response to Student's complaint on November 7, 2018, which permits the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on March 19-21, 2019, and continuing day to day at the discretion of the ALJ. The hearing shall take place at Southern Kern's district offices located at 2602 Rosamond Boulevard, Rosamond, California 93560. 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, Southern Kern 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. Southern Kern failed to certify that it would provide a facility for this case that complied with the law. Southern Kern 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, Southern Kern 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 Southern Kern's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Southern Kern 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. Southern Kern shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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.

1. Did Southern Kern deny Student a free appropriate public education by failing to meet its child find obligation and find Student eligible for special education prior to September 22, 2008?

2. Did Southern Kern deny Student a FAPE during the 2013-2014 school year by:

a. Failing to provide Student with a safe learning environment free from bullying;
b. Failing to conduct assessments of Student in all areas of suspected disability;
c. Constantly changing Student's placement;
d. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: (i) appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services; and (ii) placement in general education;
e. Failing to consider the continuum of placements at the February 27, 2013, August 28, 2013, December 5, 2013, February 13, 2014 and March 17, 2014 individualized education program team meetings; and
f. Failing to implement general and special education instruction in the February 27, 2013, August 28, 2013, December 5, 2013, February 13, 2014 and March 17, 2014 IEPs; and
g. Failing to implement accommodations included in the February 27, 2013, August 28, 2013, December 5, 2013, February 13, 2014 and March 17, 2014 IEPs?

3. Did Southern Kern deny Student a FAPE during the 2014-2015 school year by:

a. Failing to provide Student with a safe learning environment free from bullying;

b. Failing to conduct assessments of Student in all areas of suspected disability;
c. Failing to review or revise Student's behavior intervention plan, or to recommend an updated functional behavior analysis;
d. Constantly changing Student's placement;
e. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: (i) appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services; and (ii) placement in general education;
f. Failing to consider the continuum of placements at the August 5, 2014 IEP team meeting;
g. Failing to provide Parent with prior written notice when refusing her requests for assistance, specifically: (i) independent study; (ii) evaluations, and (iii) home instruction;
h. Failing to provide appropriate regular and special education instruction in accordance with the March 17, 2014 and August 5, 2014 IEPs; and
i. Failing to implement the accommodations in the March 17, 2014 and August 5, 2014 IEPs?

4. Did Southern Kern deny Student a FAPE during the 2015-2016 school year by:

a. Failing to offer an appropriate placement in the least restrictive environment, specifically: (i) appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services, and (ii) placement at Student's home school;
b. Failing to consider the continuum of placements at the September 2, 2015 and February 22, 2016 IEP team meetings;
c. Failing to conduct a timely and appropriate functional behavior analysis and develop an appropriate behavior intervention plan; and
d. Failing to provide appropriate regular and special education instruction in accordance with the September 2, 2015 and February 22, 2016 IEPs?

5. Did Southern Kern deny Student a FAPE during the 2016-2017 school year by:

a. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: (i) appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services, and (ii) placement at Student's home school;
b. Failing to consider the continuum of placements at the March 17, 2017 and May 31, 2017 IEP team meetings;
c. Failing to provide Parent with prior written notice when refusing her request for a referral to a psychologist;

d. Failing to conduct a timely and appropriate functional behavior analysis and develop an appropriate behavior intervention plan;
e Failing to provide appropriate regular and special education instruction in accordance with the March 17, 2017 and May 31, 2017 IEPs;
f. Failing to provide a safe learning environment free from bullying; and
g. Failing to timely implement instruction and accommodations in the February 22, 2016, March 17, 2017 and May 31, 2017 IEPs?

6. Did Southern Kern deny Student a FAPE during the 2017-2018 school year by:

a. Failing to offer appropriate special education and related services in the least restrictive environment, specifically: appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services;
b. Failing to consider the continuum of placements at the August 15, 2017 and May 6, 2018 IEP team meetings;
c. Failing to conduct a timely and appropriate functional behavior analysis and develop an appropriate behavior intervention plan;
d. Failing to provide appropriate regular and special education instruction in accordance with the August 15, 2017 and May 6, 2018 IEPs;
e. Failing to timely implement accommodations in the August 15, 2017 and May 6, 2018 IEPs?

7. Did Southern Kern deny Student a FAPE during the 2018-2019 school year by failing to offer appropriate special education and related services in the least restrictive environment, specifically: (i) appropriate accommodations, counseling, psychological services, social work services, social skills training, parent training, and wrap around services, and (ii) extended school year?

As remedies, Student seeks: a finding that Student is eligible for special education under the eligibility category(ies) of specific learning disability, other health impairment, emotional disability or intellectual disability; compensatory education in the areas of academics, social skills, pragmatic language therapy, and vocational training; prospective therapeutic counseling; and independent educational evaluation in functional behavior by a Board Certified Behavior Analyst; reimbursement to Parent for costs of independent educational evaluations; and training for Southern Kern staff.

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 letters "S" or "D" in front of the exhibit to designate if it is a Student or school district exhibit (for example, "S-1" or "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. Each party shall serve an exhibit binder containing its respective exhibits on the other party by March 12, 2019, 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. Each party will provide a total of four (4) copies of their exhibit binder(s): one for the ALJ, one for the witnesses, one for the opposing party (served by March 12, 2019), and one for their own use. 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 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. To the extent practicable, exhibits in the binders shall be in chronological order.

Excerpts of an audio record of an individualized education program team meeting, if any, must be transcribed and offered as documentary evidence; that 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 to allow the ALJ to listen to the recording as well as read the transcript. The parties may also be required to electronically transfer the audio recordings to OAH, at the ALJ's discretion.

The parties shall meet and confer by 5:00 p.m. on march 15, 2019, to eliminate duplicate exhibits from the exhibit binders. Duplicate exhibits and tabs should be removed from all binders prior to the first day of hearing. The parties shall not re-number exhibits after duplicates are removed. The parties are encouraged, if the total number of documents is not too large, to place the exhibits for both parties into one binder. Each exhibit shall consist of one document; separate documents may not be combined into one exhibit.

The parties shall include, as exhibits, resumes for each witness 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.

Southern Kern shall include as part of its exhibits the school calendar(s) for the years at issue.

If the parties intend to rely on individualized education programs, 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).

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. Education Code section 56505,

subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

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 to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

The parties are ordered to meet and confer by 12:00 p.m. (noon) on March 15, 2019, as to the schedule of witnesses. 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 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (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.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one **joint** detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination. Southern Kern shall have witnesses available in case agreement on a witness list is not reached.

The parties are ordered to meet and confer by **no later than 5:00 p.m. on March 13, 2019,** to identify the witnesses on its/his respective witness lists who cannot be produced at hearing without a subpoena and provide the witnesses contact information to opposing counsel so that subpoenas can be issued. As part of the meet and confer process, Southern Kern's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of Southern Kern, and if not, shall provide Student's counsel with the witness(es)' most recent contact information, including a telephone number and address at which process may be served. Any contact information provided by Southern Kern shall be used by Student's counsel for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disseminated to any other person(s).

The ALJ will finalize the witness schedule, and will revisit the schedule at the beginning and end of each hearing day. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

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. If a party intended to call a witness called first by the other party, that party shall complete their direct examination at the same time as their cross 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, except as provided at paragraph 8 of this order.

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 physical 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. Electronic copies of the evidence binders will not be permitted. The witness must be on a clear telephone connection, and in a location that ensures the confidentiality of the proceedings. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested permission to audio record the hearing.

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 is the petitioning party. Accordingly, Student shall present her case-in-chief, followed by Southern Kern.

At the beginning of the hearing, on the first day, Student and Southern Kern call any and all witnesses, and present their documentary evidence, on whether any exception applies to the two-year statute of limitations in this matter. The parties shall call their witnesses on exceptions to the statute of limitations first, regardless of whether it will involve calling those witnesses again later in the hearing on other issues. After both parties have presented their evidence on this issue, the ALJ will take a break for 30 minutes, or longer in his or her

discretion, to decide whether Student will be permitted to go forward on issues predating September 25, 2016, or whether those issues are barred by the statute of limitations.

The statute of limitations for special education due process claims in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) The statute of limitations operates to bar claims based upon facts outside of the two year period. (*J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 444-445 (*J.W. v. Fresno*); *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.) Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process (i) due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or (ii) by the local educational agency's withholding of information that was required to be provided to the parent.

A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221: *M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09–4624, 10–04223 SI) 2012 WL 398773, ** 17 - 19.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039; see also *M.M. V. Lafayette School District* (9th Cir. 2014) 767 F.3d 842, 858-59.)

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 at least three days prior to or during the PHC of March 11, 2019.

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. 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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed to the Public. The hearing will be closed to the public unless Student requests it be open.

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. Each of the parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing, or if the petitioning party withdraws the request for due process. 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, OR THE PETITIONING PARTY WITHDRAWS THE DUE PROCESS HEARING REQUEST, AFTER 3:00 P.M. THE DAY PRIOR TO HEARING, EACH OF THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE FOR OAH REGARDING THE SETTLEMENT OR WITHDRAWAL AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. IN THE CASE OF SETTLEMENT, THE PARTIES SHOULD SIMULTANEOUSLY **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.applications.dgs.ca.gov/oah/oahsftweb.

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 provide the date of the next board meeting. The hearing dates will not be cancelled without this information. The matter will be dismissed 30 days after the scheduled board meeting, unless the parties request otherwise to OAH in writing.

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

IT IS SO ORDERED.

DATE: March 11, 2019

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings