BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT ,	OAH Case No. 2017120319
LONG BEACH UNIFIED SCHOOL DISTRICT , v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017081066 ORDER FOLLOWING PREHEARING CONFERENCE

On March 5, 2018, a telephonic prehearing conference was held before Administrative Law Judge Alexa J. Hohensee, Office of Administrative Hearings. Tania L. Whitleather, Attorney at Law, appeared on behalf of Student. Debra K. Ferdman, Attorney at Law, appeared on behalf of Long Beach Unified School District. The PHC was recorded.

District filed its response to Student's complaint on December 18, 2017, which permits the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200 (*Antelope Valley*).)

Student moved for an order that District be required to file an amended response to Student's complaint because the response was insufficient. The motion was denied as untimely as made two months after the response was filed, and on the ground that neither *Antelope Valley*, the Individuals with Disabilities Education Act (U.S.C. § 1400, et seq.), nor other federal or State statutes or regulations required or authorized OAH to determine the sufficiency of a response to a due process complaint.[1]

[1] In contrast, the IDEA expressly gives parties to a due process hearing the right to challenge the sufficiency of the complaint. (20 U.S.C. § 1415(b) & (c).) The complaint is deemed sufficient unless a party notifies OAH and the other party in writing within 15 days of receiving the complaint that the party believes has not met the notice requirements. (20 U.S.C. § 1415(c)(2)(C); Ed. Code, § 56502, subd. (d)(1).) Here, Student did not raise the sufficiency of the notice in District's response for more than two months after it was filed

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 13-15 and 20-22, 2018, 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 Tucker, Bungalow 24, 2221 Argonne Avenue, , Long Beach, California 90815. 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.

District was informed that the filing of a certificate of compliance in a different, prior confidential due process proceeding does not comply with this order in this case.

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.

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and eight days before the hearing. By the scheduled PHC date, Student had designated her exhibits, identified witnesses, and filed a PHC statement stating the issues for hearing. These actions and the extended delay in seeking clarification indicate that Student had notice of District's position and the issues in dispute, and was not at a disadvantage in preparing for hearing.

Student's Case[2]

1. In the two years preceding the filing of the complaint, did District fully and appropriately assess Student in the areas of (i) central auditory processing, (ii) speech and language, (iii) psychoeducational development, (iv) visual processing and (v) occupational therapy and sensory processing?

2. Did District deny Student a FAPE by failing to implement stay put social skills services and transportation to Student from December 2, 2015 through the next agreed upon individualized education program?

3. Did District deny Student a FAPE by failing to implement extended school year services for Student in extended school year 2016?

4. Did District deny Student a FAPE at the IEP team meetings of February 10, 2016, February 24, 2016, March 8, 2016, April 15, 2016 and May 3, 2016, by failing (i) to identify the support services Student required to make educational progress, and (ii) to offer Student a FAPE?

5. Did District deny Student a FAPE from May 2016 and throughout the time it failed to review parentally funded independent educational evaluations, specifically, evaluations by Lights-On Learning, Dr. Simun, Susan Hollar and Dr. Maria Abramson?

6. Did District deny Student a FAPE by predetermining Student's educational program at the May 31, 2017 IEP team meeting when it informed Parent that extended school year services were never offered to ninth grade students?

7. Did District deny Student a free appropriate public education by predetermining Student's goals and denying Parent meaningful participation at the IEP of June 8, 2017?

8. Did District deny Student a FAPE at the IEP team meetings of May 31 and June 8, 2017, by failing to have the necessary participants present at and throughout the meetings?

9. Did District deny Student a FAPE at the IEP team meetings of October 5, 2016, April 25, 2017, May 31, 2017 and June 8, 2017, by failing (i) to identify the support services Student required to make educational progress, and (ii) to offer Student a FAPE?

[2] During the PHC, Student's counsel and the ALJ clarified the issues for hearing, which the ALJ renumbered and rephrased pursuant to the discussion at the PHC and to place the issues in chronological order. The ALJ dismissed the tenth issue identified in Student's complaint and PHC statement for lack of jurisdiction.

10. Did District deny Student a FAPE by failing to provide Parent with timely prior written notice when it refused Parent's request for an intensive reading intervention program and the PACE program?[3]

District's Case

11. Did District's April 25, 2017 IEP, as developed on April 25, 2017, May 31, 2017 and June 8, 2017, offer Student a FAPE in the least restrictive environment?

As remedies, Student seeks: compensatory education in social skills training and as recommended by Student's experts; independent educational evaluations in the areas of visual processing, auditory processing, occupational therapy and sensory integration; and reimbursement to parent for educational expenditures and transportation. District seeks an order that the IEP of April 25, 2017, offered Student a FAPE in the least restrictive environment.

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"). Student moved for permission to identify her exhibits alphabetically, as she had already prepared her exhibit binder with letters, instead of numbers as routinely ordered by OAH. Student designated approximately 150 exhibits in exhibit list. After discussion on the record, Student's motion was denied, and Student was expressly ordered to number her exhibits, specifically, to number Exhibits A, B, C, etc. as Exhibits 1, 2, 3, etc., without changing the order or number of exhibits. Student was told that she did not need to change the existing exhibit tabs, but to write the number of the exhibit onto each tab. The letters may be covered with white-out tape or crossed out. Student does not need to change the pagination of the documents, or to remove any tabs.

In light of the great number of exhibits designated by Student, the simple change ordered will eliminate the inherent confusion in directing witnesses to similarly designated exhibits, such as "AAA," "AAAA," and "AAAAA."[4] The use of alphabetic, rather than numeric, identification increases the possibility of an unclear record, as many letters sound alike, such as B, P and V. Many letters have very similar sounds that may be difficult to distinguish at hearing or on the audio record, such as B, C, D, E, G, P, T, V and Z. Compounding these sound similarities with multiple repetitions, due to the number of

[3] Student was ordered to identify the date(s) of Parent's request on the first day of hearing.

[4] Even more confusing alphabetic combinations exist, such as changing the first letter for each subsequent series, for example "AA," "AB," "AC," and "BA," "BB," "BC," etc. Numerical references make for a clearer record and clearer direction to the witnesses.

exhibits identified, creates the likelihood of a confusing and unclear record. The identification of exhibits by letter in these circumstances would result in the unnecessary and unjustified use of time to clarify each reference to Student's exhibits during the hearing, and increase the likelihood of typographical errors when referencing Student's exhibits in writing. Accordingly, Student shall use numbers to identify her exhibits.

Student's counsel represented on the record that she had already identified exhibits by letter on the evidence binder being sent for service on District that afternoon, and that her office would not have time to renumber those exhibit tabs. After further discussion on the record, Student was ordered to timely serve the exhibits as marked, and District's counsel was ordered to mark the tabs on the one exhibit binder served on District with numbers in accordance with the orders to Student. This process is anticipated to take District's counsel no more than a few minutes.

Student's counsel is admonished that the concerns stated in this Order apply to all due process proceedings, and that counsel should use numbers to identify exhibits in subsequent due process proceedings in compliance with OAH's standard PHC orders.

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. (Student shall designate exhibits in the table of contents by number, which may be done in handwriting on the printed table of contents.) Each party shall serve an exhibit binder containing its respective exhibits on the other party by 5:00 p.m. on March 6, 2018, 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. (Student shall have these exhibit binders prepared with numbered exhibit tabs and a numbered table of contents at the start of the hearing.) 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 March 9, 2018, 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.

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

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).

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 5:00 p.m. on March 9, 2018, 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, cross, re-direct and re-cross examination. District 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 9, 2018, 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, District'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 District, 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 District 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.

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. Neither party identified any witness who requires telephonic testimony.

7. Electronic Recording of Hearing.

a. Audio Recording. Student requested permission to make an audio recording of the hearing. Any party who desires to make such a recording shall do so only on the conditions that: (1) The parties shall turn on and off the recording device at the same time that the ALJ is on and off the record, to avoid recording conversations while off the record; (2) the parties shall not play any part of the recording for a prospective witness; (3) the parties shall not publish or play any part of the recording for any purpose other than assisting in the representation and presentation of this due process hearing; (4) the parties will erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any

decision herein has been exhausted; and (5) the parties shall not use this recording in any subsequent due process hearing. The recording by OAH is the only official recording; recording of the hearing by a party is not the official record and is permitted as a courtesy. The operation of the party's recording mechanism will not be allowed to delay 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].) In these consolidated cases, Student is the petitioning party in her case, and District is the petitioning party in its case. As Student's case presents broader issues, Student shall present her case-in-chief, followed by District. Each party shall bear the burden of proof in their respective cases.

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 PHC of March 5, 2018.

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 Open To the Public. At the request of Student, the hearing will be open 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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.dgsapps.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.

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

IT IS SO ORDERED.

DATE: March 6, 2018

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