BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. TEHACHAPI UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016110657 ORDER FOLLOWING PREHEARING CONFERENCE, GRANTING CHANGE OF HEARING LOCATION, GRANTING CONTINUANCE, AND SETTING PREHEARING CONFERENCE AND DUE PROCESS HEARING DATES

On January 6, 2016, a telephonic prehearing conference was held before Administrative Law Judge Kara Hatfield, Office of Administrative Hearings. Andrea Marcus and Kelly Kaeser, Attorneys at Law, appeared on behalf of Student. Darren Bogie, Stephanie Virrey Gutcher, and Kathleen LaMay, Attorneys at Law, appeared on behalf of Tehachapi Unified School District. The PHC was recorded.

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

1. Student's Motion to Change Hearing Location. On December 29, 2016, Student filed a motion to change the location of the due process hearing either to a location in Bakersfield, California or to the Office of Administrative Hearings in Van Nuys, California, based upon Student's counsel's concerns about her safety if the hearing is held in Tehachapi. District filed an opposition to Student's motion on January 5, 2017, citing the incomplete and uncertain allegations of Student's counsel's declaration and the burden conducting a hearing in either Bakersfield or Van Nuys would impose on District as well as Parents. During the PHC, Student's counsel represented that Bakersfield is a location that is reasonably convenient to Parents.

Without determining the truth of the allegations Student's counsel made regarding her perception of intimidation or harassment in Tehachapi, having considered Student's assertion that Bakersfield is reasonably convenient to Parents and having considered both the inconveniences and benefits to District of participating in a due process hearing away from District's office but where District's attorneys are located, Student's motion to change the location of the hearing to Bakersfield is granted. OAH will identify a specific location in Bakersfield at which the due process hearing will be held and will notify the parties' attorneys of the hearing location.

2. Student's Request for Continuance and Hearing Dates and Times. During the PHC, Student requested a continuance because the currently scheduled dates conflict with the due process hearing scheduled in another matter involving the same school district and the same attorneys, and because a continuance would afford more time to identify a location for the hearing to be held in Bakersfield. District did not oppose the request. The parties stipulated to dates.

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. (34 C.F.R. § 300.515(a) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).)

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is granted. Accordingly, the hearing shall take place on February 14, 15, and 16, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. 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.

A further PHC will be held on February 6, 2017, at 1:00 p.m. Any further motions, including for telephonic testimony, must be filed by 5:00 p.m. on February 1, 2017.

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.

3. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Did District deny Student a free appropriate public education by:

1. Failing in the January 19, 2016 and March 4, 2016 individualized education programs to offer Student a full-time one-to-one applied behavior analysis-trained aide with two hours per week of supervision from a Board Certified Behavior Analyst; and

2. Failing to file for a due process hearing with OAH to seek a determination that the January 19, 2016 IEP offered Student a FAPE and to authorize District to implement the January 19, 2016 IEP without parental consent?

Student's proposed remedies are a full time one-to-one ABA-trained aide with two hours per week of supervision from a Board Certified Behavior Analyst and compensatory education in the form of intensive academic instruction.

4. 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.

The parties are ordered to meet and confer by February 9, 2017, to delete duplicate exhibits from the exhibit binders.

The parties shall exchange 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.

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.

5. 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. 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 February 9, 2017, as to the schedule of witnesses. The parties shall provide the ALJ with a detailed schedule which shall include an estimate of time for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness when the witness is first called. District shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony each witness is expected to take.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

6. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

7. 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. Unless otherwise ordered regarding any particular witness, the proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify from a private room using a landline telephone. No witness will be heard by telephone unless all these requirements have been fulfilled. Neither party has requested telephonic testimony at this time but may do so in advance of the February 6, 2017 PHC.

8. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested to audio record the hearing. The ALJ shall audio record the hearing. No other person may audio record the hearing unless otherwise permitted by the ALJ.

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.

9. 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 his case-in-chief, followed by District.

10. Motions. As indicated above, Student's motion to change the location and request for continuance are granted. Any further motions must be filed by 5:00 p.m. on February 1, 2017.

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. 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.

14. Special Needs and Accommodations. Neither party anticipates the need for accommodations or for interpreting services.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the 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/Accommodations.aspx

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

16. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO OAH AT THE FAXINATION LINE at 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

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.

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

IT IS SO ORDERED.

DATE: January 6, 2017

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Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings