BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017101237
v.	ORDER ACCEPTING JOINT STIPULATION AND ORDER SETTING REBUTTAL HEARING
MANHATTAN BEACH UNIFIED SCHOOL DISTRICT.	

By Order issued July 2, 2018, Manhattan Beach Unified School District was to decide by July 5, 2018, if it was going to seek to present rebuttal testimony. District notified Student on that date that it wished to so do. Accordingly, under the terms of the July 2, 2018 Order, the parties on July 26, 2018, submitted a joint stipulation and individual briefing on District's request.

Joint Stipulation

The parties have proposed to stipulate to the following facts:

1. If called on rebuttal, Ms. Gloria Marsella would testify that she was Student's sixth grade special education teacher and that she never observed nor is she aware of the episode that allegedly occurred on January 18, 2017, where Student eloped from class and laid on the field against a fence for an hour while drooling, as described by Parent on direct examination.

2. If called on rebuttal, Ms. Jen Saliba would testify that she was Student's fifth grade special education teacher and case manager, and that she never observed nor is she aware of any instances where Student eloped from class in the 5th grade, as described by Parent on direct examination.

The parties' proposed stipulated facts are accepted and made part of the hearing record.

Request to Present Rebuttal Testimony

District seeks to put on rebuttal testimony by Mr. Andrew Kilpatrick and Ms. Tami Schoen-Dowgiewicz in response to hearing testimony presented by Student.

Due process hearings are conducted under regulations adopted by the California Department of Education (Ed. Code, § 56505(a)), which provide, in part, that:

> [Due process hearings] shall not be conducted according to the technical rules of evidence and those related to witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

Following a party's presentation of evidence, the adversary is allowed an opportunity to rebut. The function of rebuttal evidence is to explain or disprove an adversary's evidence. (*United States v. Schneiderman* (S.D. Cal 1952) 104 F.Supp. 405, 410.) Decisions concerning the use of rebuttal evidence lie within the sound discretion of the trial court. (*United States v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 383.) After the parties have presented their cases, they "may respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permits them to offer evidence upon their original case." (Code Civ. Proc., § 607.) Otherwise, rebuttal is limited to evidence contradicting an adverse party's presentation of facts or impeaching its witnesses.

Mr. Andrew Kilpatrick

Rebuttal is not available to District to present evidence which it should have presented in its case-in-chief unless an exception must be made in the furtherance of justice. District does not contend that such exception applies. District wishes to recall Mr. Kilpatrick to rebut Student's presentations on four issues: 1) whether Mr. Kilpatrick visited Success Learning Center prior to the May 5, 2017 IEP team meeting; 2) whether Mr. Kilpatrick presented SLC as a placement option at the May 5, 2017 IEP team meeting; 3) whether Parent was aware that her counsel was aware that Student's counsel was "involved with" the private school at which Student as ultimately placed prior to the start of the hearing in this matter; and 4) whether Parent was told at the May 5, 2017 IEP team meeting that the team would not reconsider the placement offer made at that meeting. All of these matters were presented by the testimony of Parent, who was the last witness called.

Student opposes allowing Mr. Kilpatrick to present testimony in rebuttal. Student asserts that District had the opportunity to anticipate and present evidence on these topics, that the testimony would be duplicative and wasteful of resources, and that Mr. Kilpatrick has already given testimony that answers these questions.

For the most part, Student's objections are unpersuasive. The proposed rebuttal testimony is not unduly cumulative, and District has not waived its right to present rebuttal. The test is not whether a party could possibly have put on evidence that anticipated the factual areas it now seeks to rebut. A party may not fill holes in its presentation through rebuttal, but may repair damage made to its case by its adversary's case. In seeking to respond to points raised by Student, District is properly exercising its right of rebuttal.

Rebuttal thus limited will not be wasteful of time or resources. The proposed testimony is not redundant because the specific questions to be answered in rebuttal have not

been answered. For example, Student contends in response to the fourth issue that Mr. Kilpatrick already testified that he declined to recess the May 5, 2017 IEP team meeting without making an offer of FAPE. That does not resolve the fourth issue. With one exception, the issues for which District intends to present Mr. Kilpatrick's testimony are proper areas for rebuttal and necessary to the development of the record.

District wishes to present evidence on issue to impeach Parent's credibility, asserting that Parent had knowledge of some relationship Student's counsel had with a private school prior to the start of the hearing in this matter. At most, Mr. Kilpatrick could testify that he informed Parent of such a relationship before the start of hearing, which would present a conflict between the two witnesses as to where the truth lay. Although the credibility of both witnesses would then be impeached, the impeaching issue is a minor collateral matter which has no bearing on the outcome of this matter. Because the proposed impeaching testimony is minor and unlikely to be indisputably established, its probative value is outweighed by the undue consumption of time. (Evid. Code, § 352(a).) District may not present rebuttal evidence on this issue.

Ms. Tami Schoen-Dowgiewicz

District intends to present Ms. Schoen-Dowgiewicz to rebut Parent's testimony about the conditions at SLC during Parent's second visit to SLC, particularly the composition of the middle school student body. District states that it was unaware prior to Parent's testimony that Parent made a second visit to observe SLC.

Student contends that this testimony is being presented in an effort to supplement District's case-in-chief with information to support the appropriateness of its offer of a free appropriate public education. Such buttressing is not a proper purpose of rebuttal. If rebuttal testimony by this witness is allowed, Student argues, it should be strictly limited to the terms presented: response to Parent's assertions about the conditions observed at the second visit to the school.

Parent is correct that Ms. Schoen-Dowgiewicz may not testify about the appropriateness of SLC as a placement offer for Student. Rebuttal is available to respond to specific testimony given by Parent relating to observations she made during her second visit to the school and, thus limited, will be allowed.

Ms. Michelle Romero

Student states that she wishes to call Ms. Romero to respond to the anticipated testimony by Ms. Schoen-Dowgiewicz. Student may call Ms. Romero on that issue if Ms. Schoen-Dowgiewicz does testify. As District is not being allowed to have Mr. Kilpatrick testify about Student's counsel's relationship with the private school, Ms. Romero may not testify on that issue.

Scheduling of Hearing

In their Joint Statement, the parties proposed two dates for the completion of the hearing in this matter. As agreed to by the parties, the completion of hearing will be had on Monday, August 13, 2018, beginning at 9:00 a.m. at District office located at 325 S. Peck Avenue, Manhattan Beach, CA 90266. Any documents that may be introduced at the hearing must be exchanged by not later than 5:00 p.m. on Monday, August 6, 2018.

IT IS SO ORDERED.

DATE: August 1, 2018

DocuSigned by:
Chris Butchko
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings