BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. PASADENA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018110928 ORDER FOLLOWING PREHEARING CONFERENCE

On March 29, 2019, a telephonic prehearing conference was held before Administrative Law Judge Laurie Gorsline, Office of Administrative Hearings. Nelson Chu, Attorney at Law, appeared on behalf of Student. Meredith Reynolds, Attorney at Law, appeared on behalf of Pasadena Unified School 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 9, 10 and 11, 2019**, and continue day to day at the discretion of the ALJ. The hearing shall take place at:

Wilson Middle School
300 Madre Street
Pasadena, CA 91107

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.

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.

The hearing room shall be available to the ALJ one hour before the scheduled hearing, and shall be secured and locked at the end of each hearing day. **The same hearing room shall be used for each day of hearing.** Prior to the beginning of the hearing, Pasadena shall assist the ALJ to ensure that the hearing room is configured into a courtroom or square setting, including (1) a table for Student and his representatives; (2) a table for Pasadena's legal representative and special education representative; (3) a table for the

witness; and (4) a table for the ALJ near an electrical outlet. Pasadena shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

Pasadena shall arrange a separate room for Student and Student's counsel to use during the hearing. Pasadena shall ensure that the room is available for Student and Student's counsel each day of the hearing at least thirty minutes prior to the scheduled start time of the hearing through 4:30 p.m.

Pasadena shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, Pasadena's attorneys, and witnesses.

The local educational agency shall immediately notify OAH if it is unable to comply with any part of this paragraph.

2. Facility Certification. 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. At the time of the prehearing conference, Pasadena failed to file a signed certification that it would provide a facility that complied with the law. **Pasadena was ordered to certify to OAH by way of a certification signed under penalty of perjury that its hearing facilities comply with the law, or notify OAH that it is unable to comply with this order by no later than April 2, 2019.**

3. Pasadena's Response to Student's Complaint. State and federal law require a local education agency to respond to a due process. (Ed. Code, § 56502, subd. (d)(2)(A); 20 USC § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508.); *M.C. by and through his guardian ad litem M.N. v. Antelope Valley Union High School Pasadena* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) On December 7, 2018, Pasadena filed a response to the complaint.

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

Issues[1]:

(1) Did Pasadena deny Student a free appropriate public education by failing to assess her for special education and related services between September 19, 2017 and January 10, 2018, in violation of its child find duty to assess;

(2) Did Pasadena deny Student a FAPE by failing to appropriately assess her in all areas of known or suspected disability, specifically:

(a) By failing to appropriately conduct the psychoeducational assessment dated April 27, 2018;

(b) By failing to conduct a behavior assessment between January 10, 2018 and April 27, 2018;

(c) By failing to conduct an educationally related mental health services assessment between January 10, 2018 and April 27, 2018;

(d) By failing to conduct an occupational therapy assessment between January 10, 2018 and April 27, 2018;

(e) By failing to conduct a social skills assessment between January 10, 2018 and April 27, 2018;

(f) By failing to conduct a transition assessment between January 10, 2018 and November 27, 2018, the date the complaint was filed;

(3) Did Pasadena deny Student a FAPE in the April 27, 2018 IEP by:

(a) Failing to accurately and completely state Student's present levels of performance in the areas of social emotional/behavioral, vocational and adaptive/daily living skills;

(b) Failing to develop appropriate measureable annual goals in the areas of social emotional and employment;

[1] During the prehearing conference, Student clarified the issues for hearing. The ALJ rephrased and clarified the issue stated in Student's prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made.

(c) Failing to make a clear offer of placement in a specific nonpublic school, thereby significantly impeding parent's opportunity to participate in the decision making process;

(d) Failing to offer an appropriate placement;

(e) Failing to offer an appropriate amount of counseling and psychological services;

(f) Failing to offer one-to-one aide support;

(g) Failing to offer occupational therapy services;

(h) Failing to offer a behavior support plan;

(i) Failing to offer social skills support;

(j) Failing to offer an appropriate individualized transition plan tailored to meet Student's unique needs with appropriate goals;

(k) Failing to offer appropriate transition services in the key areas of education/training, employment and independent living based on Student's strengths, interests and preferences;

(l) Failing to offer a program with research-based intervention;

(4) Did Pasadena deny Student a FAPE by failing to provide Parent prior written notice regarding Parent's request as to eligibility and school placement made at the April 27, 2018 IEP team meeting?

Proposed Resolutions:

Student's proposed resolutions include placement in a private or nonpublic school; compensatory education; reimbursement; a behavior support plan; a transition plan with transition services; one-to-one aide support, occupational therapy, individual counseling, and social skills training through a nonpublic agency; transportation; independent educational evaluations in the areas of psychoeducation, educational related mental health services, occupational therapy, social skills, transition and behavior; and the development of an appropriate IEP.

5. Exhibits. The parties shall serve their evidence binders in compliance with Education Code section 56505. 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. 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.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. To the extent practicable, exhibits in the exhibit binders shall be in chronological order.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae by **April 2, 2019**.

Pasadena shall include as part of their exhibits the school calendar(s) for all of the years at issue. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), Pasadena shall serve a copy of the school calendar(s) on Student by **April 2, 2019**.

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 or attached to the IEP(s). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party along with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter.

The parties shall meet and confer **by April 3, 2019,** to delete duplicate exhibits from the exhibit binders. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and/or the ALJ rules that it is admissible. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been timely disclosed.

6. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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.

No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion

of the ALJ. Education Code section 56505, subd. (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 business days before the hearing.

The parties shall meet and confer **by April 3, 2019,** as to the schedule of witnesses and coordinate the availability and order 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 also meet and confer regarding the one joint detailed hour-by-hour schedule described below**.

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 identify which party(s) is calling the witness to testify and include an estimate of time for each party's direct and cross-examination. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

The parties are ordered to meet and confer **by April 3, 2019,** and identify the witnesses on the parties' 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, Pasadena'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 Pasadena, and if not, shall provide Student's counsel with the witness(es) most recent contact information **by April 3, 2019.** Any contact information provided by Pasadena 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).

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. Pasadena 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 such evidence. 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 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.

7. 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. The order in which the parties present their cases in-chief shall be subordinate to the need for each witness to appear only once.

8. Telephonic Testimony. No telephonic testimony was requested. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) In the event that telephonic testimony is requested, the party seeking to present a witness by telephone shall move in advance for leave to do so. Any motion filed shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not timely made three days prior to the prehearing conference, unless the opposing party has stipulated that the witness may appear by telephone. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of *exact physical copies of the exhibit binders* from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. *Faxed or electronic copies are unacceptable.*. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

9. Electronic Recording of Hearing.

a. Audio Recording. The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing, unless otherwise ordered. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

Counsel for the parties shall be permitted to make an audio recording subject to the following conditions: 1) OAH's recording is the only official recording; 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 the party's recording mechanism will not be allowed to delay the hearing; 4) such recording shall be for counsel's personal use only and only for review and preparation of the hearing and closing brief; 5) counsel shall not play any part of the recording for any party, witness or prospective witness and the recording shall not be disseminated to anyone; 6) the parties shall not use the recording in any subsequent due process hearing or other proceeding; and 7) the parties shall destroy the unofficial recording upon the earlier of the following: (a) upon settlement of this matter, (b) dismissal of this case, (c) withdrawal as counsel; or (d) within 90 days of issuance of the ALJ's decision in this case.

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.

10. 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 Student's case-in-chief, followed by Pasadena. However, if a witness is called by more than one party, all parties shall examine the witness when the witness is first called.

11. Motions. No pretrial motions are pending or contemplated. Any motion not timely filed shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not timely made three days prior to the prehearing conference.

12. 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.

13. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form. The parties shall meet and confer **by April 5, 2019, at 4:00 p.m.** to determine legal and factual stipulations, if any, to be submitted at hearing.

14. 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 during the hearing unless permission to the contrary is obtained from the ALJ. There shall be no texting permitted while the hearing is in session.

15. Special Needs and Accommodations. Neither party requested 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, or email the ADA Coordinator at OAHADA@dgs.ca.gov, 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.

16. Closed Hearing. The hearing will be closed to the public.

17. 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.

If the parties settle the matter 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. OAH will not cancel the hearing dates without this information and will set the matter for dismissal 30 days after the scheduled board meeting.

18. Failure to Comply. The failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: April 2, 2019

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LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings