BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ANTIOCH UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018050914 ORDER FOLLOWING PREHEARING CONFERENCE

On November 19, 2018, a telephonic prehearing conference was held before Administrative Law Judge Penelope Pahl, Office of Administrative Hearings. Tania Whiteleather, Attorney at Law, appeared on behalf of Student. Matthew Tamel and Kasmira Brough, Attorneys at Law, appeared on behalf of Antioch Unified School District. The PHC was recorded.

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

1. Continuance. Counsel for Student represented that she has been ordered to appear in case number 2018071234 on November 28, 2018, and thus a continuance of the hearing in this matter is required. Counsel informed the undersigned that the scheduling of this case was known to the ALJ presiding over OAH case number 2018071234 at the time of the hearing on that matter; that the potential conflict was specifically addressed; and that counsel was ordered to appear in 2018071234 on November 27, 2018 as the hearing in that matter had already started.

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); 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).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs.,tit. 1, § 1020;Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal.Rules of Court, rule 3.1332(c).)

Counsel for Student was admonished for failing to file a motion for continuance. However, in this instance, in light of the impending dates involved, good cause for the continuance was found based on counsel's representations as an officer of the court, due to the prior order of the ALJ in case number 2018071234. The continuance was granted.

2. Hearing Dates, Times, and Location. The hearing in this matter shall take place beginning on December 11, 2018 at 9:30 a.m., and continuing on December 12 and 13, 2018 at 9:00 a.m., then continuing day to day at the discretion of the ALJ. The hearing shall take place at the Antioch Unified School District offices located at 510 G. Street, Antioch, CA 94509. This hearing shall take precedence over any other hearing scheduled to be heard on those dates involving either Antioch or counsel representing either side in this matter. No further continuances will be granted absent extraordinary circumstances.

As ordered in the scheduling order, District shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 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. Counsel for District has verbally assured the undersigned that the facilities to be used for this case comply with the law and shall file the required certification of ADA compliance no later than November 27, 2018, which shall specify the exact address of the room to be used for the hearing. District shall inform OAH within two days of the date of this order if it is unable to comply with this order.

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.

Prior to the beginning of the hearing, District 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 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 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 must be capable of being locked overnight and during breaks in the hearing so that recording equipment and hearing materials are not disturbed for the duration of the hearing.

3. Pending Motions In Limine. District timely filed three motions in limine on November 14, 2018. The last day to oppose those motions is today, November 19, 2018. Student's counsel expressed a preference for providing opposition in writing. As the motions are potentially dispositive, Antioch was given permission to file a written reply to Student's opposition. Antioch's reply is due by close of business on Wednesday November 21, 2018. The parties were ordered to address the following issues in their briefs: a) Whether the issues related to the January 18, 2018 manifestation determination hearing are moot; b) whether any of the issues presented are barred due to findings made in the prior case involving these parties in OAH case number 2017080513; and c) whether any issues in this case are barred due to the Stipulation entered into in the prior case involving these parties in OAH case number 2018010348.

4. Issues and Proposed Resolutions. Pursuant to discussions with the parties during the prehearing conference, the issues to be determined at the due process hearing, and the proposed resolutions were clarified. The issues to be heard in this matter are listed below:

1. Was the psycho-educational assessment conducted by Dr. Valerie Lopes on behalf of Antioch Unified School District in May 2016 inappropriate, such that Student is entitled to an independent psycho-educational evaluation at public expense?

2. Did Antioch Unified School District fail to convene an individualized education program team meeting to timely revise and review Student's Behavioral Intervention Plan prior to removing him from the placement agreed to in the December 15, 2015 IEP?

3. Did Antioch Unified School District fail to comply with the procedural requirements of the IDEA and California law by[1]:

a. giving notice of the January 18, 2018 manifestation determination less than 24 hours prior to the meeting;

b. holding the January 8, 2018 manifestation determination hearing over Parents' objections and without Parents' participation; and

c. failing to allow Parents to participate in the determination of the 45-day interim alternative educational setting placement when it determined that Student would be removed to Sierra School of Antioch on January 18, 2018.[2]

Issue Review

The parties shall carefully review the issues set forth above to determine that, as written, they accurately capture the discussions and amendments agreed to during the Prehearing Conference. These are the issues to be tried at hearing. The parties were advised that if they believe the issues do not accurately capture the discussions, that party is to expeditiously raise the concern in writing. Any concerns raised will be discussed on the first day of the hearing.

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[1] Student's issues three and four have been combined for clarity.

[2] It was noted on the record at the time of the Prehearing Conference, that the motions in limine will be considered separately from the issue clarification process. Thus, all issues stated will still be subject to any determinations made following the motions in limine.

Proposed Resolutions:

Student's proposed resolutions include reimbursement for an independent psycho-educational assessment to assess the impact of Student's autism on his education; compensatory education for failure to identify needs associated with Student's autism; reimbursement for parent-incurred expenses for private educational and educationally related services for Student; and an order requiring District staff to undergo training regarding determinations necessary prior to interim alternative educational services being implemented.

5. 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 with consecutive bates stamping of exhibits preferred. 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. 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 the ALJ rules that it is admissible.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

District shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to District.

6. 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 timely disclosed except for good cause shown, and at the discretion of the ALJ.

7. Meet and Confer. The parties are encouraged to review and shorten their witness lists and lists of exhibits 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. To that end, parties are ordered to meet and confer **no later than 3 p.m. December 6, 2018,** to discuss whether routine information can be the subject of stipulations to shorten the hearing by avoiding the necessity of testimony, particularly as to routine

matters, and/or exhibits. The parties shall also discuss the order of witnesses and the length of witness testimony and shall present the ALJ with a written joint witness list with time estimates and dates of expected testimony on the first day of hearing.

Should agreement on a list not be reached, each party shall prepare a separate list and Student shall have witnesses available so the hearing can proceed promptly. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, 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 of each such witness is expected to take.

8. 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.

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 requested the hearing, bears the burden of proof, and shall present his case-in-chief first, followed by District**.**

10. Telephonic /Video Testimony. Neither party has requested permission for a witness to testify telephonically. Whether a witness may appear by telephone or other electronic means 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 or video conference shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone or video conference. 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 instruct the witness as to the rules regarding maintenance of Student's privacy with regard to the documents provided. The proponent of the testimony shall also ensure that the room from which the witness is testifying has a land line and/or video equipment that allows all hearing participants to hear and, if applicable, see the witness, and that the witness is able to hear objections and rulings. Should telephonic or video testimony be ordered, Antioch shall ensure that the hearing room is equipped with adequate telephonic or video conferencing equipment that allows receipt of the transmitted telephonic or video testimony. Video conferencing will be allowed only if the proponent of the evidence ensures that adequate equipment is available and the connection is reliable. Should video conferencing become burdensome or time consuming, the testimony shall proceed via telephone. No witness will be heard by telephone or video conference unless all these requirements have been fulfilled.

11. Electronic Recording of Hearing.

a. Audio Recording. The parties' motions to make audio recordings of the hearing are granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; 3) the recording device will be removed by the recording party during any recess where the party leaves the room; 4) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a private recording will not be used to prepare the testimony of an upcoming witness in 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.

12. IEP Recordings. Any request to introduce a portion of an IEP recording will be considered at the time of hearing subject to the following conditions: 1) It is preferable that a transcript **of the portion of the IEP recording being introduced** be prepared and submitted with a declaration authenticating the transcription;[3] 2) At the time the evidence is introduced, relevance of the portion of the IEP recording at issue must be established; 3) the exact portion (minutes) of the IEP recording the party seeks to admit must be identified; and 4) the identity of the person speaking on the portion of the recording being introduced must be established.

An opposing party is not precluded from seeking admission of additional portions of an IEP recording to establish additional context of comments subject to the above requirements.

Parties are not precluded from seeking admission of an entire IEP recording subject to establishment of relevance of the entire recording as well as meeting the other requirements listed above.

13. Anticipated Motions. Student has indicated that he believes he will need to make a request for document disclosure. No further pre-trial motions other than the motions in limine discussed above are anticipated. Any motion that was not filed by the date the Prehearing Conference statement was due, that is, 3 business days prior to the date of the Prehearing Conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

14. 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

[3] A certified transcription is not required.

education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

15. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged to promote hearing efficiency. Stipulations to routine foundational facts and avoiding duplicative exhibits are particularly favored. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

16. 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.

17. Special Needs Accommodations and Translation. At present neither party anticipates the need for accommodation for any witness or party, or for the services of an interpreter. Any party or participant to this case requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 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/Accessibility.aspx.

18. Hearing Open To the Public. At the request of Student, the hearing will be open to the public.

19. 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.applications.dgsapps.dgs.ca.gov/oah/oahsftweb **.** IFTHE SETTLEMENT IS SUBJECT TO BOARD APPROVAL, THE LETTER SHALL CONTAIN THE DATE ON WHICH THE BOARD IS SCHEDULED TO CONSIDER THE SETTLEMENT AGREEMENT.

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.

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

IT IS SO ORDERED.

DATE: November 19, 2018

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings