BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017020648
v.	ORDER FOLLOWING PREHEARING CONFERENCE AND DISMISSING ISSUE
SEQUOIA UNION HIGH SCHOOL DISTRICT.	

On March 6, 2017, a telephonic prehearing conference was held before Division Presiding Administrative Law Judge Bob N. Varma, Office of Administrative Hearings. Margaret P. Roberts, Attorney at Law, appeared on behalf of Student. Kathryn E. Meola and Rebecca H. Horton, Attorneys at Law, appeared on behalf of the Sequoia Union High 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 expedited hearing shall take place on March 14 through March 16, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at District's offices located at 480 James Avenue, Redwood City, California. 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. **On March 14, 2017, the hearing shall be in recess from 11:30 a.m. to 1:30 p.m.**

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. District failed to certify that it would provide a facility for this case that complied with the law. Counsel for District stated that she believed Sequoia's facilities were compliant. **District shall inform OAH within two days of the date of this order if it is able to certify that it will provide a facility that complies with the law.**

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 shall be locked following the hearing each night. District shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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 expedited due process hearing, and the proposed resolutions, are listed below.

Issue No. 1: Was Student's November 9, 2016 conduct, which resulted in a recommendation for expulsion, caused by or have a direct and substantial relationship to Student's disabilities?

Issue No. 2: Did District commit material procedural violations in conducting the November 18, 2016 manifestation determination by:

a. failing to review and consider all relevant information in Student's education file, in conjunction with information presented at the manifestation determination;

b. failing to consider, or address, input from parent and from Student's case manager regarding Student's behavior being caused by, or substantially related to, Student's medication, which is prescribed to treat her disability;

c. ignoring Parent's request to seek a medical opinion regarding the side effects of Student's medication;

d. limiting consideration to the relationship between Student's conduct and Moyamoya disease, and not considering the relationship between the conduct and her seizure disorder or the medications used to treat the seizure disorder; and

e. failing to provide Parent with legally adequate prior written notice prior to removing Student from her placement?[1]

Proposed Resolutions: Student seeks an order finding that her conduct was a manifestation of her disability; an order vacating the expulsion order and the county hearing officer's decision; removal of all references to the 2016 and 2017 expulsion proceedings from Student's records; reinstatement of Student in high school of her choice within District; and, a functional behavior assessment to be completed, and behavior intervention plan to be

[1] Student's Issue 2(f) was dismissed at the PHC. It is discussed below.

developed, within 60 days of the Decision in the expedited hearing. The parties were informed that they should ensure that the presentation of the case and any closing arguments should address whether the ALJ has authority to grant some of the requested remedies, such as vacating the decision of another hearing officer or purging Student records.

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"). 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. 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 included in the exhibit lists, disclosed to the other party five business days before the hearing 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.

Student raised several objections to exhibits disclosed by District, including foundational objections and objection to duplicative exhibits. The objections were primarily addressed towards video recordings, recordings of the expulsion proceeding and transcript of the expulsion proceeding. District raised several objections to Student's exhibits, primarily as to the relevance of Student's individualized education programs that are several years removed from the time period at issue in the expedited hearing. The undersigned denied all requests to exclude evidence at the time of the PHC. The parties may raise any valid objections to any exhibit at 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. 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, or disclosed to the other party five business days prior to the hearing, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

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 parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. 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.

The parties agreed to confer as to the scheduling of District employees. Student raised objections to one of District's witness. The undersigned deferred ruling on the request to exclude the witness until the hearing, and if the witness is actually called.

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. 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 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. No witness will be heard by telephone unless all these requirements have been fulfilled. Neither party anticipated the need for telephonic testimony.

7. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested permission to audio record the hearing. Should either party desire to record the proceedings, the party shall request permission to record from the ALJ. If the request is granted the recording shall be 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; and 3) that 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].) Here, Student is the petitioning party. Accordingly, Student shall present its case-in-chief, followed by District.

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 prehearing conference of March 6, 2017.

Motion to Dismiss Issue 2(f): At the PHC District moved to dismiss Student's Issue 2(f), which reads as follows:

> *Did District commit material procedural violations in conducting the November 18, 2016 manifestation determination by: other failures that Parent may not currently be aware of but that may be revealed at the hearing.*

District contended that the issue failed to meet the notice requirements of 20 U.S.C. § 1415(b)(7)(ii)((III), in that there is no description of an actual problem relating to Student's special education, or the proposed initiation or change in Student's special education. Student contended that due to the lack of discovery in special education proceedings, Student wished to preserve the right to raise any issues that Parent may become aware of through the evidence and testimony presented at hearing.

District's motion to challenge the sufficiency of Issue 2(f) is more appropriate for a Notice of Insufficiency, which is a process unavailable in an expedited hearing. However, basic principles of notice still apply. Here, no actual problem has been identified. District cannot defend against a future, yet undiscovered, problem. The undersigned has no jurisdiction to rule upon an issue not yet stated. Additional, under Education Code section 56509 Student is permitted to file additional due process hearing requests on any issue separate from those addressed in an already filed request for due process hearing. Accordingly, Student's Issue 2(f) was dismissed.

10. Compensatory Education and 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: http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed To the Public. The hearing shall be closed to the public, unless Student requests otherwise.

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.

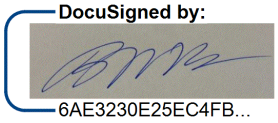
IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH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

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

IT IS SO ORDERED.

DATE: March 7, 2017



BOB N. VARMA
Division Presiding Administrative Law Judge
Office of Administrative Hearings