BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. OXNARD UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2017020382 ORDER FOLLOWING PREHEARING CONFERENCE

On April 28, 2017, a telephonic prehearing conference was held before Administrative Law Judge Robert Martin, Office of Administrative Hearings. Lyndsey Gallagher and Andréa Marcus, Attorneys at Law, appeared on behalf of Student. Julie Coate, Attorney at Law, appeared on behalf of Oxnard Union High School District. The PHC was recorded.

Based on discussion at the PHC, the ALJ issues the following order:

1. District's Motion to Consolidate. Student filed his request for due process hearing in this matter on February 6, 2017, naming District. Student contended that District denied Student a free appropriate public education by: (1) failing to properly assess Student in any area of suspected need from August 2015 to January 2017; (2) conducting an inappropriate speech and language evaluation of Student in January, 2017; and (3) failing to provide Student appropriate supports and services to address his known disability of cerebral palsy, including, but not limited to, occupational therapy, speech and language services, and aides physically capable of lifting Student and pushing him in his wheelchair, from August 2015 to the filing of the complaint. Student also contended that District deprived Parents of their right to meaningfully participate in the development of Student's individualized education program by failing to consent to, deny, or otherwise respond to Parents' request for additional areas of assessment, which Parents wrote on District's assessment plan dated November 10, 2016.

Student filed a second complaint on April 17, 2017 naming District in OAH Case Number 2017040926. In that matter, Student contended that District denied Student a FAPE by: (1) subjecting Student to bullying by his one-on-one aide from September 2015 to December 2015; (2) failing to provide Student with aides capable of physically lifting Student and pushing him in his wheelchair, from December 2015 to the filing of the second complaint. Student also contended that District deprived Parents of their right to participate in the development of Student's IEP by conducting Student's February 24, 2017 IEP team meeting after Parents told District they would not attend the meeting.

On April 25, 2017, District moved to consolidate the two Student-filed matters. Student did not oppose the motion for consolidation.

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

Here, consolidation would not further the interests of judicial economy. Two of Student's issues from his second complaint – the issues of bullying and holding Student's February 24, 2017 IEP team meeting without Parents – involve different questions of law or fact from those presented in this matter. The third – failing to provide Student with aides capable of physically lifting Student and pushing him in his wheelchair – is duplicative of an issue presented in the initial complaint, except for the end date of the time period at issue, and therefore many of the issues may be resolved at hearing of the first complaint. Also, the first complaint has been pending since February 6, 2017, and was previously continued to dates selected by the parties. Further delay for the purpose of adding new issues does not further the interests of judicial economy.

Accordingly, consolidation is denied.

2. Joint Request to Continue Hearing. This matter was previously continued at the parties' joint request to hearing dates proposed by the parties. At the prehearing conference, the parties jointly requested that the matter be further continued on grounds that Student's counsel had conflicting obligations to appear in federal district court on May 10, 2017. However, the parties were unable to agree on proposed hearing dates when counsel for both parties would be available.

The parties' joint oral request for a second continuance of this matter was denied without prejudice at the PHC because it was made without supporting declarations or an agreement as to mutually available dates. Additionally, the parties did not explain why the conflict with federal district court dates was not known to the parties on March 22, 2017, when they proposed the present hearing dates in this matter.

3. District Response to Student's Complaint. District has not filed a response to Student's complaint, as required under the Individuals with Disabilities Education Act. (20 U.S.C. § 1415(c)(2)(B)(i)(I); *M.N. v. Antelope Valley Union High School District* (9th Cir. 2017) 852 F.3d 840, 850.) District shall file and serve a response to Student's complaint no later than May 1, 2017 at 5:00 p.m.

4. Hearing Dates, Times, and Location. The hearing shall take place on May 9, 10 and 11, 2017 and continue day to day thereafter, Monday through Thursday, at the

discretion of the ALJ. The hearing shall take place at Oxnard Union High School District, 309 South K Street, Oxnard, CA 93030. The hearing will commence at 9:30 a.m. on May 9, 2017, and at 9:00 a.m. on all other days, unless otherwise ordered.

As ordered in the scheduling order, District 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. District shall inform OAH within two days of the date of this order 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 assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (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 also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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.

5. Student's Issues and Proposed Resolutions. Student's issues to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, and Student's proposed resolutions, are:[1]

(1) Did District deny Student a free appropriate public education by failing to properly assess Student in any area of suspected need from August 2015 to January 2017?

(2) Did District deny Student a free appropriate public education by conducting an inappropriate speech and language evaluation[2] of Student in January, 2017?

[1] Student raised claims based on alleged violations of the Americans with Disabilities Act (Title 42 U.S.C. §§ 12101, et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), and the Unruh Civil Rights Act (Civ. Code, § 51). These claims are dismissed for lack of OAH jurisdiction. (See *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

[2] At Student's request on the record at the PHC, Student's claim that District conducted an inappropriate psychoeducational evaluation of Student in January 2017 was dismissed.

(3) Did District deny Student a free appropriate public education from August 2015 to January 2017 by failing to provide Student appropriate supports and services to address his known disability of cerebral palsy, including, but not limited to:

a. Occupational therapy services;

b. Speech and language services; and

c. An aide physically capable of lifting Student and pushing Student in his wheelchair?

(4) Did District deprive Parents of their right to meaningfully participate in the development of Student's individualized education program by failing to consent to, deny, or otherwise respond to Parents' request that District assess Student in additional areas, made by Parents in writing on District's assessment plan dated November 10, 2016?

(5) Student's Proposed Resolutions:

An Order directing District to:

(1) Fund independent educational evaluations in areas included in the signed assessment plan provided to the District on November 9, 2016, including : speech and language, occupational therapy, vocational/prevocational, assistive technology and augmented/alternative communication;

(2) Convene an IEP meeting to develop, in all of Student's areas of need, goals that are measurable and based upon current data provided to Parents and IEP team as per the results of the independent speech and language, occupational therapy, vocational/prevocational, assistive technology and augmented/alternative communication assessments ordered by OAH;

(3) Reimburse Parents for Occupational Therapy services received for the past two years prior to the filing of this complaint; and

(4) Provide any other relief the ALJ deems just and proper.

6. Exhibits. Student identified 23 exhibits that Student intends to present at hearing. District identified eight exhibits that District intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., and Respondents shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit

binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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.

Each party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination. District shall include as part of its exhibits the school calendar(s) for all of the years at issue.

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.

7. Witnesses. Student identified three percipient witnesses and four exclusively expert witnesses, whom Student intends to present at hearing. District identified 16 percipient witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed that it would make witnesses under its control reasonably available to Student without the need for subpoena. District will also inform Student of the identity of, and available contact information for, any witness identified by Student as an employee of District who has left District's employ, by 5:00 p.m. on Wednesday, May 3, 2017. The parties will 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.

a. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five business days prior to the hearing, a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing. The parties shall exchange final witness lists and exhibit binders on or before 5:00 p.m. on Tuesday, May 2, 2017. Witnesses and documents not disclosed by that time may be excluded at the request of the other party from introduction at the hearing. Each party reserves the right to present additional witness and documents for purposes of rebuttal.

b. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Friday May 5, 2017 at 3:00 p.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to District's counsel to initiate the meet and confer. The parties are to coordinate the availability and order of testimony 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 discuss a time estimate of the length of each witness's direct examination testimony, and

identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

The parties are encouraged to review and shorten their witness lists prior to the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with one detailed hour-by-hour schedule of all witnesses expected to testify at the hearing, which list shall also include an estimate of time for each party's direct and cross-examination. The ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses and the ALJ will finalize the witness schedule. 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 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: (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.

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. Student's witnesses Cyndi Cottier may appear telephonically at hearing in this matter. 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. Student shall provide each 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.

7. Electronic Recording of Hearing.

a. Audio Recording. Student requested leave to make an audio recording of the hearing. Leave is granted subject to the following conditions: (1) OAH's recording is the only official recording; (2) 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 audio recording may not be shared with any witnesses or third parties; and (4) operation of the party's recording mechanism will not be allowed to delay the hearing. District may also make an audio recording under the same conditions.

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. The parties anticipate filing a joint request for continuance on or before 5:00 p.m. on May 2, 2017. District also anticipates filing a motion for reconsideration of District's motion for consolidation. In the event that any other motion, other than a challenge to a newly-assigned ALJ for the hearing, is brought after this date, it 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 PHC.

10. 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.

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. Neither party requested any 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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing is Open To the Public. At Student's request, the hearing will be open to the public.

15. Settlement. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. 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 AND SHALL 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. 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.

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

IT IS SO ORDERED.

DATE: May 1, 2017

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ROBERT G. MARTIN
Administrative Law Judge
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Office of Administrative Hearings