BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. FRUITVALE SCHOOL DISTRICT.	OAH Case No. 2018070377 ORDER FOLLOWING PREHEARING CONFERENCE

On August 20, 2018, Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings held a telephonic prehearing conference. Attorneys Diane and Jerry Weissburg appeared on Student's behalf. Attorneys Christina Oleson and Darren Bogie, and Fruitvale district representative Dr. Rebecca Rocha appeared on behalf of Fruitvale. The PHC was recorded. Based upon discussion with the parties, the ALJ makes the following orders.

1. Hearing Dates, Times, and Location. Student requested that the first day of hearing be held at OAH's office in Van Nuys, California to accommodate the availability of expert witnesses Dr. Bea Braun and Dr. Beth Ballinger. Student's counsel acknowledged that Parent does not object to traveling to Van Nuys for one day of hearing. Fruitvale objected to Student's request, on the ground that convenience of witnesses was not a basis to change location. Given that Student is requesting the change of location without concern to Student's convenience, but to insure the availability of witnesses, Fruitvale's objection is overruled. However, both expert witnesses shall be scheduled by Student to testify on either of the first two days of hearing at OAH's Van Nuys office, pursuant to the following and Paragraph 4.

The hearing shall take place on August 29 and 30, and September 11, 12, and 13, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place on August 29 and 30, 2018, at OAH's offices located at 15350 Sherman Way, Suite 300, Van Nuys, California 91406. The hearing on September 11, 12 and 13, 2018, shall take place at Fruitvale's offices located at 7311 Rosedale Highway, Bakersfield, California 93308. The hearing shall begin at 9:30 a.m. August 29, 2018, and on September 11, 2018, and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency shall provide a facility for the hearing on the days it is hosting 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. The named

local educational agency certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

Prior to the beginning of the hearing, Fruitvale shall ensure that the hearing room for September 11, 12, and 13, 2018 is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Fruitvale's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Fruitvale 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. Fruitvale 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 parties discussed and agreed to the following issues at the due process hearing, and the proposed resolutions:

1) Did Fruitvale deny Student a free appropriate public education during the two year statutory period by failing to assess Student in:

a) Educationally necessary vision therapy;

b) Occupational Therapy;

c) Speech and language; and

d) Auditory processing?

2) Did Fruitvale deny Student a FAPE during the two year statutory period by failing to offer services in the areas of:

a) Educationally necessary vision therapy;

b) Occupational Therapy;

c) Speech and language; and

d) Auditory processing?

Proposed resolutions: Independent educational evaluations in vision therapy by Dr. Beth Ballinger; vision therapy services by Dr. Suter; independent educational evaluation by Lindamood Bell; independent educational evaluation in occupational therapy and speech and language; compensatory services; reimbursement of Parents' educationally related expenses for independent educational evaluations.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Except as permitted in this order or otherwise ordered by the ALJ, 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 Fruitvale exhibit (for example, S-5, S-6, or D-1, D-2). The pages of each exhibit shall be numbered internally, or the entire binder may be numbered consecutively, excluding exhibit tabs and cover pages that are not part of an exhibit.

Exhibit binders shall include a table of contents including the exhibit number, date of document, title and tab number. Exhibits shall be organized chronologically from the earliest date to the latest date, where possible.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Emails may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible.

Excerpts of an audio record of an individualized education program team meeting, if any, should be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter. If the parties intend to rely on individualized education programs, 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 the IEP(s).

The parties shall exchange resumes, and provide a copy for the exhibit binders, for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes and curriculum vitae not later than 24 hours before the witness is scheduled to testify.

Fruitvale shall include as part of its exhibits the school calendar(s) for the years at issue. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), Fruitvale shall serve a copy of the school calendar(s) and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ not later than the first day of hearing.

The parties shall meet and confer on **August 24, 2018 at 2:00 p.m.** in order to delete duplicate exhibits from the exhibit binders and to consolidate exhibits where possible. The parties are not required to renumber exhibits if exhibits are removed from their binders.

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 shall 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 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.

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 except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

In consideration of the previous paragraph, the parties are ordered to meet and confer on or before **August 24, 2018, at 2:00 p.m.,** as to the schedule of witnesses. 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 include a **reasonable** estimate of time for each party's direct and cross-examination and identify which party is calling each witness as part of his/its case-in-chief. The parties shall meet and confer each day of hearing to revise the witness schedule as needed, and provide a revised copy to the ALJ. The parties shall meet and confer by no later than **close of business on August 24, 2018,** 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 and identify the witnesses on the witness lists who cannot be produced at hearing without a subpoena and provide the witnesses contact information to opposing party so that subpoenas can be issued. As part of the meet and confer process, Fruitvale'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 Fruitvale and will be produced at hearing, and if not, shall provide the last known contact information, including home and business addresses for such witness(es) no later than **August 24, 2018 at 2:00 p.m.** Any contact information provided by Fruitvale 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).

Fruitvale 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, subdivision (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.

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.

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. 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 witness testifies from a quiet location with no other persons present and 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. Subject to Paragraph 14, either party may make an audio recording of the hearing as a courtesy and 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) operation of the party's recording mechanism will not be allowed to delay the

hearing; 4) the recording shall not be played or published for a prospective witness; 5) the recording shall not be used for any purpose other than assisting in the representation and presentation of this due process hearing; 6) the parties shall erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and 7) the parties shall not use this recording in any subsequent due process 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, subject to Paragraph 5, Student shall present its case-in-chief, followed by Fruitvale.

9. Motions. Student's request for oral closing argument is taken under submission and the hearing ALJ will rule on it during the hearing. No other 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 filed three business days before or during the prehearing conference of August 20, 2018.

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 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 send an email to

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.

14. Hearing Open To the Public. At Student's request, the hearing will be open to the public. Student shall advise the ALJ if Student expects any group or members of the press to be present during the hearing. No one, except the attorneys for the parties as provided in Paragraph 7(a), may record any part of the hearing, and all electronic devices must be off or silent in the hearing room unless permission to the contrary is obtained from the ALJ.

Parents should be aware that by opening the hearing, Fruitvale employees who are not witnesses, or other people who are unknown to Parents, may attend the hearing. Any person disclosed on either party's witness list will be excluded from the hearing, except for Parents and a representative for Fruitvale.

The parties shall confer on or before **August 25, 2018** , as to the seating requirements for members of the public and shall notify OAH **on or before 5:00 p.m. on September 7, 2018**, if the location in Bakersfield currently set for hearing cannot accommodate sufficient seating for the public. The OAH office can accommodate a small number of persons on the first two days of hearing, and those attending may be asked to rotate in and out of the hearing room if the number of attendees exceeds the capacity of the hearing room.

Student's request that the hearing be open to the public does not limit the authority of the ALJ hearing this matter to order closure of a hearing or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the particular case, or for other purposes as set forth at Government Code, section 11425.20. The ALJ may also exclude persons whose actions impede the orderly conduct of the hearing, restrict attendance because of the physical limitations of the hearing facility, or take other action to promote due process or the orderly conduct of the hearing. (Tit. 1, Cal. Code Regs., § 1030.)

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 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 .

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 submit a request for a status conference and provide the date of the next board meeting. OAH will not cancel the hearing dates 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: August 20, 2018

DocuSigned by:
Adrienne L. Krikorian
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ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings