BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LOS ANGELES UNIFIED SCHOOL DISTRICT.	OAH Case No. 2019030607 ORDER FOLLOWING PREHEARING CONFERENCE; DENYING REQUEST TO DISMISS; AND DENYING MOTION FOR STAY PUT

On May 20, 2019, a telephonic prehearing conference was held before Administrative Law Judge Tara Doss, Office of Administrative Hearings. Parent appeared on behalf of Student. Meagan Kinsey, Attorney at Law, appeared on behalf of Los Angeles Unified School District. The PHC was recorded.

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

1. Notice of Settlement.

On May 15, 2019, Los Angeles filed a Notice of Settlement with OAH, claiming Student and Los Angeles entered into a final settlement agreement in this case on May 9, 2019, in which Student agreed to dismiss the case with prejudice. Los Angeles attached a copy of the agreement's signature page that contained signatures of both Student's and Los Angeles's representatives. The signature page contains handwritten edits, including a crossed out case number replaced with a new case number, changed spelling of Parent's name, and reference to other handwritten edits on other pages of the agreement.

On May 16, 2019, Student filed an Opposition to the Notice of Settlement. Student disputes the existence of a valid settlement agreement on the grounds that Parent notified Los Angeles she revoked consent to the proposed agreement with handwritten edits, prior to Los Angeles signing the agreement. Student also disputes the validity of Los Angeles's signature on the agreement on the grounds that Los Angeles only signed the agreement after Student revoked consent. Student attached a copy of email correspondence between Parent and Los Angeles, showing revocation of consent to the agreement and showing that Los Angeles returned a signed agreement to Student after the date of revocation.

Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); see also Ed. Code, § 56501, subd. (a).) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

OAH does not have jurisdiction to enforce settlement agreements. (*Id.* at p. 1030.) However, OAH may interpret a settlement agreement for the purposes of determining whether OAH has jurisdiction to decide issues in the complaint. Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.)

Los Angeles seeks dismissal of this case through enforcement of the settlement agreement. OAH does not have jurisdiction to enforce a settlement agreement. Furthermore, whether an enforceable settlement agreement exists is not clear. Student disputes the existence of a settlement agreement and offered evidence that supports Student's claim. The settlement agreement offered by Student, in whole, and by Los Angeles, in part, shows multiple handwritten edits. Additionally, the email correspondence between the parties indicated Los Angeles was to send a clean version of the agreement to Parent for signature. Accordingly, it is not clear that the document with handwritten edits was intended by either party to be the final settlement agreement. Moreover, Los Angeles did not offer any evidence to contradict Student's argument that it sent Student a fully executed settlement agreement before Student revoked consent.

Because the existence of an enforceable settlement agreement is not clear, OAH will not dismiss Student's case and maintains jurisdiction to hear the issues contained in the complaint, absent any future ruling to the contrary.

2. Motion for Stay Put.

On May 16, 2019, Student filed a Motion for Stay Put to allow Student to continue placement at Westmark School, a private school, pending the conclusion of this case. Student attached a copy of an individualized education program dated February 8, 2019, in which Parent signed in disagreement to Los Angeles's proposed placement for Student. On May 17, 2019, Los Angeles filed an Opposition to Student's motion on the grounds that Parent unilaterally placed Student at Westmark School, and Los Angeles never offered the placement at an IEP team meeting.

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006)[1]; Ed. Code, § 56505

[1] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's individualized education program, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

Student's Motion for Stay Put is denied. The purpose of "stay put" is to allow a student to remain in his or her current educational placement, assuming that the placement was previously agreed to, and implemented by the student's parents or educational rights holder, and the school district. Here, Student did not provide an IEP showing the last agreed upon and implemented placement. Instead, Student provided an IEP from February 8, 2019, in which Parent did not agree with Los Angeles's offered placement. Consequently, there is no evidence Westmark School was ever Student's "current educational placement" for purposes of the stay put doctrine.

3. Hearing Dates, Times, and Location. The hearing shall take place on **May 29 and 30, 2019**, continuing day to day, at the discretion of the ALJ.[2] The hearing will be held at **OAH, 15350 Sherman Way, Suite 300, Van Nuys, CA 91406**. The hearing will begin at 9:30 a.m. the first day and at 9:00 a.m. on all following days, unless otherwise ordered.

The parties must 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.

4. Issues and Proposed Resolutions.[3] 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) Did Los Angeles deny Student a free appropriate public education at the February 8, 2019 individualized education program team meeting by failing to have a special day class teacher attend the meeting?

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[2] During the PHC, the parties agreed that four days of hearing would likely be required to present the case. The ALJ will discuss additional hearing dates on the first day of hearing.

[3] The ALJ has reworded and clarified some issues stated in [party]'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].) The ALJ has reclassified Student's issues with respect to reimbursement for, and prospective placement at Westmark School, as proposed resolutions.

(2) Did Los Angeles deny Student a FAPE in the February 8, 2019 IEP, as developed during IEP team meetings on January 30, 2018, and February 5, 8, and 28, 2018, by failing to offer appropriate goals, including:

(a) failing to offer any goals and objectives based on Student's present levels of performance;

(b) failing to offer goals that would allow Student to access the general education curriculum; and

(c) offering goals in social/emotional, prevocational education, behavioral functioning, and pragmatic language, solely to justify Los Angeles's placement offer in a special day class program?

(3) Did Los Angeles deny Student a FAPE in the February 8, 2019 IEP, as developed during IEP team meetings on January 30, 2018, and February 5, 8, and 28, 2018, by failing to offer an appropriate placement in the least restrictive environment, including failing to offer:

(a) access to the general education core curriculum;

(b) appropriate teaching methods; and

(c) appropriate accommodations, including a quiet environment to meet Student's auditory processing needs?

(4) Is Student entitled to reimbursement from Los Angeles for the cost of an independent neuropsychological evaluation conducted by Dr. Marguery Lyvers on February 28, 2017?

(5) Is Student entitled to reimbursement from Los Angeles for the cost of an independent psychological evaluation conducted by Dr. B.J. Freeman on November 28, 2018?

Student's Proposed Resolutions:

(1) Placement at Westmark School.

(2) For Westmark School to be named Student's "stay put" placement.

(3) Reimbursement of all educational expenses and related costs for Student to attend Westmark School, as follows:

2017-2018 school year: $29,626 (plus $15,000 provided by financial aid)

2018-2019 school year: $32,304 (plus $15,000 provided by financial aid)

2019-2020 school year:	$50,142 (anticipated cost without financial aid)
2020-2021 school year:	$53,150 (anticipated cost without financial aid)
Extended school year:	$10,000 (2019 and 2020)
Transportation:	$16,500 ($25 x 165 days/year x 4 years)
Total:	$202,722

(4) Reimbursement for all expert witness fees and independent educational evaluation costs, in an amount according to proof, but estimated at no less than $15,000.

(5) Attorney's fees as permitted by law.

(6) For other such relief the ALJ deems appropriate.

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 (i.e. consecutive numbering on each page). Each exhibit binder shall contain a detailed table of contents that includes each exhibit number and the name of the corresponding document. The parties shall provide their evidence binders to each other in compliance with Education Code section 56505, subdivision (e)(7). On the first day of hearing, each party must bring an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties should not send exhibits to 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 other witness whose education and employment are expected to be subjects of testimony. Los Angeles must include as part of its exhibits the school calendar(s) for all of the years at issue.

Each exhibit shall only contain one document. Any IEP and related documents (e.g. IEP invitations, assessment plans, etc.) relied upon during the hearing shall include all pages of the original (or copy thereof) document, including attendance and signature pages, and any pages with handwritten or type-written notes. Excerpts of an audio recording of an IEP team meeting, if any, should, in addition to the audio recording offered, be transcribed and offered as documentary evidence; that portion of the audio recording 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.

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.

The parties are encouraged to review and shorten their exhibit 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.

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 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 Tuesday, May 21, 2019.** 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 or before Friday, May 24, 2019, regarding the schedule of witnesses for the hearing.** 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 and cross-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 must 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 testimony of each witness and any scheduling issues for individual witnesses. 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 estimated time of each witness's testimony.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witness 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: (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. 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 with all of each party's exhibits prior to the hearing. The proponent of the witness shall ensure the witness testifies from a private location with no other persons present, using a "land-line," 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 met.

Student's request to have Dr. B.J. Freeman, Dr. Marguery Lyvers, and Dr. Bea Braun testify telephonically is granted, as long as Student provides timely notice to Los Angeles that Student intends to call these witness, and if the above conditions are satisfied.

9. Electronic Recording of Hearing.

a. Audio Recording. Student's request to audio record the hearing is granted, subject to the following conditions: (1) OAH's recording is the only official recording, unless otherwise determined by the ALJ; (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) such recording shall be for the party's personal use only, and must only be used for review and preparation of the hearing; (4) the audio recording may not be shared with any witnesses or third parties; (5) the party shall not use the recording in any subsequent due process hearing; (6) operational challenges with the party's recording equipment will not delay the hearing; and (7) the party shall dispose of the unofficial recording when the time for appeal of the ALJ's decision in this matter has expired. Los Angeles 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.

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 requested the hearing and has the burden of proof. Therefore, Student shall present its case-in-chief first, followed by Los Angeles.

11. Motions. Other than the motions ruled on above, 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 PHC.

During the PHC, Los Angeles reserved the right to file a Motion in Limine if it disagreed with the ALJ's framing of Student's issues.

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 writing.

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 or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

15. Special Needs and Accommodations. Neither party requested accommodations for the hearing.

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.

16. Hearing Open To the Public. Student's request that the hearing be open to the public is granted.

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.

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

IT IS SO ORDERED.

DATE: May 21, 2019

DocuSigned by:
Tara Doss
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TARA DOSS
Administrative Law Judge
Office of Administrative Hearings