BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

IRVINE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NUMBER 2019061154

ORDER FOLLOWING PREHEARING CONFERENCE

On October 4, 2019, Administrative Law Judge Laurie Gorsline of the Office of Administrative Hearings held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH.

Amy Rogers, Attorney at Law, appeared on behalf of Irvine Unified School District. Parent appeared on behalf of Student and was assisted by a special education advocate. The prehearing conference was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on October 15, 16 and 17, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at Westwood Training Center, 1 Liberty, Irvine, CA 92620. 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.

District facilities shall fully comply 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. Districts are required to file written certification with OAH that the facilities a district provides comply with these laws.

On September 25, 2019, Irvine filed the required certificate with OAH. Irvine shall immediately notify OAH if it is unable to provide facilities that comply with the laws governing accessibility of government facilities to persons with disabilities.

Before the beginning of the hearing, Irvine shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and Student's representatives;

- a table for Irvine's legal representative and special education representative;
- a table for the witness;
- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and
- water and tissue available for the participants.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. Irvine shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

Irvine shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, District's attorneys, and witnesses. Irvine shall also make reasonable efforts to ensure drinking water and tissue are available to all parties, the witnesses, and the ALJ.

ISSUES AND PROPOSED RESOLUTIONS

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the prehearing conference are:

ISSUES

1. Was Irvine Unified School District's academic assessment memorialized in the report dated November 20, 2018 appropriate within the meaning of Education Code section 56329(c)?
2. May Irvine Unified School District assess Student pursuant to the assessment plan dated September 24, 2018 without parental consent?

PROPOSED RESOLUTIONS

Irvine seeks a determination from OAH that its academic assessment memorialized in the report dated November 20, 2018 was appropriate and that Parent is not entitled to an independent educational evaluation at public expense. Irvine also seeks an order that it may assess Student pursuant to the assessment plan dated September 24, 2018, without parental consent.

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties shall place a letter followed by a number on each tab to identify each exhibit. Student shall use the letter S before the number to identify Student's exhibits. Irvine shall use the letter D before the number to identify Irvine's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Irvine's exhibit tab 1. Each page of each binder shall be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering the pages of the exhibits in the binders.

CONTENT

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. Exhibits in the binders should be in chronological order.

Parties should include resumes or curriculum vitae 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 not later than 24 hours before the witness is scheduled to testify.

Irvine's binder shall include a color copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other such that they are received by the opposing party at least five business days before the first day of hearing. During the prehearing conference, Irvine's counsel agreed that Student may serve her binder on Irvine by delivering it to Irvine Unified School District's office to the attention of Jennifer O'Malley. The exchange of documents is required by Education Code section 56505, subdivision (e)(7). The parties shall bring the binder they received from the opposing party and a copy of their own binder to the hearing to use during the hearing. Each party shall also bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

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.

Irvine's counsel agreed that to the extent any records are produced by Irvine after October 8, 2019 pursuant to Parent's request which Parent did not already have, Irvine will not object to their admission into evidence on the grounds they were not timely exchanged.

WITNESSES

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their control reasonably available. Each party shall serve on the opposing party a list of witnesses they intend to have testify during the hearing. The list shall be served on the other party such that it is received by the other party at least five business days prior to the first day of hearing. 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.

During the prehearing conference, Student orally identified some witnesses also listed in Irvine's prehearing conference statement. Student's other witnesses include Student, Leslie Roach, Irvine's superintendent and two board members. Counsel for Irvine agreed to produce all of the witnesses orally identified by Student other than the superintendent and two board members, and Irvine asked for an offer of proof regarding those three witnesses. The parties were ordered exchange their final witness lists by no later than October 8, 2019 and to meet and confer no later than October 9,

2019 regarding any objections to the other party's proposed list of witnesses to attempt to resolve those objections. Irvine agreed that Student's witness list may be served on District's counsel by email. Student is directed to the OAH website and OAH staff for assistance regarding the procedure for issuance of subpoenas for hearing.

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 to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The parties are ordered to meet and confer by no later than on October 9, 2019. The parties shall discuss the availability of witnesses, the order of witnesses, the length of witness testimony, and objections to any witnesses. The parties shall discuss whether the witnesses on the respective lists are employed by or under the control of a party and whether they will be produced at hearing without a subpoena.

During the meet and confer, the parties should attempt to eliminate duplicate exhibits from their binders. The parties should discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing. During the prehearing conference, Parent represented that documents were

requested from Irvine which had not been produced. During the meet and confer, the parties shall also attempt to resolve any outstanding dispute regarding Parent's request for records and Irvine's failure to produce those records.

Any dispute concerning the witnesses and documents the parties are unable to resolve after meeting and conferring, shall be addressed by the ALJ at hearing.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case, Irvine requested the hearing. Accordingly, Irvine's case-in-chief shall be presented first, followed by Student unless the parties agree to a different schedule.

WITNESS LISTS

The parties shall give the ALJ a joint proposed witness list for each day of hearing. Irvine is responsible for preparing the list after meeting and conferring with Parent. The list should include dates and time estimates of expected testimony and identify the party(s) calling the witness to testify at hearing. Irvine shall have witnesses available in case there is no agreement on the schedule. Before the hearing begins, 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. The ALJ will finalize the witness schedule. Parties shall be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time the testimony each witness is expected to take.

SCOPE OF WITNESS EXAMINATION

Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties presents their case in-chief.

TELEPHONIC TESTIMONY

Neither party requested permission to obtain testimony by telephone. 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 request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness shall provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness shall ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony shall ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. In the event telephonic testimony is permitted, the school district shall ensure that the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

ELECTRONIC RECORDINGS

Audio Recording

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties shall turn the recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be used to prepare the testimony of a witness in the hearing;
- the recording shall not be shared with anyone, including but not limited to, any party, non-party, witness, possible witness, or through social media;
- the parties shall not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality as a closed to the public due process hearing; and
- the parties shall dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Both parties requested permission to record the hearing. Both parties may record the hearing subject to these conditions and any other conditions imposed by the ALJ during the hearing. Any person who violates any of these conditions may be subject to sanctions.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

Recordings as exhibits

Student proposes to introduce all or part of a recording of an individualized education program team meeting. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording shall be considered at the time of hearing. The ALJ may grant or deny the request, or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant. The ALJ may request a transcript of the portion of the recording requested or have the party offering the recording to provide an exact identifiable portion of the recording the party seeks to admit. The identities of any person speaking on the portion of the tape being introduced must be established. An ALJ may allow the opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

Student shall timely serve Irvine with a copy of the audio recordings Student intends to rely upon at hearing and include those items in Student's binders. Parent shall meet and confer with Irvine's counsel by October 9, 2019, to identify the relevant portions of the audio recordings Parent intends to introduce at hearing, and the parties shall meet and confer about the submission of a transcription of the audio recordings.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

Parent represented that there might be a pending or contemplated motion to consolidate. Any motion that was not filed three business days before the prehearing conference on October 4, 2019, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing.

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, recorders, and other noisemaking electronic devices shall be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. There shall be no texting while the hearing is in session. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

No accommodations were requested during the prehearing conference. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING OPEN TO THE PUBLIC

Special Education hearings are closed to the public unless Student requests the hearing to be open to the public. At Student's request, the hearing will be open to the public. The parties, should inform the ALJ if Student expects any group or members of the press to be present during the hearing. No one from the public may record any part of the hearing, and all electronic devices must be off in the hearing room unless permitted by the ALJ.

Parents should be aware that by opening the hearing, Irvine employees who are not witnesses, or other people that Parents might not know, may attend the hearing. Persons disclosed on either party's witness list, with the exception of Irvine's representative, Parents, and Student, will be excluded from the hearing until their testimony has been completed. The parties shall confer by October 11, 2019, as to the seating requirements for members of the public. Disputes as to the physical limitations of the hearing facility shall be resolved at hearing by the ALJ. The parties shall

immediately notify each other and OAH if they are aware that there will be media attending the hearing.

Government Code, section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the particular case. 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.)

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM 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.

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 before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

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

IT IS SO ORDERED.

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DATED: October 7, 2019

Laurie Gorsline
Administrative Law Judge
Office of Administrative Hearings