BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016040427
v.	CORRECTED ORDER FOLLOWING PREHEARING CONFERENCE AND PARTIALLY GRANTING AND PARTIALLY DENYING MOTION TO DISMISS
LAKE ELSINORE UNIFIED SCHOOL DISTRICT.	

On September 19, 2016, a telephonic prehearing conference was held before Administrative Law Judge Chris Butchko, Office of Administrative Hearings. Tania Whiteleather, Attorney at Law, appeared on behalf of Student. Rikesha Lane and Cynthia Vargas, Attorneys at Law, appeared on behalf of District. The PHC was recorded.

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

1. Motion to Dismiss. On September 13, 2016, District moved to dismiss issues 7, 8, and 10 of Student's due process hearing request. Student opposed the motion on September 19, 2016. District asserts that issues 7 and 8 are remedies, not issues to be heard, and should be dismissed before hearing. District asserts that issue 10 asserts claims over which OAH does not have jurisdiction, specifically, claims arising under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and California's civil rights statutes.

Issue 7 asserts that District failed to respond to Student's request for an independent educational evaluation within the prescribed time period, and that Student is therefore entitled to reimbursement for the cost of an evaluation paid for by her parents. Although the issue was summarized in the complaint in a manner that suggested it was merely a proposed remedy, the text of the complaint contains a triable issue as to whether or not District violated the statutory procedures for responding to a request for an independent assessment. The motion to dismiss issue 7 is denied.

Issue 8 alleges that District's failure to offer Student a free appropriate public education entitled Parents to reimbursement for educational costs and related services they procured for her. This claim is an argument for relief; to the extent that it asserts a violation of the IDEA, it is duplicative of other issues in the complaint. In her opposition to the motion to dismiss, Student charges that this issue is necessary to allow her to prove that her private school placement was an "appropriate" placement for her and is thus reimbursable under precedent. That issue is an item of proof for relief, not an assertion of a violation of the law or of Student's right to FAPE. Issue 8 is redundant and unnecessary under the law

and need not be separately pled to establish Student's entitlement to relief. The motion to dismiss issue 8 is granted.

Issue 10 asserts that Student, a person with a disability, was deprived of her rights under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and California's civil rights statutes. In her opposition, Student concedes that it has been OAH's position that it does not have jurisdiction over such claims and expects that the claim will be dismissed. OAH does not have jurisdiction to entertain claims based on Section 504, the Americans with Disabilities Act, or other related state and federal civil rights laws. The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education," and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has 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); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) 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.) Therefore, District's motion to dismiss issue 10 is granted. The matter shall proceed to hearing on the remaining issues, stated below.

2. Hearing Dates, Times, and Location. The hearing shall take place on September 28 and 29, and October 4, 5 and 6, 2016, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at District's offices located at 545 Chaney Street, Lake Elsinore, CA 92530. 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.

As ordered in the scheduling order, District shall 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 certified that the facilities used for this case comply with the law. District 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, 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.

3. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

1) Did District deny Student a FAPE during the 2014-2015 school year by failing to create and offer a Behavior Improvement Plan at the June 3, 2014 IEP team meeting to address behaviors that impeded her education?

2) Did District deny Student a FAPE by failing to timely file for Due Process to establish that its June 3, 2014 IEP provided an offer of FAPE for Student?

3) Did District deny Student a FAPE by failing to provide in the June 3, 2014 IEP a transition plan for Student's transfer from private placement to a District placement?

4) Did District deny Student a FAPE during the 2015-2016 school year by failing to create and offer a Behavior Improvement Plan at the December 4, 2015 IEP team meeting to address behaviors that impeded her education?

5) Did District deny Student a FAPE by failing to provide in the December 4, 2015 IEP a transition plan for Student's transfer from private placement to a District placement?

6) Did District deny Student a FAPE by failing to timely file for Due Process to establish that its December 4, 2015 IEP provided an offer of FAPE for Student?[1]

7) Did District fail to timely grant or file for Due Process in response to Student's March 2016 request for an independent Functional Behavior Assessment?

[1] Issues 4 and 6 have been revised to correct the September 20, 2016 Order Following Prehearing Conference and Partially Granting and Partially Denying Motion to Dismiss, as sought by District's September 21, 2016 request for clarification.

8) Did District deny Student a FAPE by failing in the 2014-2015 and 2015-2016 school years to meet her needs in the areas of Speech and Language and Occupational therapy?

Student seeks reimbursement for an independent educational evaluation by Dr. Melaura Tomaino; reimbursement for the costs of Student's attendance at Port View, including transportation; and compensatory education and services in behavior, speech and language, and occupational therapy.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties agreed that Student will designate her exhibits by the means of letters and District shall number its exhibits. 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 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.

5. 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.

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 have agreed to meet and confer 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 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 prepare and present to the ALJ a written schedule for each day of hearing at the start of each day's proceedings. District shall have witnesses available if agreement on a witness list is not reached.

6. 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.

7. 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. Currently, no testimony is expected to be taken telephonically.

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 her 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. The parties have agreed to proceed by written closing briefs in lieu of final argument.

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 should 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 Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing should contact Colette Clark, the assigned calendar staff, at (916) 263-0880 as soon as the need is known. Additional information is available at http://www.dgs.ca.gov/oah/Home/Accommodations.aspx. Neither party anticipates the need for any accommodations.

14. Hearing Open/Closed To the Public. At the request of Student, the hearing will be open to the public. All witnesses are barred from the hearing room prior to the taking of their testimony.

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 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.

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: September 23, 2016

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Chris Butchko
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings