BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2018121008
v.	ORDER FOLLOWING PREHEARING CONFERENCE; DENYING MOTION TO QUASH SUBPOENAS DUCES TECUM
SAN MARCOS UNIFIED SCHOOL DISTRICT.	

On April 22, 2019, a telephonic prehearing conference was held before Administrative Law Judge Paul H. Kamoroff, Office of Administrative Hearings. Meagan M. Nunez and Jennifer L. Varga, Attorneys at Law, appeared on behalf of Parents and Student. Tiffany M. Santos, Attorney at Law, appeared on behalf of San Marcos Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on May 1, 2, and 8, 2019, and continuing at the discretion of the ALJ. The hearing shall take place at San Marcos' office located at 255 Pico Avenue, Suite 150, San Marcos, CA 92069. 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, the named local educational agency shall provide a facility for 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. On April 16, 2019, San Marcos certified that the facilities used for this case comply with the law.

Prior to the beginning of the hearing, San Marcos 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 San Marcos' legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. San Marcos 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. San Marcos 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 issues at the due process hearing, and the proposed resolutions, are listed below.

1. Did San Marcos deny Student a free appropriate public education during the 2016-2017 school year, by:

    a. Failing to provide Student an individual aide;

    b. Failing to assess Student in (i) occupational therapy; (ii) assistive technology; and (iii) vision therapy;

    c. Failing to provide appropriate goals;

    d. Failing to provide Parents prior written notice of its decision to discontinue Student's individual aide; and

    e. Failing to provide Parents a copy of San Marcos' occupational therapy observation.

2. Did San Marcos deny Student a FAPE during the 2017-2018 school year, by:

    a. Denying Parents' request for an independent educational evaluation;

    b. Failing to provide Student appropriate services and supports in (i) speech and language; and (ii) academics;

    c. Failing to assess Student in assistive technology;

    d. Failing to provide Student appropriate goals;

    e. Failing to provide Parents prior written notice of its decision to (i) deny Parents' request for an independent educational evaluation; and (ii) reduce Student's speech and language services;

    f. Failing to file for due process upon denying Parents' request for an independent educational evaluation; and

g. Failing to make a clear and specific FAPE offer.

3. Did San Marcos deny Student a FAPE during the 2018-2019 school year, by:

a. Failing to offer appropriate supports and services in (i) specialized academic instruction; (ii) speech and language; (iii) occupational therapy; and (iv) transition;

b. Failing to offer an appropriate placement;

c. Failing to offer a transition plan;

d. Failing to make a clear and specific FAPE offer;

e. Failing to provide Parents prior written notice of its decisions to (i) decrease Student's counseling services; and (ii) deny Parents' request for reimbursement for placement at a nonpublic school;

f. Failing to consider independent evaluations;

g. Observing Student at her private placement without a release of information from Parents.

To remedy her issues, Student requests reimbursement for placement at a nonpublic school and independent educational evaluations funded by San Marcos.

3. 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 San Marcos 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. 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.

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.

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 are ordered to meet and confer by 5:00 p.m. on April 24, 2019, regarding the scheduling of witnesses. The parties shall attempt to reach agreement on a witness list for the first day of hearing. San Marcos shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, 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, and the ALJ will finalize the witness schedule. Additionally, 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.

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. 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. At present, neither party has requested for a witness to appear by telephone.

7. Electronic Recording of Hearing.

a. Audio Recording. The parties' joint motion to make an audio recording of the hearing 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, to avoid recording conversations while off the record; 3) operation of the party's recording mechanism will not be allowed to delay the hearing; and 4) the recording shall not be shared with any non-party representative, possible witness, or social media.

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 her case-in-chief, followed by San Marcos.

9. Motions.

Motions to Quash

On April 16, 2019, Student filed motions to quash subpoenas duces tecum for documents and materials from Jill Weckerly, Ph.D., and The Winston School. San Marcos opposed the motions on April 18, 2019. During the prehearing conference, Student revised the motions to quash to cover only electronic mail between Parents and Dr. Weckerly, and Parents and Winston, pertaining to Student. San Marcos opposed the revised motion during the prehearing conference.

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH relies by analogy on the relevant portions of Code of Civil Procedure section 1987.1, which provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

Here, Student is requesting reimbursement for placement at Winston, a private school. Consequently, communications between Parents and Winston regarding Student's placement there may be relevant to the issues alleged in this matter. San Marcos' subpoena duces tecum is sufficiently narrow in time and scope and San Marcos has shown reasonable necessity for Winston's email communications with Parents regarding Student. Student's motion to quash the subpoena duces tecum as to Winston is therefore denied.

Dr. Weckerly is an independent expert and adverse witness to San Marcos. As such, communications between Parents and Dr. Weckerly regarding Student may be relevant to the issues alleged in this matter. Similarly, San Marcos has shown reasonable necessity for its subpoena duces tecum for Dr. Weckerly's email communications with Parents regarding Student. Therefore, Student's motion to quash subpoenas duces tecum as to Dr. Weckerly is denied.

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 made three days prior to the prehearing conference of April 22, 2019.

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. At present, neither party has requested any special needs or 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.applications.dgs.ca.gov/oah/oahsftweb.

14. Hearing Closed To the Public. The hearing will be closed to the public unless Student requests it be open.

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 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 provide the date of the next board meeting. OAH will dismiss the case 30 days after the date of the board meeting unless either party request a status conference in writing before the dismissal date. 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: April 22, 2019

DocuSigned by:
Paul H. Kamoroff
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PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings