BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018080795
v.	ORDER FOLLOWING PREHEARING CONFERENCE
POWAY UNIFIED SCHOOL DISTRICT.	

On December 3, 2018, a telephonic prehearing conference was held before Administrative Law Judge Christine Arden, Office of Administrative Hearings. Wendy Dumlao, Attorney at Law, appeared on behalf of Student. Danielle Gigli, Attorney at Law, appeared on behalf of Poway 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 **December 11, 12, and 13, 2018**[1], and continuing day to day, at the discretion of the ALJ. The hearing shall take place at Poway's offices located at 15250 Avenue of Science, San Diego, CA 92128. 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 was to 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. The named local educational agency failed to certify that it would provide a facility for this case that complied with the law. The local educational agency shall certify to OAH within two days of the date of this order that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Poway shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for Poway's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Poway shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

[1] The parties represented at the PHC that they believe the hearing will require six days to complete.

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.

(A) Issues:

(1) Did Poway deny Student a free appropriate public education during the 2016-2017 school year, starting August 20, 2016, by offering and implementing the individual education programs dated January 26, 2016, and January 24, 2017, by failing to:

(a) offer and provide appropriate placement, specifically, New Bridge, a nonpublic school;

(b) develop appropriate reading supports, specifically, research and evidence based reading supports**,** to ensure adequate educational progress was made on IEP goals; and for Student to obtain passing grades;

(c) develop appropriate writing supports to ensure adequate educational progress was made on IEP goals; and for Student to obtain passing grades;

(d) offer and provide approrpiate educational supports and services in math, and

(e) offer, as of January 24, 2017, extended school year for summer, 2017

(2) Did Poway deny Student a FAPE during the 2016-2017 school year by failing to implement his IEPs dated January 26, 2016, and January 24, 2017, as written and agreed upon, causing Student to be deprived of educational benefit and significantly impeding Parents' opportunity to participate in the decision-making process regarding provision of a FAPE to Student by failing to implement Student's IEPs specifically, by failing to:

(a) implement all IEP goals as written as of September 20, 2016;

(b) implement IEP goals 1, 12 and 13, as written as of October 20, 2016;

(c) implement IEP goals 10, 12, and 13, as written, as of January 24, 2017;

(d) implement IEP goals 101 through 106 as written, as of June 2, 2017; and

(e) provide access to typing technology for Student to use on his writing assignments between August 2016, and January 2017?

3. Did Poway deny Student a FAPE during the 2017-2018 school year by failing to:

(a) offer and provide an appropriate placement, specifically New Bridge, a nonpublic school, as of August 28, 2017;

(b) develop appropriate reading supports to ensure adequate progress was made as of August 28, 2017, on IEP goals; and for Student to obtain passing grades;

(c) develop appropriate writing supports to ensure adequate educational progress was made as of August 28, 2017, on IEP goals; andfor Student to obtain passing grades;

(d) develop appropriate math supports to ensure adequate educational progress was made and passing grades were received as of August 28, 2017;

(e) provide research and evidence-based reading intervention programs to ensure Student made adequate educational progress between August 28, 2017 and June 2, 2018; and

(f) offer adequate educational supports and services to meet Student's needs in middle school as of January 2018?

4. Did Poway deny Student a FAPE during the 2017-2018 school year and cause Student to be deprived of educational benefit and significantly impeded Parents' opportunity to participate in the decision-making process regarding provision of a FAPE to Student by failing to implement his IEPs dated January 24, 2017, December 12, 2017 and January 28, 2018, as written and agreed upon, specifically by failing to:

(a) implement IEP goals 103, 104 and 105 as written as of August 28, 2017;

(b) implement all of Student's IEP goals as written as of November 9, 2017;

(c) implement all of Student's IEP goals as written as of January 9, 2018;

(d) implement Student's IEP goals 2 and 4 as written as of June 11, 2018;

(e) provide access to typing technology for Student to use on his writing assignments between October 2017 and January 2018; and

(f) ensure that Student completed writing activities consistently; and

(g) provide accommodations, as identified in Student's January 24, 2017 IEP?

Student withdrew his issues originally numbered: 2(a)(vi), 3(f) and.4(e) on the record during the PHC.

B. Proposed resolutions:

As remedies Student proposes an Order applying to the time period through the end of the 2020-2021 school year, including extended school year, that Poway shall:

(1) fund Student's placement at a non-public school of Parents' choice;

(2) reimburse Parents for the New Bridge summer program for summer 2018;

(3) reimburse Parents for tutoring in reading and writing for Fall 2016 and summer 2017 in the amount of $2,500; and

(4) provide extensive training to Poway's special education staff in research and evidence-based reading intervention programs for students with dyslexia over the next school year.

Student withdrew his proposed remedy of adding speech and language services to Student's IEP on the record during the PHC.

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 Poway 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.

The parties shall meet and confer by 5:00 p.m. on **December 4, 2018**, to delete duplicate exhibits from the exhibit binders. The parties do not need to renumber exhibits after duplicates have been removed.

The parties shall exchange resumes for each witness who is expected to testify to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae by 5:00 p.m. on **December 4, 2018.** Poway shall include as part of its exhibits the school calendar(s) for all of the years at issue, including the calendars for extended school years. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), Poway shall serve a copy of the applicable school calendar(s) on Student by 5:00 p.m. on **December 4, 2018,** and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ.

If the parties intend to rely on IEP's, the parties shall include 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). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence. Only the portion of the audio record that the party raises to the attention of the ALJ must be transcribed. That portion of the audio record transcribed shall be provided to the opposing party along with the transcript before the hearing to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses, and shall subpoena witnesses if necessary, to ensure that the witnesses available to testify. Each party shall make witnesses under her/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.

The parties shall comply with Education Code section 56505 (e)(7). No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Education Code section 56505, subd.(e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five business

days before the hearing. Each party shall identify witnesses by name and provide a list to opposing counsel by 5:00 p.m. on **December 4, 2018.**

The parties shall meet and confer by 5:00 p.m., **December 4, 2018,** to schedule 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. As part of the meet and confer process, Poway'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 Poway, and if not, Poway shall provide Student's counsel with the witness(es)' most recent contact information to enable Student to issue subpoenas to Poway's former employees.

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 an estimate of time for each party's direct and cross-examination. Poway 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 to revise the witness schedule as needed.

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, subd. (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.

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. Neither party requested telephonic testimony, so no telephonic testimony is presently anticipated at hearing. 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. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of duplicate physical copies of the exhibit binders from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. Faxed or electronic copies are unacceptable. The hearing room shall have sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-

line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Student and Poway each requested leave to make an audio recording of the hearing. Both parties' requests for leave to record the hearing are granted, subject to the following conditions: (1) such recording shall be for the party's personal use only and only for review and preparation of the hearing; (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) operation of a personal recording device will not delay the hearing; (4) the parties shall not play any part of the recording for any prospective witness(es) and the recording shall not be disseminated; 5) the parties shall not use the recording in any subsequent due process hearing; (6) the recording is subject to the same confidentiality as the due process hearing; and (7) the parties shall dispose of the unofficial recording when the time for appeal of the ALJ's decision in this matter has expired. Any recording made by either party is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ. The OAH recording made by the hearing ALJ is the official record unless otherwise ordered.

b. Video Recording. No video recording of any part of the proceedings is permitted. 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 his case-in-chief, followed by Poway.

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 of December 3, 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.

No accommodations for hearing participants were requested by either party.

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 email the ADA coordinator at 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 the request of Student, the hearing will be open to the public.

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 school board approval, in addition to a signed copy of the signature page of the settlement agreement, as noted above, the parties shall also submit a request for a status conference and provide the date of the school board meeting at

which the school board's approval of the settlement will be addressed. 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: December 3, 2018

DocuSigned by:
Christine Arden
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CHRISTINE ARDEN
Administrative Law Judge
Office of Administrative Hearings