BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2019010600
v.	ORDER FOLLOWING PREHEARING CONFERENCE
LONG BEACH UNIFIED SCHOOL DISTRICT.	

On April 29, 2019, a telephonic prehearing conference was held before Administrative Law Judge Christine Arden, Office of Administrative Hearings. Mother appeared on behalf of Student. Debra Ferdman, Attorney at Law, appeared on behalf of Long Beach Unified School Long Beach. 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 7, 8, and 9, 2019, and continuing day to day at the discretion of the ALJ. The hearing shall take place at Long Beach's offices located at Tucker, Bungalow 24, 2221 Argonne Avenue, Long Beach, CA 90815. **The hearing shall begin at 9:30 a.m. the first day of the hearing, at 11:30 a.m. on May 8, 2019[1], 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. The named local educational agency certified that the facilities used for this case comply with the law. The local educational agency 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, Long Beach 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 Long Beach's legal representative and special

[1] **Long Beach's motion to start the hearing no earlier than 11:30 a.m. on May 8, 2019 (referred to in paragraph 9 herein), is granted.**

education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Long Beach 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. Long Beach 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.

A. Issues:

(1) Did Long Beach deny Student a free appropriate public education from the beginning of the 2017-2018 school year by failing to hold monthly "IEP goal progress clinic" meetings?

(2) Did Long Beach deny Student a FAPE from the beginning of the 2018-2019 school year by refusing to allow Parent to record monthly "IEP goal progress clinic" meetings?

B. Proposed resolutions:

As a remedy Student proposes an Order providing that Parent and the nonpublic agency delivering services to Student, be allowed to meet monthly for "IEP goal progress clinic" meetings, without a Long Beach administrator present, and that such monthly meetings shall be delayed no more than ten days due to the unavailability of a Long Beach administrator to attend. As a further remedy Student proposes an Order providing Parent be allowed to record monthly "IEP goal progress clinic" meetings upon 24-hour notice to Long Beach from Parent that Parent plans to record a monthly "IEP goal progress clinic" meeting.

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 Long Beach 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.

Mother and counsel for Long Beach are ordered to meet and confer regarding exhibits, and to identify and produce to each other any exhibits that the parties intend to offer for admission into evidence at hearing. Both parties shall exchange their exhibits with each other by **5:00 p.m. on April 30, 2019,** at the latest, which is five business days before the first day of hearing. (Ed. Code, section 56505, subd. (e)(7**).) Also by 5:00 p.m. on April 30, 2019, t**he parties shall meet and confer to delete duplicate exhibits from the exhibit binders.

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 exchange resumes for each witness who is expected to testify to their professional credentials, and include those resumes in their exhibit binders. 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 April 30, 2019.** Long Beach 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), Long Beach shall serve a copy of the applicable school calendar(s) on Student by **5:00 p.m. on April 30, 2019,** 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. 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 are available to testify. Each party shall make witnesses under his/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. Student did not file a PHC statement. Each party shall identify witnesses by name and provide a witness list or an amended witness list to the opposing party by **5:00 p.m. on April 30, 2019.** At the PHC Mother identified the following witnesses Student intends to call at hearing: (1) Cheryl Stroll, supervisor from Autism Behavior Consulting, a nonpublic agency; (2) Mother; (3) Kimberly Banua, administrator and teacher from Marshall Academy of the Arts; and (4) Catherine Wombold, administrator and teacher from Marshall Academy of the Arts. At the PHC counsel for Long Beach stated Long Beach did not have authority to produce a witness employed by a nonpublic agency.

The parties shall meet and confer by **5:00 p.m. on April 30, 2019,** 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, Long Beach's counsel shall inform Mother as to whether any of the witnesses identified by Mother as Student's witnesses at the April 29, 2019 PHC, or on Student's witness list, are employed by or otherwise under the control of Long Beach, and if not, Long Beach shall provide Mother with the witness(es)' most recent contact information to enable Student to issue subpoenas to Long Beach'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. Long Beach 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. Mother requested leave to allow witness, Cheryl Stroll, to testify at hearing telephonically. Long Beach objected to Ms. Stroll's telephonic

testimony on the ground that Long Beach's cross-examination might be prejudiced by Ms. Stroll's 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. Mother's request for the telephonic testimony of witness, Cheryl Stroll, was granted, subject to the conditions described herein. Prior to the hearing, Mother 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. Long Beach's counsel stated that the hearing room will 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 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. Mother made a motion to make an audio recording of the hearing. Both parties were granted leave to record the hearing, 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

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 Long Beach.

9. Motions. No pretrial motions are pending or contemplated, **other than Long Beach's motion for the hearing to start no earlier than 11:30 a.m. on May 8, 2019, which is granted.** Any other 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 April 29, 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. Neither party requested an interpreter or other accommodation for any hearing participant.

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 OAH ADA Coordinator's office as soon as the need is known. The e-mail address for the office is OAHADA@dgs.ca.gov and 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/Home/Accessibility.aspx.

14. Hearing Closed to the Public. The hearing will be closed 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 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 the above mentioned information. OAH will dismiss the case 30 days following the date of the applicable school board meeting, unless OAH is informed by the filing party that the school board did not approve the settlement.

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

IT IS SO ORDERED.

DATE: April 30, 2019

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