BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2014080281 ORDER FOLLOWING PRE-HEARING CONFERENCE

On September 22, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Laurie Gorsline, Office of Administrative Hearings (OAH). Tania Whiteleather, Attorney at Law, and Lisa Peskay Malmsten, Attorney at Law, appeared on behalf of Student. Debra Ferdman, Attorney at Law, appeared on behalf of Long Beach Unified School District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Student's Motion to Continue the Hearing. Student made an oral motion to continue the hearing at the PHC. District opposed the continuance. The motion to continue was argued and denied at the PHC. Student failed to establish good cause for the continuance of the hearing. The fact that District has more recently agreed to fund the auditory processing assessment (which has yet to be completed) is not a basis for continuance of the hearing. The complaint itself alleges District agreed to fund the auditory processing assessment but has failed to do so and this failure is alleged to be one of the reasons Student filed for a due process hearing. As such, Student's claim that he requires the results of the assessment in order to move forward with the scheduled hearing is without merit.

2. Hearing Dates, Times, and Location. The hearing shall take place on September 30 through October 2, and October 7 and 8, 2014, and will continue day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m., with the exception of the first day of hearing, on which day the hearing shall begin at 9:30 a.m., unless otherwise ordered.

The hearing shall take place at Tucker, Bungalow 24, 2221 Argonne Avenue, Long Beach, CA 90815. District shall ensure there is parking available for Student, Student's representatives, and the ALJ. District shall provide Student with at least three parking spaces, one of which shall be a parking space designated for disabled person[s].

The parties are ordered to meet and confer and, by no later than September 26, 2014, District shall advise Student's counsel as to whether signage will be posted directing arriving witnesses from the parking lot to the hearing room or whether someone will be directing arriving witnesses to the hearing room during the hearing.

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. Dismissal of Claims Outside OAH Jurisdiction. Student's complaint, and specifically "Issue 4," raises claims that allege District's actions violate Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act (ADA), and State civil rights laws.

OAH does not have jurisdiction to entertain claims based on Section 504, the ADA, or other related state and federal civil rights laws. The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), 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.)

Accordingly, the claims alleged in what Student identified as "Issue 4" in the complaint are dismissed. The matter shall proceed to hearing on the remaining issues, stated below.

4. Issues at Hearing. The issues at the due process hearing are listed below.

(1) Whether the District denied Student a free appropriate public education (FAPE) by:

a. Failing to appropriately assess him in all areas of suspected disability between November 22, 2013 and August 5, 2014, specifically, in the areas of occupational therapy/sensory integration, central auditory processing, social-emotional and social skills.

b. Failing to implement the May 2013 Individualized Education Program (IEP) with regard to educational instructional services by failing to provide 245 minutes per day of instructional time.
c. Failing to timely complete Student's annual IEP by May 2014, including failing to provide his parents with a completed annual IEP and an offer of FAPE for the 2014-2015 school year.

5. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Except as permitted herein or otherwise ordered by the ALJ, 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 District exhibit (for example, "S-5, S-6, or D-1, D-2). Based upon the representation of Student's counsel, that Student has already marked and photocopied his exhibits, Student shall be permitted to use letters to identify his 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.

The parties shall meet and confer by September 26, 2014 to delete duplicate exhibits from the exhibit binders.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae not later than 24 hours before the witness is scheduled to testify.

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.

6. 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. 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.

The parties shall meet and confer by September 26, 2014, as to the schedule of 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.

District is ordered to provide to Student's counsel with witness Connie Jensen's most recent current address by the close of business on September 22, 2014.

At the PHC, District questioned the appropriateness of Student calling certain witnesses to testify during the hearing. The parties are ordered to meet and confer by September 26, 2014 regarding this issue and, if necessary, direct any issues concerning that subject to the ALJ presiding over the due process hearing.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one 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.

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. The District 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 the time the testimony each witness is expected to take.

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.

7. Telephonic Testimony. Neither party anticipates that any witness will testify 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 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. 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.

8. Motions. At present no prehearing motions are pending or contemplated, except Student intends on filing a motion to bifurcate regarding the assessment issue. Any prehearing motion filed after the prehearing conference shall be supported by a declaration

under penalty of perjury establishing good cause why the motion was not made prior to the prehearing conference.

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

The parties shall meet and confer by September 26, 2014 to determine legal and factual stipulations, if any, to be submitted at hearing.

10. 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 set to vibrate [on low volume] or shut off during the hearing unless permission to the contrary is obtained from the ALJ. There shall be no texting permitted while the hearing is in session.

The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

11. 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.

12. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services. In the event either party or their counsel learns that Ms. Sara Lupo requires accommodation, counsel are ordered to meet and confer and, if necessary, direct any issues to the ALJ presiding over the hearing.

13. Hearing Closed To the Public. The hearing will be closed to the public.

14. 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 THE 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.

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

IT IS SO ORDERED.

DATE: September 22, 2014

/S/

LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings