BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015120810 ORDER FOLLOWING PREHEARING CONFERENCE

On January 21, 2016, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Student's Father appeared on behalf of Student. Lenore Silverman and Abbe Anderson, Attorneys at Law, appeared on behalf of the Oakland Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place at the Oakland office of OAH, 1515 Clay Street, Room 206, Oakland, California 94612. It shall take place on January 26, 27, and 28, 2016, and February 2, 3, and 4, 2016, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of hearing and at 9:00 a.m. on all other days, unless otherwise ordered.

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.

A. In the 2014-2015 school year, did Oakland commit the following procedural violations which resulted in a denial of a free appropriate public education to Student:

1. failing to assess Student in all areas of suspected disabilities; namely, for an audio processing disorder.

2. rejecting Parents' request for an assessment of his social interaction;

3. rejecting Parents' conditions on their consent to assessment;

4... withholding information about the tests to be used in the assessment process;

5. cancelling or delaying assessments in May and/or June 2015;

6. withholding test protocols and test scoring records Parents requested;

7. failing to provide speech and language assessment results within the time required by law;

8. providing false information about Student's academic ability to Parents, thus precluding them from being able to give informed consent to Student's program;

9. cancelling the August 28, 2015 IEP team meeting; and

10. Predetermining its individualized educational program offers of September 24, 2014 and June 3, 2015?

B. Did Oakland substantively deny Student a FAPE in the school year 2014-2015 by:

1. failing to implement the March 5, 2015 IEP amendment;

2. failing to provide adequate remedies and support services for his auditory processing and speech and language disorders, his social and adoptive deficits, and his prosopagnosia;

3. failing to provide a one-to-one aide,

4. failing to provide individual pull-out tutorials, individual pull-out speech and language therapy, group social speech therapy; an individualized accelerated and expanded curriculum, and attendance at one science class a day;

5. failing to provide adequate goals, modifications, and accommodations and rejecting Parents' proposed goals and modifications;

6. failing to provide an IEP that appropriately used the "Strength-based model" to remediate his weaknesses?

7. Failing generally to provide an IEP appropriately suited to his needs and abilities?[1]

C. In the 2015-2016 school year, did Oakland commit the following procedural violations which resulted in a denial of FAPE to Student:

1. Unilaterally placing Student in kindergarten rather than first grade without Parents' informed consent;

2. Predetermining its IEP offer of September 15, 2015; and

3. Unduly limiting and interfering with Parents' expression of their views at the IEP team meetings of October 6 and November 10, 2015;

4. Failing to provide timely prior written notice of its September 2015 reduction of speech and language services and its rejection of Parents' requests made at the September 15, 2015 IEP team meeting?

D. Did Oakland substantively deny Student a FAPE in the school year 2015-2016 by:

1. Failing to provide the speech and language services required by his last agreed-upon and implemented IEP;

2. Failing to place Student in the least restrictive environment of a general education first grade classroom rather than in kindergarten;

3. Failing to provide adequate remedies and support services for his auditory processing and speech and language disorders, his social and adoptive deficits, and his prosopagnosia?

4. Failing to provide an IEP that appropriately used the "Strength-based model" to remediate his weaknesses?[2]

As resolutions, Student seeks a wide variety of relief set forth at pages two through six of his Prehearing Conference Statement.

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[1] This classification of issues as procedural or substantive is made for the efficient conduct of the hearing, and does not constitute a final ruling on whether any particular issue is procedural, substantive, or both.

[2] The issues for hearing do not include Student's claims under section 504 of the Rehabilitation Act, as OAH has no jurisdiction over those claims.

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 in a way that clearly identifies the party offering it (such as "S1" or "D2"). 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 have served exhibit 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.

Every copy of every exhibit placed in the evidence binders and offered in evidence shall be reasonably legible or the exhibit will not be admitted.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely 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.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither 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.

b) The parties shall meet and confer telephonically to attempt to reach agreement on a witness list for the first day of hearing. Oakland 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.

c) 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.

5. Scope and Order 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, so the parties shall establish their cases in chief during the first appearance of a witness.

6. Telephonic Testimony.

a) Student's motion to allow the testimony of Dr. Deborah Swain, Dr. Dan Peters and Dr. Kimberley Tompkins by telephone was unopposed and is granted, subject to the conditions in section 6.b of this Order.

b) At present no party intends to present any witness by telephone other than those listed in section 6.a, above. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) A 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 any witness appearing by telephone 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.

7. Electronic Recording of Hearing.

a. Audio Recording. The motions of the parties to be allowed to make audio recordings of the hearing are granted subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

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 requested the hearing and shall present his case-in-chief first, followed by Oakland.

9. Motions.

a) Student's motion to determine the order of witnesses in advance is denied.

b) Student's motion to admit in evidence the Universal Resource Locators of certain video recordings available on youtube.com, in lieu of the recordings themselves, is denied. Preservation of evidence by a third party such as youtube.com is inherently

unreliable. Any recording introduced in evidence shall be capable of physical inclusion in full in the administrative record produced at hearing.

c) Student's suggestion that OAH acquire additional software in order to display some of his exhibits is declined. Any audio or video recording that Student wishes to introduce in evidence shall be presented on a compact disc capable of being played on an ordinary Windows computer using Windows 7 Professional, without additional software, unless otherwise ordered by the ALJ at hearing. Any audio or video recording any party wishes to introduce must be played on equipment supplied by the party wishing to introduce the evidence. The relevance and admissibility, if any, of such a recording shall be decided at hearing.

d) Student's motion to admit the full original of a Common Core Standards First Grade Workbook is deferred until the hearing. If Student wishes to offer the entire Workbook in evidence, he shall have clear copies of the entire Workbook for use as an exhibit by the ALJ, the witness, Oakland and himself. The relevance and admissibility, if any, of the Workbook or any portion of it shall be decided at hearing.

e) At present no other prehearing motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during this prehearing conference.

10. Compensatory Education and 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 anticipates the need for special accommodation for any witness or party, or for the services of an interpreter. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is known. Additional

information concerning requests for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accommodations.aspx.

14. Hearing Closed To the Public. At the request of Parents, the hearing will be closed to the public.

15. Settlement. The parties are encouraged to continue their attempts 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 five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall immediately inform OAH of that fact 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 showing all required signatures 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.

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

IT IS SO ORDERED.

Dated: January 21, 2016

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings