BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. COLTON JOINT UNIFIED SCHOOL DISTRICT, RIALTO UNIFIED SCHOOL DISTRICT, SAN BERNARDINO COUNTY SUPERINTENDENT OF SCHOOLS.	OAH Case No. 2015060423 ORDER FOLLOWING PREHEARING CONFERENCE

On November 20, 2015, a telephonic prehearing conference was held before Administrative Law Judge Robert Martin, Office of Administrative Hearings. Tania Whiteleather, Attorney at Law, appeared on Student's behalf. Deborah Cesario, Attorney at Law, appeared on behalf of Colton Joint Unified School District, Rialto Unified School District, and San Bernardino Superintendent of Schools (jointly referred to as "Respondents"). Laura Chism, Program Manager for East Valley Special Education Local Plan Area, also participated in the PHC as Respondent's representative. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on November 30, and December 1, 2, and 3, 2015, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Colton Joint Unified School District, located at 10435 Cedar Ave., Bloomington, CA 92316. The hearing shall begin at 1:30 p.m. the first day of the hearing, and end at 5:00 p.m., and at 9:00 a.m. all other days, and end at 4:30 p.m., 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. Colton Joint Unified School District has certified that the facilities used for this case comply with the law. Colton Joint Unified School District 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, Colton Joint Unified School District 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 Respondents' legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Colton Joint Unified School District 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. Respondents shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

2. Issues and Proposed Resolutions. The issues to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, and Student's proposed resolutions, are whether Respondents denied Student a free appropriate public education by:

(1) failing to timely complete psychoeducational, adaptive physical education, speech, and assistive technology assessments that Respondents agreed in April 2014 that they would conduct at the beginning of the 2014-2015 school year;

(2) failing to timely offer Parents an assessment plan until February 2015, after Parents requested independent educational evaluations of Student based on Respondent's failure to provide an assessment plan; and

(3) failing to develop a safety plan for Student to address risks that Student would suffer harm and become lost while under Respondent's care?[1]

Student's Proposed Resolutions:

(1) An Order:

a. that Respondents provide Student independent educational evaluations in psychoeducation (including neuro-psychoeducation); speech and language, adaptive physical education, and augmentative and alternative communication; and

b. that Respondents develop a safety plan for Student.

3. Exhibits. Student identified 33 exhibits that Student intends to present at hearing. Respondents identified 46 Exhibits that it intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., and Respondents shall mark their exhibits using numbers R1, R2, R3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder

[1] Student's issue identified in the complaint as "Issue No. Three" – whether Respondents denied Student's rights under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (Section 504), the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), or state civil rights laws – is not within OAH's jurisdiction, and was dismissed at the PHC.

shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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. Each party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination.

4. Witnesses. Student identified 26 percipient witnesses and no expert witnesses whom Student intended to present at hearing. Ten of Student's witnesses were also identified by Respondents, including seven current or former employees of Respondents. Respondents identified 13 percipient witnesses, three of whom were not also identified by Student, and no expert witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. At the meet and confer discussed below in section 4.b., Respondents will: (i) identify those witnesses under Respondents' control whom Respondents will make available to Student without the need for subpoena; and (ii) provide Student the last known address for any current or former employee identified by Student whom Respondents will not make available without the need for a subpoena. Respondents will make available to Student at hearing, without subpoena, any current employee of Respondents, identified by both Student and Respondents as a witness. The parties will 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.

a. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five business days prior to the hearing, a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing. The parties exchanged final witness lists and exhibit binders on or before 5:00 p.m. on Thursday, November 19, 2015. Witnesses and documents not disclosed by that time may be excluded at the request of the other party from introduction at the hearing. Each party reserves the right to present additional witness and documents for purposes of rebuttal.

b. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Tuesday, November 24, 2015 at 9:00 a.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to Respondents' counsel to initiate the meet and confer. The parties are to coordinate the availability and order of testimony 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. The parties shall discuss a time estimate of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

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 the hearing, which list shall also include an estimate of time for each party's direct and cross-examination. The ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses and the ALJ will finalize the witness schedule. 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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. Neither party requested that a witness be permitted to appear telephonically at hearing in this matter. 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.

7. Electronic Recording of Hearing.

a. Audio Recording. The parties' requests to make an audio recording of the hearing are 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, in order to avoid recording conversations while off the record; and 3) 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 is the petitioning party. Accordingly, Student shall present Student's case-in-chief, followed by Respondents.

9. Motions. Student moved for an order directing Respondents to produce all educational records of Student not previously produced; or, alternatively, a declaration that

that there are no further educational records of Student in Respondent's possession, custody or control. This motion is denied. Student previously, on August 5, 2015, moved for an order directing Respondents to produce all educational records of Student not previously produced. OAH denied this motion on August 12, 2015 because Respondents provided declarations stating that they had produced all of Student's records in their possession. Counsel for Respondents stated on the record her understanding, based on her prior preparation of Respondent's declarations opposing Student's August 5, 2015 motion, that Respondents had previously provided Student all educational records of Student in Respondent's possession, custody or control. The parties shall discuss at their November 24, 2015 meet and confer the possibility of Student's removing Respondent's custodians of records from Student's witness list if provided direct representation by Respondents that all records in Respondents' custody, possession or control have been produced.

In the event that any other motion, other than a challenge to a newly-assigned ALJ for the hearing, is brought after this date, it 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 PHC.

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. Student requested a Spanish interpreter for the hearing. 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 at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accommodations.aspx.

14. Hearing Open to the Public. At Student's request, the hearing will be open to the public.

15. Settlement. The parties are encouraged to continue working together to complete 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. 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 AND SHALL 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. 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 submit a request for a status conference and provide the date of the next board meeting. 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: November 20, 2015

/s/

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings