BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018090669
v.	ORDER FOLLOWING PREHEARING CONFERENCE, AND DENYING MOTION FOR CONTINUANCE
LONG BEACH UNIFIED SCHOOL DISTRICT.	

On November 5, 2018, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. Attorney Ushma Vyas appeared on behalf of Student. Attorney Jabari Willis 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. Long Beach's Motion to Continue PHC and Hearing. Student filed his due process hearing request in this matter on September 18, 2018, alleging that Long Beach denied Student a free appropriate public education by unilaterally determining, with no individualized education program team meeting, that Student no longer needed access to the motorized scooter provided by Long Beach pursuant to Student's IEP dated December 1, 2017. OAH set a prehearing conference for November 5, 2018, and hearing on November 14, 2018. Mediation has not been scheduled or held. On October 30, 2018, Long Beach filed a motion to continue the prehearing conference to February 11, 2019, and hearing to February 19-21, 2019, on grounds that either Long Beach's counsel, or Long Beach employees, were unavailable for hearing at all times until February 19, 2019, due to conflicts with 15 previously-scheduled hearings or mediations, and Long Beach's Thanksgiving and Winter breaks. Student opposed Long Beach's motion on grounds that the proposed continued hearing date was 97 days beyond the initial hearing date, and Student was suffering ongoing pain and stress on weak joints while denied access to the motorized scooter.

A due process hearing must be held, and a decision rendered, within 45 days of receipt of the complaint, unless a continuance is granted for good cause. (Ed. Code, §§ 56502, subd. (f) & 56505, subd. (f)(1)(C)(3).) At the PHC, Student was willing to continue the hearing to allow mediation in December 2018, and hearing a short time thereafter, but Student opposed continuing the hearing to February 19, 2019, on grounds that such a three-month delay would prejudice Student.

The conflict between the hearing date in this matter and the hearing date in a previously-filed matter in which Long Beach's counsel is representing another client is good cause for a reasonable continuance of this matter. However, Long Beach and its counsel have no availability for hearing within a reasonable time of the initial hearing date. Counsel's ongoing unavailability is not good cause for a continuance of over three months, where Student may be prejudiced by the unavailability of the scooter he contends was offered in his existing IEP, and where one or more of the 15 conflicting matters affecting counsel's availability is likely to resolve or be continued.

Long Beach's motion to continue the PHC to February 11, 2019, and the hearing to February 19, 2019, is denied, without prejudice to a renewed motion by Long Beach for a shorter continuance of the hearing date, or to a joint request by the parties to continue the matter to a date within 60 days of a mediation date selected by the parties.

2. Hearing Dates, Times, and Location. The hearing shall take place on November 14, 15, and 26, 2018, and continue day to day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Long Beach USD, Tucker, Bungalow 24, 2221 Argonne Avenue, Long Beach, CA 90815. The hearing will commence at 9:30 a.m. on November 14, at 1:30 p.m. on November 26, 2018, 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.

As ordered in the scheduling order, Long Beach 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. Long Beach failed to certify that it would provide a facility for this case that complied with the law. Long Beach shall inform OAH within two days of the date of this order it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Long Beach 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 Long Beach's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Long Beach shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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. Student's Issue and Proposed Resolutions. Student's issue to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, is:

(1) Did Long Beach deny Parent meaningful participation in the IEP process, and deny Student a free appropriate public education, by unilaterally deciding outside the IEP process that Student no longer needed access to a motorized scooter, and by refusing to provide Student the motorized scooter offered in Student's IEP dated December 1, 2017?

Student's Proposed Resolutions: An order finding Student to be the prevailing party on all issues, and directing Long Beach to:

(1) Immediately provide Student access to a motorized scooter, as provided in Student's December 1, 2017 IEP; and

(2) Hold periodic trainings to educate staff on their obligations under special education law.

3. Exhibits. Student identified 21 exhibits that Student intends to present at hearing. Long Beach identified 25 exhibits including witness resumes, that Long Beach intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall place a single exhibit behind each binder tab, except where it would be more efficient at hearing to have category of documents behind a single tab; as with, for example, resumes organized alphabetically, receipts, or email strings on a single subject, and shall place the exhibits in chronological order, generally. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., Long Beach shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder 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 9 percipient witnesses Student intended to present at hearing, including one whom Student expects to also testify as an expert. Long Beach identified 15 percipient witnesses, eleven of whom were also identified as experts. Each party is responsible for procuring the attendance at hearing of its own witnesses. Long

Beach agreed to make witnesses under its control reasonably available to Student without the need for subpoena. By 5:00 p.m. on Wednesday, November 7, 2018, Long Beach will also inform Student of the identity of, and available contact information (including last known address), any witness identified by Student as an employee of Long Beach who has left Long Beach's employ. 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.

5. Timely Disclosure of Exhibits and Witnesses. 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 shall exchange copies of their final witness lists and exhibit binders on or before 5:00 p.m. on Tuesday, November 6, 2018.

Except for good cause shown, 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 or impeachment.

a. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Friday, November 9, 2018 at 10:00 a.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to Long Beach's counsel to initiate the meet and confer. The parties shall 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.

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.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. Student shall have witnesses available in case agreement on a witness list is not reached. On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with a joint, written, hour-by-hour schedule of all witnesses expected to testify at the hearing. The list shall include an estimate of time for each party's direct and cross-examination. The ALJ and the parties will review the expected duration of direct and cross-examination of each witness, and discuss any scheduling issues for individual witnesses before finalizing the expected 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.

6. 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.

7. Telephonic Testimony. Neither party requested that any witness appear telephonically. 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 witness testifies from a private location with no other persons present, on a landline or by other means allowing a clear two-way connection. 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. No witness will be heard by telephone unless all these requirements have been fulfilled.

8. Electronic Recording of Hearing.

a. Audio Recording. Student's request for leave to make an audio recording of the hearing is 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; (3) the recording will not be shared with any witness or third parties; and (4) operation of the party's recording mechanism will not be allowed to delay the hearing. Long Beach may also make an audio recording under the same conditions.

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.

9. 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 Long Beach.

10. Motions.

Student's Request to Exclude Testifying Witnesses from Hearing. Student's request that testifying witnesses be excluded from the hearing when not testifying is granted, except

as to Parent and District's designated hearing representative, each of who may attend the hearing even if expected to testify.

Other Motions. The parties indicated that they were not contemplating any other prehearing motions. In the event that any 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.

12. 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.

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

14. 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.

15. Special Needs and Accommodations. Neither party requested any accommodations for a party or witness in this matter. 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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

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

17. 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.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 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.

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

IT IS SO ORDERED.

DATE: November 6, 2018

DocuSigned by:

ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings