BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. ORINDA UNION SCHOOL DISTRICT,	OAH Case No. 2019010136
ORINDA UNION SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018120618 ORDER FOLLOWING PREHEARING CONFERENCE

On March 8, 2019, a telephonic prehearing conference was held before Administrative Law Judge Penelope Pahl, Office of Administrative Hearings. Mandy Leigh and Damien Troutman, Attorneys at Law, appeared on behalf of Student. Jennifer Baldassari, Attorney at Law, appeared on behalf of Orinda Unified School District. The PHC was recorded.

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

1. Peremptory Challenge. Prior to the commencement of the March 8, 2019 Prehearing Conference, Orinda submitted a peremptory challenge to the undersigned Administrative Law Judge. Orinda argued that it should have an opportunity to file a challenge in Student's case as the last prehearing conference was convened in the District filed case.

Government Code section 11425.40, subdivision (d), establishes the criteria for disqualification of the presiding officer. A party is entitled to one peremptory challenge (disqualification without cause) to an ALJ assigned to an Office of Administrative Hearings (OAH) hearing. (Cal. Code Regs., tit. 1, § 1034, subds. (a) & (b); Gov. Code, § 11425.40, subd. (d).) In no event will a peremptory challenge be allowed if it is made after the hearing has commenced. In addition, if at the time of a scheduled prehearing conference, an ALJ has been assigned to the Hearing, any challenge to the assigned ALJ shall be made no later than commencement of that prehearing conference. (Cal. Code Regs., tit. 1, § 1034, subd. (c).) A peremptory challenge is not allowed on reconsideration or remand, and cannot be made after a hearing has begun. (Cal. Code Regs., tit. 1, § 1034, subd. (a).)

A prehearing conference was previously convened in this matter on January 7, 2019. At that time, Orinda stipulated to consolidation of Student's case with Orinda's. At no time prior to that prehearing conference did Orinda submit a peremptory challenge. At the time of the January 7, 2019 Prehearing Conference, substantive decisions were made in the case including ordering consolidation and a continuance of the matter. Following the order of consolidation, the cases became one for purposes of administration and rulings. As Orinda's challenge was required prior to the commencement of the first prehearing conference, the challenge filed March 8, 2019, is not timely. The fact that there were previously two separate cases that were consolidated did not provide Orinda with a second opportunity to challenge an ALJ who has already made substantive rulings in the consolidated cases. Such a reading of the controlling statute and regulation would result in the opportunity for forum shopping, with a party having the opportunity to test a judge's rulings in one hearing and then claim the opportunity to challenge the judge in a subsequent hearing. Orinda's motion is denied as untimely.

2. Hearing Dates, Times, and Location. The hearing shall take place on March 19, 2019 at 9:30 a.m., and March 20 and 21, 2019 at 9:00 a.m.; then continuing day to day at the discretion of the ALJ. The hearing shall take place at District offices located at Orinda Unified School District, 8 Altarinda Road, Orinda, CA 94563.

As ordered in the scheduling order, District 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. Counsel for District had previously filed a statement of ADA compliance prior to the January 7, 2019 PHC in case number 2018120618, which shall serve as the District's compliance for the consolidated cases.

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.

Prior to the beginning of the hearing, 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 District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. 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.

2. Issues and Proposed Resolutions. Pursuant to discussions with the parties during the prehearing conference, the issues to be determined at the due process hearing, and the proposed resolutions, are listed below:

Issues[1]

Orinda's Issue:

Did the District offer Student a free appropriate public education (FAPE) through the IEP dated March 1, 2018, as amended on March 23, 2018, June 1, 2018, and September 13, 2018 such that the District may implement the March 1, 2018 IEP (as subsequently amended) absent the consent of parent?

Student's Issues[2]:

1. Did the March 1, 2019 IEP offered by Orinda Unified School District deny Student a free, appropriate public education by failing to provide goals, placement and services reasonably calculated to confer academic benefit to her and meet her unique social emotional and behavioral needs by failing to:

a. provide adequate behavior intervention services;

b. provide adequate occupational therapy services to support her sensory, fine and gross motor skills needs;

c. provide dedicated social skills services delivered by a trained specialist;

d. provide assistive technology services despite Student's well documented, significant fine motor development issues;

e. provide goals appropriately calculated to confer academic benefit

f. place Student in a setting that constituted the least restrictive environment.

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[1] The ALJ has reworded and clarified some issues as stated in Student's prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. The parties shall carefully review the issues set forth above to determine that, as written, they accurately capture the discussions and amendments agreed to during the Prehearing Conference. These are the issues to be tried at hearing. The parties must raise any concerns regarding the wording of the issues in writing prior to the first day of hearing. Any concerns raised will be discussed on the first day of the hearing.

[2] At the time of the Prehearing Conference Student's counsel acknowledged that Student's Issue #3 was duplicative of Issue #2 and therefore Issue #3 was withdrawn.

ISSUE # 2:

Did the March 23, 2018, June 1, 2018 and September 13, 2018 IEP amendments to the March 1, 2019 IEP offer fail to offer services, goals and placement appropriately calculated to confer academic benefit to Student or meet her sensory and behavior need, thereby denying her a free, appropriate public education by failing to:

a. provide placement in the least restrictive environment;

b. provide appropriate services

c. provide appropriate goals

Proposed Resolutions:

District's proposed resolution is an order from OAH determining the offered IEP is FAPE accompanied by permission to implement it without parental consent.

Student seeks a declaration that they are prevailing parties on all issues; compensatory education including academic tutoring and reimbursement for private placement at Raskob including tuition and travel, reimbursements for costs associated with private assessment and supplemental educational services paid for by parents; future funding for an OT and educational specialist to develop goals for Student; funding for private counseling and emotional support and/or social skills programs; funding for a Board Certified Behavior Analyst; training for parents to learn to work with an autistic child and attorney fees and costs.

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 District 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 with consecutive bates stamping of exhibits preferred. 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.

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 the ALJ rules that it is admissible.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

District shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to District.

4. 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. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

5. Meet and Confer. The parties are encouraged to review and shorten their witness lists and lists of Exhibits 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. To that end, parties are ordered to meet and confer no later than 3 p.m. March 14, 2019**,** to discuss whether routine information can be the subject of stipulations to shorten the hearing by avoiding the necessity of testimony, particularly as to routine matters, and/or exhibits. The parties shall also discuss the order of witnesses and the length of witness testimony and be prepared to present the ALJ with a written joint witness list with hour-by-hour time estimates and dates of expected testimony for each witness on the first day of hearing.

Should agreement on a list not be reached, each party shall prepare separate lists and Student shall have witnesses available so the hearing can proceed promptly. 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.

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. 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, the cases have been consolidated and each side has the burden of proof as to the issues pled in their individual cases. The parties have stipulated that Student shall present her case-in-chief first, followed by District**.**

8. Telephonic Testimony. Student has requested that Dr. Lynn Ponton testify by telephone. No object was received from Orinda. Whether a witness may appear by

telephone or other electronic means 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 or video conference shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone or video conference. 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 instruct the witness as to the rules regarding maintenance of Student's privacy with regard to the documents provided. The proponent of the testimony shall also ensure that the room from which the witness is testifying has sound equipment that allows all hearing participants to hear the witness and that the witness is able to hear objections and rulings.

Orinda shall ensure that the hearing room is equipped with adequate telephonic equipment that allows receipt of the transmitted telephonic testimony. No witness will be heard by telephone conference unless all these requirements have been fulfilled.

9. Electronic Recording of Hearing.

a. Audio Recording. Both parties' motions to make an audio recording of the hearing is 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; 3) the recording device will be removed by the party recording during any recess where the party leaves the room; 4) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a private recording is not allowed to be used to prepare the testimony of an upcoming witness in 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.

10. IEP Recordings. Any request to introduce a portion of an IEP recording will be considered at the time of hearing subject to the following conditions: 1) It is preferable that a transcript **of the portion of the IEP recording being introduced** be prepared and submitted with a declaration authenticating the transcription; 2) At the time the evidence is introduced, relevance of the portion of the IEP recording at issue must be established; 3) the exact portion (minutes) of the IEP recording the party seeks to admit must be identified; and 4) the person speaking on the portion of the tape being introduced must be established.

An opposing party is not precluded from seeking admission of additional portions of an IEP recording to establish additional context of comments subject to the above requirements.

Parties are not precluded from seeking admission of an entire IEP recording subject to establishment of relevance of the entire recording as well as meeting the other requirements listed above.

11. Motions. Student has indicated that she anticipates filing a request for continuance and request to amend the complaint. No other motions are anticipated. No further pre-trial motions are anticipated by the parties. Any motion that was not filed by the date the Prehearing Conference statement was due, that is, three business days prior to the date of the Prehearing Conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

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 to promote hearing efficiency. Stipulations to routine foundational facts and avoiding duplicative exhibits are particularly favored. 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 Accommodations and Translation. At present neither party anticipates the need for accommodation for any witness or party, or for the services of an interpreter. Any party or participant to this case 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/Accessibility.aspx.

16. Hearing Closed To the Public. At the request of Student, 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.applications.dgsapps.dgs.ca.gov/oah/oahsftweb **.** IFTHE SETTLEMENT IS SUBJECT TO BOARD APPROVAL, THE LETTER SHALL CONTAIN THE DATE ON WHICH THE BOARD IS SCHEDULED TO CONSIDER THE SETTLEMENT AGREEMENT.

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.

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

IT IS SO ORDERED.

DATE: March 8, 2019

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings