BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019060021

ORDER FOLLOWING PREHEARING CONFERENCE

On October 7, 2019, Administrative Law Judge Linda Johnson, Office of Administrative Hearings, held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH. The prehearing conference will be referred to as PHC.

Attorney Michael Smith appeared on behalf of Student. Attorney Gabrielle Ortiz appeared on behalf of Torrance Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on October 15, 2019, through October 17, 2019, and continue day to day at the discretion of the ALJ. The hearing will begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at Torrance Unified School District, 2201 Plaza del Amo, Room T3, Torrance, California 90509.

The parties must immediately notify all potential witnesses of the hearing dates, and must 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.

School district facilities must fully comply 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. School districts are required to file written certification with OAH that the facilities it provides comply with these laws.

Torrance filed the required certification. Torrance shall notify OAH within three business days of the date of this Order if it is unable to provide facilities that comply with the laws governing accessibility of government facilities to persons with disabilities.

Before the beginning of the hearing, Torrance must ensure the hearing room is configured into a courtroom setting and contains:

- a table for Student and Student's representatives;
- a table for Torrance and Torrance's representatives;
- a table for the witness;
- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and

- water and tissue available for the participants.

The same hearing room must be used for each day of hearing and must be available at least one hour before the beginning of the hearing each day. The hearing room must be locked following the hearing each night. Torrance must ensure the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

ISSUES AND PROPOSED RESOLUTIONS

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

ISSUES

1. Did Torrance deny Student a free appropriate public education, referred to as FAPE, from May 31, 2017, to December 2018, by failing to provide a specially designed program to meet Student's unique needs that would provide more than de minimis progress in the areas of academics, behavior, communication, functional skills, and transition skills?
2. Did Torrance deny Student a FAPE from May 31, 2017, to December 2018, by failing to develop an individualized transition plan and offer transition services reasonably calculated to prepare Student to enter a Regional Center Adult Day Program in December 2018?
3. Did Torrance deny Student a FAPE by failing to implement the specialized academic instruction and small group instruction services in the June 20, 2017, and June 6, 2018 individualized education programs?

PROPOSED RESOLUTIONS

Student seeks compensatory education in the areas of academics, transition, behavior, assistive technology, speech and language, and occupational therapy. Student also seeks an assessment in the area of transition, to determine which services will help prepare him for an Adult Day Program.

Torrance filed its response to Student's complaint on June 13, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits must be pre-marked and placed in three-ring binders before the hearing. Exhibit binders must include a tab for each exhibit. Each binder must contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties must place a letter followed by a number on each tab to identify each exhibit. Student must use the letter S before the number to identify Student's exhibits. Torrance must use the letter D before the number to identify Torrance's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Torrance's exhibit tab 1. Each page of each binder must be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. Exhibits in the binders should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties must exchange resumes not later than 24 hours before the witness is scheduled to testify.

Torrance's binder must include a copy of the school calendar for each school year in question and must have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties must serve copies of their evidence binders on each other no later than October 8, 2019. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party must bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties should not serve exhibits on OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged will not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties must make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The parties are ordered to meet and confer no later than October 11, 2019, at 5:00 p.m. The parties must discuss the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case, Student requested the hearing. Therefore, Student will present its case-in-chief first, followed by Torrance.

WITNESS LISTS

The parties must give the ALJ a joint proposed witness list for the first day of hearing. The list should include dates and time estimates of expected testimony, taking into account the estimated time for direct and cross-examination, and any breaks, including a one-hour lunch break. In the event an agreement cannot be reached, each party must prepare a separate written list. Torrance must have witnesses available in case there is no agreement. Before the hearing begins, 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. The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time the testimony each witness is expected to take.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties presents their case-in-chief.

TELEPHONIC TESTIMONY

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 must request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness must provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness must ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony must ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness's testimony to make a clear recording, and allows the witness to hear objections and rulings. Torrance must ensure the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

Torrance's motion to allow Jacqueline De Decker to testify telephonically is granted provided all the stated conditions are met. The witness shall be informed of the privacy rules pertaining to the information contained in the binders and of the proper procedure for disposal of the evidence binder following completion of the witness' testimony.

ELECTRONIC RECORDINGS

Audio Recording

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties must turn the recording device on and off at the same time the ALJ is on and off the record to avoid recording conversations while off the record;
- the recording device will be removed by the party during any recess where the party leaves the room;
- operation of the party's recording device will not be allowed to delay the hearing;
- a party's recording may not be used to prepare a witness for the witness's testimony at the hearing;
- the recording must not be shared with any nonparty, possible witness, or through social media;
- the parties must not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality requirements as the due process hearing; and
- the parties must dispose of the unofficial recording when the time for filing an appeal has passed, or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Neither party requested to audio record the hearing. Should either party seek to record the hearing, they must request permission from the ALJ, and if granted, will be subject to the audio recording conditions.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so will be subject to sanctions.

Recordings as exhibits

The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording must be considered at the time of hearing. The ALJ may grant or deny the request, or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant. The ALJ may request a transcript of the portion of the recording requested or have the party offering the recording provide an exact identifiable portion of the recording the party seeks to admit. The identities of any person speaking on the portion of the recording being introduced must be established. An ALJ may allow the opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures must present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

No prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC, must be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation must be submitted to the assigned ALJ in writing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, recording devices, and other noisemaking electronic devices must be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

REASONABLE ACCOMMODATIONS

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING CLOSED TO THE PUBLIC

The hearing is closed to the public. Special Education hearings are closed to the public unless Student requests the hearing to be open to the public.

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 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.

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 before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

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Linda Johnson
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DATED: October 7, 2019

Linda Johnson
Administrative Law Judge
Office of Administrative Hearings