BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2015080500
v.	ORDER FOLLOWING PREHEARING CONFERENCE, VACATING AND DISCHARING ORDER TO SHOW CAUSE, AND CONTINUING HEARING
SAN BRUNO PARK SCHOOL DISTRICT.	

On October 2, 2015, a telephonic prehearing conference and show of cause hearing was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Jennifer K. Whipple, Attorney at Law, appeared on behalf of Student. Shawn Olson Brown, Attorney at Law, appeared on behalf of San Bruno Park School District[1]. The PHC was recorded.

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

1. Order to Show Cause. On September 29, 2015, OAH issued an Order Show Cause Why Case Should Not Be Dismissed and Order Setting Prehearing Conference Dates. The order was issued after Student's counsel failed to appear at the PHC on September 28, 2015, at 3:15 PM. During the October 2, 2015 PHC, Ms. Whipple explained that she and two other members of her office had contacted OAH numerous times to provide an alternate contact number for the PHC. Ms. Whipple indicated that she was ready and waiting to be contacted for the PHC and when she was not contacted, she telephoned OAH numerous times to check on the status of the PHC. ALJ Redmon, who was conducting the PHC, was not notified of Ms. Whipple's efforts to reach her until well after the PHC had been concluded. After hearing Ms. Whipple's reasoning for not participating in the PHC, the Order to Show Cause was vacated and discharged.

2. Hearing Dates, Times, and Location. The hearing is continued on motion of San Bruno[2].

[1] M. Alejandra Leon, attorney for San Bruno, observed.

[2] On October 1, 2015, the parties submitted a Joint Request for Continuance. However, at the October 2, 2015 PHC Student opposed the continuance.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332 .) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).) Good cause is found for the brief continuance on the basis that San Bruno was having difficulty locating two witnesses who no longer worked for San Bruno.

The hearing shall take place on October 19, 20, 21, and 22, 2015, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at San Bruno Park School District, which is located at 500 Acacia Avenue, San Bruno, California 94066. The hearing shall begin at 1:30 PM the first day of the hearing and at 9:00 AM all other days, unless otherwise ordered. The hearing shall conclude at 5:00 PM on each scheduled day, unless otherwise ordered.

The named local educational agency will 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. The local educational agency 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 by filing the certification form located on OAH's website.

Prior to the beginning of the hearing, San Bruno 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 San Bruno's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. San Bruno 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. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Issue 1: Did San Bruno procedurally deny Student a free appropriate public education by failing to include as part of the individualized education program team:

a. a general education teacher and a special education teacher at the November 1, 2013 IEP team meeting;

b. a general education teacher at the June 27, 2014 IEP team meeting;

c. a general education teacher at the March 21, 2014 IEP team meeting; and

d. a general education teacher at the August 26, 2014 IEP team meeting?

Issue 2: Did San Bruno procedurally deny Student a FAPE by failing to consider a continuum of placement options for Student at the:

a. November 1, 2013 IEP team meeting;

b. March 21, 2014 IEP team meeting;

c. June 27, 2015 IEP team meeting;

d. August 26, 2014 IEP team meeting; and

e. December 15, 2014 IEP team meeting?

Issue 3: Did San Bruno procedurally deny Student a FAPE by failing to consider whether an special day class placement for the full school day was the least restrictive environment for Student at the:

a. November 1, 2013 IEP team meeting;

b. March 21, 2014 IEP team meeting;

c. June 27, 2015 IEP team meeting;

d. August 26, 2014 IEP team meeting; and

e. December 15, 2014 IEP team meeting?

Issue 4: Did San Bruno procedurally deny Student a FAPE by predetermining Student's placement in the special day class at the:

a. November 1, 2013 IEP team meeting;

b. March 21, 2014 IEP team meeting;

c. June 27, 2015 IEP team meeting;

d. August 26, 2014 IEP team meeting; and

e. December 15, 2014 IEP team meeting?

Issue 5: During the 2013-2014, 2014-2015, and 2015-2016 school years, did San Bruno deny Student a FAPE by failing assess Student in all areas of suspected disability by failing to adequately conduct the following assessment:

a. educationally related health and medical;

b. speech and language;

c. occupational therapy;

d. physical therapy;

e. psychoeducational; and

d. neuropsychological?

Issue 6: Did San Bruno procedurally deny Student a FAPE by failing to provide Parents with Prior Written Notice denying Parents' request for Student to be placed in home instruction or an alternate placement after the requests were made on:

a. September 17, 2013;

b. June 3, 2014;

c. August 15, 2014;

d. August 18, 2014;

e. August 29, 2014;

f. October 4, 2014;

g. October 8, 2014;

h. October 9, 2014;

i. October 23, 2014;

j. October 27, 2014; and

k. October 29, 2014?

Issue 7: During the 2013-2014, 2014-2015, and 2015-2016 school years, did San Bruno deny Student a FAPE by continuing to rely on the results of the Standardized Intelligence Test administered to Student in September 2012 in determining Student's educational program and placement?

Issue 8: During the 2013-2014, 2014-2015, and 2015-2016 school years, did San Bruno deny Student a FAPE by failing to offer Student IEPs that were reasonably calculated to provide Student with a meaningful educational benefit?

Issue 9: During the 2013-2014 and 2014-2015 school years, did San Bruno deny Student a FAPE by failing to implement the services and necessary instruction for Student to meet her goals identified in Student's IEPs?

Issue 10: During the 2013-2014, 2014-2015, and 2015-2016 school years, did San Bruno deny Student a FAPE by failing to offer and provide Student with home instruction or an alternate placement?

Proposed Resolutions 1: Student seeks and order that San Bruno be required to fund independent assessments detailed in Issue 5.

Purposed Resolution 2: Student seeks an order that San Bruno be required to fund Student's placement at the non-public school, Arbor Bay in San Carlos or a similar appropriate educational program to meet Student's unique needs with one-to-one intensive instruction.

Proposed Resolution 3: Student seeks an order that San Bruno be required to provide Student with at least two years of compensatory education and services in the areas of: one-to-one academic tutoring, speech and language, occupational therapy, physical therapy, social skills training, behavioral therapy, counseling, and in any other areas which are found to be appropriate.

Proposed Resolution 4: Student seeks an order that San Bruno be required to provide Student with extended school year services.

Proposed Resolution 5: Student seeks an order requiring San Bruno to reimburse Parents for all educationally related instruction and services.

Proposed Resolution 6: Student seeks an order requiring San Bruno to provide Student transportation to and from her prospective educational placement and to any other location where Student receives compensatory educational and related services.

4. 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. 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 included in the exhibit lists and not previously 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.

5. 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 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.

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. San Bruno 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.

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. 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.

7. 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 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.

San Bruno's motion to allow Erin Soltis to testify telephonically is granted. Prior to the beginning of the hearing, San Bruno shall provide Ms. Soltis with a complete exhibit binder from each party, containing all of each party's exhibits. These binders shall be identical to the binders being provided for the witness and the ALJ in that they are to be tabbed and paginated in the same manner. Additionally, San Bruno shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

8. Electronic Recording of Hearing.

a. Audio Recording. Student's motion 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; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing. If San Bruno desires to make such a recording, San Bruno shall move for leave to do so in advance of the hearing, and the same conditions shall apply.

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 its case-in-chief, followed by San Bruno.

10. Motions. No pretrial motions are pending or contemplated. Any motion filed after this date 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 prehearing conference of October 2, 2015.

11. 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.

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

13. 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.

14. Special Needs and Accommodations. Neither party requested any accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (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

15. Hearing Open/Closed To the Public. The hearing will be closed to the public unless Student requests it be open.

16. 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 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. 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.

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

IT IS SO ORDERED.

DATE: October 5, 2015

/s/
B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings