BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. IRVINE UNIFIED SCHOOL DISTRICT,	OAH Case No. 2015100704
IRVINE UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2015100703 ORDER FOLLOWING PREHEARING CONFERENCE AND GRANTING MOTION IN LIMINE REGARDING SETTLEMENT AGREEMENT AND DENYING MOTION REGARDING OBSERVATION AT NONPUBLIC SCHOOL AND DENYING MOTION REGARDING AN ADDITIONAL HEARING DATE

On February 1, 2016, a telephonic prehearing conference was held before Administrative Law Judge Caroline A. Zuk, Office of Administrative Hearings. Phillip VanAllsburg, Attorney at Law, appeared on behalf of Student. Ernest Bell, Attorney at Law, appeared on behalf of Irvine Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on February 9, 10 and 11, 2016, 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 5050 Barranca Parkway, Irvine, California 92604. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, 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. § 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 named local educational agency certified that the

facilities used for this case comply with the law. The local educational agency 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, 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. The hearing room shall be locked following the hearing each night. District 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 at the due process hearing, and the proposed resolutions, are listed below.

Student's issues are:

a) Did District deny Student a free appropriate public education, beginning September 3, 2014, by failing to implement three goals from the February 6, February 28, and April 4, 2014 individualizes educational programss involving the use of assistive technology?

b) Did District's February 3 and 24, 2015 IEP's deny Student a FAPE by failing to offer:

i) appropriate goals in the areas of communication and behavior;

ii) appropriate speech and language services; and

iii) an appropriate placement?

Student's proposed resolutions are:

a) a finding that the February 3 and 24, 2015 IEP's are inappropriate;

b) an unspecified amount and type of compensatory education;

c) reimbursement for private educational expenses for nonpublic services provided by Dr. Chris Davidson;

d) an order, requiring District to fund Dr. Davidson's educational services until it offers Student a FAPE; and

e) an order, stating that District may not conduct a functional behavioral assessment of Student without written parental consent.

District's issues are:

a) Did District's February 3 and 24, 2015 IEP's offer Student a FAPE in the least restrictive environment?

b) May District conduct a functional behavioral assessment of Student pursuant to the February 24, 2015 assessment plan in the absence of written parental consent?

District's proposed resolutions are an order from OAH, finding that:

a) the February 3 and 24, 2015 IEP's offered Student a FAPE in the least restrictive environment;

b) District is not obligated to reimburse parents for their unilateral placement of Student and/or directly fund such placement;

c) District may implement the February 3 and 24, 2015 IEP's over parents' objection if they want a FAPE for Student from District;

d) District may conduct a functional behavioral assessment of Student pursuant to the February 24, 2015 assessment plan over parents' objections if parents want a FAPE for Student from District;

e) parents must make Student available for the functional behavioral assessment within 30 days of receipt of OAH's order; and

f) District will be relieved of its obligation to provide Student a FAPE if parents fail to comply with an order to produce him for the functional behavioral assessment.

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. 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.

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 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.

During the prehearing conference, the parties agreed to meet and confer on February 2, 2016 to attempt to reach agreement on a witness list for the first day of hearing. District 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.

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. During the prehearing conferences, the parties did not seek to present a witness by telephone at hearing. 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. 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; 3) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 4) that the audio recordings shall be destroyed by or on the date that the administrative record is closed. District may also make an audio recording of the hearing, subject to 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.

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].) This matter is consolidated. One issue overlaps, namely the appropriateness of District's February 3 and 24, 2015 IEP. Therefore, the order of presentation of evidence shall be as follows: Student shall present his case first. The parties shall conduct direct and cross examination of witnesses regarding the appropriateness of the February 2015 IEP, and shall also examine witnesses on Student's remaining issues, where applicable. District shall follow with the remainder of its issues.

9. Motions. The parties filed a joint motion, seeking a ruling during the prehearing conference as to whether the parties' September 2, 2014 settlement agreement prevented Student from challenging District's February 6, 2014 multidisciplinary assessment of Student, and whether District was obligated to defend its assessment in this consolidated matter. District's complaint alleged that it had no obligation to request a hearing to defend the February 2014 assessment given the parties' previous settlement agreement. Student asserted that District relied on its February 2014 assessment when it developed his February 24, 2015 IEP, and that Student would not have a remedy to challenge the IEP if it could not challenge the appropriateness of the assessment.

The express, unequivocal language of the agreement states that the "Parties shall, and hereby do, release and forever discharge one another, . . . of and from any and all educationally based claims, demands, actions or causes of action of every kind and character, known and unknown, which they may now have in connection with or arising out of the Student's educational through February 6, 2015, absent an unforeseen catastrophic change in Student's disabling condition." Based on the plain language of the agreement, Student waived his right to challenge the appropriateness of District's February 6, 2014 assessment but did not waive his right to challenge the appropriateness of the February 2015 IEP. Accordingly, District is not required to defend the assessment as an issue in this consolidated matter.

District also filed a motion on January 25, 2016, requesting additional observations of Student at his nonpublic school where he receives services from Dr. Chris Davidson. District based its motion on Education Code section 56329, subdivision (d), which provides in pertinent part:

> If a parent or guardian proposes a publicly financed placement of the pupil in a nonpublic school, the public education agency shall have an opportunity to observe the proposed placement and the pupil in the proposed placement, if the pupil has already been unilaterally placed in the nonpublic school by the parent or guardian.

Student opposed the motion, pointing out that District, through lead school psychologist Dr. Angela Weedn, observed Student between 9:00 and 10:00 am on January 27, 2016. District's motion was denied, because it had an opportunity to observe Student in his parents' proposed nonpublic school placement consistent with the intent of Education Code section 56329, subdivision (d), and District did not establish that the observation was insufficient.

During the prehearing conference, District also moved for an additional half-day of hearing during the morning of February 16, 2016 to accommodate the schedule of Dr. Weedn who will be attending a professional conference out of state on February 9, 10, and 11, 2016. Student opposed the motion, because he had relied on the agreed upon the current hearing dates to prepare for his case, and has a calendar conflict on February 16, 2016, because of two previously scheduled due process hearings.

District's motion to convene the hearing during the morning of February 16, 2016, is denied without prejudice. District had ample opportunity to notify its witnesses of the due process dates based on OAH's order, dated October 29, 2015, setting the current hearing dates. District may renew its motion at the commencement of the hearing on February 9, 2016.

No further 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 February 1, 2016.

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. The parties did not request 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

14. Hearing Closed To the Public.

15. 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.

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

IT IS SO ORDERED.

DATE: February 03, 2016

/s/

CAROLINE A. ZUK
Administrative Law Judge
Office of Administrative Hearings