BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016050941 ORDER FOLLOWING PREHEARING CONFERENCE

On August 8, 2016, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Lina Foltz, Attorney at Law, appeared on behalf of Student. Diane Beall, Attorney at Law, appeared on behalf of San Francisco 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 August 16 through 18, 2016, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at San Francisco's administrative offices located at 555 Franklin Street, San Francisco 94102.[1] 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. The hearing shall end at 5:00 p.m. each day, except for August 18, 2016, on which day it will end at 4:30 p.m.[2]

As ordered in the scheduling order, San Francisco is 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. San Francisco has failed to certify that the location for the hearing complies with the law. San Francisco shall provide OAH with certification that the hearing location conforms to the law within two days of the date of this order.

[1] If San Francisco must change the location of the hearing to another building within its boundaries, Student and OAH must be notified at least 2 business days in advance.

[2] Counsel for San Francisco has an appointment that requires her to leave the hearing at 4:30 p.m. on August 18, 2016.

Prior to the beginning of the hearing, San Francisco 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 San Francisco'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 Francisco 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.

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.

2. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.[3]

1) Did San Francisco fail to meet its child find obligation between May 19, 2014, and continuing through January 14, 2015, thus denying her a free appropriate public education, by failing to assess her?

2) Did San Francisco fail to provide Student with a FAPE from January 14, 2015, through December 17, 2015, by failing to find her eligible for special education under the eligibility category of other health impairment?[4]

3) Did San Francisco fail to provide Student with a FAPE from May 19, 2014, through December 17, 2015, and continuing thereafter, by failing to provide her special education and related services that would meet her unique needs and provide her with educational benefit?[5]

4) Did San Francisco deny Student a FAPE by improperly exiting her from high school on December 17, 2015, by awarding her a high school diploma based on

[3] Student's PHC statement contained eight separate issues. Her complaint contained five issues. The issues identified for hearing were based on those in the complaint. Issue 5 was dismissed because OAH does not have jurisdiction.

[4] Student's complaint references a physical injury to one of her limbs, followed by continuing pain related to the injury that is unabated. Therefore, it is determined that Student was seeking to be found eligible for special education under the category of other health impairment.

credits that were earned through classes that did not provide her with meaningful educational benefit?

Proposed Resolutions[6]

1) The ALJ shall find that Student was eligible for special education and related services beginning May 19, 2014, and continuing to when she meets graduation requirements, or reaches age 22.

2) The ALJ shall issue an order that San Francisco rescind Student's high school diploma because she has not completed sufficient units, and an order permitting her to continue her education at the high school level until such time as she has met high school graduation requirements, or reached age 22, whichever is sooner.

3) Student shall be re-enrolled in a San Francisco high school with appropriate academic content and shall receive special education services to enable her to complete a minimum of 35 academic units; or she shall be provided with compensatory education or reimbursement for a program that will allow her to complete a minimum of 35 academic units.

4) The ALJ shall order San Francisco to permit Student to participate in its credit recovery and credit earning program for Honors Chemistry 1 and 2, Advanced Placement Biology, and other classes in which she received grades below C as a result of her disability.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties are encouraged to use different colored binders for the convenience of the witnesses. Each exhibit must be separated from the next by an divider. 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 exhibit binder shall be consecutively paginated or 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.

The parties understand that the ALJ will determine what evidence will be admitted. Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely provided to the other party shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

[6] This list of proposed resolutions does not necessarily mean that OAH has the authority to make orders in this regard.

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 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, and shall meet and confer regarding the schedule for witnesses no later than close of business on August 10, 2016. The 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. Whether a witness may appear by telephone, or remotely through another 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 remotely shall move in advance for leave to do so. 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 and any other necessary equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard remotely unless all these requirements have been fulfilled.

Student was uncertain whether any specific witnesses would need to testify remotely, but believed that one particular witness might need to testify, either telephonically or through electronic means. This matter will be addressed at the beginning of the hearing.

7. Electronic Recording of Hearing.

a. Audio Recording. Both parties shall be permitted to make an audio recording of the hearing, 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.

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].) Here, Student is the petitioning party. Accordingly, Student shall present her case-in-chief, followed by San Francisco.

9. Motions. There were no motions to be ruled on at the PHC. 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 August 8, 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 during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. Student has requested an interpreter capable of interpreting "Burmese" into English and vice versa for Parents during the hearing. However, Myanmar, as Burma is now known, has a diverse population speaking dozens of languages and dialects. Counsel for both parties were ordered to determine specifically what language the interpreter must speak, and notify OAH immediately once this is determined so that an interpreter speaking Parents' language is available for the hearing.

Student's attorney indicated that Student may need special accommodations. She was advised that Student should contact the OAH ADA coordinator so that a determination can be made as to what special accommodations may be required, and how they may be provided. .

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/Accessibility.aspx.

14. Hearing Closed To the Public. The hearing will be 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 NOON OF 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: August 9, 2016

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Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings