BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. CARLSBAD UNIFIED SCHOOL DISTRICT,	OAH Case No. 2018110285
CARLSBAD UNIFIED SCHOOL DISTRICT v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2018101037 ORDER FOLLOWING PREHEARING CONFERENCE AND DISMISSING CLAIMS OUTSIDE OAH JURISDICTION

On March 4, 2019, a telephonic prehearing conference was held before Administrative Law Judge Kara Hatfield, Office of Administrative Hearings. Father appeared on behalf of Student. Ernest Bell, Attorney at Law, appeared on behalf of Carlsbad 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 March 12, 13, and 14, 2019, and continuing day to day, at the discretion of the ALJ. The hearing shall take place at Carlsbad's offices located at 6225 El Camino Real, Carlsbad, CA 92009. The hearing shall begin at 8:30 a.m. on the first day of hearing, and at 8:00 a.m. all other days, unless otherwise ordered. The hearing shall end at 2 p.m. each day to accommodate Parents' child care needs.

As ordered in the scheduling order, Carlsbad was 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. Carlsbad failed to certify that it would provide a facility for this case that complied with the law. Carlsbad shall inform OAH within two days of the date of the PHC it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Carlsbad 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 Carlsbad's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Carlsbad 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. Carlsbad shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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. Dismissal of Claims Outside OAH Jurisdiction. Student's amended complaint, specifically Paragraph 28 and requested monetary damages remedies "d" on page 9, alleges Carlsbad's actions were discriminatory. The language of the amended complaint suggests Student attempted to assert a claim or claims not under the Individuals with Disabilities Education Act, but other civil rights laws prohibiting discrimination, such as Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (Section 504), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), and State civil rights laws.

OAH does not have jurisdiction to entertain claims based on Section 504, the Americans with Disabilities Act, or other related state and federal civil rights laws. The purpose of the IDEA (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education", and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Accordingly, to the extent Student's amended complaint is understood as alleging claims under Section 504, the Americans with Disabilities Act, or other related state and

federal civil rights laws, they are dismissed. The matter shall proceed to hearing on the remaining issues, stated below.

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

Student's Issues

Did Carlsbad deny Student a free appropriate public education by:

1) failing since April 26, 2017, to assess Student in all areas of suspected disability, specifically:

    a) central auditory processing;

    b) behavioral feeding;

    c) pediatric acute-onset neuropsychiatric syndrome; and

    d) seizure disorder;

2) failing to appropriately assess Student in the multidisciplinary evaluation dated October 16, 2017;

3) since April 26, 2017, significantly impeding Parents' participation in the educational decisionmaking process by failing to consider private assessments, providing short notice of individualized educational program team meetings, and directly contacting Student's pediatrician at University of California, Los Angeles and requesting that she sign an individualized health services plan; and

4) failing to convene an IEP team meeting after June 27, 2018?

Carlsbad's Issues

5) May Carlsbad assess Student in the areas of audiology and functional behavior without Parents' consent?

Student's proposed remedies are independent educational evaluations in behavioral feeding, central auditory processing, pediatric acute-onset neuropsychiatric syndrome, seizure disorder, psycho-education, language and speech, motor skills and sensory processing, and for FastForWord reading instruction; reimbursement for private evaluations and educational services and prospective direct payment for speech therapy, occupational therapy, and FastForWord reading instruction; an IEP team meeting with the development of an IEP including specific components and methodologies; compensatory education for the

2017-2018 regular school year and extended school year; mileage reimbursement for Parents transporting Student to his school; a safety harness for Student to use in Parents' car; and the inclusion of relevant medical diagnoses under "qualifying diagnosis" section of the IEP document. Carlsbad's proposed remedy is an order authorizing it to assess Student in the areas of audiology and functional behavior without Parents' consent.

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.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. To the extent practicable, exhibits in the binders shall be in chronological order.

The parties shall meet and confer **by March 7, 2019,** to delete duplicate exhibits from the exhibit binders. The parties are not required to renumber exhibits if exhibits are deleted from notebooks.

The parties shall exchange resumes 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 shall exchange resumes and curriculum vitae not later than **March 7, 2019.**

Carlsbad shall include as part of its exhibits the school calendar(s) for all of the years at issue. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), Carlsbad shall serve a copy of the school calendar(s) on Student **by March 7, 2019,** and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ.

If the parties intend to rely on IEPs, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party along with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter.

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 it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five business days before the hearing.

5. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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.

The parties shall comply with Education Code section 56505, subdivision (e)(7). No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five business days before the hearing.

The parties shall meet and confer **by March 7, 2019**, as to the schedule of witnesses and coordinate the availability and order of witnesses to ensure that there is a witness available to testify at all times during the hearing and to ensure that the hearing is completed as scheduled. The parties shall also meet and confer regarding the one joint detailed hour-by-hour schedule.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one joint detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination. The parties shall meet and confer each day of hearing to revise the witness schedule as needed.

The parties are ordered to meet and confer by **no later than March 5, 2019, at 2:00 p.m.** to identify witnesses on their respective witness lists who cannot be produced at hearing without a subpoena and provide the witnesses' contact information to the opposing party/counsel so that subpoenas can be issued. As part of the meet and confer process, Carlsbad's counsel shall inform Parents as to whether the witnesses on Student's witness list are employed by or otherwise under the control of Carlsbad, and if not, shall provide Parents with the witness(es)' most recent contact information by **no later than March 6, 2019, at 2:00 p.m.** Any contact information provided by Carlsbad shall be used by Parents for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disseminated to any other person(s).

Carlsbad shall have witnesses available in case agreement on a witness list is not reached. 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 each witness is expected to take.

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 such evidence. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

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 unless otherwise permitted by the ALJ. 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. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of duplicate physical copies of the exhibit binders from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. Faxed or electronic copies are unacceptable. The hearing room shall have sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled. Student indicated he might request telephonic testimony of Nancy Pohlot and Paula Talal.

8. Electronic Recording of Hearing.

a. Audio Recording. The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

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 for his issues, and Carlsbad is the petitioning party for its issues. Accordingly, subject to Paragraph 6, Student shall present his case-in-chief, followed by Carlsbad.

10. Motions. Student might request telephonic testimony of Nancy Pohlot and Paula Talal. No other pretrial motions are pending or contemplated. Other than a request for the telephonic testimony of Nancy Pohlot and Paula Talal, 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 three business days before the prehearing conference of March 4, 2019

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. The parties shall meet and confer **by March 7, 2019**, to determine legal and factual stipulations, if any, to be submitted at hearing and before the record closes.

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 during the hearing unless permission to the contrary is obtained from the ALJ. Texting is prohibited while the hearing is in session.

14. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the 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 will be Closed to the Public. The hearing will be closed the public unless Student requests that it be opened.

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 **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO OAH AT** https://www.applications.dgs.ca.gov/oah/oahsftweb.

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.

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

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

IT IS SO ORDERED.

DATE: March 6, 2019

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Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings