BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. KERN COUNTY SUPERINTENDENT OF SCHOOLS.	OAH Case No. 2016040211 ORDER FOLLOWING PREHEARING CONFERENCE

On May 27, 2016, a telephonic prehearing conference was held before Administrative Law Judge Caroline A. Zuk, Office of Administrative Hearings. Andréa Marcus, Attorney at Law, appeared on behalf of Student. Kelly A. Lazerson, Attorney at Law, appeared on behalf of Kern County Superintendent of Schools and Valley Oaks Charter School. 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 June 9, 10, 13, 14 and 15, 2016, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Office of Administrative Hearings, 15350 Sherman Way, Suite 300, Van Nuys, California 91406. 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.[1]

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.

[1] Student's prehearing conference statement requested a change of venue from Tehachapi to Bakersfield or OAH's office in Van Nuys, California. Based on information provided by Student's and Superintendent's attorneys regarding the same request in OAH Case No. 2015120968, the ALJ ordered a change in venue from Tehachapi to Van Nuys. During the prehearing conference, Superintendent requested an opportunity to research appropriate Bakersfield locations based on the new due process hearing dates in this case. The ALJ granted Superintendent's request, subject to Paragraph 9 below.

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

Student's issues are:[2]

a) Did Superintendent deny Student a free appropriate public education by refusing to allow Student to attend Charter School at the beginning of the 2014-2015 regular school year?

b) Did Superintendent deny Student a FAPE by failing to provide parents with a copy of the January 26, 2015 individualized education program until 6 weeks after the IEP team meeting?

c) Did Superintendent's September 24, 2014, October 30, 2014, November 9, 2014, January 26, 2015, and May 27, 2015 IEP's deny Student a FAPE by failing to offer an appropriate placement?

d) Did Superintendent's January 26, 2015 IEP deny Student a FAPE by failing to offer:

i) an appropriate behavior plan;

ii) appropriate behavior services; and

iii) an appropriate safety plan?

e) Did Superintendent's May 27, 2015 IEP deny Student a FAPE by failing to offer:

i) an appropriate behavior plan;

ii) appropriate behavior services;

[2] During the prehearing conference, the ALJ asked Student to specify the broad allegation that Superintendent "failed to offer Student an IEP reasonably calculated to render her educational benefit in response to her inability to benefit from her IEP, as of September 2014." Student did not want to specify her issues, because she believed that it was impermissible discovery. The ALJ rejected Student's argument, requesting that Student either clarify the issue during the prehearing conference or the ALJ would clarify it based on the notice provided in the corrected due process complaint. Student stated that she preferred, and Superintendent agreed, that the ALJ should clarify the issue. As discussed during the prehearing conference, the parties shall have an opportunity to review the issues as framed in this Order at the beginning of the first day of the due process hearing.

iii) appropriate mental health services;

iv) an appropriate safety plan; and

v) an accommodation for decreasing the amount of work for Student to complete?

e) Did Superintendent deny Student a FAPE by failing to initiate a due process hearing to establish that the May 23, 2014 IEP offered Student an appropriate placement?[3]

Student's proposed resolutions are placement at an unspecified residential treatment center with unspecified supports and services there, and unspecified compensatory education services.

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 Superintendent (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.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials.

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

[3] It is unclear whether this issue is barred by the parties' March 18, 2014 settlement agreement, referenced in the corrected due process complaint as including a prospective waiver "on the part of [Charter School] for any denial of FAPE through the end of the 2013/2014 school year."

except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by June 6, 2016, as to the schedule of witnesses and present a witness schedule at hearing pursuant to the example below, to coordinate the availability and order of testimony 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.

Example:

The following witnesses will be called to testify on June 9, 2016:

1. Jane Smith at 1:30 p.m.
2. Bob Jones at 2:30 p.m.

Student intends to call parent and two expert witnesses. Superintendent is 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. Superintendent 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 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.

Considering that the hearing has been relocated to Van Nuys, the parties' motions to allow witnesses to testify telephonically is granted. If venue is changed to Bakersfield, then the witnesses shall appear in person at the due process hearing.

7. Electronic Recording of Hearing.

a. Audio Recording. Both parties requested permission to audio record the hearing. The parties' request to make an audio recording of the hearing is granted as a courtesy and 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; 4) that the recording shall not be played or published for a prospective witness; 5) that the recording shall not be used for any purpose other than assisting in the representation and presentation of this due process hearing; 6) that the parties shall erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and 7) that the parties shall not use this recording in any subsequent due process 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 its case-in-chief, followed by Superintendent.

9. Motions. Superintendent will file and serve a written motion to support its request for change of venue no later than 5:00 p.m. on June 3, 2016. Student will file and serve its opposition to the motion for venue change no later than 5:00 p.m. on June 6, 2016. No other 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 May 27, 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. Neither party requested any reasonable accommodations for the due process hearing. 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 unless Student requests it be open.

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: June 1, 2016

DocuSigned by:
Caroline Zuk
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CAROLINE A. ZUK
Administrative Law Judge
Office of Administrative Hearings