BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017110028
v.	ORDER FOLLOWING PREHEARING CONFERENCE
SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT.	

On March 12, 2018, a telephonic prehearing conference was held before Administrative Law Judge Tara Doss, Office of Administrative Hearings. Eric Menyuk, Attorney at Law, appeared on behalf of Student. Kristin Myers, Attorney at Law, appeared on behalf of District. The PHC was recorded.

Based upon the parties' PHC statements and discussion during the PHC, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on March 20, 21, 22, and 23, 2018, 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 2828 4th Street, Santa Monica, CA 90405. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. on all following 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.A. § 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 has not 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 able to comply.

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.

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. Student's issues to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, and Student's proposed resolutions, are:

(1) Did District deny Student a free appropriate public education in the November 9, 2015 individualized education program by:

(a) failing to offer appropriate goals?

(b) failing to offer appropriate services in the areas of counseling, social emotional support, and academics?

(c) failing to offer an appropriate placement?

(2) Did District deny Student a free appropriate public education in the January 8, 2016 individualized education program by failing to offer appropriate supports and services in the areas of counseling, social emotional support, and academics?

(3) Did District deny Student a free appropriate public education in the November 9, 2016 IEP by:

(a) failing to offer appropriate goals?

(b) failing to offer appropriate services in the areas of counseling, social emotional support, and academics?

(c) failing to offer an appropriate placement?

(4) Did District deny Student a free appropriate public education in the June 6, 2017 individualized education program by:

(a) predetermining the offer of placement and services?

(b) failing to consider input from Parent or other professionals working with Student?

(c) failing to offer appropriate goals?

(d) failing to offer appropriate services in the areas of counseling, social emotional support, and academics?

(e) failing to make a clear written offer of placement?

Student's Proposed Resolutions:

(1) Placement at Arete Preparatory Academy

(2) Costs associated with transportation to and from Arete Preparatory Academy since January 2017.

(3) Costs associated with emotional counseling provided by Dr. Stuart A. Wolman since November 2016.

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.

Each party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination. District shall include as part of its exhibits the school calendar(s) for all of the years at issue.

Each exhibit shall only contain one document. Any IEP and related documents (e.g. IEP invitations, assessment plans, etc.) relied upon during the hearing shall include all pages of the original (or copy thereof) operative document, including signature pages and any pages with handwritten or type-written notes. Excerpts of an audio recording of an IEP team meeting, if any, should, in addition to the audio recording offered, be transcribed and offered as documentary evidence; that portion of the audio recording 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 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.

The parties are encouraged to review and shorten their exhibit lists prior to the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

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.

a. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five (5) business days prior to the hearing, a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing**. The parties shall exchange final witness lists and exhibit binders on or before Tuesday, March 13, 2018.** Witnesses and documents not disclosed by that time may be excluded at the request of the other party from introduction at the hearing. Each party reserves the right to present additional witness and documents for purposes of rebuttal.

b. Meet and Confer Regarding Witnesses. The parties are ordered **to meet and confer on or before Thursday, March 15, 2018, regarding the schedule of witnesses for the hearing.** Student's counsel shall place a telephone call or send an email to District's counsel to initiate the meet and confer. The parties are 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. The parties shall discuss a time estimate of the length of each witness's direct and cross-examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

The parties are encouraged to review and shorten their witness lists prior to the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with **one detailed hour-by-hour schedule of all witnesses** expected to testify at the hearing, which list shall also include an estimate of time for each party's direct and cross-examination. The ALJ and the parties will discuss the length of time anticipated for testimony of each witness and any scheduling issues for individual witnesses. The ALJ will finalize the witness schedule. 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.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing

after consideration of: (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.

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 witness with a complete set of exhibit binders with all of each party's exhibits prior to the hearing. The proponent of the witness shall ensure the witness testifies from a private location with no other persons present using a "land-line" 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.

Student's request to have Dr. Stuart Wolman testify by telephone is granted on the condition that all above requirements are met.

District's request to have one witness from the O School testify by telephone is granted on the condition that all above requirements are met.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's request to make an audio recording of the hearing is granted, subject to the following conditions: (1) OAH's recording is the only official recording, unless otherwise determined by the ALJ; (2) the recording device shall be turned on only when the ALJ states that the matter is on the record, and shall be turned off when the ALJ states that the matter is off the record; (3) such recording shall be for Student's personal use only and only for review and preparation of the hearing ; (4) the audio recording may not be shared with any witnesses or third parties; (5) the parties shall not use the recording in any subsequent due process hearing; (6) operational challenges with the party's recording equipment will not delay the hearing; and (7) the party shall dispose of the unofficial recording when the time for appeal of the ALJ's decision in this matter has expired. District may also make an audio recording under 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].) Here, Student requested the hearing and has the burden of proof. Therefore, Student shall present its case-in-chief first, followed by District.

9. 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.

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 writing.

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 accommodations for the 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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed To the Public. The hearing shall 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 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 THE OAH AT https://www.dgsapps.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 submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: March 12, 2018

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Tara Doss
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TARA DOSS
Administrative Law Judge
Office of Administrative Hearings