BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LOS ANGELES UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018030412 ORDER FOLLOWING PREHEARING CONFERENCE

On April 23, 2018, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. Attorney Diane Weissburg appeared on behalf of Student. Attorney Karl Widdell appeared on behalf of Los Angeles Unified School District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on May 3, 7, 8 and 9, 2018, and continue day to day thereafter, 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, CA 91406. The hearing will commence at 9:30 a.m. on May 3, 2018, at 1:30 pm on May 7, 2018, and at 9:00 a.m. on all other days, unless otherwise ordered.

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. Student's 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, are:

(1) Did District predetermine Student's eligibility category for special education as autism/autistic-like behavior, by the time of Student's individualized education program team meeting held February 8, 2018, and thereby deny Student a free appropriate public education by:

a. Significantly impeding Parent's opportunity to participate in the decision making process; or

b. Causing Student to be deprived of educational benefits?

Student's Proposed Resolutions: An Order directing District to:

(1) Pay the cost of Student's continued placement at Westmark School, through high school; and

(2) Reimburse Parent for all payments made for Westmark, and for independent evaluations of Student.

3. Exhibits. Student identified 28 exhibits that Student intends to present at hearing. District identified 34 exhibits and two categories of exhibits (IEP meeting transcripts and recordings, and resumes) that District intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall place a single exhibit behind each binder tab, except where it would be more efficient at hearing to have category of documents behind a single tab; as with, for example, resumes organized alphabetically, receipts, or email strings on a single subject, and shall place the exhibits in chronological order, generally. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., District shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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.

4. Witnesses. Student identified seven percipient witnesses and no expert witness whom Student intended to present at hearing. District identified 14 percipient witnesses and no expert witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed to make witnesses under its control reasonably available to Student without the need for subpoena. District will also inform Student of the identity of, and available contact information for, any witness identified by Student as an employee of District who has left District's employ, by 5:00 p.m. on Friday, April 27, 2018. The parties will 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.

5. Timely Disclosure of Exhibits and Witnesses. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five 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 copies of their final witness lists and exhibit binders on or before 5:00 p.m. on Thursday, April 26, 2018.

Except for good cause shown, 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 or impeachment.

a. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Monday, April 30, 2018 at 1:00 p.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to District's counsel to initiate the meet and confer. The parties shall 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 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, 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. The District shall have witnesses available in case agreement on a witness list is not reached. 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 cross-examination of each witness and scheduling issues for individual witnesses and 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.

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. 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. Neither party requested that a witness be permitted to appear telephonically at hearing in this matter. 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.

8. Electronic Recording of Hearing.

a. Audio Recording. District and Student's requests for leave to make an audio recording of the hearing are granted, subject to the following conditions: (1) OAH's recording is the only official recording; (2) 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) the tape recording will not be shared with any witness or third parties; and (4) 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.

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. Accordingly, Student shall present Student's case-in-chief, followed by District.

10. Motions. District filed five motions prior to the hearing: a motion in limine to exclude evidence relating to matters previously litigated between the parties, and four related to Student's alleged surreptitious recording and misuse of attorney-client communications between District counsel and District employees. The motions, numbered here for ease of reference, were:

(1) Motion in limine to exclude evidence relating to matters previously litigated between the parties and decided in OAH Case No. 2017070535;

(2) Motion to strike Student's due process request in its entirety based on Student's alleged surreptitious recording and misuse of attorney-client communications between District counsel and District employees during a lunch break at Student's IEP held on February 8, 2018;

(3) Motion in limine to exclude the introduction of any recordings, transcripts of recordings, or testimony or other references to conversations held during the

lunch breaks of Student IEP team meetings, including, but not limited to, the lunch break on February 8, 2018;

(4) Motion to disqualify Student's counsel for misuse of surreptitious recordings of attorney-client communications between District employees and District counsel; and

(5) Motion to bifurcate hearing to first hear evidence on, and rule on, District's motions based on Student's alleged surreptitious recording and misuse of attorney-client communications between District counsel and District employees, followed by a hearing on the issue of predetermination, if permitted in the order on District's motions.

Motion (1): District's motion in limine to exclude evidence relating to matters previously litigated between the parties and decided in OAH Case No. 2017070535. This motion was ruled upon at the PHC. The ruling and reasoning is stated below to memorialize the ruling at the PHC.

District moved OAH for an order excluding evidence relating to matters previously litigated between the parties and decided in OAH case No. 2017070535. District's motion sought to preclude Student from offering evidence to support legal contentions that: (i) Student did not reside in District at all times relevant to Student's complaint; or (ii) District was responsible for providing Student a FAPE at any time prior to the October 31, 2017 decision in phase 1 of OAH Case No. 2017070535. Student's complaint in this matter did not state either of these contentions as issues for hearing. However, Student's PHC statement filed April 12, 2018 identified documents, areas of witness testimony, and proposed resolutions, that Student intended to offer in support of, or reliance on, the above contentions.

In support of its motion, District cited OAH's previous decisions in OAH Case No. 2017070535. In that bifurcated case, OAH issued an October 31, 2017 decision holding that Student resided within District's boundaries, followed by a January 18, 2018 decision finding that District was not obligated to provide Student a FAPE until Parent expressed a desire to receive an offer of FAPE after OAH issued the October 31, 2017 decision.

Student's consolidated opposition stated that Student has filed an appeal from OAH case No. 2017070535 in district court, but did not otherwise address District's Motion (1). Oral argument was heard at the PHC. Student counsel stated that Student's place of residence had not changed since the October 31, 2017 decision.

District's motion to exclude evidence is predicated on the doctrine of collateral estoppel, or issue preclusion, which precludes relitigation of factual or legal issues that have been argued and decided in prior proceedings. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335.) Federal and state courts generally adhere to the related doctrine of collateral estoppel. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [101 S.Ct. 411, 66 L.Ed.2d 308]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171.) This doctrine also applies to determinations made in quasi-

judicial administrative settings. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944, citing *People v. Sims* (1982) 32 Cal.3d 468, 479).

The doctrine applies only if the following requirements are fulfilled: First, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Second, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Third, this issue must have been actually litigated in the former proceeding. Fourth, it must have been necessarily decided in the former proceeding. Finally, the decision in the former proceeding must be final and on the merits. The party asserting collateral estoppel bears the burden of establishing these requirements. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

The first four requirements for collateral estoppel were met in this matter. In OAH Case No. 2017070535, Student and District specifically litigated the issues of whether Student resided in District, and whether and when District became responsible for providing Student a FAPE. OAH necessarily considered these issues identified for hearing, and issued decisions on the merits. However, the prior OAH decisions are not yet final. Administrative determinations are not "final" until the time to appeal has lapsed or all appeals have been exhausted (see *People v. Garcia*, supra, 39 Cal.4th at p. 1078; *Long Beach Unified School District v. State of California*, supra, 225 Cal.App.3d at p. 169). A party aggrieved by an administrative decision may appeal it to a state or federal court of competent jurisdiction within 90 days of the issuance of the decision. (*Wyner v, Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1030; Ed. Code, § 56505 subd. (k).) Because Student has filed such an appeal, the doctrine of collateral estoppel does not apply.

OAH nevertheless does not have jurisdiction to itself revisit an issue it previously decided. (*Wyner*, supra, 223 F.3d at p. 1030.) Therefore, the parties may not relitigate in this matter the issues of: (i) whether Student resided in District at all times relevant to the complaint; or (ii) the earliest date on which District may have become responsible for providing Student a FAPE. Student is precluded from offering evidence for the purpose of supporting legal contentions that: (i) Student did not reside in District at all times relevant to Student's complaint; or (ii) District was responsible for providing Student a FAPE at any time prior to the October 31, 2017 decision in phase 1 of OAH Case No. 2017070535. Objections to particular testimony and documents offered in evidence may be made as the evidence is offered at hearing.

Motions (2)-(5). District's motions based on Student's alleged surreptitious recording and misuse of attorney-client communications between District counsel and District employees. These motions were not ruled on at the PHC and are under submission. Following discussion among counsel and the ALJ, the ALJ ordered further briefing by the parties by 5:00 p.m. on April 25, 2018, with the motions to be ruled on at, or prior to, the hearing.

Other Motions. The parties indicated that they were not contemplating any other prehearing motions. In the event that any other motion, other than a challenge to a newly-

assigned ALJ for the hearing, is brought after this date, it 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 PHC.

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.

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 or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

14. Special Needs and Accommodations. A Vietnamese interpreter will be available for Father at hearing on May 3, 2018. Neither party requested any other accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

15. Hearing Open to the Public. At Student's request, the hearing will be open to the public.

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 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.

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

IT IS SO ORDERED.

DATE: April 23, 2018

DocuSigned by:

ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings