BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. SAN DIEGO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017081305
SAN DIEGO UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2017090642 ORDER FOLLOWING PREHEARING CONFERENCE OF JANUARY 12, 2018

On January 12, 2018, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Jennifer Varga and Meagan Nuñez, Attorneys at Law, appeared on behalf of Student and her parents. Summer Dalessandro, Attorney at Law, appeared on behalf of San Diego Unified School District. The ALJ recorded the PHC.

1. Hearing Dates, Times, and Location. The hearing shall take place on January 23, 24, 25, 30, and 31, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. **The hearing shall take place at the OAH offices located at 1350 Front Street, Suite 3005, San Diego, California, 92101.** The hearing shall begin at 9:30 a.m. on January 23 and 30, 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. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Student's Issues:

(1) Did District deny Student a free appropriate public education by preventing Parents from meaningfully participating in Student's education and denying Student educational opportunity in the 2016-2017 school year when District's June 7, 2017 individualized education program:

a. Failed to present a sufficiently clear and specific offer of FAPE to enable Parents to give informed consent to the IEP;

b. Failed to include a "Services" page to indicate when each service will begin and end;

c. Failed to include an "Offer of FAPE" page that describes the percentage of time Student will spend in general education and special education, her classroom placement, or her School of Attendance;

d. Failed to include goals to address Student's needs; and

e. Failed to include a behavior intervention plan although the IEP refers to one.

(2) Did District deny Student a FAPE by materially failing to implement Student's IEP during extended school year 2017 because it did not provide her with any extended school year services during that time?

(3) Did District deny Student a FAPE during extended school year 2017 because it materially failed to implement her IEP, thereby preventing Parents from meaningfully participating in Student's education, by:

a. Failing to inform Parents of the change in location for Student's extended school year placement; and

b. Failing to respond to Parents' request for information regarding where Student could obtain extended school year services?

(4) Did District deny Student a FAPE during the 2017-2018 school year up until the date Student filed her amended request for due process on October 17, 2017, thereby depriving her of educational benefit by:

a) Failing to implement any of the elements of Student's June 2017 IEP when Student arrived on the first day of school on August 28, 2017;

b) Failing to implement any aspect of Student's transition plan during the 2017-2018 school year;

c) Failing to implement any of the elements of Student's June 2017 IEP when Student returned on August 29, 2017;

d) Failing to implement the June 7, 2017 IEP at any point during the 2017-2018 school year;

e) Failing to implement or offer a one-to-one aide at any time during the 2017-2018 school year;

f) Failing to develop a behavior intervention plan despite indicating the need for one at the June 7, 2017 IEP team meeting; and

g) Failing to convene an IEP team meeting at any time during the 2017-2018 school year?

(5) Did District deny Student a FAPE up until the date Student filed her request for due process on October 17, 2017, because it prevented Parents from meaningfully participating in Student's IEP process by:

a) Unilaterally removing the offer of a one-on-one aide;

b) Failing to implement the June 7, 2017 IEP;

c) Failing to implement the June 7, 2017 transition plan;

d) Failing to convene an IEP team meeting to discuss Parents' concerns during the 2017-2018 school year;

e) Failing to present a sufficiently clear and specific offer of FAPE by providing conflicting offers of FAPE at the June 7, 2017 IEP team meeting, in District's September 7, 2017 prior written notice, and in District's September 19, 2017 due process request; and

f) Failing to develop a behavior intervention plan despite indicating the need for one at the June 7, 2017 IEP team meeting?

Student's Proposed Resolutions:

Reimbursement to Parents for the cost to date of Student's tuition and transportation at the non-public school she has been attending.

District's Issue:

Did District's IEP offer of June 7, 2017, constitute a FAPE in the least restrictive environment?

District's proposed resolution:

An order that OAH find that the June 7, 2017 IEP offered Student a FAPE in the least restrictive environment and that District may implement the IEP should Parents wish to avail Student of a public education.

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. **The parties shall meet and confer by 5:00 p.m. on January 19, 2018, to review exhibits and remove duplicate exhibits from their evidence binders. If the parties have duplicate exhibits, they shall jointly determine which shall be used at hearing. The duplicate exhibit not to be used shall be removed from the respective binder prior to the hearing.** The parties are not required to renumber exhibit binders if duplicate exhibits are removed.

District shall include as part of its exhibits the school calendar(s) for the years at issue. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), District shall serve a copy of the school calendar(s) and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ not later than the first day of hearing.

If the parties intend to rely on individualized education programs, 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 individualized education program team meeting, if any, should be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials, including all witnesses designated as an expert.

Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes and curriculum vitae not later than 24 hours before the witness is scheduled to testify.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit except for related chains of correspondence or Student classwork samples.

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, 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 are ordered to meet and confer by **no later than January 18, 2018, at 5:00 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 opposing counsel so that subpoenas can be issued. As part of the meet and confer process, District's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of either entity, and if not, shall either agree to produce the witness at hearing or shall provide Student's counsel with the witness(es)' most recent contact information by **no later than January, 19, 2018.** Any contact information provided by District shall be used by Student's counsel 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).

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. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

District 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.

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. Unless otherwise ordered, only one round of redirect and/or re-cross examination shall be permitted.

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.

District has informed that witness Lisa McFaul may not be available to testify in person for medical reasons. Its unopposed motion to present Ms. McFaul's testimony telephonically, if necessary, is granted.

7. 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.

Student's motion to make an audio recording of the hearing is granted. Both parties shall be permitted to make an audio recording 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, to avoid recording conversations while off the record;

3) operation of the party's recording mechanism will not be allowed to delay the hearing; 4) such recording shall be for counsel's personal use only and only for review and preparation of the hearing; 5) 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; 6) counsel shall not play any part of the recording for any prospective witness and the recording shall not be disseminated to anyone other than counsel; 7) the parties shall not use the recording in any subsequent due process hearing or other proceeding; 8) No more than one person for each party may record the hearing; and 9) the parties shall destroy the unofficial recording when the decision in this case becomes final and/or when all appeals have been exhausted.

Any recording made by counsel is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ.

b. Video Recording/Photography. No party, witness or anyone else present may make any video recording or take any photographs 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, although the cases are consolidated, Student filed her case first, and her case encompasses significantly more issues than does District's case. Student will therefore present her case first, subject to the parameters described in paragraph 5.

9. Motions.

a. Student's unopposed motion to change venue to the OAH offices in San Diego is granted.

b. Student's motion to record the hearing is granted as stated in paragraph 7.

c. District's motion to take the testimony of witness Lisa McFaul telephonically if necessary is granted as stated in paragraph 6.

d. Any other motion filed after the date of this Order shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made on or before the due date for the prehearing conference statements.

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. Only water is permitted in OAH hearing rooms. No eating is permitted in the hearing room.

13. Special Needs and Accommodations. 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.

Neither party stated it needed any accommodations. If any need for further accommodation arises, the party shall immediately notify OAH.

14. 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.

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

IT IS SO ORDERED.

DATE: January 12, 2018

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings