BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017110859
SAN DIEGO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018030001 ORDER FOLLOWING PREHEARING CONFERENCE; ORDER GRANTING MOTION TO CONSOLIDATE AND TO CHANGE VENUE

On March 5, 2018, a telephonic prehearing conference was held before Administrative Law Judge Rommel Cruz, Office of Administrative Hearings. Jazmine Gelfand, Attorney at Law, appeared on behalf of Student. Lisa Dennis, Attorney at Law, appeared on behalf of San Diego Unified School District. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Consolidation. On November 20, 2017, Student filed a Request for Due Process Hearing in OAH case number 2017110859 (Student's Case), naming District. On February 28, 2018, District filed a Request for Due Process Hearing in OAH case number 2018030001 (District's Case), naming Student. On February 28, 2018, District filed a motion to consolidate Student's Case and District's Case. At the PHC, Student did not object to the motion to consolidate.

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

Here, District's Case and Student's Case involve common questions of law or fact, specifically, both cases involve the question as to whether or not District offered Student a free appropriate public education during the 2017-2018 school year, which includes whether District's January 4, 2018 individualized education program offered Student a FAPE in the least restrictive environment. In addition, consolidation furthers the interests of judicial economy because both cases will involve the presentation at hearing of some of the same witness testimony and other evidence. Accordingly, consolidation is granted.

Student's Case is designated the primary case. All dates previously set in District's Case, OAH case No. 2018030001 are vacated, and this consolidated matter shall proceed on the dates scheduled in Student's Case.

2. Hearing Location. Student moved to change the hearing location to the OAH San Diego office. District objected to the change in location.

The IDEA and the Education Code require that due process hearings be conducted "at a time and place reasonably convenient to the parents and child involved." (34 C.F.R. § 300.515, subd. (d); Ed. Code §56505, subd. (b).)

The OAH San Diego office is a location that is reasonably convenient to Student. Accordingly, the request is granted. The hearing shall take place at the OAH San Diego office, located at **1350 Front Street, Suite 3005, San Diego, CA 92101**.

3. Continuance Request. District sought a brief continuance of the consolidated matter to allow for additional preparation for hearing. Student sought a continuance of approximately four to six weeks in the consolidated matter to allow Student to obtain an expert witness. Student's complaint was filed on November 22, 2017, and the matter was continued on December 8, 2017, as jointly requested by the parties. The hearing on Student's Case was continued to the dates proposed by Student and District. At the PHC, Student did not provide an explanation as to any difficulties in obtaining an expert or why the request to continue the hearing dates was not made sooner.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a

party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

OAH reviewed the request for good cause and considered all relevant facts and circumstances. District's request to continue the due process hearing is denied as the issue in District's complaint is sufficiently related to the issues in Student's complaint not to warrant a continuance of previously agreed upon dates. Additional hearing days are added to allow District time to prepare its case-in-chief, which is anticipated to begin no sooner than March 20, 2018.

Student's continuance request is denied without prejudice to allow Student to further provide OAH with additional information as to why an expert was not secured sooner and to what specific issue(s) the expert would be testifying to regarding District's complaint. The ALJ will hear a renewed request to continue the due process hearing at the beginning of the first day of hearing.

4. Hearing Dates and Times. The hearing shall take place on March 13, 14, 15, 20 and 21, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. 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.

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.

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

Student's Issues:[1]

1) Did District deny Student a free appropriate public education from November 20, 2015 to the present by:

a) Failing to offer an appropriate placement with adequate special education support in the least restrictive environment;

b) Failing to provide appropriate supports and services to allow Student to make progress in all areas of academics;

[1] At the PHC, Student withdrew the issue related to District's alleged failure to provide Parent with educational records as requested during the 2017-2018 school year.

c) Failing to provide appropriate social-emotional supports;

d) Failing to provide appropriate supports and services to allow Student to make progress in the area of speech, language, and communication skills;

e) Failing to provide appropriate occupational therapy supports and services to meet Student's executive functioning needs;

f) Failing to develop goals in all areas of need; and

g) Failing to develop annual goals progress reports?

2) Did District deny Student a FAPE from November 20, 2015, to the end of the 2016-2017 school year by failing to evaluate Student in all areas of suspected disability, specifically in the areas of attention and executive functioning?

Student's Proposed Resolutions: Student is seeking an order that District fund Student's placement in a nonpublic school, to include roundtrip transportation. Student further seeks an order for District to provide compensatory educational services.

District's Issue:

Did District's January 4, 2018 IEP offer Student a FAPE in the least restrictive environment?

District's Proposed Resolution: District's seeks a finding that the January 4, 2018 IEP offered Student a FAPE in the least restrictive environment. District requests an order allowing it to implement the IEP without parental consent if Student seeks to receive special education and related services from District.

6. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Except as permitted in this order or otherwise ordered by the ALJ, 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. Each exhibit shall consist of one document; separate documents may not be combined into one exhibit.

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. 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).

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 no later than 24 hours before the witness is scheduled to testify.

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.

The parties shall meet and confer by **5:00 p.m. on March 9, 2018**, to delete duplicate exhibits from the exhibit binders and to consolidate exhibits where possible. The parties are not required to renumber exhibits if exhibits are removed from their binders.

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 shall not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

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.

7. 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 final witness list served pursuant to Education Code section 56505, subdivision (e)(7), except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

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 meet and confer by **5:00 p.m. on March 9, 2018,** 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. 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. The list shall also include an estimate of time for each party's direct and cross-examination. The ALJ has discretion to revise the witness schedule, as needed to maintain the flow and efficiency of the hearing. The parties shall be prepared at the end of each day of hearing to discuss the witnesses appearing on 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, 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.

8. 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.

9. 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 sought to allow Christine Carleton to testify by telephone. Student did not object. District's motion to allow Ms. Carleton to testify telephonically is granted. District shall provide Ms. Carleton with a complete exhibit binder from each party, 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.

10. Electronic Recording of Hearing.

a. Audio Recording. Student and District's motion to make an audio recording of the hearing is granted, 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, to avoid recording conversations while off the record; and 3) that 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.

11. 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's case is the primary case in the consolidated matter. Accordingly, Student shall present its case-in-chief, followed by District.

12. 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 of March 5, 2018.

13. 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.

14. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

15. 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.

16. Special Needs and Accommodations. Neither party indicated a need for any accommodations in this case. 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.

17. Hearing Open to the Public. At the request of Student, the hearing will be open to the public.

18. 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.

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

IT IS SO ORDERED.

DATE: March 6, 2018

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Rommel P. Cruz
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ROMMEL P. CRUZ
Administrative Law Judge
Office of Administrative Hearings