BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017080513
v.	ORDER FOLLOWING PREHEARING CONFERENCE
ANTIOCH UNIFIED SCHOOL DISTRICT.	

On March 5, 2018, a telephonic prehearing conference was held before Administrative Law Judge Tiffany Gilmartin, Office of Administrative Hearings. Tania Whiteleather, Attorney at Law, appeared on behalf of Student. Matthew Tamel and Kasmira Brough, Attorneys at Law, appeared on behalf of Antioch Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. Due to a potential conflict with beginning the hearing on March 15, 2018 that date was vacated and the matter was continued to March 20, 2018. There was no objection from either party. The hearing shall take place on March 20-22, and continuing to Monday, March 26-29, 2018. Then, if necessary, the matter will continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 510 G Street, Antioch, CA 94509. 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.

As ordered in the scheduling order, the named local educational agency was to provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 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 failed to certify that it would provide a facility for this case that complied with the law. The local educational agency shall inform OAH within two days of the date of this order it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, District shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (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 also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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.

1. Did Antioch deny Student a FAPE by not complying with the December 20, 2015 IEP and failing to implement his behavior intervention plan;

2. Did Antioch fail to create required documents, i.e. record keeping/measurement tools, progress reports, and data collection;

3. Did Antioch offer and provide Student individualized services to address his IEP goals and objectives from his December 2015 IEP in a manner that allowed him to make appropriate educational progress.

4. Did Antioch fail to implement agreed upon IEP services of behavior consultation and training for Student that were part of his December 20, 2015 IEP.

5. Did Antioch, prior to May 2016, assess Student fully and appropriately in speech and language, an area of suspected disability identified in his BIP and other educational records.

6. Did Antioch, in May 2016, accurately identify Student's needs and baselines in speech and language, so that the goals and objectives could be created and so that the parents could meaningfully participate in the creation of the IEP.

7. Did Antioch deny Student a FAPE by not conducting a manifestation determination during the 2016-2017 school year.

8. Did Antioch deny Student a FAPE by failing to assess him in the area of autism and by failing to address the impact of autism on his education.

9. Did Antioch deny Student a FAPE by failing to create and provide suspension notices, incident reports, and emergency reports for all the times of restraints, suspensions, and behavioral incidents.

As resolution Student requests:

1. Student's parents be provided with a statement of the incident reports not created for all incidences of restraint, suspension, or behavior for Student.

2. Provide an independent educational evaluation in speech and language.

3. Provide an updated behavior intervention plan that is based on data and is used by all staff with Student.

4. Change educational placement/remove Student from classroom where the teacher refuses to implement the IEP, refuses to allow the implementation of the BIP or follow the BIP and the FBA, and is verbally abusive.

5. Provide a mediated-facilitated IEP for Student.

6. Provide compensatory education to address Student's regression in academic skills and failure to comply with the IEP.

7. Any other remedies as determined by the Administrative Law Judge.

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.

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 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 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.

No later than close of business on March 8, 2018, Antioch will notify Student of any former Antioch employees who are named on Student's witness list. Student requested Antioch make its employees available without a subpoena. Antioch declined the request. Antioch's counsel requested all subpoenas be delivered to him, but did not establish that he has authority to accept service on behalf of current employees.

By close of business on Friday, March 9, 2018, Student's counsel will provide the names of the current Antioch employees she intends to call at hearing with the requested date and estimated time for appearance.

By noon on Monday, March 12, 2018, Antioch's counsel shall provide notice to Student's counsel of the option it selected below for each witness:

- Antioch will make the requested witness available without subpoena;
- Antioch will provide written notice its counsel has authority to accept service of subpoenas on the requested witness's behalf; or
- Antioch will require the remaining employee witnesses be present at the District office, during a specified one hour window on Wednesday, March 14, 2018, to accept Student's subpoenas. If Antioch elects this option, notice confirming the specific hour it will make the witnesses available is to be provided to Student's counsel no later than 3:00 p.m., on Monday March 12, 2018 confirming the time.

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. 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.

Antioch anticipated three possible witnesses who may need to testify telephonically. These witnesses are identified as witness 7, 8, 9 in Antioch's prehearing conference statement. Antioch will notify the ALJ at the start of the hearing if Antioch intends to call any of these witnesses and if they will need to testify telephonically.

7. Electronic Recording of Hearing.

a. Audio Recording. Both parties are allowed to make an audio recording of the hearing, 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; 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.

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 his case-in-chief, followed by Antioch.

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 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.

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 Open To the Public. At the request of Student, the hearing will be open to the public. Student will notify Antioch by Friday, March 16, 2018 if he anticipates more than 12 members of the public will attend.

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: March 7, 2018

DocuSigned by:
Tiffany Gilmartin
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TIFFANY GILMARTIN
Administrative Law Judge
Office of Administrative Hearings