BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2017030759
v.	ORDER FOLLOWING PREHEARING CONFERENCE OF JUNE 5, 2017
ORANGE UNIFIED SCHOOL DISTRICT.	

On June 5, 2017, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Student's mother and Student's advocate Maria Carr appeared on behalf of Student. Gabrielle Ortiz, Attorney at Law, appeared on behalf of the Orange Unified School District. The ALJ recorded the PHC.

1. Hearing Dates, Times, and Location. **The due process hearing shall take place on June 13, 14, and 15, 2017**, and continuing day to day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 1401 N. Handy Street, Pupil Services Building "C," Orange, California, 92867. 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 if it is able to certify that it will provide a hearing location that complies with the referenced statutes. If it does not so certify, other arrangements may have to be made for the hearing.

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 her 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 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 its restrooms and the hearing room and access to both are in compliance with the Americans with Disabilities Act.

District shall also arrange a separate room for Student and his representative(s) to use during breaks in the hearing.

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[1]. The issues at the due process hearing, and the proposed resolutions, are listed below, as clarified by Student in his PHC statement and during the PHC:

(1) Did District deny Student a free appropriate public education during the 2014-2015, 2015-2016, and 2016-2017 school years by:

a. Failing to implement necessary accommodations to support the identified need;

b. Failing to adhere to legal timelines;

c. Failing to provide an appropriate placement;

d. Failing to hold individualized education program team meetings in a timely manner;

e. Failing to include parents in the IEP process;

f. Failing to provide goals in all areas of need; and

g. Failing to provide progress on goals and appropriate services as outlined in Student's IEPs?

(2) Did District deny Student a FAPE by denying Parents' February 7, 2017 request for a triennial assessment in the areas of cognition, speech, occupational therapy, academics, executive functioning, assistive technology, social/emotional, and adaptive/behavior?

[1] Student's three issues alleging violation of his rights under the Family Educational Rights and Privacy Act are hereby dismissed as they are beyond the jurisdiction of OAH in this proceeding.

Proposed Resolutions: To remedy the alleged violations, Student requests that OAH order District to fund compensatory education in the area of specialized academic instruction, occupational therapy, speech therapy, and assistive technology. Student also requests an order that District reimbursement Parents for all costs of private school tuition. Student further requests an order that District reassess him in all areas of suspected disability and an order that District fund an independent educational evaluation in the area of assistive technology.

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.

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. 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.

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 have filed a stipulation agreeing to extend the exchange of their exhibit binders to be received no later than Friday, June 9, 2017.

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.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. The parties shall provide the ALJ with a witness list on the first day of hearing. The list shall include the day and time each witness is scheduled to testify, and will take into account direct examination, cross examination, and redirect/re-cross examination, as well as time for questions by the ALJ. 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.

The parties are ordered to meet and confer no later than 5:00 p.m. on June 9, 2017, as to the availability and order of witnesses, and as to any anticipated issues regarding exhibits.

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.

Student's motion to have Robyn Chu and Theresa Ede testify telephonically is granted, given their locations outside of Orange County.

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.

The Student's motion to make an audio recording of the hearing are granted. The 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, Student is the petitioning party. Accordingly, Student shall present his case-in-chief, followed by District.

9. Motions. Other than Student's motion for telephonic testimony and motion to record the hearing, discussed above, no other 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 June 5, 2017.

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. No eating is permitted in the hearing room while the ALJ is on the record, unless otherwise ordered.

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.

At present, neither party has requested specific accommodations because of an attendee's anticipated special needs. If any need for accommodation arises, the party shall immediately notify OAH.

14. The hearing shall be closed to the public unless Student requests that it be opened.

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 FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

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: June 6, 2017

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