BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018070073 ORDER FOLLOWING PREHEARING CONFERENCE

On October 19, 2018, a telephonic prehearing conference was held before Administrative Law Judge Tara Doss, Office of Administrative Hearings. Bruce Bothwell, Attorney at Law, appeared on behalf of Student. Cynthia Yount, Attorney at Law, appeared on behalf of District. The PHC was recorded.

Based upon the parties' PHC statements and discussion during the PHC, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on October 30, 31, and November 1, 2018, continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing will be held at Tucker Elementary, 2221 Argonne Avenue, Bungalow 24, Long Beach, CA 90815. The hearing shall begin at 9:30 a.m. the first day and at 9:00 a.m. on all following days, unless otherwise ordered.

As ordered in the Scheduling Order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 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 has certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH immediately if it is no longer able to comply.

Prior to the beginning of the hearing, Long Beach shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and Student's representatives; (2) a table for Long Beach and its representatives; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Long Beach shall provide drinking water and tissue 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. Long Beach shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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. 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, and Student's proposed resolutions, are:

(1) Did Long Beach deny Student a free appropriate public education in the June 26, 2015 individualized education program by failing to:

(a) identify Student as eligible for special education under the category of autism;

(b) offer an appropriate placement in the least restrictive environment;

(c) offer appropriate behavior services;

(d) offer appropriate speech and language therapy;

(e) offer appropriate occupational therapy; and

(f) offer appropriate goals in academics, communication, behavior, and social interaction?

(2) Did Long Beach deny Student a FAPE in the October 30, 2015 IEP by failing to:

(a) identify Student as eligible for special education under the category of autism;

(b) offer an appropriate placement in the least restrictive environment;

(c) offer appropriate behavior services;

(d) offer appropriate speech and language therapy;

(e) offer appropriate occupational therapy; and

(f) offer appropriate goals in academics, communication, behavior, and social interaction?

(3) Did Long Beach deny Student a FAPE in the October 11, 2016 IEP by failing to:

(a) identify Student as eligible for special education under the category of autism;

(b) offer an appropriate placement in the least restrictive environment;

(c) offer appropriate behavior services;

(d) offer appropriate speech and language therapy;

(e) offer appropriate occupational therapy; and

(f) offer appropriate goals in academics, communication, behavior, and social interaction?

(4) Did Long Beach procedurally deny Student a FAPE during the 2016-2017 and 2017-2018 school years, when it advised Parent that Student must be withdrawn from special education in order to be placed in a general education classroom?

(5) Did District deny Student a FAPE in the November 15, 2017 IEP by failing to:

(a) identify Student as eligible for special education under the category of autism;

(b) offer appropriate academic instruction;

(c) offer appropriate behavior services;

(d) offer appropriate speech and language therapy;

(e) offer appropriate occupational therapy; and

(f) offer appropriate goals in academics, communication, behavior, and social interaction?

(6) Did Long Beach deny Student a FAPE in the May 16 and 30, 2018 IEP's by failing to:

(a) offer appropriate placement in the least restrictive environment;

(b) offer appropriate behavior services;

(c) offer appropriate speech and language therapy;

(d) offer appropriate occupational therapy; and

(e) offer appropriate goals in academics, communication, behavior, and social interaction?

Student's Proposed Resolutions:

(1) Placement in a general education classroom.

(2) Long Beach to fund individual academic instruction for three hours a day.

(3) Reimbursement to Parent for privately funded academic instruction and tutoring.

(4) Compensatory academic instruction

(5) Long Beach to fund intensive individual behavior therapy program from a nonpublic agency experienced in working with children with autism. Services shall be provided at home and school, on a year-round basis.

(6) Reimbursement to Parent for privately funded behavior therapy.

(7) Compensatory behavior therapy.

(8) Independent speech and language evaluation at Long Beach's expense.

(9) Appropriate speech and language therapy provided at home and school on a year-round basis.

(10) Reimbursement to Parent for privately funded speech and language therapy.

(11) Compensatory speech and language therapy.

(12) Independent occupational therapy evaluation through a nonpublic agency at Long Beach's expense.

(13) Appropriate occupational therapy services provided at home and school on a year-round basis.

(14) Reimbursement to Parent for privately funded occupational therapy.

(15) Compensatory occupational therapy.

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.

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. Long Beach shall include as part of its exhibits the school calendar(s) for all of the years at issue.

Each exhibit shall only contain one document. Any IEP and related documents (e.g. IEP invitations, assessment plans, etc.) relied upon during the hearing shall include all pages of the original (or copy thereof) operative document, including signature pages and any pages with handwritten or type-written notes. Excerpts of an audio recording of an IEP team meeting, if any, should, in addition to the audio recording offered, be transcribed and offered as documentary evidence; that portion of the audio recording transcribed shall be provided to the opposing party along with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared 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 are encouraged to review and shorten their exhibit lists prior to the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

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.

a. Timely Disclosure of Witnesses and Exhibits. 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 final witness lists and exhibit binders on or before Tuesday, October 23, 2018.** 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.

b. Meet and Confer Regarding Witnesses. The parties are ordered **to meet and confer on or before Thursday, October 25, 2018, regarding the schedule of witnesses for the hearing.** The parties are to 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 and cross-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. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

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 testimony of each witness and any scheduling issues for individual witnesses. 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 witness 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: (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.

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 with all of each party's exhibits prior to the hearing. The proponent of the witness shall ensure the witness testifies from a private location with no other persons present, using a "land-line," 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 met.

7. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested to audio record 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 requested the hearing and has the burden of proof. Therefore, Student shall present its case-in-chief first, followed by Long Beach.

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 writing.

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. Neither party requested accommodations for the hearing.

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 Closed To the Public. 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.

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.

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

IT IS SO ORDERED.

DATE: October 19, 2018

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Tara Doss
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TARA DOSS
Administrative Law Judge
Office of Administrative Hearings