BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT AND COMMUNITY ROOTS ACADEMY.	OAH Case No. 2016100466
PARENT ON BEHALF OF STUDENT v. CAPISTRANO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017030402 ORDER FOLLOWING PREHEARING CONFERENCE OF APRIL 24, 2017; GRANTING JOINT MOTION TO CONSOLIDATE; GRANTING MOTION TO CONTINUE

On April 24, 2017, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Student's mother appeared on behalf of Student. Alefia Mithaiwala, Attorney at Law, appeared on behalf of the Capistrano Unified School District and the Community Roots Academy (referred to herein collectively and individually as Capistrano). The ALJ recorded the PHC.

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

1. Hearing Dates, Times, and Location

a. *Joint Motion to Consolidate*.

Student filed a complaint in OAH case number 2016100466 on October 4, 2016 (first case), naming the Capistrano Unified School District and the Community Roots Academy. Student filed a complaint in OAH case number 2017030402 (second case) on March 6, 2017, naming the Capistrano Unified School District. In her second complaint, Student requested that her two cases be consolidated, although she requested that the consolidated matter be heard on the dates set in the first case. Capistrano did not oppose consolidation, but asked that the cases be heard on the dates set for the second case. OAH denied the request to consolidate based upon the age of Student's first case, based on the fact that the complaints

involved different school years, and because Student had only named the Capistrano Unified School District and not Community Roots Academy in the second case, and therefore there the cases did not involve the same parties.

The hearing in Student's first case began as scheduled on April 18, 2017. After the start of the hearing, the parties made a joint request to consolidate the two cases as it now appeared that there would be similar issues and similar witnesses in both cases. Additionally, through testimony at the hearing, Capistrano established that Community Roots Academy is chartered by Capistrano, and that Capistrano was the local educational agency for purposes of Student's requests for due process.

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].)

The issues in both of Student's cases are substantially the same, although they involve separate school years. Additionally, some of the same witnesses will be testifying in both cases. Finally, although Student did not attend Community Roots Academy during the 2016-2017 school year, which is the school year at issue in her second case, Capistrano is the local educational agency responsible for Student's education in both cases. Accordingly, the ALJ orally granted the parties' joint motion to consolidate during the hearing in Student's first case, which order is memorialized here. The 45-day timeline for issuance of the decision in the consolidated cases shall be based on the filing of Student's first case in OAH case number 2016100466.

b. Joint Motion to Continue

A due process hearing must be held, and a decision rendered, within 45 days of receipt of the complaint, unless a continuance is granted for good cause. (Ed. Code, §§ 56502, subd. (f) & 56505, subd. (f)(1)(C)(3).)

During the hearing on Student's first case, the parties orally moved to continue the consolidated hearing until May 2, 2017, the dates set for Student's second case. The continuance was requested so that the ALJ could hold a PHC concerning the issues in the second case and to permit the parties to exchange evidence and witness lists and to meet and confer to discuss the order of witnesses.

Good cause appearing, the ALJ orally granted the parties' request to continue the consolidated matter for one week. Hearing on the consolidated cases shall resume on May 2, 3, 4, and 5, 2017, and will continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Capistrano's offices located at 33122 Valle Road,

San Juan Capistrano, California, 92275. The hearing shall begin at 9:30 a.m. on May 2, 2017, and at 9:00 a.m. all other 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. § 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 certified that the facilities used for this case will comply with the law. The local educational agency shall inform OAH within two days of the date of this order it is unable to comply with a hearing location that meets these criteria.

Prior to the beginning of the hearing, Capistrano 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 Capistrano's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Capistrano 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. Capistrano shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

Capistrano shall arrange a separate room for Student and her representative 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: The issues at the due process hearing, and proposed resolutions, are listed below, as clarified by Student at the PHC:

I. Case number 2016100466:

a. Did Capistrano deny Student a free appropriate public education by failing to meet its affirmative "child find" obligation to identify and evaluate Student's needs between October 4, 2014, and February 2016?

b. Did Capistrano deny Student a FAPE for the 2014-2015 school, after October 4, 2014, by failing to assess her during that school year?

c. Did Capistrano deny Student a FAPE for the 2015-2016 school year, by

failing to do any of the following:

i. Assess Student in the fall of 2015;

ii. Assess Student in all areas of suspected disability, specifically in the area of traumatic brain injury;

iii. Provide Student with appropriate and sufficient services for specialized academic instruction; counseling; cognitive retraining; cognitive rehabilitation and counseling; transportation to and from Student's medical appointments and privately provided counseling; and vision; and

iv. Find Student eligible for special education and related services under the category of traumatic brain injury?

d. Did Capistrano deny Student a FAPE by violating Parent's due process rights in the following ways:

i. Failing to provide an assessment plan within 15 days of when Parent orally requested an assessment in early September 2015, or within 15 days of Mother's written request for assessment in early October 2015?

ii. Failing to provide sufficient prior written notice for the March 14, 2016 individualized education program team meeting?

iii. Predetermining services and placement in Student's IEPs of February 2016, March 14, 2016, May 18, 2016, and May 25, 2016?

iv. Denying Parent meaningful participation in the IEP process during the statutory period?

v. Failing to provide Parent with a copy of the IEP at the conclusion of the May 18 and/or May 25, 2016 IEP team meetings?

e. Did Capistrano deny Student a FAPE by failing to provide her with independent educational evaluations in the following areas, or to timely file for due process to prove the two evaluations were not required:

i. A medical evaluation by a licensed medical doctor; and

ii. A neuropsychological evaluation?

II. Case number 2017030402

a. Did Capistrano deny Student a free appropriate public education at the August 8, 2016, November 10, 2016, February 1, 2017, and February 16, 2017 individualized education program team meetings by:

i. Failing to make services and placement decisions based on an appropriate assessment;

ii. Failing to provide Student with appropriate and sufficient services for specialized academic instruction; counseling; cognitive retraining; cognitive rehabilitation and counseling; transportation to and from Student's medical appointments and privately provided counseling; and vision;

iii. Failing to develop sufficient goals in all areas of Student's unique needs;

iv. Failing to address Student's needs in mathematics by assigning her to an online math class in the August 2016 IEP; removing the math class without providing another one in the November 10, 2016 IEP; and adding a math class in the February 2017 IEP without assessing Student's math needs?

b. Did Capistrano deny Parent the right to meaningfully participate in Student's IEP process by at the August 8, 2016, November 10, 2016, February 1, 2017, and February 16, 2017 IEP team meetings by:

i. Failing to provide Student with an appropriate initial assessment;

ii. Predetermining Student's placement;

iii. Failing to consider Student's private mental health therapy when determining her placement; and

iv. Interfering with the independent educational evaluation process by, including but not limited to, not timely finalizing the contract with the private assessor; giving Parent conflicting information about the independent evaluation process; and failing to timely provide Parent with a copy of the independent assessor's assessment report?

c. Did Capistrano deny Parent the right to meaningfully participate in Student's IEP process by failing to provide prior written notice with regard to changing Student's math placement and/or placing Student at Fusion Academy for math pursuant to Parent's request?

Proposed Resolutions:

To remedy Student's issues, she seeks an order that that Capistrano's August 8, 2016, November 10, 2016, February 1, 2017, and February 16, 2017 IEPs did not constitute FAPE; reimbursement for transportation costs including, but not limited to doctor's appointments and school; compensatory education in the areas of academics, rehabilitation counseling and psychological services, according to proof at hearing; and prospective transportation to and from school provided by Capistrano.

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 Capistrano's 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 shall be separately identified, with a tabbed divider. Each exhibit binder shall contain a detailed table of contents. The exhibits should be in chronological order. The parties shall number their exhibits as next in order to the already existing exhibits for case number 2016100466.

If Capistrano's exhibits do not already include its school calendar for all school years that are related to the issues herein, Capistrano shall provide a copy of the calendar at the first day of hearing.

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.

The parties' request to exchange exhibits no later than 5:00 p.m. on Wednesday, April 26, 2017, is granted.

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.

Each party shall provide current curriculum vitae for witnesses called to testify where the witnesses' education and experience are relevant to the witnesses' testimony, opinion, credibility and/or persuasiveness. These shall be properly numbered and placed in the parties' exhibit binders.

The parties are ordered to meet and confer by 5:00 p.m. on **Thursday, April 27, 2017**, to attempt to reach agreement on an hour-by-hour witness schedule for the first day of hearing. Further, Capistrano will notify Student of any witnesses listed in Student' prehearing conference statement who are no longer employed by Capistrano or Community Roots Academy. The parties shall have a proposed hour-by-hour witness schedule for the remainder of the hearing, which includes estimated time of direct and cross-examination by both parties. 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 witness is expected to take. Capistrano shall have witnesses available in case agreement on a witness list is not reached.

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.

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.

Neither party has requested telephonic testimony.

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 parties' motions to make an audio recording of the hearing are granted. Student's Parent and Capistrano's counsel 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 and shall present her case-in-chief first, followed by Capistrano.

9. Motions.

Other than the motions addressed above, the only other motion pending is Student's renewed motion for stay put. Capistrano shall file its response no more than three business days after receiving Student's exhibits in support of her motion.

Any other 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 PHC of April 24, 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.

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: http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

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

14. Hearing Will Be Closed To the Public. The hearing will be closed to the public unless Student requests it be open.

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: April 24, 2017

DocuSigned by:
Darrell Lepkowsky
A228F8201132499...

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings