BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017040667
v.	ORDER FOLLOWING PREHEARING CONFERENCE
IRVINE UNIFIED SCHOOL DISTRICT.	

On November 6, 2017, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. Attorney Tania Whiteleather appeared on behalf of Student. Attorney Alefia Mithaiwala appeared on behalf of Irvine Unified School District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on November 14, 16, 20, and 21, and continue day to day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Westwood Training Center, 1 Liberty, Irvine, CA 926920. District's unopposed request to start each hearing day at 9:30 a.m. was granted, and each hearing day will start accordingly, 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.

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 certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

Prior to the beginning of the hearing, District shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (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 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. District shall ensure that the hearing room and access to it 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 room shall be available to Student at least a half hour before the start of the hearing each day, during hearing breaks, and during lunch.

2. Student's 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, are:

(1) Did District deny Student a free appropriate public education during the 2016-2017 school year, by failing to timely and appropriately assess Student in all areas of suspected disability?

(2) Did District deny Student a FAPE by unilaterally dis-enrolling him from school on or about March 27, 2017?

(3) Did District deny Student a FAPE, or deny Parent the ability to meaningfully participate, in the development of Student's April 10, 2017 individualized education program, by:

a. Convening the meeting without all necessary participants;

b. Failing to obtain current information regarding Student's present levels of performance;

c. Failing to obtain information from Student's current behavior therapy and education providers before developing Student's IEP; and

d. Failing to obtain current information regarding Student's accommodations?

(4) Did District deny Student a FAPE in his April 10, 2017 IEP by:

a. Failing to provide appropriate and measurable goals;

b. Failing to offer Student placement and services in the least restrictive environment based upon Student's unique needs and present levels of performance?

(5) Did District deny Student a FAPE by failing to offer Student extended school year services for summer 2017?

Dismissal of Non-IDEA Claims.

Student's Issue No. 10 raised claims that District's actions violated Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act (ADA), and State civil rights laws.

OAH does not have jurisdiction over claims based on Section 504, the ADA, or other related state and federal civil rights laws. The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Accordingly, the non-IDEA claims alleged in Students Issue No. 10 are dismissed. The matter shall proceed to hearing on the remaining issues stated above.

Student's proposed resolution. An Order directing District to:

(1) Fund independent assessments in the areas of psychoeducation; functional behavior; speech and language, including pragmatic language; and auditory and visual processing.

(2) Reimburse Parent for the cost of Student's tuition at his private school, along with transportation costs; reimbursement for private applied behavior analysis services Parent funded; reimbursement for the costs of accommodations written into Student's last agreed-upon IEP that were necessary for Student to access his education; and reimbursement for costs Parent incurred for providing Student with extended school year education and services, including transportation costs.

(3) Fund compensatory education in the areas of occupational therapy; speech and language therapy; social skills; and any other areas pursuant to proof at hearing.

3. Exhibits. Student identified approximately 51 exhibits that Student intends to present at hearing. District identified 51 exhibits, plus witness resumes, that District intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall place a single exhibit behind each binder tab, except where it would be more efficient at hearing to have category of documents behind a single tab; as with, for example, resumes organized alphabetically, receipts, or email strings on a single subject, and shall place the exhibits in chronological order, generally. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., District shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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. District shall include as part of its exhibits the school calendar(s) for all of the years at issue.

4. Witnesses. Student identified 13 percipient witnesses and eight expert witness whom Student intended to present at hearing. District identified 17 percipient witnesses, and no exclusively expert witness. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed to make witnesses under its control reasonably available to Student without the need for subpoena. District will also inform Student of the identity of, and available contact information for, any witness identified by Student as an employee of District who has left District's employ, by 5:00 p.m. on Tuesday, November 7, 2017. The parties will 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.

5. Timely Disclosure of Exhibits and Witnesses. 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 copies of their final witness lists and exhibit binders on or before 5:00 p.m. on Monday, November 6, 2017.

Except for good cause shown, 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 or impeachment.

a. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Wednesday, November 8, 2017 at 3:30 p.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to District's counsel to initiate the meet and confer. The parties shall 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 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, 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 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, 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 cross-examination of each witness and scheduling issues for individual witnesses and 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 witnesses' testimony.

6. 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.

7. 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's motion to allow witness Richaun Hendricks to testify telephonically is granted. District shall provide the witness a complete exhibit binder from each party,

containing all of each party's exhibits, prior to the hearing, and shall ensure: (i) the witness testifies from a private location with no other persons present, from a quiet room on a reliable landline connection; and (ii) the hearing room has sound equipment that allows everyone in the room to hear the witness.

8. Electronic Recording of Hearing.

a. Audio Recording. Student's request for leave to make an audio recording of the hearing is granted, 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, in order to avoid recording conversations while off the record; (3) the tape recording will not be shared with any witness or third parties; and (4) operation of the party's recording mechanism will not be allowed to delay the hearing. District may also make an audio recording under the same conditions.

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.

9. 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 Student's case-in-chief, followed by District.

10. Motions. The parties indicated that they were not contemplating any prehearing motions. In the event that any motion is brought after this date, it 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.

11. 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.

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

13. 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.

14. Special Needs and Accommodations. Neither party requested any accommodations. A party or participant to this case, such as a witness, requiring reasonable

accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

15. Hearing Open to the Public. At Student's request, the hearing will be open to the public.

Parents should be aware that by opening the hearing, District employees who are not witnesses, or other people who are unknown to Parents, may attend the hearing. Anyone other than Student and Parents, or District representative, who is disclosed on either party's witness list will be excluded from the hearing except while testifying. The parties shall confer on Wednesday, November 8, 2017 at 3:30 p.m. regarding the seating requirements for members of the public, and notify OAH on or before 5:00 p.m. on Thursday, November 9, 2017, if the above location currently set for hearing cannot accommodate sufficient seating for the public. Student shall immediately notify District and OAH if Student becomes aware that there will be media attending the hearing.

16. 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.

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

IT IS SO ORDERED.

DATE: November 6, 2017

DocuSigned by:

ROBERT G. MARTIN
Administrative Law Judge
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Office of Administrative Hearings