BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017050975
v.	ORDER FOLLOWING PREHEARING CONFERENCE
OCEAN VIEW SCHOOL DISTRICT.	

On September 25, 2017, a telephonic prehearing conference was held before Administrative Law Judge Laurie Gorsline, Office of Administrative Hearings. Monique Fierro, Attorney at Law, appeared on behalf of Student. Counsel for District did not appear. Prior to convening the prehearing conference, the ALJ made numerous unsuccessful attempts to reach District's counsel by telephone, and then left messages with District's counsel that the PHC would proceed in the absence of defense counsel. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on **October 3, 4, 5, 9, 10, 11, and 12, 2017,** and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at:

Ocean View School District
4200 Olds Road,
Oxnard, CA 93033

The hearing shall begin at 9:30 a.m. the first day of the hearing, at 1:30 p.m. on October 9, 2017, and at 9:00 a.m. all other days, 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 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 certified that it would provide a facility for this case that complied with the law.

The hearing room shall be available to the ALJ one hour before the scheduled hearing, and shall be secured and locked at the end of each hearing day. **The same hearing room shall be used for each day of 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 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.

District shall arrange a separate room for Student and his counsel to use during the hearing. District shall ensure that the room is available for Student and his counsel each day of the hearing at least thirty minutes prior to the scheduled start time of the hearing through 4:30 p.m.

District shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, District's attorneys, and witnesses.

The local educational agency shall notify OAH if it is unable to comply with any part of this order by no later than September 28, 2017.

2. Dismissal of Claims Outside OAH Jurisdiction. Student's complaint, and specifically Claims 1, 2 and 3 raise claims that allege District's actions violate 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 to entertain 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 claims alleged in what Student identified as First, Second and Third Supplemental Claims for Relief in the complaint are dismissed. The matter shall proceed to hearing on the remaining issues, stated below.

3. Issues and Proposed Resolutions[1]. The issues at the due process hearing, and the alleged proposed resolutions, are listed below.

Issues:

(1) Did District deny Student a FAPE by significantly impeding Parent's opportunity to participate in the decision making process by failing to inform Parent prior to January 31, 2017, that the cognitive testing in the June 6, 2013 and April 30, 2015 assessments could not be relied upon because they did not take into account Student's ethnicity, and thereafter, failing to immediately provide Parent with unredacted copies of the assessments pursuant to Parent's request?

(2) Did District deny Student a FAPE by significantly impeding Parent's opportunity to participate in the decision making process by failing to conduct appropriate assessments which informed Parent of Student's needs, specifically:

a) Failing to appropriate assess Student's cognition levels as part of the June 10, 2013 assessments;

b) Failing to appropriately assess Student's cognition levels as part of the April 30, 2015 assessments?

(3) Did District deny Student a FAPE since June 10, 2013, by failing to assess Student in all areas of known or suspected disabilities, which thereby failed to reasonably accommodate or support Student's disability related needs with regard to his education, specifically:

a) Failing to assess in the area of autism since June 10, 2013;

b) Failing to assess school attendance anxiety since October 2015?

[1] During the prehearing conference as reflected in the record, Student's counsel and the ALJ clarified the issues for hearing, which the ALJ renumbered and rephrased pursuant to the discussion at the prehearing conference. Student also voluntarily withdrew all of his other claims and all other resolutions alleged in the complaint.

(4) Did District deny Student a FAPE at the May 5, 2015 individualized education program team meeting, by failing to consider a continuum of placements options to determine the least restrictive environment?

(5) Did District deny Student a FAPE at the April 13, 2016 IEP team meeting, by failing to consider a continuum of placements options to determine the least restrictive environment?

(6) Did District deny Student a FAPE between October 3, 2016 and the date the complaint was filed, by implementing a communication protocol regarding Parent's communications with District staff?

(7) Did District deny Student a FAPE at the January 12, 2017 IEP team meeting by:

a) Failing to consider a continuum of placements options to determine the least restrictive environment;

b) Failing to address Parent's concerns and the concerns of Student's doctors thereby significantly impeding Parent's opportunity to participate in the decision making process?

(8) Did District deny Student a FAPE at the January 31, 2017 IEP team meeting by:

a) Failing to consider a continuum of placement options to determine the least restrictive environment;

b) Failing to address Parent's concerns and the concerns of Student's doctors thereby significantly impeding Parent's opportunity to participate in the decision making process?

(9) Did District deny Student a FAPE at the March 28, 2017 IEP team meeting by:

a) Failing to consider a continuum of placement options to determine the least restrictive environment;

b) Failing to address Parent's concerns and the concerns of Student's doctors thereby significantly impeding Parent's opportunity to participate in the decision making process?

(10) Did District deny Student a FAPE by unilaterally withdrawing its request for a due process hearing in OAH case number 2017040773 in May 2016, which it was obligated to file under California Education Code section 56346(f)?

Proposed Resolutions:

Funding for an independent psychoeducational assessment and compensatory education according to proof.

4. 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. 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 exhibit shall consist of one document; separate documents may not be combined into one exhibit. To the extent practicable, exhibits in the exhibit binders shall be in chronological order.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae not later than **September 28, 2017.**

District shall include as part of its exhibits the school calendar(s) for all of the years at issue. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), District shall serve a copy of the school calendar(s) on Student by **September 28, 2017** and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ.

If the parties intend to rely on IEP's, 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 or attached to the IEP(s). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence; that portion of the audio record 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. The parties shall serve transcriptions no later than **September 29, 2017, at 10:00 a.m.**

The parties shall meet and confer **by September 28, 2017 at 5:00 p.m.** to delete duplicate exhibits from the exhibit binders. 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 timely 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. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been timely disclosed.

5. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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.

The parties shall comply with Education Code section 56505 (e)(7). No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five business days before the hearing.

The parties shall meet and confer **by September 28, 2017**, as to the schedule of witnesses and coordinate the availability and order 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 also meet and confer regarding the one joint detailed hour-by-hour schedule described below**.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with **one joint detailed hour-by-hour schedule** of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

The parties are ordered to meet and confer by **no later than September 28, 2017 at 5:00 p.m.** and identify the witnesses on its/his respective witness lists who cannot be produced at hearing without a subpoena and provide the witnesses contact information to opposing counsel so that subpoenas can be issued. As part of the meet and confer process, District's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of District, and if not, shall provide Student's counsel with the witness(es) most recent contact information by **no later than September 28, 2017 at 5:00 p.m.** Any contact information provided by District shall be used by Student's counsel for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disseminated to any other person(s).

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. District shall have

witnesses available in case agreement on a witness list is not reached. 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 each witness is expected to take.

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 such evidence. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (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.

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 unless otherwise permitted by the ALJ. 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. Neither party requested 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).) In the event that telephonic testimony is requested, the 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. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of *exact physical copies of the exhibit binders* from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. *Faxed or electronic copies are unacceptable.* District shall ensure that the hearing room shall has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

8. 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, unless otherwise ordered. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

Student's motion to make an audio recording of the hearing is granted. Student 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, in order 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) the parties and/or counsel shall not play any part of the recording for any prospective witness(es) 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; and 8) the parties shall destroy the unofficial recording upon the earlier of the following: (a) upon settlement of this matter, (b) dismissal of this case, or (c) within 90 days of issuance of the ALJ's decision in this case.

District may also audio record the hearing, subject to 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 his case-in-chief, followed by District. However, if a witness is called by more than one party, all parties shall examine the witness when the witness is first called.

10. Motions. Student is contemplating filing a motion to shift the burden of proof. No other pretrial motions are pending or contemplated. Any motion filed after this date, including the motion contemplated by Student, 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 September 25, 2017**.**

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. The parties shall meet and confer **by September 29, 2017 at 5:00 p.m.** to determine legal and factual stipulations, if any, to be submitted at hearing.

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

during the hearing unless permission to the contrary is obtained from the ALJ. There shall be no texting permitted while the hearing is in session.

14. Special Needs and Accommodations. Neither party requested 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/Accommodations.aspx

15. Open Hearing. Pursuant to Student's request, the hearing will be open to the public. With the exception of Parent, Student and District's representative, all witnesses shall be excluded from the hearing room until such time as the witnesses' testimony, including rebuttal testimony, has been completed. To avoid any disruption of the hearing, observers shall only be permitted to enter the hearing room before the hearing begins each day and during breaks in the proceedings. District shall provide seating for at least five observers.

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 **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.

If the parties settle the matter 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. OAH will not cancel the hearing dates without this information.

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

IT IS SO ORDERED.

DATE: September 27, 2017

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LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings