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. 2016040382 ORDER FOLLOWING PREHEARING CONFERENCE

On August 22, 2016, a telephonic prehearing conference was held before Administrative Law Judge Sabrina Kong, Office of Administrative Hearings. Adriana Nusbickel, Attorney at Law, appeared on Student's behalf. Kristin Myers, Attorney at Law, appeared on District's behalf. 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 August 30, 31, September 1, and 6, 2016, continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at District's offices located at 2221 Argonne Avenue, Long Beach, CA 90815, in the Tucker Bungalow. The hearing shall begin at 9:30 a.m., on the first day of the hearing, and at 1:30 p.m. on September 6, and end at 5:00 p.m., and at 9:00 a.m. all other days, and end at 4:30 p.m., unless otherwise ordered.

As ordered in the scheduling order, District 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. 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 efforts to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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 the proposed resolutions, are listed below.

Did District deny Student a free appropriate public education from May 5, 2015 to April 1, 2016, by failing to provide appropriate goals in the area of: (i) occupational therapy; (ii) vision; and (iii) speech and language?[1]

As a proposed resolution, Student seeks an order that District shall craft appropriate occupational therapy, vision, speech and language goals and provide compensatory services in these areas by non-public agencies.

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.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials.

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.

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.

[1] Student's fourth issue of whether District denied Student a FAPE, or breached a contract, by failing to provide appropriate goals for services provided for in a May 5, 2015 settlement agreement was dismissed at the PHC upon Student's counsel's agreement as it was duplicative of the issues 2(i) through (iii) above. Further, OAH's jurisdiction does not include determining whether the May 5, 2015 was breached, only whether District denied Student a FAPE with respect to the issues 2(i) through (iii) above.

The parties are ordered to meet and confer by August 23, 2016, as to the schedule of witnesses and present a witness schedule at hearing pursuant to the example below, 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.

Example:

The following witnesses will be called to testify on August 30, 2016:

1. Jane Smith at 10:00 a.m.
2. Bob Jones at 11:00 a.m.

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. 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.[2]

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 case in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. Neither party anticipates the need for 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

[2] District's counsel represented that Christopher Lohrman was no longer a District employee, but agreed to, and shall, provide Mr. Lohrman's last known address to Student's counsel by August 23, 2016.

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.

7. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits at least five business days prior to the hearing.

8. Electronic Recording of Hearing.

a. Audio Recording. Student moved to digitally record the hearing. District did not object. Student's request to make a digital recording of the hearing is granted as to an audio recording only, as a courtesy, and subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that 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) that operation of the party's recording mechanism will not be allowed to delay the hearing; 4) that the recording shall not be played or published for a prospective witness; 5) that the recording shall not be used for any purpose other than assisting in the representation and presentation of this due process hearing; 6) that the parties shall erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and 7) that the parties shall not use this recording in any subsequent due process hearing.

b. Video Recording. Student's motion to digitally record is denied to the extent it includes any 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].) In this matter, Student shall present his case-in-chief first, followed by District.

10. Motions. On August 15, 2016, District filed its Motions to Quash Student's August 10, 2016 Subpoena Duces Tecum directed to District and to Gallagher Pediatric Therapy. On August 17, 2016, Student filed an Opposition to District's Motions. On August 19, 2016, District filed its response to Student's Opposition. Upon consideration of both parties' filings, and oral arguments at the PHC, District's Motion to Quash Student's August 10, 2016 Subpoena Duces Tecum directed to District and to Gallagher Pediatric Therapy is denied in part, and granted in part.

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by

a party)." (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2).) While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code, § 56504), and (ii) the parties are entitled to receive copies of all the documents the educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code, § 56505, subd. (e)(7).)

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA) to include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b); 34 C.F.R. § 99.3.) Pupil or education records do not include "records of instructional, supervisory, and administrative personnel…which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(B)(i); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3.)

Because Student's occupational therapy, vision, and speech and language goals and services are directly at issue in this hearing, Student demonstrated that e-mails and correspondence pertaining to Student in these areas are "reasonably necessary" to his case. District's contention that Student does not require the e-mails and correspondence outside of those educational records maintained by District to prove his case is narrow and unsupported. However, District's contention that its contracts with non-public agencies, and its procedures, and policies regarding its dealings with non-public agencies are irrelevant to the issues at hearing is correct.

Accordingly, District's Motion to Quash Student's August 10, 2016 Subpoena Duces Tecum directed to District shall be: (i) granted in part, and denied in part with respect to bullet points one through three as follows: District shall produce on the first day of hearing e-mails, correspondence, communications, and/or files relating to Student (including those to and/or from Speech Bananas and Gallagher Pediatric Therapy), after a search by any District employee/personnel who assessed or provided services to Student from the period of May 5, 2015 to April 1, 2016 in the areas of occupational therapy, vision, and speech and language; (ii) granted in their entirety with respect to bullet points four through seven.

District's Motion to Quash Student's August 10, 2016 Subpoena Duces Tecum directed to Gallagher Pediatric Therapy regarding document production shall be granted in part, and denied in part as follows: Gallagher shall produce on the first day of hearing any and all documents pertaining to the provision of occupational therapy services for Student from May 5, 2015 through April 1, 2016, including, but not limited to, service logs, progress reports, and work samples. Further, Gallagher shall produce on the first day of hearing e-mails, correspondence, communications to, or from, District personnel referencing or discussing Student from May 5, 2015 through April 1, 2016.

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 August 22, 2016 prehearing conference.

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. None anticipated at the PHC. 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. Hearing Closed To the Public.

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 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 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: August 22, 2016

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Sabrina Kong
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SABRINA KONG
Administrative Law Judge
Office of Administrative Hearings