BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: EAST SIDE UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2019010414 ORDER FOLLOWING PREHEARING CONFERENCE

On March 11, 2019, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Eliza J. McArthur and Crystal Tidwell, Attorneys at Law, appeared on behalf of the East Side Union High School District. Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student. The PHC was recorded.

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

1. Hearing Dates, Times and Location. The hearing shall take place at East Side's District office, 830 North Capitol Avenue, San Jose, California 95133, in a room to be provided by East Side. It shall take place on March 19, 20, and 21, 2019, and continue day-to-day thereafter at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day of hearing and at 9:00 a.m. on all other days, unless otherwise ordered.

As ordered in the scheduling order, East Side 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. East Side shall within two business days of the date of this order file a certification that the facilities to be used for the hearing in this case comply with the law.

Prior to the beginning of the hearing, East Side 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 East Side's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. East Side shall provide drinking water and have tissue available to all parties, witnesses and the ALJ. Unless otherwise ordered, 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 at lunch breaks and following the hearing each night.

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 has not been properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions.[1]

1. May East Side exit Student from special education and related services because he is no longer eligible for them in any category?

2. Did East Side provide Parents with meaningful participation in the individualized education program process at the IEP team meetings on May 17 and December 4, 2018?

3. Was East Side's independent educational evaluation of Student's speech and language in compliance with the requirements of section 300.502 of Title 34 of the Code of Federal Regulations?[2]

4. Was the assessor who conducted the independent educational evaluation of Student's speech and language actually an employee of East Side?

5. Were East Side's triennial assessments appropriate such that Student is not entitled to independent educational evaluations of his speech and language or psychoeducational status at East Side's expense?

As resolutions, East Side seeks an order answering questions 1 through 3 and 5, above, in the affirmative, and question 4, above, in the negative.

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 in a way that clearly identifies the party offering it (such as "S1" or "D2"). 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. Each party shall serve an exhibit binder containing its respective exhibits on the other party or parties by 5:00 p.m. on March 12, 2019, in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each

[1] The ALJ has reworded and clarified some issues as stated in East Side's prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made.

[2] East Side shall be prepared at the beginning of hearing to specify the substantive issues inherent in this claim.

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.

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 the ALJ rules that it is admissible.

Parties are encouraged to present resumes or curricula vitae for all professional witnesses.

East Side shall introduce a color copy of the school calendar for each school year in question and shall have witnesses available to explain any legend notations that might be unique to East Side.

4. Witnesses.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

b) East Side has identified 35 witnesses to be called at the hearing. Student has identified 12 witnesses. Some of the witnesses are listed by both parties. In light of the fact that 3 days have been scheduled for the hearing, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and provide the ALJ a tentative witness list, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Each revised witness list shall contain an estimate of the length of each witness's direct examination testimony. The parties shall meet and confer telephonically on or before March 14, 2019, for this purpose.

c) Prior to the commencement of the due process hearing, 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. 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony, and to exclude evidence if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

5. Scope and Order 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall establish their cases in chief during the first appearance of a witness. 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.

6. 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, East Side requested the hearing and bears the burden of proof, and shall present its case-in-chief first, followed by Student.

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).) At present no party intends to present a witness by telephone. A party seeking to present a witness by telephone shall move in advance for leave to do so. The proponent of any witness appearing by telephone 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.

8. Electronic Recording of Hearing.

a) Audio Recording. The parties' requests to make audio recordings of the hearing are 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) no part of the recording shall be played to any witness or potential witness while the hearing is proceeding; and 4) operation of the party's recording mechanism will not be allowed to delay 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.

9. Motions.

a) Student's motion, filed March 8, 2019, to consolidate this matter with a due process hearing request, Case No. 2019030332, filed March 7, 2019, was denied as untimely and because the only significant area in which witness and documents would overlap concerns the validity of East Side's triennial assessments of Student. That issue will be resolved in the upcoming hearing in this matter, and presentation of those witnesses and documents will be necessary in that hearing with or without consolidation. It is unlikely the issue would or could be re-litigated.

b) Student may file a motion directed at East Side's alleged incomplete production of records. The ALJ made no ruling on the substance or timeliness of such a motion.

c) At present no other prehearing motions are pending or contemplated. Any motion filed after the day PHC statements were due shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made three days prior to the prehearing conference.

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

11. 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.

12. Special Needs and Accommodations.

At the request of both parties, OAH will provide a Spanish language interpreter for Parents at the hearing

At present neither party anticipates the need for any other special accommodation for any witness or party, or for the services of any other interpreter. 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 identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 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.

13. Hearing Open To the Public. At the request of Parents, the hearing will be open to the public.

14. Settlement. The parties are encouraged to continue their attempts 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 five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall immediately inform OAH of that fact 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.applications.dgsapps.dgs.ca.gov/oah/oahsftweb.

Dates for hearing will not be cancelled until the letter of withdrawal has been received by OAH. If an executed settlement agreement is reached pending board approval, a letter indicating such with the agreement's signature page containing all required signatures must be submitted to vacate hearing dates and schedule a status conference. 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.

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

IT IS SO ORDERED.

Dated: March 11, 2019

DocuSigned by:
Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings