BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SOUTH BAY UNION SCHOOL DISTRICT.	OAH Case No. 2018110605 ORDER FOLLOWING PREHEARING CONFERENCE

On May 13, 2019, a telephonic prehearing conference was held before Administrative Law Judge Linda Johnson, Office of Administrative Hearings. Meagan Nunez, Attorney at Law, appeared on behalf of Student. Ernest Bell, Attorney at Law, appeared on behalf of South Bay Union School District. 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 May 21, and 23, 2019,[1] and continuing as needed at the discretion of the ALJ. The hearing shall take place at South Bay Union School District, 601 Elm Avenue, Imperial Beach, California 91932. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

State and federal law require a local education agency to respond to a due process complaint within 10 days of receiving the complaint. (Ed. Code, § 56502, subd. (d)(2)(A); 20 U.S.C. § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508.); *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) South Bay filed its response to Student's complaint on November 26, 2018, which permits the hearing to go forward.

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

[1] On the first day of hearing, when the parties have their final witness lists, the ALJ will set the final hearing schedule. The parties should be prepared to attend consecutive hearing days. The parties anticipate needing three days for hearing, however on May 22, 2019, Student's attorney has a conflict with OAH Case No. 2018121008, which already commenced. OAH Case No. 2018121008 will resume for one additional hearing day on May 22, 2019.

disabilities. The named local educational agency failed to certify that it would provide a facility for this case that complied with the law. The local educational agency shall inform OAH within two days of the date of this order it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, South Bay 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 South Bay's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. South Bay shall also make reasonable effort 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.

Issues[2]:

(1) Did South Bay substantively deny Student a free appropriate public education during the 2016-2017 school year by:

(a) Failing to provide Student with the services and supports necessary to meet his unique needs or permit him to make progress in light of his circumstances;

(b) Failing to provide Student with appropriately ambitious goals;

(c) Failing to provide effective and appropriate behavior interventions;

(d) Failing to provide him with occupational therapy; and

(e) Failing to assess him in the area of functional behavior analysis?

[2] The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) On the first day of hearing Student will delineate, with more specificity, what services and supports he is alleging in issue 3b, what goals are alleged in issue 3c, and what goal areas are missing from issues 3d and 4aiii.

(2) Did South Bay procedurally deny Student a FAPE during the 2016-2017 school year by:

(a) Preventing Parent from participating in Student's education by failing to assess him in the area of functional behavior analysis; and

(b) Committing procedural violations that impeded Student's right to a FAPE by failing to assess him in the area of functional behavior analysis?

(3) Did South Bay substantively deny Student a FAPE during the 2017-2018 school year by:

(a) Failing to assess him in the areas of attention deficit hyperactive disorder and functional behavior analysis;

(b) Failing to provide him with services and supports necessary to meet his unique needs and permit him to make progress in light of his circumstances;

(c) Failing to provide him with appropriately ambitious goals; and

(d) Failing to provide him with measurable annual goals?

(4) Did South Bay procedurally deny Student a FAPE during the 2017-2018 school year by:

(a) Preventing Parent from participating in Student's education by:

(i) Failing to assess Student in the areas of attention deficit hyperactive disorder and functional behavior analysis;

(ii) Failing to provide prior written notice of its decision not to assess him in the areas of attention deficit hyperactive disorder and functional behavior analysis;

(iii) Failing to provide Student with measurable annual goals;

(iv) Failing to make a clear and specific FAPE offer;

(v) Failing to provide a cogent and responsive explanation for not changing Student's placement;

(vi) Failing to provide a cogent and responsive explanation for not adopting the independent educational evaluation findings;

(vii) Failing to provide Parent with Student's complete educational file within five days of the request; and

(viii) Failing to hold an individualized education program team meeting following Student's suspensions?

(b) Committing procedural violations that impeded Student's right to a FAPE by:

(i) Failing to assess Student in the areas of attention deficit hyperactive disorder and functional behavior analysis;

(ii) Failing to provide Student with measurable annual goals;

(iii) Failing to hold an IEP team meeting following Student's suspensions?

Proposed Resolution:

(1) Student seeks compensatory education.

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 South Bay 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.

If the parties intend to rely on IEPs, 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 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.

South Bay shall include in its exhibits, the school calendar(s) for each school year (including extended school year) at issue.

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.

The parties shall meet and confer by **5:00 p.m. on May 17, 2019**, regarding the schedule of witnesses for the hearing. The parties are 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. The parties shall discuss a time estimate for the length of each witness' direct and cross examination testimony, and identify those witnesses the party no longer intends to call.

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. The list shall also include an estimate of time for each party's direct and cross-examination. The ALJ has discretion to revise the witness schedule, as needed to maintain the flow and efficiency of the hearing. The parties shall be prepared at the end of each day of hearing to discuss the witnesses appearing on the next day and the time the testimony of each such witness is expected to take.

South Bay shall also provide a meeting room for Student's representatives to be available a half hour prior to the start of the hearing, during hearing breaks, and during the lunch break.

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.

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.

7. Electronic Recording of Hearing.

a. Audio Recording. The parties' motion to make an audio recording of the hearing for personal use only is granted, subject to the following conditions: (1) no part of the recording shall be published or disseminated for any purpose other than to assist in the presentation of the party's case; (2) that OAH's recording is the only official recording; (3) that 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; and (4) that 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.

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. Accordingly, Student shall present his case-in-chief, followed by South Bay.

9. Motions. No 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 three business days prior to PHC of May 13, 2019.

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 writing.

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.

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

14. Hearing Closed to the Public. The hearing will be closed to the public unless Student requests it 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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO OAH AT https://www.applications.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.

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

IT IS SO ORDERED.

DATE: May 13, 2019

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Linda Johnson
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LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings