BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017100546
v.	ORDER FOLLOWING PREHEARING CONFERENCE
IRVINE UNIFIED SCHOOL DISTRICT.	

On February 16, 2018, a telephonic prehearing conference was held before Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings. Amanda Selogie, Attorney at Law, appeared on behalf of Student. Tracy Peznick-Johnson, Attorney at Law, appeared on behalf of Irvine Unified 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 February 27, 28 and March 1, 2018,[1] and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's Westwood Training Center located at 1 Liberty, Irvine, California 92629. 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.

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. § 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

[1] The parties have requested four days for hearing. This matter should be completed within the three days scheduled, however the ALJ shall reserve March 6, 2018, as an additional hearing date. The parties shall not specifically schedule any witnesses for March 6, 2018, as it will be utilized for completion of testimony for previously scheduled witnesses, if necessary.

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.

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.

Student's issues are:

A. Did District deny Student a free appropriate public education during the 2016-2017[2] and 2017-2018 school years by failing to assess in all areas of suspected disability, specifically:

1) functional behavior, including attention/concentration to instruction and task, task initiation and task completion resulting from her executive functioning and language processing deficits; and

2) auditory processing including a central auditory processing disorder assessment.

B. Did District deny Student a FAPE during the 2016-2017 and 2017-2018 school years by failing to provide appropriate interventions for Student in the areas of:

1) attention/behavior/executive functioning;

2) academic achievement;

3) speech and language in the areas of pragmatics, receptive/expressive language, functional communication and social skills, and

4) audio processing.

C. Are Parents entitled to reimbursement of costs incurred from the provision of appropriate intensive intervention and through independent assessments?

[2] All claims prior to October 27, 2016, are barred by Settlement Agreement dated October 26, 2016.

Student's requested resolutions are:

A. An order directing District to amend Student's individualized education program to include specific intervention in the area of:

1) attention/behavior/executive functioning in the form of adult support within the general education classroom to provide frontloading of expectations, content, chunking tasks, redirecting to task, initiating tasks and completing tasks for each area of core academics;

2) academic achievement in the form of additional daily one-to-one supplemental academic support to address the content gaps missed during instruction, provide frontloading of information, and reteaching as necessary;

3) speech and language in the areas of pragmatics, receptive/expressive language, functional communication and social skills in the form of additional weekly speech and language therapy; and

4) auditory processing in the form of additional visual tools and strategies to support engagement in instruction and task completion;

B. An order providing compensatory education by a non-public agency to provide intensive intervention to address remediation in the areas of:

1) reading decoding, fluency, and comprehension;

2) writing;

3) math;

4) study skills, including developing strategies to cope with Student's auditory processing and attention deficits that impact processing of information; and

5) pragmatic language and social skills.

C. An order requiring District to reimburse Parents for costs associated with the independent assessments conducted and independent interventions provided during the 2016-2017 school year and October 2017.

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.

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.

In the event of duplicate exhibits, the most legible version will be used. The parties shall meet and confer by February 21, 2018 to delete duplicate exhibits from the exhibit binders. The parties are encouraged, if the total number of documents is not too large, to place the exhibits for both parties into one binder.

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, subdivision (e)(7), District shall provide a copy of the school calendar(s) to Student, 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 include 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.

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, subdivision (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.

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. The parties shall comply with Education Code section 56505, subdivision (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. Student shall identify witnesses by name and shall provide a list to District's counsel no later than February 21, 2018.

The parties shall meet and confer by February 21, 2018, to schedule 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. As part of this meet and confer on February 21, 2018, the parties shall 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.

Each 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 that day, which 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 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, subdivision (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.

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.

Student's motion to allow telephonic testimony is granted. Micki Simon shall be allowed to testify telephonically. Student shall provide Micki Simon a complete exhibit binder from each party, 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. The witness shall testify on a land-line telephone while alone in a private room.

7. Electronic Recording of Hearing.

a. Audio Recording. Each party may make an audio recording of the hearing, 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, to avoid recording conversations while off the record; and 3) 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 its case-in-chief, followed by District.

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 prior to or during the prehearing conference of February 16, 2018.

10. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, including documentary evidence of cost, payment, and date incurred, 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 written form.

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. Neither party has requested an interpreter or indicated the need for special 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. With the exception of Parents, 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.

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 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.

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

IT IS SO ORDERED.

DATE: February 16, 2018

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Judith Pasework
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JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings