BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2019020637
CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2019011184 ORDER FOLLOWING PREHEARING CONFERENCE

On May 6, 2019, a telephonic prehearing conference was held before Administrative Law Judge Ted Mann, Office of Administrative Hearings. Parent appeared on behalf of Student. Dan Harbottle, Attorney at Law, appeared on behalf of Capistrano 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 May 14, 15, and 16, 2019, and continuing day to day, at the discretion of the ALJ. The hearing shall take place at Capistrano's offices located at 33122 Valle Road, San Juan Capistrano, CA, 92675. 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 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 has certified that it will provide a facility for this case that complies with the law.

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:

1) Did Capistrano deny Student a free appropriate public education since February 2017 by:

    a. Failing to share medical documentation with school personnel and all members of the individualized educational program team; and
    b. Failing to assess Student after being put on notice of her traumatic brain injury?

2) Did Capistrano deny Student a FAPE, and Parent meaningful participation, at the March 2017 IEP team meeting by:

    a. Failing to have a general education teacher in attendance;
    b. Failing to assess for and/or provide assistive technology devices; and
    c. Predetermining the offer of FAPE?

3) Did Capistrano deny Parent meaningful participation in the IEP process in 2017 by:

    a. Failing to provide Parent with prior written notice(s); and
    b. Failing to provide progress reports for goals?

4) Did Capistrano deny Student a FAPE in the February 2017 and February 2018 annual IEP team meetings by predetermining Student's eligibility?

5) Did Capistrano deny Student a FAPE, and Parent meaningful participation, in the IEP process during the 2017-2018 school year by:

    a. Failing to provide sufficient academic supports;
    b. Failing to provide home hospital instruction;
    c. Failing to provide Parent with timely or sufficient prior written notice(s);
    d. Failing to provide progress reports for goals; and
    e. Failing to consider Student's need for 1:1 instruction or a modified schedule as recommended by Student's doctors?

6) Did Capistrano deny Student a FAPE at the August 2018 IEP team meeting by:

a. Failing to provide an appropriate placement;
b. Making placement decisions based on Capistrano's available programs and not on Student's needs;
c. Failing to document or consider the input of Student's pediatrician in their assessment or IEP; and
d. Delegating the responsibility and decision-making authority regarding the assessment process and the August 2018 IEP team meeting to their attorney and denying Parent meaningful participation as a result?

7) Did Capistrano deny Student a FAPE in 2017 and 2018 by failing to file for due process to prove Student's IEPs offered her a FAPE when Parent disagreed with the FAPE offer and when she privately placed Student at Halstrom Academy in the Summer of 2017, Spring of 2018, and during the 2018-2019 school year?

8) Did Capistrano deny Student a FAPE, and Parent meaningful participation, in the January 2019 IEP team meeting by:

a. Failing to develop an IEP that addresses all of Student's unique needs;
b. Failing to consider or discuss medical information in developing the IEP;
c. Failing to consider or discuss Student's need for vision therapy or assistive technology devices in developing the IEP;
d. Failing to provide goals or services to address Student's attention, focus, and cognitive fatigue;
e. Failing to keep data on Student's goal progress;
f. Predetermining the FAPE offer; and
g. Developing an IEP that is substantially the same as Student's 2018 IEP?

Proposed Resolutions:

1) An order finding that:

a. Student is eligible for special education under the primary category of traumatic brain injury;
b. Capistrano had denied Student a FAPE since February 2017;
c. Parent shall be reimbursed for the cost of courses taken by Student at Halstrom Academy;
d. Capistrano shall apply the credits for all courses taken by Student at Halstrom Academy to her transcript as credits towards her graduation;
e. Student's current placement of three on-campus courses and two courses at Halstrom Academy is appropriate and constitutes her "stay put" through the end of the 2018-2019 school year, and until an independent assessor determines that Student is able to tolerate a full load of on-campus courses;
f. Capistrano shall fund an independent educational evaluation with an expert in brain injuries and shall fully develop an appropriate IEP in a single IEP

team meeting that includes the brain injury expert and Capistrano's staff with decision-making authority;

g. Capistrano's attorneys are restrained from attending any of Student's future IEP team meetings;
h. Capistrano shall fund an independent educational evaluation for vision therapy and/or Irlens Lenses, and fund any assistive technology devices recommended as a result of the IEE;
i. Capistrano shall fund compensatory education in the form of 1:1 instruction over the summer, for the duration necessary for Student to retake and pass the English course she failed during the first semester of tenth grade;
j. Capistrano shall fund compensatory education in the form of cognitive retraining; and
k. Capristrano shall reimburse Parent for the cost of the "QEEG" procedure/assessment.

Capistrano's Issues:

Was the evaluation undertaken by Brain Learning, and the attendant report, in August 2018, conducted in accordance with all legal requirements, so as to deny Student independent assessment(s) at public expense?

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.

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 the close of business on May 9, 2019 to delete duplicate exhibits from the exhibit binders. The parties are not required to renumber exhibits if they delete exhibits after the exchange of documents.

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 by the close of business on May 9, 2019.

Capistrano 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), Capistrano shall serve a copy of the school calendar(s) on Student by the close of business on May 9, 2019 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 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 prior to the beginning of the hearing to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter. Parent shall serve recordings of the IEP(s) on Capistrano by 5 p.m. on Tuesday, May 7, 2019. Parent shall serve transcriptions of the audio recordings by 5 p.m. on Wednesday, May 8, 2019

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 exchanged.

4. 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 timely disclosed.

The parties shall meet and confer by the close of business on May 9, 2019, 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 meet and confer by the close of business on May 9, 2019, and identify the witnesses 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, Capistrano's counsel shall inform Parent as to whether the

witnesses on Student's witness list are employed by or otherwise under the control of Capistrano and will be produced at hearing, and if not, shall provide Parent with the most recent contact information for that witness no later than the close of business on May 9, 2019.

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. Parties shall meet and confer each day of hearing to revise the witness schedule as needed. Student 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.

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.

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; 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; and shall ensure that the witness has a private, quiet location with no other persons present, from which to testify undisturbed. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's request to allow Dr. Katherine Williamson to testify by telephone was granted subject to the above-referenced requirements for telephonic testimony, and to their proper disclosure pursuant to Education Code section 56505 (e)(7).

7. 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. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

Student requested permission to make an audio recording of the hearing, and permission to record the hearing was granted to both parties, subject to the following conditions. Any party seeking to be permitted to make an audio recording will be 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) counsel shall not play any part of the recording for any prospective witness 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 when the ALJ's decision in this matter is issued.

Any recording made by counsel is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ.

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. 62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, in this consolidated matter, Student's Case was designated as the primary case. Accordingly, Student shall present its case-in-chief, followed by Capistrano, subject to paragraph 5, above.

9. Motions. No pretrial motions are pending or contemplated, other than Student's motion to quash Capistrano's subpoenas, filed on May 6, 2019. Capistrano's opposition to the motion shall be filed and served prior to 5 p.m. on Thursday, May 9, 2019. The motion will be taken under submission thereafter. 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 May 6, 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 written form. The parties shall meet and confer by the close of business on May 9, 2019, 2019 to determine legal and factual stipulations, if any, to be submitted at hearing.

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 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, unless otherwise permitted by the hearing ALJ.

13. 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, or email the ADA coordinator, as soon as the need is known. The e-mail address is OAHADA@dgs.ca.gov and the e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed To the Public. The hearing will be closed to the public.

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.

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.

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

IT IS SO ORDERED.

DATE: May 06, 2019

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Ted Mann
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TED MANN
Administrative Law Judge
Office of Administrative Hearings