BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2016110289
v.	ORDER FOLLOWING PREHEARING CONFERENCE OF DECEMBER 5, 2016; ORDER GRANTING MOTION TO CHANGE VENUE; ORDER GRANTING REQUEST TO CONTINUE HEARING
TEHACHAPI UNIFIED SCHOOL DISTRICT.	

On December 5, 2016, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Andréa Marcus, Attorney at Law, appeared on behalf of Student. Kyle Holmes and Darren Bogié, Attorneys at Law, appeared on behalf of Tehachapi Unified School District. The ALJ recorded the PHC.

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

1. Student's Motion for Change of Venue and District's Motion to Continue. Student made an oral motion to change venue for the hearing to OAH's offices in Van Nuys, California, or, in the alternative, to another location in Bakersfield, California, such as the offices of District's attorneys. Student asserted that she and her attorney have experienced previous acts of intimidation by police in Tehachapi, which have provided the basis for OAH to grant Student's motions to change venue in other cases involving District.

Under the Individuals with Disabilities Act and state law, hearings must be conducted at a time and place that is reasonably convenient to the parents and child involved. (34 C.F.R. §300.515(d); Ed. Code, §56505(b).) Therefore, due process hearings are generally scheduled at the school district offices, the office of the Special Education Local Plan Area to which the District belongs, or the regional OAH office closest to the parents' residence.

Although District voiced some opposition to Student's motion, it did not request an opportunity to brief the issue, and did not suggest an alternate location. District did, however, request that the hearing be continued from Wednesday, December 14, 2016, to Monday, December 19, 2016, if OAH granted the motion to change venue. The parties had already indicated that they were not available for hearing on Thursday, December 15, 2016, due to a conflict with a federal court proceeding. District also pointed out that the distance between Tehachapi and Van Nuys was about 100 miles and it was very inconvenient to ask the parties to attend a hearing in Van Nuys for just one day. District opined that it was more

logical to start the hearing the following week and hold it on continuous days given Student's representation that the entire hearing would take three to four days to complete.

Good cause appearing, Student's motion to change venue and District's motion to continue the hearing, **are granted**. As discussed below, witnesses will be permitted to testify telephonically.

2. Hearing Dates, Times, and Location. The hearing shall take place on December 19, 20, 21, and 22, 2016, and will continue thereafter day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Office of Administrative Hearings, 15350 Sherman Way, Suite 300, Van Nuys, CA 91406. Unless otherwise ordered, the hearing shall begin at 1:30 p.m. on December 19, 2016, and at 9:00 a.m. on all other days.

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.

3. Issues and Proposed Resolutions.[1] The issues to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, and Student's proposed resolutions, are:

A. Did District deny Student a free appropriate public education by interfering with her parents' right to participate in the individualized education program process when it did not allow Student to receive applied behavioral analysis treatment at school as prescribed by Student's doctor?

B. Did District deny Student a FAPE by failing to include a health plan in Student's IEP allowing for the provision of applied behavioral analysis treatment at school as prescribed by Student's doctor?

As remedies, Student requests:

A. An order that District is required to permit Student's applied behavioral analysis aide to accompany Student to school to administer applied behavioral analysis treatment to her during school hours.

B. Compensatory education, according to proof at hearing.

[1] Student's allegations raised under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 are beyond the jurisdiction of OAH and are hereby dismissed.

C. Any additional relief the ALJ deems appropriate.

4. 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.

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 5:00 p.m. on December 15, 2016,** 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, subdivision (e)(7), the parties shall exchange resumes and curriculum vitae by **5:00 p.m. on December 15, 2016.**

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 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 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.

5. 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, 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. 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 timely disclosed.

During the Prehearing Conference, the parties were ordered to meet and confer by **no later than 5:00 p.m. on December 15, 2016, at 5:00 p.m.,** and identify the witnesses the 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, Districts' 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 will be produced at hearing, and if not, shall provide Student's counsel with the most recent contact information for that witness no later than **December 15, 2016, at 5:00 p.m.**

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

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. District 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, 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.

6. 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. Unless otherwise ordered, only one round of redirect and/or re-cross examination shall be permitted.

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).) 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 witness is alone in their location at the time testimony is presented. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's motion to take the testimony of Dr. Copeland and Dr. Green by telephone is granted, based upon the distance of the witnesses' homes from the hearing venue. District's motion to take the testimony of its witnesses from the Tehachapi area, as needed, is also granted. At the beginning of the first day of hearing, the parties shall provide the ALJ with a final list of the witnesses who will be testifying telephonically.

8. 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's counsel and District's counsel shall be permitted to make an audio recording 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, 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; 8) No more than one person for each party may record the hearing; and 9) the parties shall destroy the unofficial recording when the decision in this case becomes final and/or all appeals are exhausted.

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/Photography. No party, witness or anyone else present may make any video recording or take any photographs 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].) Here, both Student has filed for due process. Student will present her case first, followed by District, subject to the order in Item 6 above.

10. Motions. Student's motion to change venue, District's motion to continue, the parties' motions for telephonic testimony, are granted as discussed above. 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 prehearing conference of December 5, 2016.

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. Neither party indicated a need for any accommodations in this case. If a party or participant to this case, such as a witness, later requires reasonable accommodation to participate in the mediation or hearing, the party or either party's attorney 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/Accessibility.aspx.

15. The Hearing Will Be 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 THE 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.

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

IT IS SO ORDERED.

DATE: December 7, 2016

DocuSigned by:
Darrell Lepkowsky
A228F8201132499...

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings