BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SANTA PAULA UNIFIED SCHOOL DISTRICT AND VENTURA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017041029 ORDER FOLLOWING PREHEARING CONFERENCE

On July 31, 2017, a telephonic prehearing conference was held before Administrative Law Judge Alexa J. Hohensee, Office of Administrative Hearings. Andréa Marcus, Attorney at Law, appeared on behalf of Student. Sundee M. Johnson, Attorney at Law, appeared on behalf of Santa Paula Unified School District (Santa Paula). Kimberly A. Smith, Attorney at Law, appeared on behalf of Ventura Unified School District (Ventura). 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 August 8-10 and 14-16, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Santa Paula's offices located at 201 S. Stecker Drive, Santa Paula, California 93060. The hearing shall begin at 9:30 a.m. on August 8, 2017, and at 1:30 p.m. on August 14, 2017, and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, Santa Paula 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. Santa Paula 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, District 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 District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical

outlet. District 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.

Did Ventura, from the beginning of the 2014-2015 school year through the individualized education program of November 21, 2014, and Santa Paula from Student's enrollment in November 2014 through the filing of the complaint, deny Student a free appropriate public education as follows:

1. Did Ventura and Santa Paula deny Student a FAPE by failing to identify and assess Student in all areas of suspected disability?

2. Did Ventura and Santa Paula deny Student a FAPE by failing to take into consideration Parent's requests for assessments in the areas of autism and attention deficit hyperactivity disorder?

3. Did Ventura and Santa Paula deny Student a FAPE by offering him half-school days and reduced instructional time, and long periods of non-instructional time, to address Student's behaviors in lieu of appropriate behavior intervention?

4. Did Ventura and Santa Paula deny Student a FAPE by failing to consider a continuum of placement options in determining the least restrictive environment for Student, thereby denying Parent the opportunity to meaningfully participate in the development of Student's individualized education program as an informed member of the IEP team?

5. Did Santa Paula deny Student a FAPE by failing to notify Parent by behavioral emergency reports each time its staff physically restrained Student, and by failing to hold emergency IEP team meetings to address Student's behaviors, so that Parent could participate in the development of an appropriate educational program for Student?

6. Did Santa Paula deny Student a FAPE by failing to assess Student's behavioral needs and offer alternative interventions for behavior in Student's IEP's once the interventions in place were proven ineffective?

7. Did Santa Paula deny Student a FAPE by failing to notify Parent by prior written notice of its decision to deny Parent's request for one-on-one applied behavior analysis support for Student?

As remedies, Student seeks: an independent educational evaluations in the areas of psychoeducational development and functional behavior analysis; District assessments of Student in language and speech, occupational therapy, vocational/prevocational functioning and assistive technology; a one-on-one aide to accompany him during the school day, supervised by a board-certified behavior analyst, or an order that Student's privately-funded applied behavior analysis services be administered at school; compensatory services; and an order that Santa Paula hold an IEP team meeting to develop goals and offer placement and services in conformance with the decision in this matter.

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 makes clear the party offering it (such as "S1" or "D2"). Ventura and Santa Paula shall separately identify their exhibits, unless the parties file a joint evidence binder, which is encouraged. 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 by 5:00 p.m. on August 1, 2017, 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.

The parties shall meet and confer by 5:00 p.m. on August 4, 2017, to eliminate duplicate exhibits from the exhibit binders. Duplicate exhibits and tabs should be removed from all binders prior to the first day of hearing. The parties shall not re-number exhibits after duplicates are removed. The parties are encouraged, if the total number of documents is not too large, to place the exhibits for all parties into one binder. Each exhibit shall consist of one document; separate documents may not be combined into one exhibit.

The parties shall include, as exhibits, resumes for each witness expected to testify as to their professional credentials. Ventura and Santa Paula shall include as part of their exhibits their respective school calendar(s) for the years at issue. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

If the parties intend to rely on individualized education programs, 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).

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. 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 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 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 disclosed in the party's prehearing conference statement and listed below, 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 disclosed at least five days before the hearing.

The parties are ordered to meet and confer by 5:00 p.m. on August 4, 2017, as to the schedule of witnesses. The parties shall 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. Student shall promptly inform Ventura and Santa Paula of the witnesses from each district that Student is likely to call at hearing. Ventura and Santa Paula shall promptly notify Student if any of the witnesses designated by Student are no longer under their control, and shall provide Student with the last known telephone and address information of witnesses not under their control so that Student may contact those witnesses and serve those witnesses with subpoenas. This information should be timely exchanged so that counsel can have a meaningful discussion of witness availability when they meet and confer.

Pursuant to the discussion on the record during the PHC, the parties shall arrange to have all witnesses relevant to the issues against Ventura called first. That is, Student shall call first the witnesses he proposes to have testify regarding the alleged actions or inactions of Ventura from the beginning of the 2014-2015 school year through the November 21, 2014 IEP team meeting, including any witnesses concerning the appropriateness of Ventura's assessments. Ventura shall then call its witnesses in defense of Student's claims. The hearing shall otherwise proceed in accordance with Paragraph 8, subject to the ruling on Student's pending motion to shift the burden of proof.

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. 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.

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 District shall have witnesses available in case agreement on a witness list is not reached.

The ALJ will finalize the witness schedule, and will revisit the schedule at the beginning and end of each hearing day. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

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. If a party intended to call a witness called first by the other party, that party shall complete their direct examination at the same time as their cross 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 physical 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. Electronic copies of the evidence binders will not be permitted. The witness must be on a clear telephone connection, and in a location that ensures the confidentiality of the proceedings. No witness will be heard by telephone unless all these requirements have been fulfilled.

Santa Paula's motion to allow Frida Friend to testify telephonically is granted. Santa Paula shall provide Ms. Friend with a complete physical 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.

Ventura's motion to allow Lisa Anctil to testify telephonically is denied, without prejudice to renewal at hearing when more information is known regarding Ms. Anctil's availability.

7. Electronic Recording of Hearing.

a. Audio Recording. Student requested permission to make an audio recording of the hearing. Any party who desires to make such a recording shall do so only on the

conditions that: (1) The parties shall turn on and off the recording device at the same time that the ALJ is on and off the record, in order to avoid recording conversations while off the record; (2) the parties shall not play any part of the recording for a prospective witness; (3) the parties shall not publish or play any part of the recording for any purpose other than assisting in the representation and presentation of this due process hearing; (4) the parties will erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and (5) the parties shall not use this recording in any subsequent due process hearing. OAH's recording is the only official recording; recording of the hearing by a party is not the official record and is permitted as a courtesy. The 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 Ventura and Santa Paula, except as specified in Paragraph 4.

9. Motions. Student's motion to shift the burden of proof is pending, and at the time of the PHC, Santa Paula indicated that it would be filing written opposition. Student's motion will be decided after the period for filing of opposition has passed, by a separate order.

Ventura was given an opportunity at the PHC to argue Ventura's motion for reconsideration of the July 28, 2017 Order denying Ventura's motion to bifurcate the hearing. OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

Ventura argued that the July 28, 2017 Order conflicted with an order in another OAH due process matter regarding Student's sibling. Prior administrative decisions have persuasive value in later cases, although they are not binding precedent. (Cal. Code Regs., tit. 5, § 3085.) Here, the order in the sibling case was not relevant or persuasive to Ventura's motion for bifurcation, as the sibling ruling merely deferred the discussion of whether bifurcation would be ordered to that case's PHC, the ruling was procedural and not substantive, and was based on the specific facts in that case. Accordingly, Ventura failed to make a showing of new or different facts, circumstances or law justifying reconsideration, and reconsideration was denied.

The ALJ explored the possibility of arranging presentation of witnesses to address those issues against Ventura first, in lieu of bifurcation, under the ALJ's broad authority to control the proceedings pursuant to Education Code, section 56505.1. Student's allegations against Ventura involve alleged actions and inactions that took place from August 2014 through November 2014, which constitutes a small portion of the time period to be addressed during the six days reserved for hearing. Student's claims against Ventura pre-date those against Santa Paula, and calling these witnesses in chronological order promotes the efficient presentation of testimonial and documentary evidence. Accordingly, the parties were ordered, during their meet and confer on the witness schedule, to arrange presentation of the witnesses relevant to Student's issues against Ventura first, unless a different witness schedule is agreed upon among the parties. The ALJ will finalize the witness schedule on the first day of hearing.

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.

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 Spanish language interpreter is required.

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.

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 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.

If the matter settles 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. The hearing dates will not be cancelled 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: August 1, 2017

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings