BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: JOHN SWETT UNIFIED SCHOOL , v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018050384 ORDER FOLLOWING PREHEARING CONFERENCE

On May 29, 2018, a telephonic prehearing conference was held before Administrative Law Judge Tiffany Gilmartin, Office of Administrative Hearings. Leah Smith and Faatima Seedat, Attorney at Law, appeared on behalf of John Swett Unified School District. Parent appeared on behalf of Student. The PHC was recorded.

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

1. Ex Parte Communication. At the outset of the prehearing conference it was discovered that OAH had received an ex parte communication from Parent in the form of a one-page document unsigned by Parent. The document was not addressed to anyone nor did it have a case number. It also did not include a proof of service upon John Swett's counsel of record.

Any document filed in connection with a pending special education hearing must be either delivered personally or sent by mail or other means to the opposing party in the case or, if the party is represented, to their attorney or other authorized representative. (Cal. Code. Regs., tit. 5, § 3083, subd. (a).) Delivery may be by first class mail. Delivery by facsmile or other electronic means is also allowed if agreeable to the parties. (Cal. Code. Regs., tit. 5, § 3084, subd. (b).) All parties must receive any document filed with OAH. (Cal. Code. Regs., tit. 5, § 3084, subd. (c).)

Ex parte communications are not permitted while a due process proceeding is pending. "While special education due process hearing proceedings are pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to a hearing officer from an employee or representative of a party or from an interested person unless the communication is made on the record at the hearing." (Cal. Code. Regs., tit. 5, § 3084, subd. (a).) When an ex parte communication is received, the administrative law judge presiding over the matter must disclose the communication to all parties, make it part of the record, and allow the parties an opportunity to address the matter within 10 days of receipt of the notification of communication. (Cal. Code. Regs., tit. 5, § 3084, subds. (c)-(e).)

Parent was ordered to serve a copy of the document on John Swett's counsel by 3:00 p.m. on Tuesday, May 29, 2018. John Swett has three days following receipt of service of the document filed with OAH by Student on May 22, 2018, to file any responsive motion to Parent's ex parte communication.

2. Hearing Dates, Times, and Location. The hearing shall take place on June 5, 6, and 7, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 400 Parker Avenue, Rodeo, CA 94572. 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, John Swett shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 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. John Swett's counsel certified that the facilities used for this case comply with the law. John Swett 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, John Swett 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 John Swett legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. John Swett 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

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. The sole issue to be considered at the due process hearing, and the proposed resolution is:

Whether John Swett's offer of placement and services, most recently communicated via IEP offered dated February 12, 2018, constitute a free appropriate public education within the least restrictive environment?

As resolution, John Swett requests an order determining the most recently communicated via IEP offer dated February 13, 2018 constitutes a FAPE within the LRE and it may be implemented over Parent's refusal to consent.

4. Exhibits. Parties agreed to exchange exhibits in person at 10:00 a.m. on Wednesday, May 30, 2018. 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.

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 the ALJ rules that it is admissible.

5. 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 and the ALJ deems it relevant.

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 parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. A joint written witness list with dates and estimated times for direct examination shall be presented to the ALJ at the commencement of the hearing. If this is not possible, each party shall create a list for the witnesses they plan to call. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, 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 of each such witness is expected to take.

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.

7. Telephonic Testimony. No telephonic testimony is anticipated by either party. 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.

8. Electronic Recording of Hearing.

a. Audio Recording. Both parties are granted permission to 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, in order to avoid recording conversations while off the record; and 3) the recording device will be removed by the party recording during any recess where the party leaves the room; 4) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a private recording is not allowed to be used to prepare the testimony of an upcoming witness in 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.

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, John Swett is the petitioning party. Accordingly, John Swett bears the burden of proof and shall present its case-in-chief, followed by Student.

10. Motions. No pretrial motions are pending or contemplated. Any motion that was not filed by the date the Prehearing Conference statement was due, that is, 3 business days prior to the date of the Prehearing Conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

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. Stipulations to routine foundational facts and avoiding duplicative exhibits are particularly favored. 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 has requested accommodations for any special needs. Nor has either party requested translation. 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.

15. Hearing Closed To the Public. At the request of Student, 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 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.

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

IT IS SO ORDERED.

DATE: May 29, 2018

DocuSigned by:
Tiffany Gilmartin
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TIFFANY GILMARTIN
Administrative Law Judge
Office of Administrative Hearings