BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. MENIFEE UNION SCHOOL DISTRICT,	OAH Case No. 2017100838
MENIFEE UNION SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017110585 ORDER FOLLOWING PREHEARING CONFERENCE

On December 4, 2017, a telephonic prehearing conference was held before Administrative Law Judge Kara Hatfield, Office of Administrative Hearings. Mother appeared on behalf of Student. Cynthia Vargas, Attorney at Law, appeared on behalf of Menifee Union 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 December 12, 13, 14, and 18, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at District's office at 30205 Menifee Rd., Menifee, California 92584. The hearing shall begin at 9:30 a.m. the first day of the hearing and on December 18, 2017, and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, District 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. District certified that the facilities used for this case comply with the law. District 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 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:

Pursuant to an exception to the statute of limitations, did District deny Student a free appropriate public education since 2011 by:

1) failing to provide Student specially designed physical education required by title 20 United States Code section 1402(25) and California Education Code sections 51210, subdivision (a)(7), and 51223; and

2) substituting the related service of physical therapy in place of physical education, a direct instruction special education service?

Student contends she has timely filed her claims presented in her October 17, 2017 complaint based on the exception to the two-year statute of limitations for a district's withholding of information from the parent that the district was required to provide. Student alleges District was required but failed to inform Parent that Student was entitled to either special physical education, specially designed physical education, or adapted physical education.

Student's proposed remedy is 350 hours of compensatory education described as adapted physical education from a nonpublic agency, and one-to-one adapted physical education two times a week for 60 minutes each session.

District's Issue:

May District assess Student pursuant to the October 13, 2017 triennial reassessment plan without parental consent?

District's proposed remedy is an order authorizing District to assess Student pursuant to the October 13, 2017 assessment plan without parental consent and to have included in the order a statement that if Parent wants to avail Student to a publicly funded education, she must make Student available for the assessments proposed in the October 13, 2017 assessment plan.

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 binders shall be in chronological order.

The parties shall meet and confer **by December 8, 2017,** to delete duplicate exhibits from the exhibit binders. **If the parties have duplicate exhibits, they shall jointly determine which shall be used at hearing. The duplicate exhibit not to be used shall be removed from the respective binder prior to the hearing.** The parties are not required to renumber exhibits if exhibits are deleted from notebooks.

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 not later than **December 8, 2017.**

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 serve a copy of the school calendar(s) on Student **by December 8, 2017,** 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 IEPs, 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 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, 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 disclosed at least five business days before the hearing.

The parties shall meet and confer **by December 8, 2017**, 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 also meet and confer regarding the one joint detailed hour-by-hour schedule.

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

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.

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 unless otherwise permitted by the ALJ. 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.

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. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of duplicate physical copies of the exhibit binders from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. Faxed or electronic copies are unacceptable. The hearing room shall have sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled. Neither party requested telephonic testimony.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's request to audio record the hearing is granted. Either party may make an audio recording of the hearing as a courtesy and subject to the following conditions: 1) the ALJ's recording is the only official recording, unless otherwise ordered; 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) the recording may only be used by Mother and District's attorney, may not be shared with others, may not be played to any witness or any prospective witness, and may not be published or disseminated in any form or by any means; 5) the recording shall not be used for any purpose other than assisting in the representation and presentation of this due process hearing; 6) the parties shall erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and 7) the parties shall not use this recording in any

subsequent due process hearing or other proceeding. Any person violating this order shall be subject to sanctions.

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 in her case, and District is the petitioning party in its case. Accordingly, subject to the parameters discussed in Paragraph 5, Student shall present her case-in-chief, followed by District.

9. Motions.

a. November 20, 2017 Order Requiring Written Briefs Regarding Exception to Statute of Limitations. On November 17, 2017, District filed a Motion to Define the Statute of Limitations in Student's Complaint and Clarify the Issues for Hearing. During the November 20, 2017 PHC, District made an oral motion to bifurcate the due process hearing, to first conduct a hearing regarding the statute of limitations. As stated in the November 20, 2017 Order Following Prehearing Conference, the parties are ordered to serve and file written argument regarding the exception to the statute of limitations upon which Student relies **by 5:00 p.m. on December 5, 2017**. Student contends she may bring claims dating back to when Student was found eligible for special education in 2011 because District withheld information from Parent that District was required to provide. Student alleges District was required but failed to inform Parent that Student was entitled to either special physical education, specially designed physical education, or adapted physical education. The parties shall address 1) any legal authority regarding whether District was required to inform Parent that Student was entitled to either special physical education, specially designed physical education, or adapted physical education, and 2) regardless of whether District was or was not legally required to inform Parent that Student was entitled to either special physical education, specially designed physical education, or adapted physical education, what evidence would be presented at hearing regarding if District did not, or did, inform Parent that Student was entitled to either special physical education, specially designed physical education, or adapted physical education. Each party may file a written response to the other party's written argument **by 5:00 p.m. on December 8, 2017**.

b. 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 by November 29, 2017.

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 December 8, 2017**, to determine legal and factual stipulations, if any, to be submitted at hearing and before the record closes.

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. No eating is permitted in the hearing room while the ALJ is on the record.

13. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any other witness or party, or for translation services.

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: http://www.dgs.ca.gov/oah/Home/Accommodations.aspx

14. The Hearing Will Be Open to the Public. At Student's request, the hearing is open 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 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 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: December 5, 2017

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Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings