BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SAN MARCOS UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018080080 ORDER FOLLOWING PREHEARING CONFERENCE; ORDER DENYING STUDENT'S CONTINUANCE REQUEST

On December 3, 2018, a telephonic prehearing conference was held before Administrative Law Judge Sabrina Kong, Office of Administrative Hearings. Attorney Soo Yun appeared on Student's behalf. Attorney Sarah Orloff appeared on San Marcos School District's behalf. The PHC was recorded.

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

Student's Motion to Continue Hearing at PHC:

Student requested a continuance because of: an upcoming individualized education team meeting, future completion of independent evaluation reports, and the unavailability of its two experts, B.J. Freeman, and Karen Schnee. San Marcos objected to the request as untimely and prejudicial because based on prior OAH hearing continuance and order that the hearing shall proceed on its currently scheduled dates it arranged for all witnesses to be available based on current hearing dates.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other

pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

This request for continuance was untimely, not requested three business days before this PHC. Further, ALJ did not find good cause to continue the hearing. The due process hearing had been filed on August 2, 2018, continued once and an amended complaint filed in October 2018. The October 15, 2018 PHC Order explicitly stated, "As OAH previously continued this matter on August 30, 2018, any additional continuance must establish good cause by way of declaration." The parties had notice of the current hearing dates since October 15, 2018, and Student had ample time to inform his two experts. Further, the results of future IEPs and evaluations was not good cause to continue the hearing because Student could file another due process complaint based on the results of those future events. Moreover, ALJ granted Student's request to have his two experts testify telephonically, alleviating their inability to appear in person at hearing. *See,* paragraph six below under "Telephonic Testimony" for details. Based on the foregoing, Student's request for a hearing continuance at the PHC is denied.

1. Hearing Dates, Times, and Location. The hearing shall take place on December 11, 12, and 13, 2018, continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the San Marcos's offices located at 255 Pico Ave., Suite 250, San Marcos, CA 92069. 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, San Marcos 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. San Marcos shall certify that the facilities used for this case comply with the law within two days of the date of this order, or inform OAH if it is unable to comply with this order.

Prior to the beginning of the hearing, San Marcos 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 San Marcos's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. San Marcos shall also make reasonable efforts to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

San Marcos filed its response to Student's amended complaint on October 24, 2018, which permits the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

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.

a. Did San Marcos deny Student a free and appropriate public education from August 2, 2016 to October 11, 2018 by: (i) failing to provide Parents with progress and information in a timely manner for meaningful participation in the development of Student's individualized education program; (ii) failing to provide Parents with assessment information in a timely manner for meaningful participation in the development of Student's IEP; (iii) depriving Parents the opportunity to participate in the decision making process about Student's (1) placement; (2) behavioral services; (3) speech and language services; (4) occupational therapy services?

b. Did San Marcos deny Student a FAPE from August 2, 2016 to October 11, 2018 by failing to offer appropriate: (i) behavior intervention and supports; (ii) sufficient speech and language services; and (iii) and sufficient occupational therapy services?

c. Did San Marcos deny Student a FAPE by failing to offer appropriate placement in the least restrictive environment at the June 13, 2018 IEP team meeting?[1]

d. Did San Marcos file for due process hearing without unnecessary delay following Parents' request for an independent educational evaluation?

As proposed resolutions, Student seeks compensatory education, independent evaluations, and appropriate services for Student.

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[1] This issue is part of this hearing but subject to final determination by ALJ on the first day of hearing. At the PHC, Student's attorney represented that the issue of placement was stated throughout the first amended complaint, but she did not have the access to the first amended complaint at the PHC and could not provide specific citations. At the PHC San Marcos' attorney represented that placement was referenced in the first amended complaint, but was not stated as an issue, so therefore should not be an issue at hearing. Based on technical difficulties, ALJ was unable to access the first amended complaint to make a final ruling. ALJ ordered Student's attorney to file with OAH and serve on all parties a document citing to all references in the first amended complaint where San Marcos was placed on notice that this was an issue at hearing no later than 9:00 a.m. on December 4, 2018. San Marcos' attorney was ordered to file with OAH and serve on all parties a document supporting why this issue should not be heard at hearing because San Marcos had no notice of it and it was not properly referenced in the first amended complaint. San Marcos' attorney was given three extra hours to file its document, by noon on December 4, 2018, so she may respond to Student's attorney's document at the same time without the need for a second filing.

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 San Marcos 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.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials.

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.

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. 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, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by December 4, 2018 as to the schedule of witnesses and present a witness schedule at hearing pursuant to the example below, to 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.

Example:

The following witnesses will be called to testify on December 11, 2018:

1. Jane Smith at 10:00 a.m.
2. Bob Jones at 11:00 a.m.

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

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. The order in which the parties present their case in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. Student requested telephonic testimony for its expert witnesses, Dr. B.J. Freeman, and Ms. Karen Schnee because he would like to avoid the costs of travel and lodging expenses for them. Both expert's offices were at least 100 miles from San Marcos. San Marcos objected based on its right to cross-examine both experts in person. ALJ granted telephonic testimony of both experts based on: (1) Both experts have had recent health issues preventing them from long distance driving and/or spending the night which the hearing would require; (2) Student's representation that each expert's testimony would be an hour and a half to two hours (including cross-examination); and subject to the requirements set forth in this paragraph. 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. Testimony shall be on a land line, in a room where witness shall be alone. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e) (7), provides for disclosure of witnesses and exhibits at least five business days prior to the hearing.

8. Electronic Recording of Hearing.

a. Audio Recording. Both parties moved to audio record the hearing. The parties' request to make an audio recording of the hearing is granted as a courtesy and 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, to

avoid recording conversations while off the record; 3) that operation of the party's recording mechanism will not be allowed to delay the hearing; 4) that the recording shall not be played or published for a prospective witness; 5) that the recording shall not be used for any purpose other than assisting in the representation and presentation of this due process hearing; 6) that 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) that the parties shall not use this recording in any subsequent due process 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].) In this matter, Student shall present his case-in-chief first, followed by San Marcos.

10. Motions. No 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 timely made, three business days before the prehearing conference.

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. Student requested a Korean interpreter for Parents. No other accommodations were requested at the PHC. 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

15. Hearing 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.applications.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.

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

IT IS SO ORDERED.

DATE: December 3, 2018

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Sabrina Kong
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SABRINA KONG
Administrative Law Judge
Office of Administrative Hearings