BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017061033
v.	ORDER FOLLOWING PREHEARING CONFERENCE
ANTIOCH UNIFIED SCHOOL DISTRICT.	

On May 7, 2018, a telephonic prehearing conference was held before Administrative Law Judge Tiffany Gilmartin, Office of Administrative Hearings. Jean Murrell Adams, Attorney at Law, appeared on behalf of Student. Amy R. Levine, Attorney at Law, appeared on behalf of Antioch Unified 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 May15, 16, and 17, 2018 and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Antioch's offices located at 510 G Street, Antioch, California 94509. 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, Antioch 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. Antioch certified that the facilities used for this case comply with the law. Antioch 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, Antioch 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 Antioch's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Antioch 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. If the room is not in compliance with the Americans with Disabilities Act and related laws, Antioch will be required to move the hearing to a suitable room.

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.

The ALJ will afford both parties a limited amount of time at the start of the hearing to introduce evidence of the date Student knew or had reason to know of the facts underlying the basis for her claims regarding alleged violations of law that pre-date June 22, 2015. To make the most efficient use of their hearing time, the parties are encouraged to prepare a written statement of stipulated facts signed by both counsel and to submit this at the start of the hearing on May 15, 2018. By Friday, May 11, 2018 the parties shall exchange, and file with OAH, a proposed joint witness list with time estimates for direct and cross examination for those witnesses they intend to call regarding this preliminary question.

Counsel will be allotted the morning of the first day of hearing to present evidence of when Student was aware of the basis for her claims.[1] After hearing evidence on this question, the ALJ will issue a ruling from the bench as to when Student knew or had reason to know of the facts underlying her claims and whether Student is entitled to bring claims that pre-date June 22, 2015. The parties shall be prepared to immediately proceed with the hearing as to the remaining issues following the ruling on the record. The ALJ's analysis will be contained in the final decision following hearing.[2]

2. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

1. Did Antioch deny Student a free appropriate public education by failing to make him eligible for special education and related services from at least January 2015 through August 2015?

2. Did Antioch deny Student a FAPE by failing to provide comprehensive assessments in all areas of suspected disability, specifically psycho-education, speech, health, mental health, and behavior, from at least January 2015 through August 2015?

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[1] An ALJ may set a reasonable time limit on the length of a hearing considering the issues to be heard; the complexity of the issues; the ability of the parties to present their case; and the estimates the parties gave in which to present their case. (Ed. Code, § 56505.1, subd.(h).)

[2] Counsel shall complete their presentation of evidence prior to the start of the afternoon session on May 15, 2018. The ALJ anticipates ruling the afternoon of March 15, 2018, or by the start of hearing on March 16, 2018.

3. Did Antioch deny Student a FAPE by failing to tailor an appropriate educational program to meet his unique needs from at least January 2015 through August 2015?

4. Did Antioch deny Student a FAPE by failing to timely inform Parent of her procedural safeguards, failing to include Parent in the decision-making process[3] regarding providing a FAPE to Student, and failing to provide prior written notices, thus violating Student's and Parent's procedural rights from at least January 2015 through August 2015?

As resolutions, Student requests:

1. Antioch shall fund Student's independent educational evaluation conducted by Dr. Robert Rome, fund a Speech and Language Evaluation by Speech Pathology Group, and fund an ERMHS assessment and educationally-related health assessments by qualified assessors of Parent's choice, including their attendance at Student's IEP meeting to review their reports;

2. Antioch shall conduct staff training regarding procedural safeguards and parent rights pursuant to the Individuals with Disabilities Education Act, including but not limited to making multiple SST [student study team] meetings a prerequisite to special education assessments, failing to include parents in the decision-making process regarding the need to assess, and failing to provide prior written notices.

3. Antioch shall provide Student with compensatory education in all areas of need, including but not limited to, intensive remedial academic instruction in language arts and mathematics, tutoring services, educational therapy, counseling, and reimbursement for educational and related services.

4. Any additional assessments/services as demonstrated by the evidence at hearing and/or by the Antioch's delay of these proceedings.

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.

[3] During the PHC the parties agreed that "decision-making process" referred to the assessment process, given the change of time periods now at issue.

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 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.

Counsel for Antioch indicated she would make witnesses who are currently employed by Antioch available to Student without the need for a subpoena. Antioch will not make District board president Walter Ruehlig available to Student without a subpoena. Antioch will provide to Student by noon on May 11, 2018 a written notice counsel has the authority to accept service of the subpoena on Mr. Ruehlig's behalf; or Antioch will arrange for a one hour window of time on Monday May 14, 2018 where Mr. Ruehlig is available to accept subpoena. If Antioch elects this option, notice confirming the specific hour it will make Mr. Ruehlig available shall be provided to Student's counsel no later than 3:00 p.m. on Friday May 11, 2018.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. Antioch 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 cases in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. Antioch may make a motion to have a witness testify telephonically at the hearing. This issue is reserved until the first day of hearing. 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.

7. Electronic Recording of Hearing.

a. Audio Recording. Antioch's motion to make an audio recording of the hearing is granted, 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) that operation of the party's recording mechanism will not be allowed to delay the hearing. If Student desires to make such a recording, Student may do so.

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 bears the burden of proof and shall present his case-in-chief first, followed by Antioch.

9. 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 made prior to or during the prehearing conference.

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.

At present no party anticipates a need for any particular accommodation for any participant. 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. At the request of Student, the hearing will be closed to the public. Student requested another Attorney from her firm also be allowed to view the hearing for training purposes. Antioch objected. This issue is reserved pending the start of the hearing.

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 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.

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

IT IS SO ORDERED.

DATE: May 8, 2018

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