BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. COMPTON UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015110718 ORDER FOLLOWING PREHEARING CONFERENCE AND DISMISSING NON-JURISDICTIONAL CLAIMS, AND GRANTING JOINT MOTION TO ADD ONE HEARING DAY

On January 4, 2016, a telephonic prehearing conference was held before Administrative Law Judge Caroline A. Zuk, Office of Administrative Hearings. Ben Conway, Attorney at Law, appeared on behalf of Student. Elliot Field, Attorney at Law, appeared on behalf of Compton 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 January 7, 19, 20, 21 and 25, 2016, 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 2300 Caldwell Avenue, Compton, California 90220. The hearing shall begin at 1:30 p.m. the first and second day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency 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. The named local educational agency 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 her 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. Dismissal of Claims Outside OAH Jurisdiction. Student's complaint, specifically issue 5, raises claims that allege District's actions violate Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (Section 504), 42 U.S.C. § 1983 (Section 1983), and State civil rights laws. Student moved to dismiss these claims on the grounds that OAH had no jurisdiction to hear them. District did not oppose Student's motion.

OAH does not have jurisdiction to entertain claims based on Section 504, Section 1983, or other related state and federal civil rights laws. The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education", and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Student's motion is granted. Accordingly, the claims alleged in what Student identified as issue 5 in the complaint are dismissed. The matter shall proceed to hearing on the remaining issues, stated below.

3. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.[1]

[1] Based on the discussion and agreement between the parties during the prehearing conference, Student's issues were clarified and reorganized from those set forth in the due process complaint and Student's prehearing conference statement. At the beginning of the due process hearing, the parties shall have an opportunity to review the issues as set forth in this order to ensure that they comport with the discussion during the prehearing conference.

a) Did District deny Student a free appropriate public education from September 2011 through October 2013 by failing to:

i) offer assistance to Student's parents to make their verbal requests for an assessment in writing;

ii) provide Student's parents with required written notice regarding procedural safeguards;

iii) provide Student's parents with prior written notice regarding District's refusal to assess Student; and

iv) satisfy District's child find duty by failing to assess Student for a suspected specific learning disability?

b) Did District deny Student a FAPE from November 2011 through October 2013 by failing to find Student eligible for special education because of a specific learning disability and develop an individualized education program for her?[2]

c) Did District deny Student a FAPE between November 13, 2013 and June 2014 by:

i) failing to offer assistance to Student's parents to make their verbal requests for an assessment in writing;

ii) failing to provide Student's parents with required written notice regarding procedural safeguards;

iii) failing to provide Student's parents with prior written notice regarding District's refusal to assess Student; and

iv) failing to satisfy District's child find duty by failing to assess Student for a suspected specific learning disability?

[2] Student filed her complaint on November 13, 2015. During the prehearing conference, the parties discussed District's position that issue 3(a), and its subparts, and issue 3(b) are time barred due to the two-year statute of limitations. Student alleged an exception to the statute of limitations based on District's alleged failure to provide parents with required written notices. An evidentiary hearing is required to determine whether an exception to the statute of limitations applies here.

d) Did District deny Student a FAPE between November 13, 2013 and July 28, 2014, by failing to find Student eligible for special education because of a specific learning disability and develop an IEP for her?

e) Did District deny Student a FAPE between November 13, 2013 and May 2015, by failing to conduct a speech and language assessment?

f) Did District deny Student a FAPE from November 13, 2013 through November 13, 2015, by failing to conduct appropriate assessments in the areas of auditory processing and assistive technology?

g) Did District's July 29, 2014, October 9, 2014, June 3, 2015, and October 14, 2015 IEP's deny Student a FAPE by:

i) failing to include a statement of Student's needs in the area of assistive technology;

ii) failing to include appropriate statements regarding Student's present levels of academic achievement and functional performance;[3]

iii) failing to include appropriate academic and functional goals to meet Student's unique needs;

iv) failing to offer appropriate speech and language services;

v) predetermining Student's placement; and

vi) failing to offer extended school year services?

h) Did District's October 9, 2014 and June 3, 2015 IEP team meetings deny Student a FAPE by failing to ensure that the IEP team included the required participants?

i) Did District's July 29, 2014 and October 9, 2014 IEP's deny Student a FAPE by failing to include a determination that no additional data was needed to determine Student's unique needs?

[3] Student shall meet and confer with District to clarify issues 3(g)(ii), 3(g)(iii), and 3(h) based on the allegations in the complaint, and provide OAH and District with a written statement regarding any stipulations between the parties regarding these issues by January 7, 2016, at 9:30 a.m.

j) Did District deny Student a FAPE between March 28 and November 13, 2015, by failing to ensure that Student's general education teachers were trained on how to implement Student's then-current IEP?

k) Did District deny Student a FAPE by failing to provide her parent with copies of service logs and standards-based testing in response to parents' March 2015 request for a copy of all educational records?

l) Did District deny Student a FAPE between October 2014 through November 13, 2015 by failing to provide independent educational evaluations, or initiate a due process hearing to defend its assessments, in the areas of cognition, auditory processing, executive functioning, academic achievement, speech and language, and audiology?

m) Did District deny Student a FAPE by failing to materially implement Student's October 9, 2014 IEP between March 28 and October 20, 2015 by failing to:

i) fully implement resource specialist program services; and

ii) implement any IEP goals?

Student's proposed resolutions are:

a) placement in a nonpublic school, preferably the Prentice School in Tustin, California;

b) participation in the federal free lunch program or development of a system for providing free school lunches to Student;

c) transportation between home and a preferred nonpublic school through a nonpublic agency;

d) an IEP containing appropriate present levels performance and goals;

e) one hour per week, each, of individual and group speech and language therapy provided by a nonpublic agency at a nonpublic school, such as Prentice;

f) educationally related mental health services, counseling, and/or positive behavioral supports, and educational therapy in reading and mathematics, to be provided after school in the home or another location convenient to parents provided by a nonpublic agency;

g) extended school year services;

h) compensatory education, including prospective placement at the Prentice School for at least two years, including transportation; 75 hours of speech therapy

by parents' preferred nonpublic agency; 50 hours of tutoring in mathematics by parents' preferred nonpublic agency; and at least 200 hours of intensive reading intervention, such as the Lindamood Bell program; and

i) reimbursement for parents' private educational expenses, including tuition, meals, mileage, airfare, and evaluation fees.

4. 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.

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.

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, 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.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. District 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.

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. 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. The proponent of the witness shall also ensure that the witness provides testimony in a private room and has access to a landline. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's unopposed motion to allow Dr. Jay Lucker, an independent evaluator from Georgetown University, to testify telephonically is granted, subject to the above requirements.

8. Electronic Recording of Hearing.

a. Audio Recording. The parties' joint 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; 3) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 4) that the audio recordings shall be destroyed by or on the date of appeal of the final administrative decision regardless of whether any party invokes it right to appeal the decision.

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, Student is the petitioning party. Accordingly, Student shall present its case-in-chief, followed by District.

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 made prior to or during the prehearing conference of January 4, 2016.

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. The parties did not request any accommodations. 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 Open To the Public. At the request of Student, the hearing will be open to the public. The parties are advised that Student's request that the hearing be open to the public does not limit the authority of the ALJ hearing this matter to order closure of a hearing or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the particular case, or for other purposes as set forth at Government Code, section 11425.20. The ALJ may also exclude persons whose actions impede the orderly conduct of the hearing, restrict attendance because of the physical limitations of the hearing facility, or take other action to promote due process or the orderly conduct of the hearing. (Cal. Code Regs., tit. 1, § 1030.)

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 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.

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

IT IS SO ORDERED.

DATE: January 05, 2016

/S/

CAROLINE A. ZUK
Administrative Law Judge
Office of Administrative Hearings