BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017100838
v.	ORDER FOLLOWING PREHEARING CONFERENCE, DENYING WRITTEN MOTION TO DEFINE THE STATUTE OF LIMITATIONS, DENYING ORAL MOTION TO BIFURCATE HEARING REGARDING STATUTE OF LIMITATIONS, AND REQUIRING WRITTEN BRIEFS REGARDING EXCEPTION TO STATUTE OF LIMITATIONS
MENIFEE UNION SCHOOL DISTRICT.	

On November 20, 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 is continued as part of granting District's motion to consolidate, issued under separate order. The prehearing conference in the consolidated cases shall take place on December 4, 2017, at 3:00 p.m.[1] The date by which mediation requests, prehearing conference motion(s), and prehearing conference statements must be filed is November 29, 2017. 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.

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

[1] Further orders regarding the conduct of the due process hearing will be made at that time and the information provided in paragraphs below regarding exhibits is only intended to facilitate the parties' preparation for hearing and is not a full statement of the requirements.

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 Student's issues at the due process hearing, and the proposed resolutions, are listed below.

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 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 compensatory education described as adapted physical education, and one-to-one adapted physical education three times a week for 60 minutes each session.

3. 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. District requested that the Student's claims be limited only to the period covering two years before the date Student filed her complaint. District submitted as exhibits to its motion a copy of Student's individualized education program from December 2, 2014, and a copy of the notice of procedural safeguards and parents' rights District asserts it provided Parent in December 2014, as indicated by Parent's initials on the December 2, 2014 IEP acknowledging receipt of the notice of procedural safeguards and rights.

The parties argued the motion during the PHC. Student and District both rely on Education Code section 51210, subdivision (a)(7), but Student does not agree with District's interpretation that the statute only includes physical education as a curricular requirement for students in first through sixth grades, such that Student was not entitled to physical education as a curricular requirement before the 2015-2016 school year. Student did not agree to narrow her claims to the time period since two years before she filed her complaint (since October 17, 2015), or since the beginning of the 2015-2016 school year.

Although special education law does not provide for a summary judgment procedure, OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction (e.g., civil rights claims, Section 504 claims, incorrect parties, etc.). However, for a claim such as Student's, that there is an exception to the statute of limitations, it is sometimes necessary to conduct an evidentiary hearing. Based on the current state of this case and the lack of a summary judgment procedure in special education law, District's motion to limit the statute of limitations is denied.

District made an oral motion to bifurcate the due process hearing, to first conduct a hearing regarding the statute of limitations, and after a ruling on that phase of the hearing, proceed to hearing regarding the substance of Student's claim that District denied Student a FAPE during the time period as determined in the first phase of the hearing. The motion to bifurcate is denied.

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**.

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.

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 exchange resumes for each witness who is expected to testify as to their professional credentials.

District shall include as part of its exhibits the school calendar(s) for all of the years at issue, at this time including the 2011-2012 school year.

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.

5. 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.

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

IT IS SO ORDERED.

DATE: November 21, 2017

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Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings