BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016030010 (Primary)
PARENT ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016020203 ORDER FOLLOWING PREHEARING CONFERENCE OF MAY 23, 2016; ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS ISSUES

On May 23, 2016, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Ernest Bell, Attorney at Law, appeared on behalf of Capistrano Unified School District. Adriana F. Nusbickel, Attorney at Law, appeared on behalf of Student. The ALJ recorded the PHC.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on **May 3l, 2016, and June 1, 2, 7, and 8, 2016,** and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at District's offices located **at Capistrano Unified School District, 33122 Valle Road, Washington Room #260, San Juan Capistrano, CA 92675. The hearing shall begin at 1:30 p.m. on the first day of the hearing, at 9:30 a.m. on June 7, and at 9:00 a.m. all other days, unless otherwise ordered.**

As ordered in the scheduling order, the named local educational agency 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. The named local educational agency certified that the

facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

The hearing room shall be available to the ALJ one hour before the scheduled hearing, and shall be secured and locked at the end of each hearing day. **The same hearing room shall be used for each day of hearing in any given week the hearing is held**, unless otherwise ordered. 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 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 ensure that drinking water and tissue are available to all parties, witnesses and the ALJ. **District shall also ensure that a separate room is made available at the hearing location for the use of Student and her representatives during hearing breaks, including lunch.**

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.

District's Issues:[1]

I. Did District's January 11, 2016 individualized education plan offer provide Student a free appropriate public education although it did not include transportation as a related service?

II. Are District's testing accommodations in the January 11, 2016 offer of a placement, program, and services appropriate such that they provide Student a FAPE?

[1] District's original issue one of its amended complaint stated "Whether the District's January 11, 2016 offer of a placement, program and services constitutes a FAPE for [Student] in her LRE." In its prehearing conference statement, as confirmed during the PHC, District narrowed the issues to the two aspects of its January 11, 2016 offer stated in Issues I and II above.

District also raised the following as an issue for hearing in its amended complaint: "Whether the District's February 8, 2016 response to Student's request for due process violated any procedural requirement, and thereby denied Student a FAPE." As discussed below, Student's motion to dismiss this issue is granted.

District's Proposed Resolutions:

1. An order that its January 11, 2016 offer of placement, program, and services constitutes a FAPE for Student and may be fully implemented without her Parents' consent even though the offer did not include transportation as a related service; and,

2. An order that the testing accommodations provided to Student were appropriate and therefore provided her with a FAPE.

Student's Issues:

I. Did District deny Student a FAPE when it failed to provide timely notice of District's intention to hold Student's annual IEP team meeting, resulting in Parent being unable to attend because she was not available on the date scheduled by District?

II. Did District deny Student a FAPE when it held an individualized education program team meeting without Parent on November 17, 2015, and developed an IEP without Parent's input and participation?

III. Did District's failure to offer Student curb-to-curb transportation as a related service during the 2014-2015 and 2015-2016 school years deny Student a FAPE?

Student's Proposed Resolutions:

1) An order that District reimburse Parent for the cost of Student's transportation to and from school from November 1, 2014, until the date of OAH's decision in this case;
2) An order that District find Student eligible for curb-to-curb transportation service and provide the services to Student prospectively;
3) An order that District hold another annual IEP team meeting for Student ensuring Parent is present;
4) A finding that Student is the prevailing party; and
5) All further remedies as the ALJ may deem just and equitable.

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.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. To the extent practicable, exhibits in the exhibit binders shall be in chronological order.

In the event of duplicate exhibits, the most legible version will be used. The parties shall meet and confer **5:00 p.m. on May 26, 2016,** to delete duplicate exhibits from the exhibit binders. The parties are not required to renumber exhibits if they delete exhibits after the exchange of documents.

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, subd. (e)(7), the parties shall exchange resumes and curriculum vitae by **5:00 p.m. on May 26, 2016.**

If the parties intend to rely on IEP's, 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.

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 timely disclosed.

The parties shall meet and confer **5:00 p.m. on May 26, 2016,** 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.

During the Prehearing Conference, the parties were ordered to meet and confer by **no later than May 26, 2016, at 5:00 p.m.,** and identify the witnesses the witness lists who cannot be produced at hearing without a subpoena and provide the witnesses contact information to opposing counsel so that subpoenas can be issued. As part of the meet and confer process, District's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of District and will be produced at hearing, and if not, shall provide Student's counsel with the most recent contact information for that witness no later than **May 26, 2016 at 5:00 p.m.**

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.

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. 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. 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. Neither party requested 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 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. **Physical copies in binders must be provided. 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.

7. Electronic Recording of Hearing.

a. Audio Recording. The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

Student's motion to make an audio recording of the hearing was granted. Student's counsel and District's counsel shall be permitted to make an audio recording subject to the following conditions: 1) OAH's recording is the only official recording; 2) 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) operation of the party's recording mechanism will not be allowed to delay the hearing; 4) such recording shall be for counsel's personal use only and only for review and preparation of the hearing; 5) the recording device shall be turned on only when the ALJ states that the matter is on the record, and shall be turned off when the ALJ states that the matter is off the record; 6) counsel shall not play any part of the recording for any prospective witness and the recording shall not be disseminated to anyone other than counsel; 7) the parties shall not use the recording in any subsequent due process hearing or other proceeding; 8) the parties shall destroy the unofficial recording when the . decision in this matter becomes final; and 9) only one person per party may record the proceedings.

Any recording made by counsel is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ.

b. Video Recording/Photography. No party, witness or anyone else present may make any video recording or take any photographs 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, the matter has been consolidated, and both parties are the petitioning party in their respective cases. Student has requested to present her case first. District did not oppose the request. Accordingly, Student shall present her case-in-chief, followed by District, subject to the order in Item 5 above.

9. Motions.

a. Student's motion to dismiss District's complaint. On May 18, 2016, Student filed a motion to dismiss both allegations of Student's complaint. District filed an opposition to Student's motion on May 20, 2016.

i. *Motion to Dismiss District's Issue 1*

District's Issue one asks whether its January 11, 2016 offer of placement, program and services constitute a free appropriate education in the least restrictive environment. In her motion to dismiss, Student contends that the issue is overbroad and duplicative because it does not present any new live controversy between the parties. Student contends that any issues regarding a denial of FAPE to Student regarding the January 11, 2016 IEP are contained in Student's complaint. Student further contends that no dispute exists beyond those she has specifically raised.

Student's argument that District's case is duplicative of hers is similarly unpersuasive. Education Code section 56346, subdivision (f), requires school districts to file for a due process hearing if parents have not consented to any or all of an IEP and the district believes that the student requires the programing and services to receive a FAPE. The Ninth Circuit Court of Appeals recently found that failure to follow this section of the Education Code could result in a denial of FAPE if the school district waited an unreasonable amount of time to file for due process (*I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164) (*I.R.*).) District here contends that Student's parent has not consented to the January 11, 2016 IEP, which District contends offers Student a FAPE. Pursuant to the Education Code and the decision in *I.R.*, District properly filed for due process to prove the validity of its offer.

Student's argument that District's case is duplicative of hers is equally unavailing. Even where a district has filed for due process on the exact issue a student has raised (which has not occurred here), a district filing is not redundant. Student's motion to dismiss fails to address the issue of prevailing party and remedy. The only party entitled to a remedy for prevailing at a due process hearing is the party that filed the case. Therefore, for example, if a district files to validate its offer of FAPE and for an order that it may implement the offer without consent of the student's parents, a student who does not cross-file will not be able to receive a remedy even if she proves the district's offer would not provide her with a FAPE. In this case, although Student may have raised some issues similar to the District's regarding whether the January 11, 2016 IEP would provide her with a FAPE, if District had not filed its own case, it would not be able to obtain a remedy even if Student was not successful is showing that the offer was not legally adequate.

Student is correct that under the doctrine of mootness, a court may refuse to hear a case because it does not present an existing controversy by the time of decision. (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) However, mootness is not a jurisdictional defect. (*Plymouth v. Superior Court* (1970) 8 Cal.App.3d

454, 460.) A case may be moot when the court cannot provide the parties with effectual relief. (*MHC Operating Ltd. Partnership v. City of San Jose* (2003) 106 Cal.App.4th 201, 214.) An exception to the mootness doctrine is made if a case presents a potentially recurring issue of public importance. (*DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58.)

In this case, however, Student acknowledged at the prehearing conference that she still contests the validity of the January 11 IEP even though her parent has consented to implement all or part of it. Student conceded at the prehearing conference that the issue therefore was not moot.

For these reasons, Student's motion to dismiss Issue one of District's complaint is DENIED.

ii. Motion to Dismiss District's Issue 2

Issue 2 of District's amended complaint states: "Whether the District's February 8, 2016, response to Student's request for due process violated any procedural requirement, and thereby denied Student a FAPE." Student contends that District's issue two is beyond the jurisdiction of OAH to decide in the context of a request for due process. District contends that since it is required to follow the procedural mandates of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.), in this case title 20 United States Code section 1415(c)(2)(B), it may properly request a due process hearing to determine whether it followed the requirements of the section and, if it did not, whether its failure to do so denied Student a FAPE.

The purpose of the IDEA 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 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.)

Although Student may have filed a compliance complaint with the California Department of Education with regard to whether District's February 8, 2016 response to her complaint was adequate, there is no present controversy over whether the response did or did not deny Student a FAPE. A district's response to a complaint does not relate to the identification, evaluation, or educational placement of a student. District failed to

persuasively demonstrate that the issue of its response somehow implicates the provision of a FAPE to Student.

District contends that OAH jurisdiction to determine the validity of a district's response to a complaint is the same as OAH's jurisdiction to determine the sufficiency of a due process complaint. District additionally points to OAH jurisdiction to determine the sufficiency of a district's prior written notice. However, District fails to cite to any case in support of its contention that the scope of a district's response to a complaint is proper subject matter of a due process hearing. Nor are the cases it cites in support of the fact that OAH has found within its jurisdiction allegations by students that a district failed to give proper prior written notice of its decisions helpful in analyzing the present issue. Neither case stands for the proposition that OAH has jurisdiction to decide whether a district's response to a due process complaint somehow failed or did not fail to provide a student with a FAPE.

Student's motion to dismiss issue two of District's amended complaint is therefore GRANTED.

b. Student's motions in limine

i. Student's moved for a motion in limine to sequester witnesses so that they are not present while other witnesses are testifying. Student's motion is moot in light of the fact that she has requested the hearing be closed to the public. Any witness, other than a party representative, will accordingly not be permitted in the hearing room, whether before or after the witness has testified.

To the extent that Student is requesting that witnesses be admonished to refrain from discussing their testimony either during the time they are called as a witness or after their testimony is received, ruling is deferred on the motion to the first day of hearing.

ii. Student moved for a motion in limine giving her permission to present a transcript of her IEP team meeting(s) as evidence. Student seeks a ruling on the admission of a piece of evidence before either District or the ALJ have seen the evidence. The proper method of having a piece of evidence admitted into evidence is for counsel to move it into evidence at hearing. Student's motion in limine asking for the transcript is therefore DENIED. Student may seek to move the transcript into evidence if and when a witness references the document while testifying at hearing. Student is directed to provide a copy of the audio recording of the IEP team meeting(s) in question as part of her evidence binder if she also seeks to move the transcript(s) into evidence. Student must provide a copy of the recording to District no later than **5:00 p.m. on May 24, 2016.**

c. District's motion to quash subpoena duces tecum will be addressed in a separate order.

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 5:00 p.m. on May 26, 2016,** to determine legal and factual stipulations, if any, to be submitted at hearing.

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, unless otherwise permitted by the hearing ALJ. No food is permitted to be eaten in the hearing room while the ALJ is on the record.

13. Special Needs and Accommodations. Neither party requested 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/Accessibility.aspx.

14. The Hearing Will Be Closed 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 **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.

If the parties settle the matter 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. OAH will not cancel the hearing dates without this information.

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

IT IS SO ORDERED.

DATE: May 24, 2016

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings