BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

OXNARD UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2019050500

ORDER FOLLOWING PREHEARING CONFERENCE

On August 12, 2019, Administrative Law Judge Tara Doss of the Office of Administrative Hearings held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH. The prehearing conference will be referred to as PHC.

Scott Ayers, Attorney at Law, appeared on behalf of Student. Lee Rideout, Attorney at Law, appeared on behalf of Oxnard Union High School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on August 20, 21 and 22, 2019, and continue day to day at the discretion of the ALJ. The hearing will begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at the offices of Oxnard Union High School District, located at 309 South K Street, Oxnard, California 93030. Oxnard Union High School District will be referred to as Oxnard.

The parties must immediately notify all potential witnesses of the hearing dates, and must 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.

School district facilities used for hearings must fully comply 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. School districts are required to file written certification with OAH that the facilities comply with these laws. Oxnard has certified their facilities meet the requirements. Oxnard must inform OAH immediately if they are no longer able to comply.

Before the beginning of the hearing, Oxnard must ensure the hearing room is configured into a courtroom-style setting that includes:

- a table for Student and Student's representatives;
- a table for Oxnard and its representatives;
- a table for the witness;

- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and

- water and tissue available for the participants.

The same hearing room must be used for each day of hearing and must be available at least one hour before the beginning of the hearing each day. The hearing room must be locked following the hearing each night. Oxnard must ensure the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

ISSUES AND PROPOSED RESOLUTIONS

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

ISSUES

1. Did Oxnard deny Student a free appropriate public education, referred to as a FAPE, in the May 21, 2018 individualized education program by failing to offer:
    a. appropriate behavioral support, including cognitive behavior therapy; and
    b. an appropriate placement?
2. Did Oxnard deny Student a FAPE in the October 18, 2018 individualized education program, referred to as an IEP, by failing to offer:
    a. appropriate behavioral support, including cognitive behavior therapy; and
    b. an appropriate placement?

3. Did Oxnard deny Student a FAPE in the November 16, 2018 IEP by failing to offer:
    a. appropriate behavioral support, including cognitive behavior therapy; and
    b. an appropriate placement?
4. Did Oxnard deny Student a FAPE in the February 15, 2019 IEP by failing to offer:
    a. appropriate behavioral support, including cognitive behavior therapy; and
    b. an appropriate placement?
5. Did Oxnard deny Student a FAPE in the March 26, 2019 IEP by failing to offer:
    a. appropriate behavioral support, including cognitive behavior therapy; and
    b. an appropriate placement?

PROPOSED RESOLUTIONS

1. For OAH to order Oxnard to fund Student's placement at Passageway nonpublic school, or an equivalent nonpublic school approved by Student.

2. For OAH to order Oxnard to provide applied behavior analysis services throughout Student's school day, including during transportation. The services are to be provided by a nonpublic agency approved by Student.

EXHIBITS

BINDERS

Exhibits must be pre-marked and placed in three-ring binders before the hearing. Exhibit binders must include a tab for each exhibit. Each binder must contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties must place a letter followed by a number on each tab to identify each exhibit. Student must use the letter S before the number to identify Student's exhibits. Oxnard must use the letter D before the number to identify Oxnard's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Oxnard's exhibit tab 1. Each page of each binder must be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by the service provider and should be in the order the services occurred where possible. Exhibits in the binders should be in chronological order, starting with the oldest date and concluding with the most recent date.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties must exchange resumes at least 24 hours before the witness is scheduled to testify.

Oxnard's binder should include a color copy of the school calendar for each school year in question and should have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties must provide copies of their evidence binders to each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party must bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties should not provide exhibits to OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged will not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties must make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witness testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The parties are ordered to meet and confer no later than August 15, 2019. The parties must discuss the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and Student's case-in-chief will be presented first, followed by Oxnard.

WITNESS LISTS

On the first day of hearing, before the first witness testifies, the parties must provide the ALJ with a joint hour-by-hour schedule of all witnesses expected to testify at the hearing. The list should include dates and time estimates of expected testimony. The list must also include an estimate of time for each party's direct and cross-examination. In the event an agreement cannot be reached, each party must prepare a separate written list, and Student must have witnesses available to testify.

Before the hearing begins, 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. The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time each witness's testimony will take.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine witnesses on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties present their case-in-chief.

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 must request permission to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness must provide the witness with a complete set of exhibit binders

from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable.

The party presenting the witness must ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony must ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

ELECTRONIC RECORDINGS

Audio Recording

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties must turn the recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be used to prepare the testimony of a witness in the hearing;

- the recording must not be shared with any non-party, possible witness, or through social media;
- The parties must not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality as the due process hearing; and
- the parties must dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Both parties requested to audio record the hearing. The request is granted, subject to OAH's conditions.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so will be subject to sanctions.

Recordings as exhibits

The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording will be considered during the hearing. The ALJ may grant or deny the request, or grant the request subject to certain conditions. Audio recordings from IEP team meetings must be transcribed and offered as documentary evidence. The part of the audio recording transcribed must be provided to the opposing party with the transcript, to allow an opportunity to verify the accuracy of the transcription. Transcription by a certified court reporter is not required. The relevant parts of the audio recording must be included with the transcript, at the ALJ's discretion, to allow the ALJ to listen to the recording along with the transcript. The ALJ may allow

the opposing party to offer additional parts of the audio recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures must present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

No prehearing motions are pending or contemplated. Any motion not filed three business days before the PHC, must be supported by a declaration under penalty of perjury, establishing good cause why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation must be submitted to the ALJ in writing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, recorders, and other noisemaking electronic devices must be shut off or set to vibrate during the hearing, unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the subject line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING CLOSED TO THE PUBLIC

The hearing is closed to the public.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties must inform OAH in writing immediately if 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 must also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM the day prior to hearing, the parties must 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.

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 before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties must provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATED: August 12, 2019

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Tara Doss
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Tara Doss
Administrative Law Judge
Office of Administrative Hearings