BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SAN LEANDRO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2019020613 ORDER FOLLOWING PREHEARING CONFERENCE

On March 11, 2019, a telephonic prehearing conference was held before Administrative Law Judge Penelope Pahl, Office of Administrative Hearings. Leah Smith and Conor Kennedy, Attorneys at Law, appeared on behalf of San Leandro Unified School District.

Student's Mother joined the conference at the outset on behalf of Student. She protested having the conference proceed without having her representative present, stating that she had been informed that the case was dismissed. No notice of representation has been filed on Student's behalf. When Mother indicated she would not participate, she was advised that her presence was preferred so that her information could be considered. However, if she chose to leave, the conference would need to proceed without her. When asked about the identity of the person who informed her the case had been dismissed, Mother asked the parties to wait while she retrieved documents and did not return to the telephone. The ALJ attempted to reach Parent by phone two additional times. Each call went to a voicemail system and the ALJ left a message both times. The first message informed Mother a second call would be made in 10 minutes, at 3:15 p.m. Mother did not answer the call at 3:15 p.m., so a message was left stating that the prehearing conference would proceed without her, which it did. The PHC was recorded.

Based upon discussion on the record with counsel for San Leandro, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on March 19, 2019, beginning at 9:30 a.m. and on March 20 and 21, 2019, beginning at 9:00 a.m. unless otherwise ordered. The hearing shall take place at San Leandro Unified School District Office located at 14735 Juniper Street, San Leandro, California 94579-1299.

As ordered in the scheduling order, San Leandro 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. Counsel for San Leandro has filed the required certification of ADA compliance. San Leandro shall inform OAH within two days of the date of this order if it is unable to provide an accessible, appropriate hearing facility.

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.

Prior to the beginning of the hearing, San Leandro 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 San Leandro's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. San Leandro 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.

2. Issues and Proposed Resolutions. Pursuant to discussions during the prehearing conference, the issue to be determined at the due process hearing, and the proposed resolutions, are listed below:

Issue[1]

Did San Leandro Unified School Districts' Psycho-educational, functional behavior and occupational therapy assessments of Student meet all legal requirements such that Student is not entitled to independent educational evaluations in those areas at public expense?

WITHDRAWAL AND DISMISSAL OF ISSUES:

On March 1, 2019, San Leandro gave notice that it was dismissing its request to defend the assessment conducted of Student's academic abilities that was included in

[1] The ALJ has reworded, numbered (instead of lettered) and clarified the issue as stated in San Leandro's prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) If either party believes the issue as clarified does not adequately capture the issue as raised in the complaint and clarified during the PHC, that party is to swiftly notify OAH in writing prior to hearing regarding any discrepancy.

the request for due process hearing filed February 19, 2019.

Proposed Resolution:

San Leandro seeks an order determining that its psycho-educational, functional behavior and occupational therapy assessments met all legal requirements and thus San Leandro is not required to provide independent educational evaluations in those areas at public expense.

3. Exhibits. Each party must disclose a copy of any document, (called an "Exhibit"), that they plan to submit as evidence during the hearing. Exhibits shall be pre-marked by placing the exhibit in a three-ring binder with a tab that says S-1, S-2. S-3, etc; or D-1, D-2, D-3 etc.. These tabs will designate whether it is a Student or DISTRICT exhibit. Each page of each exhibit shall have a page number; or all of a party's exhibits may be Bates-stamped with consecutive bates stamped numbers throughout the binder of exhibits, if preferred. Each exhibit binder shall contain a detailed table of contents describing the documents in the binder with listings such as "S-1: January 15, 2017 IEP"; S-2: "Email from Ms. Smith to Mother re: Occupational Therapy Assessment"; S-3: "September 12, 2017 Assessment Plan".

Mother is referred to OAH's Special Education Handbook, available online, for additional details regarding how to prepare an exhibit binder and present her case at hearing. Each party shall create 4 copies of their evidence binders.

The parties shall serve one of the evidence binders created, which should also contain a copy of their witness list, discussed below, on each other in compliance with Education Code section 56505, subdivision (e)(7) which requires that a party serve a copy of their witness list and exhibits on the opposing party no later than *five business days prior to the beginning of the hearing*. This means the documents and witness list must be received by the opposing party on or before this date.

On the first day of hearing, each party shall supply two of the exhibit binders containing the evidence to the ALJ. One will be used by the ALJ during hearing and the other is for reference by the witnesses in the event a party has questions for a witness about a document that is proposed for admission into evidence. The parties may not serve exhibits on OAH prior to the hearing.

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

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

San Leandro shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to San Leandro.

4. Witnesses.

Each party is responsible for securing the attendance at hearing of its own witnesses. Parties must notify or subpoena witnesses as necessary. Each party shall make witnesses under its control reasonably available.

5. Meet and Confer. The parties are encouraged to review and shorten their witness lists and lists of Exhibits 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. To that end, parties are ordered to meet and confer by telephone **no later than 3 p.m. March 14, 2019,** to discuss whether routine information can be the subject of stipulations (agreements between the parties) to shorten the hearing by avoiding the necessity of testimony, particularly as to routine matters, and/or exhibits. The parties shall also discuss the order of witnesses and the length of witness testimony and be prepared to present the ALJ with a written joint witness list with time estimates and dates of expected testimony on the first day of hearing.

Should agreement on a list not be reached, each party shall prepare separate lists, and San Leandro shall have witnesses available so the hearing can proceed promptly. 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.

San Leandro's witnesses will be called first as San Leandro has the burden of proof in this case. Neither party shall be permitted to call any witnesses not disclosed to the other side by the statutory deadline except for good cause shown, and at the discretion of the ALJ.

Witnesses shall wait outside the hearing room until it is their turn to testify unless otherwise ordered by the ALJ.

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, keeping in mind that the scope of allowable rebuttal is very limited. 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. 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 requested the hearing, bears the burden of proof, and shall present his case-in-chief first, followed by San Leandro.

8. Telephonic Testimony. San Leandro has requested the opportunity to have Natasha Limones testify by telephone. Whether a witness may appear by telephone or other electronic means 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 make a motion requesting leave to do so in advance, unless the opposing party has agreed that the witness may appear by telephone. The person calling the witness shall provide the witness testifying by telephone with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing, and shall instruct the witness as to the rules regarding maintenance of Student's privacy with regard to the documents provided. The proponent of the testimony shall also ensure that the room from which the witness is testifying has sound equipment that allows all hearing participants to hear; and that the witness is able to hear objections and rulings.

San Leandro has agreed to comply with the preparations required and, on that basis, its request for Ms. Limones to testify by telephone is Granted.

9. Electronic Recording of Hearing.

a. Audio Recording. San Leandro'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; 3) the recording device will be removed by the party recording during any recess where the party leaves the room; 4) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a private recording is not allowed to be used to prepare the testimony of an upcoming witness in the hearing.

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.

10. IEP Team Meeting Recordings. Neither party has indicated an intent to introduce a portion of an IEP team meeting recording. Any request to introduce a portion of an IEP recording will be considered at the time of hearing subject to the following conditions: 1) It is preferable that a transcript **of the portion of the IEP recording being introduced** be prepared and submitted with a declaration authenticating the transcription. This transcript, which must include a notation of the minutes relevant to the issues being heard, must be disclosed by the deadline for evidence disclosure; 2) The IEP recording being offered should be saved onto a flash drive; 3) At the time the evidence is introduced, relevance of the portion of the IEP recording at issue must be established; 4) the exact portion (minutes) of the IEP recording the party seeks to admit must be identified; and 5) the person speaking on the portion of the recording being introduced must be established.

An opposing party is not precluded from seeking admission of additional portions of an IEP recording to establish additional context of comments subject to the above requirements.

Parties are not precluded from seeking admission of an entire IEP recording subject to establishment of relevance of the entire recording as well as meeting the other requirements listed above.

11. Motions. San Leandro does not anticipate any further pre-hearing motions. Any motion that was not filed by the prehearing motion deadline, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not filed by the deadline in addition to establishing good cause for the request made in the motion. Evidence will be required in support of any motion for continuance.

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 Accommodations and Translation. At present neither party anticipates the need for accommodation for any witness or party, or for the services of an interpreter. Any party or participant to this case requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 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. Hearing Closed To the Public Unless Informed Otherwise by March 14, 2019. As no instruction for an open hearing was received, the hearing will be closed to the public unless Student advises OAH and San Leandro in writing by 3 p.m. on March 14, 2019 that Student wishes to have an open hearing, in order to give San Leandro the ability to provide space for additional people in the hearing room. All observers shall conduct themselves in a respectful manner, appropriate to the importance of the matter being considered.

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.applications.dgsapps.dgs.ca.gov/oah/oahsftweb **.** IFTHE SETTLEMENT IS SUBJECT TO BOARD APPROVAL, THE LETTER SHALL CONTAIN THE DATE ON WHICH THE BOARD IS SCHEDULED TO CONSIDER THE SETTLEMENT AGREEMENT.

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.

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

IT IS SO ORDERED.

DATE: March 11, 2019

DocuSigned by:
Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings