BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>ANTIOCH UNIFIED SCHOOL DISTRICT. | OAH Case No. 2019020320<br><br>ORDER FOLLOWING PREHEARING CONFERENCE |

On April 22, 2019, a telephonic prehearing conference was held before Administrative Law Judge Rita Defilippis, Office of Administrative Hearings. Christian Knox and Patricia Black, Attorneys at Law, appeared on behalf of Student. Amy Levine, Attorney at Law, appeared on behalf of Antioch 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 April 30, May 1 and 2, 2019, continuing day to day, at the discretion of the ALJ. The hearing shall take place at the Antioch Unified School District's offices located at 510 G Street, Antioch, California, 94509. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, Antioch 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. Antioch failed to certify that it would provide a facility for this case that complied with the law. Antioch shall file a certification with OAH within two days of the date of this order that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Antioch shall ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for Antioch's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Antioch shall also make reasonable effort to ensure that drinking water and tissue are available 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. The hearing room shall be locked following the hearing each night. Antioch shall ensure that the

hearing room and access to it are in compliance with the Americans with Disabilities Act and related statutes.

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 to be determined at the due process hearing, and the proposed resolutions, are listed below:

*Issues*[1]

1. Did Antioch deny Student a free appropriate public education during the 2016-2017 school year, from February 7, 2017, by:

a. failing to offer Student specialized reading services;

b. failing to offer Student an appropriate transition plan and services;

c. failing to offer an appropriate amount of specialized academic instruction in writing and math;

d. failing to offer goals in all areas of need, specifically, transition, reading, writing and math;

e. failing to provide progress reports on goals;

f. failing to timely provide an assessment plan following the May 8, 2017 individualized education program team meeting recommendation for math diagnostic testing;

g. failing to document tutoring services in his IEP dated May 8, 2017; and

h. failing to implement counseling and guidance and individual counseling services pursuant to the November 4, 2016 IEP?

2. Did Antioch deny Student a FAPE during the 2017-2018 school year, by:

[1] The parties discussed the issues, which were reworded and reorganized, during the prehearing conference. If either party feels the issues as stated in this order do not reflect the prehearing conference discussion, either party may file a written statement to that effect with OAH as soon as possible. Any dispute regarding the wording of the issues will be resolved on the first day of hearing.

a. failing to offer Student specialized reading services;

b. failing to offer Student an appropriate transition plan and services;

c. failing to offer an appropriate amount of specialized academic instruction in writing and math;

d. failing to offer goals in all areas of need, specifically, transition, reading, writing and math;

e. failing to provide progress reports on goals;

f. failing to document the one-to-one tutoring services recommended in Student's October 31, 2017; January 25, 2018; and May 24, 2018 IEP team meetings;

g. failing to provide notice of the October 31, 2017 IEP team meeting;

h. failing to provide accurate present levels of performance in the October 31, 2017 IEP;

i. failing to invite the educational rights holder as part of the October 31, 2017 IEP team;

j. predetermining the October 31, 2017 IEP due to absence of educational rights holder participation;

k. failing to offer accommodations in the October 31, 2017 IEP, specifically: checking for understanding; repeating instructions for tests, assignments, and homework; positive reinforcement; flexible seating; flexible scheduling; and small group setting for tests;

l. failing to have a general education teacher present for the entirety of all IEP team meetings;

m. failing to have a transition or vocational specialist present at the January 25, 2018 IEP team meeting;

n. failing to meaningfully consider Dr. Baikova's private evaluation and recommendations at the May 24, 2018 and June 4, 2018 IEP team meetings;

o. failing to offer accommodations and services recommended by Dr. Baikova;

p. failing to timely contract with Dr. Carina Grandison, Student's independent educational evaluation assessor as agreed to by Antioch on May 21, 2018; and

q. failing to provide Prior Written Notice for Antioch's June 4, 2018 stated denial, during the IEP team meeting, of one-to-one tutoring?

3. Did Antioch deny Student a FAPE during the 2018-2019 school year by:

a. failing to offer Student specialized reading services;

b. failing to offer Student an appropriate transition plan and services;

c. failing to offer an appropriate amount of specialized academic instruction in writing and math;

d. failing to offer goals in all areas of need, specifically, transition, reading, writing and math;

e. failing to provide progress reports on goals;

f. failing to ensure a general education teacher was present throughout the November 27, 2018 IEP team meeting;

g. placing unreasonable requirements for funding of an independent educational evaluation; and

h. failing to fund and facilitate the independent psychoeducational evaluation as offered in Antioch's letter, dated May 21, 2018?

4. Did Antioch fail to adequately assess Student in all areas of suspected disability, specifically psychoeducation, transition, assistive technology, and speech and language?

*Proposed Resolutions*

1. Antioch shall provide Student with compensatory education that may include, but is not limited to, the following:

a. tuition and costs for placement in a transition program;

b. one-to-one tutoring in all areas of need including reading, math, written expression, transition, independent living, and executive functioning;

c. specialized reading tutoring such as Lindamood Bell;

d. other academic interventions as recommended in the assessments; and

e. transportation costs.

2. Antioch shall fund the independent educational evaluation completed by Carina Grandison.

3. Antioch shall fund independent educational evaluations in the areas of transition and speech and language.

4. Such other and further relief as deemed appropriate by the Administrative Law Judge.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use letters 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 timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

Parties are encouraged, but are not ordered, to present resumes or curriculum vitae for each professional witness.

Antioch 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 Antioch.

4. 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 timely disclosed except for good cause shown, 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. Student shall have witnesses available to testify in the event that the parties cannot agree on a joint witness list. 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.

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.

6. Telephonic Testimony. No parties requested that a witness appear by telephone at this time. 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. 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. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Student and Antioch requested to record the hearing. Both parties' motions to make an audio recording of the hearing are 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; and 3) that operation of the party's recording mechanism will not be allowed to delay 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.

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, Student requested the hearing, bears the burden of proof, and shall present his case-in-chief first, followed by Antioch.

9. Motions. Antioch anticipates possible motions to exclude Student's juvenile court related evidence at hearing which may be confidential pursuant to California Rule of Court 5.552 and Welfare and Institutions Code Section 827. Any such motion to exclude evidence will be considered at hearing at the time Student seeks to introduce the evidence, upon objection by Antioch. No other 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 three business days prior to the prehearing conference.

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 and Exhibits. Stipulations to pertinent facts, contentions or resolutions are encouraged to promote hearing efficiency. Stipulations to routine foundational facts and avoiding duplicative exhibits are particularly favored. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

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 and Accommodations. Student requested that Antioch provide a private room for Student's counsel to have confidential communications during hearing breaks. Antioch will make best efforts to accommodate this request. Neither party requests the services of an interpreter at hearing. A party or participant to this case, such as a witness, 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. At the request of Student, 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 EMAILTHE 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. IF THE 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. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

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

IT IS SO ORDERED.

DATE: April 22, 2019

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Rita Defilippis
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RITA DEFILIPPIS
Administrative Law Judge
Office of Administrative Hearings