BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
DUBLIN UNIFIED SCHOOL DISTRICT,	OAH Case No. 2016080413
v.	ORDER FOLLOWING PREHEARING CONFERENCE, DENYING STUDENT'S MOTION TO DISMISS, AND GRANTING MOTION TO LIMIT THE ISSUE FOR DUE PROCESS
PARENT ON BEHALF OF STUDENT.	

On December 2, 2016, a telephonic prehearing conference was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Mother appeared on behalf of Student. Melanie Larzul, Attorney at Law, appeared on behalf of Dublin Unified School District. The PHC was recorded.

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

1. Dublin's Motion to Limit the Issue as Framed, Student's Motion to Dismiss, and Jurisdictional Concerns Raised by the ALJ. All of these motions and concerns were addressed and decided during the December 2, 2016 PHC.

During the PHCs on October 14, 2016, and October 17, 2016, the undersigned raised concerns about Dublin's narrow pleading of its issue, in light of its requested resolution to be able to implement a portion of the IEP. To address those concerns, Dublin was ordered to submit a brief addressing specific questions. A briefing scheduled was created, which permitted Student the opportunity to respond to Dublin's brief.

On October 17, 2016, Dublin filed a motion to limit the issue to the issue as framed in the due process hearing complaint. On October 26, 2016, Dublin filed a brief in support of its motion, which addressed the specific questions posed during the October 17, 2016 PHC. On October 31, 2016, Student filed a response to Dublin's brief and a motion to dismiss Dublin's complaint.

Dublin's complaint and prehearing conference statement lists its sole issue for hearing as:

> May District transition Student from an NPA (nonpublic agency) provided aide and behavior services to District provided aide and behavior services?

As the proposed resolution, Dublin requests that OAH order that Dublin may transition Student from a nonpublic agency provided aide and behavior services to an aide and behavior services provided by Dublin without parental consent.

As written, Dublin's issue appeared to request an advisory opinion from OAH, as it failed to tie its issue to a particular individualized education program offer. Although in its complaint and briefing, Dublin indicated that the issue related to the IEP that resulted from the continuing IEP team meetings of January 26, 2016, March 18, 2016, and May 5, 2016, the issue as written did not reflect that information. During the PHC on December 2, 2016, the ALJ raised the concern that OAH lacked jurisdictional to decide the issue, because OAH does not have jurisdiction to provide advisory opinions. In response to those jurisdictional concerns, Dublin requested to reframe its issue to reflect the IEP to which it related. Dublin's request was granted, thus satisfying ALJ's jurisdictional concerns.

Student's motion to dismiss did not specify the grounds for dismissal, but instead refers the reader back its arguments contained in its briefing. When the briefing and motion to dismiss and briefing were read as a whole, Student's motion to dismiss seemed to revolve around the concept that a portion of an IEP could not be found to be FAPE and that OAH did not have the ability to order that a portion of an IEP be implemented without parental consent. Student's arguments were similar to the concerns expressed by the ALJ during the October 14, 2016 and October 17, 2016 PHCs. Dublin argued in the opposite in its briefs and moved to limit the issue as pled.

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) 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 OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction (e.g., civil rights claims, section 504 claims, enforcement of settlement agreements, incorrect parties, etc…..), special education law does not provide for a summary judgment procedure. Student's motion to dismiss presumes that Dublin will not present sufficient evidence to defend its IEP offer. This argument is akin to that of a motion for summary judgment or a motion for judgment on the pleadings because the motion is not

limited to matters that are facially outside of OAH jurisdiction, because it seeks a ruling on the merits. Accordingly, Student's motion is denied.

Dublin moved to limit its issue as plead in its due process complaint, however, at the PHC, Dublin's motion to reframe the issue to include the specific IEP offer to which it referred. Dublin's motion and brief argued that OAH could find a portion of an IEP offer constituted a FAPE and that OAH could order that a portion of that IEP be implemented without parental consent. This order does not address whether OAH may find a portion of an IEP constitutes a FAPE and whether OAH has the ability to order that portion of an IEP be implemented without parental consent, as opposed to the entire IEP. Those issues will be decided at hearing, once all of the evidence and arguments are heard by the ALJ.[1] This order focusses instead on whether Dublin may proceed to hearing on the issue as reframed during the December 2, 2016 PHC.

2. Hearing Dates, Times, and Location. The hearing shall take place on December 13, 14, and 15, 2016, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Dublin's offices located at 7471 Larkdale Avenue, Dublin, California 94568. 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, the named local educational agency 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. The named local educational agency failed to certify that it would provide a facility for this case that complied with the law. The local educational agency shall inform OAH **within two days of the date of this order** it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Dublin 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 Dublin's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Dublin shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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] At the PHC, the undersigned discussed with the parties the complexity of the legal issue regarding Dublin's assertion that a portion of an IEP may be found to constitute a FAPE and that OAH may order implementation of a portion of an IEP without parental consent. The parties should be prepared to address this during hearing and closing briefings.

continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

3. Issues and Proposed Resolutions. The sole issue at the due process hearing, and the proposed resolutions, are listed below.

Issue: May District transition Student from an NPA (nonpublic agency) provided aide and behavior services to District provided aide and behavior services as offered in the IEP that resulted from the continued IEP team meetings of January 26, 2016, March 18, 2016, and May 5, 2016?

Proposed Resolution: Dublin requests that OAH order that it may transition Student from a nonpublic agency provided aide and behavior services to an aide and behavior services provided by Dublin as offered in the IEP that resulted from the continued IEP team meetings of January 26, 2016, March 18, 2016, and May 5, 2016, without parental consent.

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.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously 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.

5. 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 disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, 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 meet and confer to discuss witness scheduling and to attempt to reach agreement on a witness list for the hearing. Dublin shall have witnesses available in case agreement on a witness list is not reached. 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.

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. 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.

7. 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. 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.

Student's motion to allow Elizabeth Monday to testify telephonically is granted. Student shall provide Ms. Monday with a complete exhibit binder from each party, 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.

Student indicated that she may be requesting to have other witnesses appear by telephone. If Student intend to request to have other witnesses appear by telephone, she must make that request at the beginning of the hearing. Student is expected to have provided those witnesses with the evidence binders prior to their testimony. As such, no delay in the hearing will be permitted to allow Student the opportunity to provide those witnesses with the evidence binders.

8. Electronic Recording of Hearing.

a. Audio Recording. The 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.

9. 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, Dublin is the petitioning party. Accordingly, Dublin shall present its case-in-chief, followed by Student.

10. Motions. No 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 prior to or during the prehearing conference of December 2, 2016.

11. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

12. Conduct of Counsel and Hearing Room Decorum. Counsel, the 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.

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. Hearing Will Be Closed To the Public. The hearing will be closed to the public unless Student requests it be open.

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.

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

IT IS SO ORDERED.

DATE: December 8, 2016

DocuSigned by:
B. Andrea Miles
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B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings