BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. ANTIOCH UNIFIED SCHOOL DISTRICT,	OAH Case No. 2015030589
ANTIOCH UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2015020590 ORDER FOLLOWING PREHEARING CONFERENCE

On August 17, 2015, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearing. Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student. Lenore Silverman, Attorney at Law, appeared on behalf of Antioch Unified School District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on August 25, 26, and 27, 2015, and continuing day to day, Monday through Thursday, as needed, at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m., with the exception of the first day of hearing, on which day the hearing shall begin at 9:30 a.m., unless otherwise ordered.

The hearing shall take place on District's offices located at 510 G. Street, Antioch, California, 94509. At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. District shall ensure that all parties and the ALJ have drinking water, and that tissue is available on the witness table during the hearing. District shall ensure that the facility for the hearing 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), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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 are listed below.

Student's Issues

1. Is Student entitled to an exception to the statute of limitations based upon an alleged misrepresentation made by District in November 2011?

2. Did District deny Student a free appropriate education from June 2013 until March 13, 2015 by failing to assess her in the areas of speech and language, and other health impairment based on her diagnosis of Hashimoto Disease and other frail health concerns?

3. Did District deny Student a FAPE during the 2011-2012 school year by failing to draft measurable individualized educational program goals in the areas of written expression, reading, and math?

4. Did District deny Student a FAPE during the 2012-2013 school year by failing to draft measurable IEP goals in the areas of written expression, reading, and math?

5. Did District deny Student a FAPE during the 2013-2014 school year by failing to:

a) draft measurable IEP goals in the areas of written expression, reading, and math; and

b) offer home and hospital instruction?

6. Did District deny Student a FAPE during the 2014-2015 school year by failing to:

a) draft measurable IEP goals in the areas of written expression, reading, and math; and

b) provide prior written notice when it:

1) denied Parent's request for assessment in the areas of academics and speech and language in October 2014; and

2) discontinued speech and language services in the fall of 2014?[1]

District's Case

1. Can District exit Student from special education because she no longer meets eligibility criteria?

2. Can District assess Student without Parent consent?

Student's Proposed Resolutions

Student is requesting independent educational evaluations in all areas of need identified by Parent, and compensatory education in the areas of need including speech and language, written expression, math, language arts, and reading by way of one-to-one services. Student is also asking for counseling, continued eligibility for special education, specialized academic instruction and services in all areas of need. Further, Student requests that she be made eligible as a student with other health impairment and be provided with home and hospital services. Student asks that District fully evaluate Student before recommending removal from special education. Finally, Student asks that District implement all previous recommendations from the Diagnostic Center assessments.

District's Proposed Resolutions

District is asking that Student be exited from special education without Parent consent. If it is decided that the evidence does not support Student being exited from special education, District asks that it be permitted to assess Student without Parent consent.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing, with each exhibit separated from the next by a divider. It is suggested, but not ordered, that the parties use different colored binders for ease of use by witnesses when testifying. The parties shall use numbers to identify exhibits and place the letter "S" or "D" in front of each exhibit number, 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 consecutively numbered or Bates-stamped. Each

[1] In regards to Issues 1, 3, and 4 Student shall be prepared at the commencement of hearing to make an offer of proof of the testimony and evidence it intends to introduce to establish a case that supports an extension of the statute of limitations beyond the two year period prior to Student filing her complaint. Student shall start the hearing with the presentation of this evidence. The ALJ shall rule on the record as to whether the statute of limitations should be extended. Student shall be permitted to introduce evidence pertaining to Issues 3, and 4 for the time period preceding the two year statute of limitations only if the ALJ rules that the statute of limitations should be extended.

exhibit binder shall contain a detailed table of contents. In accordance with Education Code section 56505, subdivision (e)(7), the parties shall serve the evidence binders on each other five business days prior to the commencement of the hearing.

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.

Inclusion of an exhibit in an exhibit binder, or presentation of an exhibit to the other side according to the agreed upon timeline, does not guarantee the admission of an exhibit. The ALJ shall determine whether the exhibit is relevant and admissible.

The parties are asked, but not ordered, to provide curricula vitae or resumes for witnesses testifying in their professional capacity, such as teachers. The parties are asked, but not ordered, to waive the five-business-day rule for exchange of documents as it relates to curricula vitae or resumes. Except for good cause shown, or unless used solely for rebuttal or impeachment, any document not previously exchanged in a timely manner shall not be admitted into evidence at the hearing unless the parties stipulate to admission and the ALJ rules that it is admissible. A party seeking admission of a previously undisclosed document must be prepared to make an offer of proof as to why it was not previously produced.

4. Order of Presentation of Evidence. This matter is consolidated, and involves two parties. To the extent possible, Student shall present her case first.

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 timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.[2]

The parties shall meet and confer concerning the schedule of witnesses at 5:00 p.m. on August 17, 2015, unless other arrangements are made. The parties shall coordinate the availability and order of testimony 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. 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.

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 ALJ has discretion to

[2] Student did not submit a PHC statement for this PHC. Therefore, her PHC statement April 24, 2015, was used with her consent.

limit the number of witnesses who testify and the time allowed for witnesses' testimony. Neither party shall be permitted to call any witnesses not disclosed within statutory guidelines except for good cause shown.

6. Scope of Witness Examination. If a witness is to be called by more than one party, the second party questioning the witness may expand cross-examination to include questions that might have been asked on direct examination had the party called the witness first. 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.

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. 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 indicated that a Diagnostic Center employee might need to testify telephonically. No ruling was made at the PHC, and Student may renew the request at the hearing if she so desires.

8. Motions. On August 14, 2015, Student filed a motion to continue the hearing in this matter to dates other than August 25-28. District opposed the request orally at the PHC. The undersigned ALJ orally denied this motion to continue during the PHC, and affirms this order below.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

District filed the original complaint in this matter in February 2015. Student filed her complaint in March 2015 and the matters were then consolidated at Student's request. Continuances were granted March 23, and April 24, 2015. On May 20, 2015, OAH granted District's motion to amend its complaint, and all dates for mediation, PHC and hearing were reset. On June 10, 2015, OAH partially granted the parties joint request for continuance of the due process hearing in this matter which was set to begin June 16, 2015, finding that District had established good cause for continuance, but Student had not. August 25, 2015, was the date the parties agreed to for the commencement of the due process hearing in this consolidated matter when they filed the joint motion to continue the hearing. The order of June 10, 2015, stated the following in bold font: **no further continuances will be granted without a showing of substantial good cause.**

On August 7, 2015, the undersigned ALJ conducted a PHC in OAH Case No. 2015050567. Ms. Amey is counsel for the student in that matter. That hearing is set to begin on August 18, 2015, and will continue on August 19 and 20, 2015. When the parties indicated at the PHC that the due process hearing in that matter could not be completed by August 20, 2015, additional hearing dates of August 25-27, 2015, were added. Although Ms. Amey mentioned that she might have something else set for those dates, she did not provide specific information about the case such as the information that the last continuance granted in that matter stated that "no further continuances would be granted without a showing of substantial good cause."

The scheduling conflict of hearing dates of August 25-27, 2015, set in this case and in OAH Case No. 2015050567, is one of Ms. Amey's own making. She did not establish "substantial good cause" for continuing the due process hearing dates of August 25-27, 2015 in this matter. Accordingly her motion to continue was denied.

At present no other motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during the prehearing conference of August 17, 2015.

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

10. 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.

11. Audio Recording of the Hearing. It is within the discretion of the ALJ to permit the audio recording of a due process hearing. The parties that they may record the hearing if they wish. However, the parties are advised that OAH always makes a digital

recording of the proceedings, and this recording is the official record of the hearing. Parties who record the hearing are to turn off their recorders whenever the ALJ orders that the hearing is "off the record." Parties will not be given time during the hearing to deal with any malfunction of their recording equipment. Any violation of this order to turn off recorders when the matter goes off the record will result in the revocation of permission to record the hearing. No video recording is allowed.

12. 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.

13. Special Needs and Accommodations. Parent requires an Spanish language interpreter for this hearing, and one has been ordered by OAH. Neither party anticipates the need for any other accommodations for a participant or witness

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in the hearing, may contact the assigned calendar clerk 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. Information concerning a request for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accommodations.aspx.

14. Hearing Closed To the Public. 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 NOON ON THE BUSINESS 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: August 20, 2015

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings