BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017010619
v.	ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING DISTRICT'S MOTION TO CONSOLIDATE
RIVERSIDE UNIFIED SCHOOL DISTRICT.	

On May 15, 2017, a telephonic prehearing conference was held before Administrative Law Judge Cole Dalton, Office of Administrative Hearings. Anna Rivera and Andrea Smith, Attorneys at Law, appeared on behalf of Student. Student's Parent attended the PHC. The PHC was interpreted into Spanish for Parent. Jack Clarke, Attorney at Law, appeared on behalf of 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 May 23, 24, 25, 30, and 31, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 6050 Industrial Avenue, Riverside, CA 92503. The hearing shall begin at 9:30 a.m. the first day of the hearing, at 1:30 p.m. on May 30, 2017, and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency 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. The named local educational agency certified that the facilities used for this case comply with the law.

Prior to the beginning of the hearing, District 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 District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District 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. The hearing room shall be locked following the hearing each night.

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[1] and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

2014 – 2015 School Year

(1) Did District deny Student a free appropriate public education during the 2014 – 2015 school year by failing to conduct an appropriate central auditory processing disorder assessment in that (a) the assessor was not an appropriately qualified audiologist and (b) the assessment was not conducted using a variety of assessment tools?

(2) Did District deny Student a FAPE during the 2014 – 2015 school year by failing to provide Parents with prior written notice in their native language of Spanish, when it changed Student's placement in his April 2015 individualized education program, thereby denying Parents the opportunity to meaningfully participate in the IEP development process?

(3) Did District deny Student a FAPE during the 2014 – 2015 school year when it failed to make an offer in its IEP's dated January 12, 2015, March 5, 2015, and April 28, 2015, that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances?

2015 – 2016 School Year

(4) Did District deny Student a FAPE during the 2015 – 2016 school year by failing to assess in all areas of suspected disability when it failed to conduct an assessment for educationally related mental health services?

(5) Did District deny Student a FAPE during 2015 – 2016 school year by failing to provide Parents with prior written notice in their native language of Spanish when it refused to change Student's educational placement at the April 2016 IEP, thereby denying Parents the opportunity to meaningfully participate in the IEP development process?

(6) Did District deny Student a FAPE during the 2015 – 2016 school year when it failed to make an offer in its IEP's dated December 16, 2015, January 20, 2016, February 25, 2016, March 29, 2016, and April 26, 2016, that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances?

[1] During the PHC, counsel for Student confirmed they were not proceeding on the issue of District's refusal to delay Student's graduation, identified as issue six in Student's complaint.

In resolution of this matter, Student seeks an appropriate placement to address his academic, phonological, and auditory processing needs, to include intensive remediation of reading skills, reading comprehension, and mathematics deficits. Student seeks speech and language services three times per week for 45 minutes, with one session being provided one-on-one. Student also seeks compensatory education in speech and language, a mental health services assessment and an independent central auditory processing disorder assessment by an assessor with a doctorate degree in audiology.

3. 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-1, S-2, 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.

The parties shall meet and confer by no later than **5:00 p.m. on May 18, 2017**, to discuss exhibits and eliminate duplicate exhibits from the exhibit binders.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Excerpts of an audio record of an individualized education program team meeting, if any, should be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. District shall include as part of its exhibits the school calendar(s) for the years at issue.

If the parties intend to rely on individualized education programs, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s).

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.

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.

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 by **5:00 p.m. on May 18, 2017,** as to the schedule of witnesses and coordinate the availability and order 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.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one **joint** detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination.

The District shall have witnesses available in case agreement on a witness list is not reached. 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 each 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. 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.

7. Electronic Recording of Hearing.

a. Audio Recording. No party, witness or anyone else present may make an audio recording of the hearing. Any party desiring to make such a recording, shall move for leave to do so in advance of 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 is the petitioning party. Accordingly, Student shall present its case-in-chief, followed by District.

9. Motions.

a. District's Motion to Consolidate. On May 9, 2017, District filed a Request for Due process Hearing naming Student, OAH case number 2017050475 (District's case), and moved to consolidate that case with this one. On May 15, Student filed written opposition.

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

Here, Student's Case involves several issues of FAPE concerning the 2014 – 2015 and 2015 – 2016 school years. Student's complaint was filed five months ago, on January 11, 2017. The parties in this matter have been granted two prior continuances.

On the other hand, District's case involves the sole issue of whether it should be allowed to conduct triennial assessments of Student over lack of Parental consent. District seeks a two week continuance of the consolidated matters.

The triennial assessments have no bearing on prior FAPE issues being addressed in Student's case. Further, Student relied on the currently set hearing dates to prepare for hearing and secure the attendance of witnesses, including three experts. Student opposes any further continuance.

In light of the age of this case and the lack of common questions of law and fact, consolidation is denied. The matter will proceed on the currently scheduled dates.

b. Other 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 May 15, 2017.

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. 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, 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. A Spanish language interpreter is required. The parties are not aware of the need for any other 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 https://www.dgs.ca.gov/oah/Home/Accessibility.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 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.

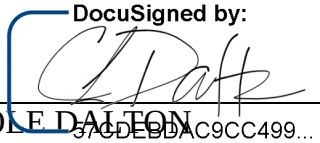
If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: May 17, 2017

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COLE DALTON
Administrative Law Judge
Office of Administrative Hearings