BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017120674
CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2018031019 ORDER FOLLOWING PREHEARING CONFERENCE OF MAY 4, 2018

On May 4, 2018, 2018, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Lauren-Ashley Caron, Attorney at Law, appeared on behalf of Student and her parents. Alefia Mithaiwala, Attorney at Law, appeared on behalf of Capistrano Unified School District. The ALJ recorded the PHC.

1. Hearing Dates, Times, and Location. The hearing shall take place on May 15, 16, 17, 22, 23, and 24, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. **The hearing shall take place at District's offices located at 33122 Valle Road, Capistrano, California, 92675.** The hearing shall begin at 9:30 a.m. on May 15 and May 22, 2018, and at 9:00 a.m. on all other days, unless otherwise ordered.

District has not yet certified 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 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. District shall file a certification within two business days of the date of this Order that its facilities fully 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.

District shall also provide a meeting room for Student's representatives that will be available to them a half hour prior to the start of the hearing, during hearing breaks, and during the lunch break.

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, and the proposed resolutions, are listed below.

Student's Issues:

(1) Did District deny Student a free appropriate public education by failing to make an appropriate offer of placement and services via the individualized education program developed on December 18, 2015, in the areas of intensive behavioral intervention; one-on-one aide assistance; and speech and language therapy and social skills services to address Student's pragmatic language and social skills needs?

(2) Did District deny Student a FAPE by failing to file for due process to defend its IEP developed on December 18, 2015?

(3) Did District deny Student a FAPE by failing to make an appropriate offer of FAPE via the annual IEP developed on May 23, 2016, and September 12, 2016 by failing to develop goals that addressed her needs in the areas of academics, social/emotional, and anxiety?

(4) Did District deny Student a free appropriate public education by failing to make an appropriate offer of placement and services via the individualized education program developed on May 23, 2016, and September 12, 2016, in the areas of intensive behavioral intervention; one-on-one aide assistance; and speech and language therapy and social skills services to address Student's pragmatic language and social skills needs?

(5) Did District deny Student a FAPE by failing to file for due process to defend its annual IEP developed on May 23, 2016, and September 12, 2016?

(6) Did District deny Student a FAPE up during the 2017-2018 school year by:

a) Failing to convene an annual IEP team meeting in May 2017 to develop an IEP for Student for the 2017-2018 school year; and

b) Failing to have a current IEP in place for Student at the beginning of the 2017-2018 school year?

Student's Proposed Resolutions:

(1) A finding that Student has prevailed on all issues.

(2) Reimbursement to Parents for all costs to date of Student's placement at the University of California, Irvine's Child Development School, including related services and transportation.

(3) An order that District fund Student's prospective placement at an appropriate non-public school, including related services and transportation, until such time as District offers Student a FAPE.

(4) An order that District staff members receive training related to the procedural requirements for annual IEP team meetings.

District's Issue:[1]

May District fully and comprehensively assess Student in the absence of Parents' consent?

District's Proposed Resolutions:

(1) An order that it may assess Student without Parents' consent.

(2) An order that Parents are required to make Student reasonably available for District to assess her.

(3) An order that if Parents do not permit District to assess Student, District will have no further obligation to provide special education to Student, or to reimburse Parents for any educationally related expenses, until Parents permit District to assess Student.

[1] Parents signed consent to the assessment, which was forwarded to counsel for District right before the start of the PHC. District will review the signed consent and determine whether it will withdraw its case. If so, it will file a notice of withdrawal as soon as possible.

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-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. **The parties shall meet and confer by 5:00 p.m. on May 10, 2018, to review exhibits and remove duplicate exhibits from their evidence binders. If the parties have duplicate exhibits, they shall jointly determine which shall be used at hearing. The duplicate exhibit not to be used shall be removed from the respective binder prior to the hearing. The parties are not required to renumber exhibit binders if duplicate exhibits are removed.**

District shall include as part of its exhibits the school calendar(s) for the years at issue. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), District shall serve a copy of the school calendar(s) and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ not later than the first day of hearing.

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).

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, including all witnesses designated as an expert. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes and curriculum vitae not later than 24 hours before the witness is scheduled to testify.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit except for related chains of correspondence, Student classwork samples, or data collected on behavior.

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, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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 shall comply with Education Code section 56505, subdivision (e)(7). No 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. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five business days before the hearing.

The parties are ordered to meet and confer by **no later than May 10, 2018, at 5:00 p.m.** to identify witnesses on their respective witness lists who cannot be produced at hearing without a subpoena and provide the witnesses' contact information to opposing counsel so that subpoenas can be issued. As part of the meet and confer process, District's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of District, and if not, shall either agree to produce the witness at hearing or shall provide Student's counsel with the witness(es)' most recent contact information by **no later than 5:00p.m. on May 10, 2018.** Any contact information provided by District shall be used by Student's counsel for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disseminated to any other person(s).

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. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

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.

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 such evidence. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after

consideration of all of the following: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

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. Unless otherwise ordered, only one round of redirect and/or re-cross examination shall be permitted.

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.

At present, neither party has requested that a specific witness testify telephonically.

7. Electronic Recording of Hearing.

a. Audio Recording. The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

Student's motion to make an audio recording of the hearing is granted. Both parties shall be permitted to make an audio recording subject to the following conditions: 1) OAH's recording is the only official recording; 2) the recording will be turned on and off at the same time as the ALJ's recording, to avoid recording conversations while off the record; 3) operation of the party's recording mechanism will not be allowed to delay the hearing; 4) such recording shall be for counsel's personal use only and only for review and preparation of the hearing; 5) the recording device shall be turned on only when the ALJ states that the matter is on the record, and shall be turned off when the ALJ states that the matter is off the record; 6) counsel shall not play any part of the recording for any prospective witness and the recording shall not be disseminated to anyone other than counsel; 7) the parties shall not use the recording in any subsequent due process hearing or other proceeding; 8) No more than one person for each party may record the hearing; and 9) the parties shall destroy the unofficial recording when the decision in this case becomes final and/or when all appeals have been exhausted.

Any recording made by counsel is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ.

b. Video Recording/Photography. No party, witness or anyone else present may make any video recording or take any photographs 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, although the cases are consolidated, Student's case has been designated the primary case and includes far more issues than does District's case. Student will therefore present her case first, subject to the parameters described in paragraph 5.

9. Motions.

a. Student's motion to record the hearing is granted as stated in paragraph 7.

b. Motion to quash subpoena duces tecum to the University of California, Irvine's Child Development School: District filed an opposition to Student's motion to quash; however, OAH does not have a record of the motion. Student will re-file the motion so the ALJ may review and rule on it.

c. Student may file a motion to dismiss District's case, based upon Parents' signing consent to the assessment at issue, should District decide not to withdraw its case.

d. Any other motion filed after the date of this Order shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made on or before the due date for the prehearing conference statements.

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. Only water is permitted in OAH hearing rooms. No eating is permitted in the hearing room.

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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

Neither party stated it needed any accommodations. If any need for further accommodation arises, the party shall immediately notify OAH.

14. The hearing shall 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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT address https://www.dgsapps.dgs.ca.gov/oah/oahsftweb**.**

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: May 7, 2018

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings