BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BELLFLOWER UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018020218 ORDER FOLLOWING PREHEARING CONFERENCE

On September 7, 2018, a telephonic prehearing conference was held before Administrative Law Judge Clifford H. Woosley, Office of Administrative Hearings. Phillip Sparks, Attorney at Law, appeared on behalf of Student. Marcia Brady, 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 **September 18, 19, 20, 25, and 26, 2018**, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at:

Bellflower Unified School District
16703 South Clark Ave
Bellflower, California 90706

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.

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.

The hearing room shall be available to the ALJ one hour before the scheduled hearing, and shall be secured and locked at the end of each hearing day. **The same hearing room shall be used for each day of hearing.** Prior to the beginning of the hearing, District 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 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 also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

District shall arrange a separate room for Student and his counsel to use during the hearing. District shall ensure that the room is available for Student and Student's counsel each day of the hearing at least thirty minutes prior to the scheduled start time of the hearing through 4:30 p.m.

District shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, District's attorneys, and witnesses.

The local educational agency shall immediately notify OAH if it is unable to comply with any part of this paragraph.

2. Facility Certification. 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. On May 14, 2018, District filed the required certification.

3. District's Response to Complaint. State and federal law require a local education agency to respond to a due process. (Ed. Code, § 56502, subd. (d)(2)(A); 20 USC § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508.); *M.C. by and through his guardian ad litem M.N. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) District filed a response to Student's amended complaint on August 1, 2018.

4. Prehearing Conference Statements and Motions: Both parties were admonished for filing their respective prehearing conferences statements late.

5. Issues and Proposed Resolutions. During the prehearing conferences on May 11, 2018 and September 7, 2018, as reflected in the record, Student's counsel and the ALJ clarified issues, which the ALJ has renumbered and rephrased pursuant to the discussion at the prehearing conferences as set forth below:

Issues:

1. Did District deny Student a free appropriate public education by failing to conduct a social-emotional assessment since February 5, 2016?

2. Did District deny Student a FAPE by failing to assess Student in all areas of known or suspected disability since November 2016 for:

   (a) Speech and language; and/or

(b) Assistive technology?

3. Did District deny Student a FAPE between February 5, 2016 and November 17, 2016, by failing to address Student's behaviors that impeded his learning by not providing or offering:

   (a) A behavior support plan regarding Student's distractibility and inattentiveness, failure to do his homework, and/or nonparticipation in the classroom; and/or

   (b) Appropriate behavior intervention in the form of full-time aide support and behavior supervision or one-to-one adult assistance?

4. Did District deny Student a FAPE in the November 2016 individualized education program by failing to:

   (a) Accurately measure and report Student's present levels of performance;

   (b) Develop and offer appropriate goals in the areas of math, language and self-help;

   (c) Offer a nonpublic school placement;

   (d) Offer appropriate individual and group resource support or specialized academic instruction for math;

   (e) Offer appropriate speech and language services; and/or

   (f) Address Student's behaviors that impeded his learning by not offering:

      (1) A behavior support plan regarding Student's distractibility and inattentiveness, failure to do his homework, and/or nonparticipation in the classroom; and/or

      (2) Appropriate behavior intervention in the form of full-time aide support and behavior supervision or one-to-one adult assistance?

5. Did District deny Student a FAPE in the May 31, 2017 IEP by:

   (a) Not offering:

      (1) A nonpublic school placement;

(2) Appropriate individual and group resource support or specialized academic instruction for math; and/or

(3) Appropriate speech and language services;

(b) Not addressing Student's behaviors that impeded his learning by not offering:

(1) A behavior support plan regarding Student's distractibility and inattentiveness, failure to do his homework, and/or nonparticipation in the classroom; and/or

(2) Appropriate behavior intervention in the form of full-time aide support and behavior supervision or one-to-one adult assistance?

6. Did District deny Student a FAPE in the October 26, 2017 IEP by:

(a) Making a predetermined offer of placement and services;

(b) Significantly impeding Parent's opportunity to participate in the decision making process regarding the provision of a free appropriate public education to Student by conveying that the goals and accommodations were sufficient to address Student's social emotional and behavior needs and failing to discuss other options;

(c) Not offering:

(1) A nonpublic school placement;

(2) Appropriate individual and group resource support or specialized academic instruction for math; and/or

(3) Appropriate speech and language services;

(d) Not addressing Student's behaviors that impeded his learning by not offering:

(1) A behavior support plan regarding Student's distractibility and inattentiveness, failure to do his homework, and/or nonparticipation in the classroom; and/or

(2) Appropriate behavior intervention in the form of full-time aide support and behavior supervision or one-to-one adult assistance?

7. Did District deny Student a FAPE by breaching the February 27, 2018 interim agreement, specifically by failing to provide different assessors?

8. Did District deny Student a FAPE by failing to timely provide to Parent a complete copy of Student's educational records, specifically, the October 26, 2017 IEP, in response to Student's January 14, 2018 request?

Motion to Dismiss:

District moved to dismiss Issue 7. Motions must be filed as of the due date for the prehearing conference order. Here, District did not timely file its motion and, therefore, the motion was not addressed at the prehearing conference. Instead, District shall file and serve its motion to dismiss in writing by **5:00 p.m., September 11, 2018**. Student may file a response by **5:00 p.m., September 13, 2018**, at which time the motion shall be deemed submitted for ruling.

Proposed Resolutions:

Student seeks:

(a) independent educational evaluations in the areas of psychoeducational, functional behavior, speech, mental health/social emotional and assistive technology;
(b) non-public agency full-time one-to-one assistance;
(c) resource support services;
(d) speech and language services;
(e) compensatory education;
(f) reimbursement for tutoring and transportation; and
(g) nonpublic school placement.

6. 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. 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.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. To the extent practicable, exhibits in the exhibit binders shall be in chronological order.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae **no later than September 12, 2018.**

District shall include as part of their exhibits the school calendar(s) for all of the years at issue. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), District shall serve a copy of the school calendar(s) on Student **no later than September 11, 2018** and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ.

If the parties intend to rely on IEP's, 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 or attached to the IEP(s). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party along with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter.

The parties shall meet and confer **by September 12, 2018 at 5:00 p.m.** to delete duplicate exhibits from the exhibit binders. 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 it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been timely disclosed.

7. 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.

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, subd. (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 shall meet and confer **by no September 12, 2018 at 5:00 p.m.** 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. **The parties shall also meet and confer regarding the one joint detailed hour-by-hour schedule described below**.

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 identify which party(s) is calling the witness to testify and 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.

The parties are ordered to meet and confer by **5:00 p.m., September 12, 2018,** and identify the witnesses on its/his 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 provide Student's counsel with the witnesses' most recent contact information by **5:00 p.m., September 13, 2018.** Any contact information provided by District shall be used by Student's counsel for the limited purpose of issuing subpoenas or contacting witnesses to attend the hearing and shall not be disseminated to any other person.

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. 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, subd. (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.

8. 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 unless otherwise permitted by the ALJ. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

9. Telephonic Testimony. Neither party requested 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).) In the event that telephonic testimony is requested, the party seeking to present a witness by telephone shall move in advance for leave to do so. Any motion filed shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not timely made three days prior to the prehearing conference, unless the opposing party has stipulated that the witness may appear by telephone. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of *exact physical copies of the exhibit binders* from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. *Faxed or electronic copies are unacceptable.* District shall ensure that the hearing room shall have sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

10. Electronic Recording of Hearing.

a. Audio Recording.

Student's motion to make an audio recording of the hearing is granted, 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, in order 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 parties and/or 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; 6) the parties shall not use the recording in any subsequent due process hearing or other proceeding; and 7) the parties shall destroy the unofficial recording upon the earlier of the following: (a) upon settlement of this matter, (b) dismissal of this case, or (c) after the hearing and all opportunities for appeal from any decision has been exhausted. District may also audio record, subject to the same conditions.

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.

11. 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 Student's case-in-chief, followed by District. However, if a witness is called by more than one party, all parties shall examine the witness when the witness is first called.

12. Motions. Other than District's motion to dismiss as discussed in paragraph 5, 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 timely made three business days prior to the prehearing conference.

13. 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.

14. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form. The parties shall meet and confer **by not later than September 14 at 10:00 a.m.** to determine legal and factual stipulations, if any, to be submitted at hearing.

15. 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. There shall be no texting permitted while the hearing is in session.

16. Special Needs and Accommodations. A Spanish language interpreter and translator is required. 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.

17. Closed Hearing. The hearing will be closed to the public.

18. 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 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.

If the parties settle the matter 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. OAH will not cancel the hearing dates without this information.

19. Failure to Comply. The failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: September 10, 2018

DocuSigned by:

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CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings