BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. EAST SIDE UNION HIGH SCHOOL DISTRICT AND SANTA CLARA COUNTY OFFICE OF EDUCATION.	OAH Case No. 2016061098 ORDER FOLLOWING PREHEARING CONFERENCE

On September 12, 2016, a telephonic prehearing conference was held before Administrative Law Judge Dena Coggins, Office of Administrative Hearings. Christian Knox, Attorney at Law, appeared on behalf of Student. Julia Souza, Attorney at Law, also appeared on behalf of Student. Eliza McArthur, Attorney at Law, appeared on behalf of East Side Union High School District. Tracy Johnson, Attorney at Law, appeared on behalf of Santa Clara County Office of Education. 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 27, September 28, September 29, October 4, October 5, and October 6, 2016. The hearing will continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 830 North Capitol Avenue, San Jose, CA 95133. 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 certified that it would provide a facility for this case that complies with the law.

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 Santa Clara's legal representative and special education representative; (4) a table for the witness; and (5) 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.

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 Issue 1: Did East Side deny Student a free appropriate public education for the 2014-2015 school year, from the beginning of the school year through April 23, 2015, by:

a. failing to implement any services offered in Student's February 7, 2014 individualized education program;
b. failing to hold an annual IEP meeting within one year of the last recorded annual IEP before the 2014-2015 school year;
c. failing to offer or provide adequate specialized academic instruction services in an appropriate therapeutic setting;
d. failing to offer or provide an appropriate behavior plan;
e. failing to offer or provide individual counseling;
f. failing to offer or provide group counseling;
g. failing to offer or provide social skills training;
h. failing to provide adequate present levels of performance;
i. failing to offer or provide measurable goals in all areas of need;
j. failing to offer or provide appropriate extended school year services;
k. failing to provide a trauma informed placement and services;
l. failing to adequately maintain educational records;
m. failing to make an offer of placement and services prior to the beginning of the school year;
n. failing to convene an IEP team meeting within thirty days of the beginning of the school year;
o. failing to provide a timely assessment plan;
p. failing to provide progress reports on goals;
q. failing to make a clear written offer;
r. failing to convene a manifestation determination IEP team meeting;
s. changing placement without parental consent; and
t. failing to consider a continuum of placement options?

Student's Issue 2: Did Santa Clara deny Student a free appropriate public education for the 2014-2015 school year, beginning April 23, 2015, through the 2015 extended school year, by:

a. failing to offer or provide adequate specialized academic instruction services in an appropriate therapeutic setting;
b. failing to offer or provide an appropriate behavior plan;
c. failing to offer or provide individual counseling;
d. failing to offer or provide group counseling;
e. failing to offer or provide social skills training;
f. failing to offer or provide appropriate extended school year services;
g. failing to provide a trauma informed placement and services;
h. failing to timely provide an assessment plan;
i. failing to provide progress reports on goals;
j. failing to convene a manifestation determination IEP team meeting;
k. changing placement without parental consent; and
l. failing to consider a continuum of placement options?

Student's Issue 3: Did East Side deny Student a FAPE for the 2015-2016 school year, from August 10, 2015, through November 2, 2015, and April 27, 2015, through May 31, 2016, by:

a. failing to implement Student's IEP;
b. failing to offer or provide adequate specialized academic instruction services;
c. failing to offer or provide individual or group counseling;
d. failing to offer or provide social skills training;
e. failing to offer or provide a behavior intervention plan;
f. failing to provide adequate present levels of performance;
g. failing to offer or provide measurable goals in all areas of need;
h. failing to offer residential treatment;
i. failing to provide Student with a trauma informed placement and services;
j. failing to provide progress reports on goals;
k. failing to make an offer or placement and services prior to the beginning of the school year;
l. failing to provide Student with an adequate individual transition plan;
m. failing to consider a continuum of placement options;
n. failing to timely convene an IEP team meeting;
o. failing to convene an IEP team meeting when Student was not making adequate progress;
p. failing to convene an IEP team meeting to develop a plan to transition him from the juvenile hall;

q. improperly determining that Student's behavior was not a manifestation of his disability; and
r. improperly awarding credits for completion of high school courses?

Student's Issue 4: Did Santa Clara deny Student a FAPE for the 2015-2016 school year, including extended school year, from November 2, 2015, through April 27, 2016, and May 31, 2016, through the 2016 extended school year by:

a. failing to implement Student's IEP;
b. failing to offer or provide adequate specialized academic instruction services;
c. failing to offer or provide individual or group counseling;
d. failing to offer or provide social skills training;
e. failing to offer or provide a behavior intervention plan;
f. failing to provide adequate present levels of performance;
g. failing to offer or provide measurable goals in all areas of need;
h. failing to offer residential treatment;
i. failing to provide Student with a trauma informed placement and services;
j. failing to provide progress reports on goals;
k. failing to provide Student with an adequate individual transition plan;
l. failing to consider a continuum of placement options;
m. failing to timely convene an IEP team meeting;
n. failing to convene an IEP team meeting when Student was not making adequate progress;
o. failing to convene an IEP team meeting to develop a plan to transition him from the juvenile hall;
p. improperly determining that Student's behavior was not a manifestation of his disability; and
q. improperly awarding credits for completion of high school courses?[1]

Student's Issue 5: Did East Side and Santa Clara fail to adequately assess Student in all areas of suspected disability by:

a. failing to conduct a functional behavior analysis; and
b. failing to conduct an adequate psychoeducational evaluation, including social/emotional functioning, executive functioning, processing, and academic achievement?

[1] In its PHC statement, Santa Clara argued that OAH does not have jurisdiction over the award of high school credits. Santa Clara withdrew this argument during the PHC.

Student's Issue 6: Did Santa Clara fail to offer Student a FAPE for the 2016-2017 school year?[2]

Proposed Resolution:

1. Respondents fund independent educational evaluations in the following areas:
    a. psychoeducational, including social/emotional functioning, executive functioning, and academic achievement; and
    b. functional behavior.
2. Respondents fund the attendance of the independent assessors at an IEP meeting to review the results of the assessments. At the meeting, the IEP team develops goals in all areas of need, adequate accommodations and modifications, and an adequate transition plan.
3. Respondents provide Student with compensatory education in the areas of counseling, social skills, and tutoring in all academic areas. As compensatory education, Respondents provide Student with placement in a trauma informed residential treatment center.
4. Respondents provide Student with placement in an appropriate trauma informed residential treatment program, prospectively, appropriate counseling services, and transportation services. Respondents provide Student's mother with transportation, lodging, and per diem for participation in family counseling.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties are to use different colored binders for the convenience of the witnesses. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" or "SC" in front of the exhibit to designate if it is a Student, District, or Santa Clara exhibit (for example, "S-5, S-6, or D-1, D-2, or SC-1, SC-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 timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

[2] Student withdrew this issue as to East Side, and clarified that the claim is against Santa Clara only.

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.[3] 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, unless the ALJ rules the witness may testify.

The parties are to meet and confer regarding the order of witnesses and the projected length of testimony to ensure the best use of hearing time **on or before September 16, 2016**. 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 attempt to reach agreement on a witness list for the first day of hearing. The District 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.

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

[3] Student's counsel informed the parties that Student's father is not her client; therefore, she is not able to make him available to testify at hearing. Respondents were advised by Student's counsel that Student's father will need to be subpoenaed if either party wishes to call him as a witness.

According to Santa Clara's counsel, probation and behavioral support witnesses are not under the control of Santa Clara.

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 Elva Silvestre to testify telephonically is granted. Student shall provide Ms. Silvestre with a complete exhibit binders from each party, containing 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.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's, East Side's, and Santa Clara's 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.

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 East Side and Santa Clara.

9. 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 September 12, 2016.

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. Santa Clara requested an accommodation of 20-minute breaks at least every three hours during the course of the hearing for breastfeeding purposes. Santa Clara's request is granted.

Student's counsel represented that Parent may not be available at all times during the hearing because of child care issues, and Parent has provided permission to Student's counsel to proceed at hearing in Parent's absence.

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 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.

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

IT IS SO ORDERED.

DATE: September 13, 2016

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DENA COGGINS
Administrative Law Judge
Office of Administrative Hearings