BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: TORRANCE UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT ,	OAH Case No. 2015090012
PARENT ON BEHALF OF STUDENT, v. TORRANCE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015080141 ORDER FOLLOWING PREHEARING CONFERENCE

On October 16, 2015, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. Jennifer Guze Campbell, Attorney at Law, and Damian Fragoso, Attorney at Law, appeared on behalf of Student. Geoffrey Winterowd, Attorney at Law, appeared on behalf of 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 will take place on October 27, 28, 29 and November 9, 2015, and continue thereafter day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge. The hearing shall begin at 9:30 a.m. on the first day of hearing and at 9:00 a.m. all other days, unless otherwise ordered. The hearing shall take place at Torrance Unified School District, 2335 Plaza Del Amo, Torrance, CA 90509**.**

District 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. District shall file a certification, available on the OAH website, that the facilities to be used for this case comply with the law. The local educational agency shall inform OAH within two business days of the date of this order if it is unable to comply with this requirement

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 to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, are:

Student's Issues**:**

(1) Did District deny Student a free appropriate public education by unreasonably delaying its filing of a request for due process hearing following Parent's March 2, 2015 request for independent educational evaluations (IEE's) of Student based on District's allegedly inappropriate:

a. speech and language evaluation; and

b. psychoeducational evaluation?

(2) Did District deny Student a FAPE by failing to appropriately assess Student's suspected need in the areas of:

a. speech and language; and

b. psychoeducation?

(3) Did District deny Student a FAPE by failing to find Student eligible for special education under the categories of speech and language impairment and/or autism at Student's IEP team meeting held on February 25, 2015?

Student's Proposed Resolutions:

(1) An Order:

a. that District fully reimburse Parent for the cost of the speech and language IEE performed by Ms. Susan Hollar;

b. that District fully reimburse Parent for the cost of the psychoeducational IEE performed by Dr. Ann Simun;

c. that District to hold an IEP team meeting within thirty (30) days of completion of the IEEs;

d. designating Student as eligible for special education and related services and reinstating Student's March 2014 IEP as an interim IEP;

e. that District provide Student with compensatory speech services in the amount of ten (10) hours of one-to- one speech therapy; and

f. granting such other relief as OAH deems just and proper.

District's Issues**:**

(1) Was District's February 2015 speech and language assessment of Student properly conducted, such that the District need not provide Student an IEE in that area at public expense?

(2) Was District's February 2015 psychoeducational assessment of Student properly conducted, such that the District need not provide Student an IEE in that area at public expense?

District's Proposed Resolutions:

(1) An Order finding that:

a. District's Spring 2015 speech and language assessment of Student was properly conducted, and that the District need not provide Student an IEE in that area at public expense; and

b. District's Spring 2015 psychoeducational assessment of Student was properly conducted, and that the District need not provide Student an IEE in that area at public expense.

3. Exhibits. Student identified 40 exhibits that Student intends to present at hearing. District identified 50 Exhibits that it intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., and District shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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 party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination.

4. Witnesses. Student expects to present five percipient witnesses and two expert witnesses at hearing. District expects to present six percipient witnesses and three expert witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed that it would make witnesses under its control reasonably available to Student without the need for subpoena. The District will also inform Student of

the identity of, and available contact information for, any witness identified by Student as an employee of the District who has left the District's employ, by 5:00 p.m. on Wednesday, October 21, 2015. The parties will 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 disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

a. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five business days prior to the hearing, a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing**.** The parties are to exchange final witness lists and exhibit binders by 5:00 p.m. on Tuesday**,** October 20, 2015 at 5:00 p.m. Witnesses and documents not disclosed by that time may be excluded at the request of the other party from introduction at the hearing. Each party reserves the right to present additional witness and documents for purposes of rebuttal.

b. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Wednesday, October 21, 2015 at 2:00 p.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to District's counsel to initiate the meet and confer. The parties are to 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 discuss a time estimate of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with one detailed hour-by-hour schedule of all witnesses expected to testify at the hearing, which list shall also include an estimate of time for each party's direct and cross-examination. The ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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. Neither party requested that a witness be permitted to testify telephonically in this matter. 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. Student's motion to make an audio recording of the hearing was 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. District may also make an audio recording under 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.

8. Order of Presentation of Evidence. In these consolidated matters, Student shall present Student's case in chief first, followed by District.

9. Motions. The parties brought the motions identified below. In the event that any additional motion, other than a challenge to a newly-assigned ALJ for the hearing, is brought after this date, it 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 PHC.

Student's Motions.

On September 11, 2015, Student filed three motions in limine to exclude evidence from hearing. District filed oppositions to Student's motions on September 16, 2015.

Motion for an order excluding all witnesses from hearing, other than Parents, except while the witness is testifying. Citing California Code of Regulations, title 5, section 3082, subdivision (c)(3), and Rule 615 of the Federal Rules of Evidence, Student sought an order excluding all witnesses, other than Parents, from hearing except when testifying,. Section 3082, gives parties the right, absent compelling circumstances to the contrary, and upon motion to the hearing officer, to have witnesses excluded from the hearing, and Rule 615 provides that, at a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Rule 615 expressly provides that it does not apply to a party who is a natural person, or to an officer or employee of a party that is not a natural person,

after being designated as the party's representative by its attorney. Section 3082 does not state any explicit exceptions to its general rule providing for exclusion of witnesses, but Student did not present any instance in which it has been applied to bar the presence of any party's representative at a hearing. Therefore, although the Federal Rules of Evidence do not apply to OAH administrative proceedings, they persuasively support the proposition that neither Parents nor designated District representatives should be excluded from hearing based on their designation as testifying witnesses.

Student's motion was granted in part and denied in part. Witnesses other than Parents or District's designated representatives will be excluded from the hearing, absent a showing at the hearing of compelling circumstances to the contrary.

Motion for an order directing District witnesses not to discuss their testimony with District counsel after direct examination, during or after cross-examination, and during recesses or breaks as deemed by the ALJ to be necessary or appropriate. Citing *Kadelbach v. Amaral* (1973) 31 Cal. App. D 815, 824 for the proposition that courts have wide discretion over the examination and cross-examination of witnesses, Student sought a broad pre-hearing order directing District witnesses not to discuss their testimony with District counsel after direct examination, during or after cross-examination, and during recesses or breaks as deemed by the ALJ to be necessary or appropriate, to prevent improper coaching of witnesses. An ALJ at a prehearing conference, may address such matters "as shall promote the orderly and prompt conduct of the hearing" (Gov. Code, § 11511.5, subd. (b)(12)), and at hearing, may take action "to promote due process or the orderly conduct of the Hearing." (Cal. Code Regs., tit. 1, § 1030, subd. (e)(3).) However, the issue of whether action by the hearing officer is necessary or appropriate to prevent witness coaching will depend on circumstances at hearing.

Student's motion was denied without prejudice to bringing future motions for similar relief, if supported by facts and circumstances at hearing.

Motion for an order permitting Student to question District's expert witnesses regarding their communications with District counsel. Citing Code of Civil Procedure section 2034, Evidence Code section 912, subdivision (a), and Federal Rules of Evidence Rule 702, Student sought an order finding that communications between District counsel and persons designated as District experts is not protected by the attorney-client or attorney work product privileges, and permitting Student to question District expert witnesses about compensation, facts or data provided by District counsel and considered by the expert, and any assumptions provided by District's counsel that were used by the expert in forming the expert's opinions. District stated that it did not oppose examination of its expert witnesses as to the bases for their expert opinions, but noted that District's anticipated expert witnesses were also percipient witnesses and District employees, whose communications with counsel regarding their observations and actions as percipient witnesses should be protected. The issue of whether District may appropriately object at hearing to Student cross-examination on grounds of attorney-client or attorney work product privilege will depend upon the particular witness, direct examination questions, cross examination question, and objection, and is not appropriate subject for a blanket order in advance of hearing.

Student's motion was denied without prejudice to asserting similar arguments in response to District objections at hearing.

Motion for an order barring testimony from District expert witnesses for whom District failed to provide a brief summary of the expert's opinion and a description of the issue to which the expert's testimony relates. On October 14, 2015, Student filed a motion in limine for an order barring testimony from District expert witnesses for whom District failed to provide a brief summary of the expert's opinion and a description of the issue to which the expert's testimony relates. This motion was not addressed at the PHC, because District had until October 19, 2015 to file a response to Student's motion, and stated that it intended to do so.

Request to reschedule a mediation date. On October 13, 2015, Student filed a request that OAH reschedule mediation in this matter, on grounds that Student had attempted unsuccessfully to reschedule mediation with District. District did not agree to reschedule. Mediation is voluntary and cannot be compelled by OAH. Student's request to reschedule a mediation was denied.

District's Motion to Quash Student's Subpoena Duces Tecum.

On September 21, District filed a motion to quash Student's subpoena duces tecum directed to District. Student filed an opposition on October 12, 2015. District's motion was argued at the PHC, and is addressed in a separate Order.

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. Neither party identified any party or participant requiring 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: 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 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: October 22, 2015

/s/

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings