BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. CHULA VISTA ELEMENTARY SCHOOL DISTRICT.	OAH Case No. 2017030569 ORDER FOLLOWING PREHEARING CONFERENCE OF SEPTEMBER 25, 2017

On September 25, 2017, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Meagan Nuñez and Jennifer Varga, Attorneys at Law, appeared on behalf of Parent on behalf of Student. Pamela Townsend, Attorney at Law, appeared on behalf of the Chula Vista Elementary School District.[1] The ALJ recorded the PHC.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on October 3, 4, 5, and 13, 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 84 East J Street, Chula Vista, California, 91910. 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 has certified that is able 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 local educational agency shall inform OAH immediately if it is no longer able to provide a facility 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 her 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

[1] At the PHC, Student dismissed the Arroyo Vista Charter School as a respondent as it is not a local educational agency.

available 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 ensure that its restrooms and the hearing room and access to both are in compliance with the Americans with Disabilities Act.

District shall also arrange a separate room for Student and her representative(s) to use during breaks in the hearing. The room shall be available to Student at least a half hour before the start of the hearing each day, during hearing breaks, and during lunch.

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, as clarified by Student in her PHC statement and during the PHC:[2]

(1) Did District deny Student a free appropriate public education for the 2014-2015 school year, by violating its child find obligation to her when it failed to assess her for special education eligibility although it had reason to suspect she might be a child with a disability?

(2) Did District deny Student a FAPE during the 2014-2015 school year because it prevented Parent from meaningfully participating in Student's education and denied Student educational opportunities by:

a. Failing to provide an assessment plan to assess Student for special education eligibility after Parent requested one on February 11, 2015; and

[2] At the PHC, Student withdrew the following issues: 1) failure to assess Student in the area of speech during all school years at issue; 2) failure to conduct an assessment to determine if a one-to-one aide was necessary and failing to provide an aide pursuant to Student's IEP; 3) developing goals that were compound, not measurable, and not tailored to Student's unique needs or reasonably calculated to provide her with educational benefit; 4) failure to materially implement the specialized academic instruction required by Student's IEP; 5) failure to make a clear offer of FAPE as it related to the provision of specialized academic instruction to Student and the amount of time she would spend in general education; and 6) failure to provide Student with specialized academic instruction, thereby materially failing to implement her IEP.

b. Failing to provide Parent with prior written notice of its refusal to assess Student after Parent's request for assessment on February 11, 2015?

(3) Did District deny Student a FAPE during the 2015-2016 school year because it prevented Parent from meaningfully participating in Student's education and denied Student educational opportunities by:

a. Failing to assess her in all areas of suspected disability, including but not limited to attention deficit hyperactivity disorder and occupational therapy,

b. Failing to find Student eligible for special education and related services after assessing her in September 2015;

c. Failing to develop an individualized education program on May 27, 2016, to address all of Student's unique needs and provide her with educational benefit because her IEP did not provide Student with necessary pull-out specialized academic instruction; and

(4) Did District deny Student a FAPE for the 2016-2017 school year because it denied Parent the right to meaningfully participate in Student's education and denied Student educational opportunities, by:

a. Failing to assess her in the areas of attention deficit hyperactivity disorder and occupational therapy; and

b. Failing to provide her with services and supports tailored to her unique needs or reasonably calculated to provide her with educational benefit by failing to provide her with sufficient small group instruction with a special education teacher?

Student's proposed resolutions:

(1) An order that District fund 150 hours of compensatory education by a non-public agency in the areas of academics;

(2) Reimbursement for Dr. Weckerly's psychoeducational assessment privately funded by Parent; and

(3) District to fund five hours of training for district staff on their child find obligations.

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 September 29, 2017 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.**

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 or Student classwork samples.

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. 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.

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 parties shall provide the ALJ with a witness list on the first day of hearing. The list shall include the day and time each witness is scheduled to testify, and will take into account direct examination, cross examination, and redirect/re-cross examination, as well as time for questions by the ALJ. 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.

The parties are ordered to meet and confer no later than 5:00 p.m. on September 29, 2017, as to the availability and order of witnesses, and as to any anticipated issues regarding exhibits.

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.

Student's motion to have Michelle Whipple testify telephonically is granted, given her locations outside of California, and subject to the above criteria.

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. The 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, Student is the petitioning party and will therefore present her case first, subject to the parameters described in paragraph 5.

9. Motions.

a. Student's motion to change venue. During the PHC, Student requested that the hearing be held at the OAH offices in San Diego. Student stated that the request was due to Parent's desire to hold the hearing at a neutral location, which Parent believes District's office is not.

The IDEA and the Education Code require that due process hearings be conducted "at a time and place reasonably convenient to the parents and child involved." (34 C.F.R. § 300.515, subd. (d); Ed. Code §56505, subd. (b).) "Reasonably convenient" does not mean that the hearing may be located anywhere a parent chooses. To be reasonable, there must be some balance of interest between what is convenient for the parent and child on one side and

what is efficient for the district or other parties on the other side. Due process hearings are generally scheduled in the offices of the school district as the pupil generally resides within the district's coverage area. Due process hearings must be fair and conducted so that the parties can exercise their rights as provided for by law. (Ed. Code § 56505, subd. (c) and (e).)

Here, Student has failed to establish that the District office is not reasonably convenient to Parent and Student. The reasons Student offers for changing venue are not supported with evidence justifying a change in location based upon "reasonable convenience" of Student or her parent. While a neutral setting may be desired by Student, it is not a legal basis of reasonable convenience which is necessary for a change of venue. The ALJ hearing the matter is responsible for conducting a fair hearing at any location. Additionally, District has been directed to provide Student, Parent, and their representatives with a separate meeting room for confidential discussions. For these reasons, Student's request to change venue for the hearing to OAH in San Diego is denied.

b. Student's motions to record the hearing and to take the testimony of Michelle Whipple telephonically are granted, as stated above.

c. 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 prior to or during the prehearing conference of September 25, 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. No eating is permitted in the hearing room while the ALJ is on the record, unless otherwise ordered.

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.

At present, neither party has requested specific accommodations because of an attendee's anticipated special needs. If any need for 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** 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

IT IS SO ORDERED.

DATE: September 25, 2017

DocuSigned by:
Darrell Lepkowsky
A228F8201132499...

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings