BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2015060967
SAN DIEGO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2015080848 ORDER FOLLOWING PREHEARING CONFERENCE OF OCTOBER 2, 2015, AND GRANTING BIFURCATION AND CONTINUING CASE

On October 2, 2015, a telephonic prehearing conference was held before Administrative Law Judge Robert Helfand, Office of Administrative Hearings. Meagan M. Nunez and Jennifer L. Varga, Attorneys at Law, appeared on behalf of Parents on behalf of Student. Sarah L.W. Sutherland, Attorney at Law, appeared on behalf of the San Diego Unified School 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 October 13-15, 2015, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the offices of OAH located at 1350 Front Street, Suite 3005, San Diego, CA 92101. 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.

2. Motion to Bifurcate. On the motion of the ALJ, this matter is bifurcated and the hearing will proceed as to the issue of residency only.

Federal and state laws pertaining to special education due process administrative proceedings do not contain a specific reference to the procedure for bifurcating issues at trial. Such authority resides in the discretion of the administrative law judge, provided the separate hearings are conducive to judicial economy or efficient and expeditious use of judicial resources. (See Gov. Code, § 11507.3, subd. (b).)

Generally, OAH will bifurcate a hearing where the resolution of a threshold question will determine whether the remainder of a hearing will be necessary. For example, OAH will bifurcate the issue of whether a student is or was a resident of a school district named as a respondent in a complaint to determine if the district was appropriately named as a party. OAH has also bifurcated specific legal issues such as the statute of limitations because a determination of that issue may reduce or eliminate issues and determine whether the remainder of the hearing will be necessary. Bifurcation limiting parties or issues furthers judicial economy by dismissing a named respondent from a complaint, or by finding that no complaint exists against a respondent due to the student's lack of residency, or that the issue is barred by the statute of limitations. There is an issue as to whether Student was an actual resident of the District. The issue of residency is determinative as to whether or not District has the responsibility to provide Student with educational services.

3. Issue and Proposed Resolutions. The issue at the due process hearing, and the proposed resolutions, are listed below.

Whether and/or when Student established residency within San Diego Unified School District boundaries?

4. 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. 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 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.

The parties will file with OAH no later than October 8, 2015, a list of exhibits that they intend to introduce as to the issue being heard.

5. 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. 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 will file with OAH no later than October 8, 2015, a list of witnesses that they intend to introduce as to the sole issue being heard.

6. 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.

7. 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.

Neither party has requested that any witness testify telephonically.

8. Motions.

District's motion to file amended complaint and continuance of case

District's motion to file an amended complaint is granted. The motion was filed timely, and Student does not contend he will be prejudiced. The District filed case (OAH Case number 2015080848) will now be the designated primary case. The hearing date for District filed case is hereby continued, and OAH will issue a scheduling order after the conclusion of the hearing on residency.

Student's motions to quash subpoenas duces tecum

On September 23, 2015, Student filed a motion to quash subpoenas duces tecum, which District served on The Institute for Effective Education (Institute), San Dieguito Union High School District, and Del Mar Union School District, on or about September 16, 2015. District filed an opposition on September 29, 2015.

A party to a due process hearing under the Individuals with Disabilities in Education Act has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).)

The provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and SDT's (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(b)), which requires:

> A copy of an affidavit shall be served with a subpoena duces tecum . . . , showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.) Special education law does not specifically address motions to quash subpoenas or SDT's. In ruling on such motions, OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

Student formerly was a student in the San Dieguito and Del Mar prior to enrolling in the District. He also attended Institute pursuant to an Individualized Education Program immediately prior to enrolling with the District. Student alleges that District has denied him a free appropriate public education by its failure offer comparable services to that which are contained in the IEP from his former district.

Student contends that the SDT's should be quashed because (1) District failed to demonstrate reasonable necessity exists, (2) the description of documents is overly broad and vague, and (3) the records requested to be produced are not education records. Student offers no authority to support his contention that a District is restricted to obtaining and using as evidence documents which are not educational records.

The SDT's contain a declaration of District's counsel stating that Student's parents had initiated a due process proceeding alleging that District denied their son a FAPE and that the documents requested are necessary to defend the matter. District has demonstrated reasonable necessity.

Student also argues that the requested list of documents is overly broad and vague. The SDT requests fail to offer any specificity or particularity as to what is being sought. District is limited to seek only those documents which would be necessary to defend against Student's claims. An example is the request to produce all "records." It is unclear what that term refers to. Also, all communications is too broad as it fails to limit to what topic those communications would be responsive. Of the class of documents requested, the only areas which are specific and particularly sufficient are the requests for assessments, test protocols, and progress reports.

Student's motion to quash SDT's to the Institute, San Dieguito, and Del Mar is GRANTED in part as the only documents which need be produced are limited to assessment reports, testing protocols, progress reports, and settlement agreements.

On October 1, 2015, District filed with OAH copies of SDT's addressed to five persons associated with the Institute requesting the same documents as that requested in the Institute SDT. This amounts to harassment. The document production portion of the individual SDT's is hereby quashed except as to the extent that any of the individuals personally possess any assessments, testing protocols, progress reports or settlement agreements which have not been produced by the Institute. District's counsel is directed to produce a copy of any documents received pursuant to the SDT's to Student's counsel within 24 hours of receipt.

The SDT's shall be amended to have production of the documents to the time that the hearing on the substantive issues is held.

Student's Motion to Compel Observation

On October 5, 2015, Student filed with OAH a motion seeking an order to compel the District to permit his expert, Dr. Rienzi Haytasingh, to observe the District's proposed placement, a moderate/severe special day class at Wangenheimer Middle School.

District does not oppose the observation of Dr. Haytasingh and agrees to schedule the requested observation by October 15, 2015. Accordingly, Student's motion is denied as moot.

Other Motions

No other 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.

9. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

10. 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.

11. 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: http://www.dgs.ca.gov/oah/Home/Accommodations.aspx

12. Hearing Closed To the Public.

13. 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.

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

IT IS SO ORDERED.

DATE: October 6, 2015

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings