BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ABC UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013020685 ORDER FOLLOWING PRE-HEARING CONFERENCE

On March 27 and March 28, 2013, the telephonic prehearing conference (PHC) in this matter was held before Administrative Law Judge (ALJ) Robert G. Martin, Office of Administrative Hearings (OAH). Tania L. Whiteleather, Esq., appeared on behalf of Student. Debra K. Ferdman, Esq., appeared on behalf of the ABC Unified School District (District). The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Motion to Disqualify the ALJ. At the commencement of the PHC on March 27, 2013, ALJ Martin disclosed to the parties that he had served as mediator in a prior matter, OAH Case No. 2012080536, that involved Student's claims against three other school districts, but did not include claims against the District. ALJ Martin disclosed that: (i) he had a vague recollection that some of the fact contentions in the prior matter regarding Student's placement corresponded to fact contentions set forth in Student's Due Process Hearing Request (complaint) in this matter; (ii) that he was unaware of any factual or legal contentions that were raised in the prior mediation and potentially relevant to this matter that were not also included in the factual and legal contentions already set forth in Student's complaint, the District's response, or the parties' PHC Statements in this matter; and (iii) that he harbored no bias or prejudice in favor of, or against, either party in this matter.

Following the disclosures, Student assented to ALJ Martin hearing this matter. The District orally moved to disqualify the ALJ for cause, on grounds that the prior mediation involved many of the same facts and issues as this matter, and the ALJ might have heard fact contentions in the prior mediation that would not be admissible evidence in this matter.

An ALJ may be disqualified for bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.40, subd. (a).) The following, without further evidence of bias, prejudice, or interest, are not by themselves grounds for disqualification: 1) the ALJ is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group; 2) the ALJ has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding; or 3) the ALJ has as a lawyer or public official participated in the drafting of

laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. (Gov. Code, § 11425.40, subd. (b).)

In other words, to disqualify an ALJ for cause, a factual showing of actual bias or prejudice is required. (See *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, 472.) For example, in order to be a basis for disqualification, the financial interest of the ALJ in the outcome of the case must be direct, personal, and substantial, rather than slight. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1031.) Similarly, personal involvement in the case by the ALJ or familial connections may warrant disqualification based solely on the probability of bias. (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-1173.) However, in most other cases, including claims of bias arising from the hearing officer's personal or political views, disqualification will not occur absent a showing of actual bias. (*Haas*, *supra*, at p. 1032.)

Here, the ALJ has no financial, personal or familial involvement in the case, and there is no showing of actual bias or prejudice. The ALJ has disavowed any bias or prejudice in favor of, or against, either party. The ALJ recalled no potentially relevant factual or legal contentions being asserted in the mediation of the prior matter that were not also asserted in the parties' filings in this action. The District expressed a vague concern that the ALJ might have heard but not presently recall factual arguments during the mediation that would not be admissible evidence in this matter, but identified no issues of fact or law in this matter with respect to which it could reasonably be argued that the mere hearing of inadmissible evidence might potentially influence the determination of the issue. If the ALJ is either offered or recalls inadmissible evidence during the hearing of this matter, it may be addressed in the usual manner by being identified, excluded and disregarded.

The District's motion to disqualify the ALJ is denied.

2. District's Motion for a Continuance. On March 26, 2013, the District filed a Motion to Continue Due Process Hearing, made on grounds that the District's hearing counsel, Adam Newman, was unavailable on the April 9, 2013 hearing date for this matter because he was scheduled on that same date to commence a due process hearing in consolidated OAH Cases Nos. 2011110175 and 2012100096. Those consolidated matters substantially predate the filing of this matter. No prior continuance has been sought in this matter.

Student objected to a continuance on grounds that Mr. Newman's declaration in support of the continuance did not expressly state that Mr. Newman would be the responsible counsel for his firm's client in the hearing of the consolidated matters. However, counsel for the District confirmed at the PHC that Mr. Newman would be the responsible counsel in both this matter and the consolidated matters.

Student also objected to a continuance on grounds that Student would be prejudiced by a delay of the hearing because Student's guardian had placed Student for a matter of months in a residential treatment center in Texas as of March 26, 2013, and Student needed: (i) a determination before the end of that placement of the appropriateness of that placement;

(ii) a determination of the local educational agency (LEA) responsible for providing that placement; and (iii) a responsible LEA to hold a 30-day IEP meeting with respect to Student's placement.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

Based on discussion of the parties, and considering all relevant facts and circumstances, it appears that good cause exists due to the unavailability of counsel to grant the District a five-week continuance to the earliest hearing dates available to Student and District counsel and the OAH. Such a continuance will not significantly prejudice Student because: (i) Student on March 26, 2013 was placed by her guardian in a residential treatment center of Student's choice for a matter of months, providing Student an extended period of time to obtain a determination, before the end of that placement, of the appropriateness of that placement and the local educational agency (LEA) responsible for providing that placement; and (ii) Student in any event could not have obtained a determination of the LEA responsible for her placement, and a 30-day IEP meeting, within thirty days of the March 26, 2013 placement, even if the hearing had been help on April 9, 2013 as originally scheduled.

Accordingly, the District's motion is granted, and the hearing is continued to the dates set forth immediately below.

3. Hearing Dates, Times, and Location. The hearing is continued to May 15, 16 and 20, 2013. The hearing may be continued day to day, Monday through Thursday, as needed at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. and end at 4:30 p.m. The hearing shall take place at the offices of the ABC Unified School District, 16700 Norwalk Blvd., Cerritos, CA 90703.

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.

4. Issues. At the PHC, Student withdrew Student's Issue No. 2 concerning the appropriateness of services offered by the District to Student at College Hospital during the 2012-2013 school year. The sole issue to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, is:

a. Whether the District failed to offer Student a free, appropriate public education (FAPE) when it refused to offer Student a residential treatment center placement at her IEP meeting held on January 15, 2013.

5. Proposed Resolutions. As relief, Student seeks:

a. A finding that the District was Student's LEA during the time that Student was placed at College Hospital.

b. A finding that, to provide Student a FAPE, the District was required to offer Student placement at a residential treatment center at her IEP meeting held on January 15, 2013.

c. Compensatory education or reimbursement to compensate Student for the District's failure to offer Student a residential treatment center placement at her IEP meeting held on January 15, 2013.

6. Exhibits. 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 the 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.

7. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party agreed at the PHC that it would make witnesses under its control reasonably available to the other party without the need for subpoena. The District also agreed to inform Student of the identity of, and available contact information for, any witness identified in Student's witness list as an employee of the District who has left the District's employ.

Student expects to present the direct testimony of four witnesses: Patrice Vance, Christopher Russell, Kristin Guerrero, and expert Mitchel D. Pearlman, Ph.D. Student also expects to present one or more witnesses to testify concerning Student's conservatorship and any orders of the juvenile court that relate to Student's placement and services at College Hospital or at Devereaux, Texas. Student does not expect to call the following witnesses previously identified in Student's PHC statement: Rodney Ford, Martha Needelman, Kimberly Taylor, Tiana Thorp, Mary Kay Heenan, Joleen Gross, Stacy Helligenthaler, Marciel Fortescue, Donna Huff, Patsy James, and expert Susan Hollar.

The District expects to examine witnesses presented by Student, and to present the direct testimony of six witnesses: Kimberly Taylor, Stacy Helligenthaler, Zahra Mishek, Sonya Vardanyan, and experts Marciel Fortescue and Dr. Valenza Rina.

The parties will exchange final witness lists no later than five business days prior to the hearing. Each party reserves the right to present additional witness for purposes of rebuttal.

8. Telephonic Testimony. Student requested that expert Mitchel D. Pearlman, Ph.D., who resides in San Diego, California, be permitted to appear by telephone.

Whether a witness may appear by telephone is a matter within the discretion of the ALJ. Cal. Code Regs., tit. 5, § 3082, subd. (g). Leave is granted for Mitchell D. Pearlman, Ph.D. to appear by telephone. Student shall provide Student's telephonic witness a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing. No witness will be heard by telephone unless this requirement has been fulfilled.

9. Meet and Confer Regarding Witnesses and Possible Stipulations. The parties are ordered to meet and confer on or before May 7, 2013, regarding the schedule of witnesses and possible stipulations that might reduce or eliminate the need to present certain witnesses or documents. 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 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. Prior to the commencement of the due process hearing, 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.

10. Scope of Witness Examination. 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.

11. Timely Disclosure of Witnesses/Exhibits. The parties will exchange final witness lists pursuant to Education Code section 56505, subdivisions (e)(7), which 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. Each party will deliver to the other, by no later than May 8, 2013, binders containing a complete set of exhibits that the party intends to present at the hearing. Witnesses and documents not disclosed on or before May 8, 2013 may be excluded at the request of the other party from introduction at the hearing.

12. Motions. The parties do not anticipate bringing any motions in addition to those heard at the PHC. In the event that any other motion 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.

13. 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.

14. 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.

15. Special Needs and Accommodations. Each party represented that no special accommodation is required for any witness or party.

16. Hearing Open To the Public. At the request of Student, the hearing will be open to the public. No videotaping or audiotaping will be permitted in the hearing room.

17. Settlement. The parties are encouraged to continue working together to complete 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. 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 AND SHALL 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. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

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

IT IS SO ORDERED.

Dated: April 5, 2013

/s/
ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings