BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>PANAMA BUENA VISTA UNION SCHOOL DISTRICT. | OAH CASE NO. 2014090188<br><br>ORDER FOLLOWING PRE-HEARING CONFERENCE, GRANTING DISTRICT'S MOTION TO LIMIT ISSUES, AND GRANTING JOINT REQUEST FOR CONTINUANCE |

On October 20, 2014 Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings held a telephonic prehearing conference. Attorney Nicole Amey appeared on Student's behalf. Attorneys Darren Bogie and Stacy Inman appeared on behalf of Panama Buena Vista Union School District. The PHC was recorded. Based on discussion of the parties, the ALJ issues the following orders.

*District's Motion to Limit Issues*

On October 16, 2014, District filed a motion to limit issues #1 and #5, as articulated in the complaint. Student filed an opposition on October 20, 2014 shortly before the PHC. The parties discussed the motion on the record and the ALJ took the matter under submission to consider Student's opposition.

Specifically, District contends that, pursuant to a recent OAH Decision involving Student in OAH Case Number 2014040519, the issue of whether District's offers of placement during the applicable statutory period should be limited under the doctrines of res judicata and collateral estoppel. Specifically, the issue in the Decision was limited to whether District denied Student a free appropriate public education in Student's March 20, 2014 individualized education program by failing to offer Student home hospital instruction. The ALJ in the Decision made a very narrow finding that District did not deny Student a FAPE by failing to offer Student home-hospital instruction in the March 20, 2014 individualized education program as a result of events that occurred at Student's then-placement in January 2014 (Decision in OAH Case Number 2014040519 at paragraph 36).

In this case, Student alleges that District failed to offer Student an appropriate placement during the applicable statutory period, which runs from September 2, 2012 through the date of filing of the complaint, September 2, 2014.

Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision precludes litigation of the same issue in a suit on a different cause of action involving a party to the first case. Collateral estoppel applies to

special education due process hearings in California. (*Student v. Los Angeles Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs. Case No. N 2007010315*; Student v. San Diego Unified School Dist.* (2005) Special Education Hearing Office Case No. SN 2005-1018.)

Collateral estoppel precludes relitigation of an issue when five conditions are met: (1) the issue to be precluded must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated at that time; (3) the issue must have been necessarily decided; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.)

Collateral estoppel is not avoided simply because a party chose not to make an argument or introduce evidence in the first proceeding. The doctrine bars relitigation by means of evidence that was, or could have been, presented in the first action. (*People v. Sims*, (1982) 32 Cal.3d 468, 481; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 607; *Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal. App.3d 177, 181.)

In this case, Issue #1 in the complaint is very broadly written and refers to Student's educational program, but not specifically placement; Student's issue #5 alleges that District failed to offer Student an appropriate placement. The issue of whether home-hospital was an appropriate placement option for Student at the March 20, 2014 IEP, based upon events that occurred in January 2014, has been litigated and Student is estopped and precluded from arguing that home-hospital was a viable placement option in connection with the March 20, 2014 IEP or alleged incidents that occurred at Student's then-current placement in January 2014.

District motion is granted to the extent that the issue of placement may be litigated as to all potential placement options during the applicable statutory period, except the issue of home-hospital placement in the March 20, 2014 IEP.

*Pre-hearing Conference*

1. Hearing Dates, Times, and Location. The hearing is continued for good cause on joint motion of the parties and shall take place on December 9, 10 and 11, 2014, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:30 a.m. on the first day, and at 9:00 a.m. on all other hearing days, unless otherwise ordered. The hearing shall take place at the District's offices located at 3100 Actis Street, Bakersfield, California 93309.

The school district shall 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 .), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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. The issues at the due process hearing, subject to the above ruling on District's motion to limit issues, are:

a) Did District deny Student a free appropriate public education during the applicable statutory period by failing its Child-Find obligations?

b) Did District deny Student a FAPE during the applicable statutory period by failing to assess him in all areas of suspected need, including neuropsychology, mental health, behavior, occupational therapy, assistive technology, augmentative communications, and hearing?

c) Did District deny Student a FAPE during the applicable statutory period by:

1) Predetermining the goals and objectives for his individualized education program, thereby depriving Student's parents the opportunity for meaningful participation in the development of his IEP; and

2) Failing to include appropriate and measurable goals and objectives in his IEP?

d) Did District deny Student a FAPE during the applicable statutory period by failing to offer Student related services to address his unique needs, and specifically:

1) A trained one-to-one aide;
2) School based counseling; and
3) Community-based mental health services.

e) Did District deny Student a FAPE during the applicable statutory period by failing to develop and implement an appropriate behavior support plan?

f) Did District deny Student a FAPE during the applicable statutory period by failing to offer Student an appropriate placement?

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbered exhibit tabs 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 identifying at least the name of the document, the

date and page number(s) in the binder. All documents with separate dates shall be identified under a separate exhibit number unless they are part of a series of related documents such as emails.

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 shall meet and confer before the first day of hearing in order to delete duplicate exhibits from the exhibit binders and to consolidate exhibits where possible. The parties shall not serve exhibits on OAH prior to the hearing.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

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 ordered to meet and confer in person or telephonically by December 1, 2014, as to the schedule of witnesses. On the first day of hearing, the parties shall provide the ALJ with a detailed schedule which shall include a reasonable estimate of time for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness on all issues when the witness is first called. The District shall have witnesses available in case agreement on a witness list is not reached. 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 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.

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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

5. 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.

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.

Neither party contemplated the need for telephonic testimony at the time of the PHC.

7. Motions. With the exception of District's motion to limit issues discussed above, no other prehearing 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 October 20, 2014.

8. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form. In particular, because this matter follows the hearing in OAH Case Number 2014040519, in which certain background factual findings were made by the ALJ, the parties are ordered to meet and confer before the first day of hearing to discuss a proposed stipulation of facts based on the applicable factual findings in that Decision.

9. 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 person in the hearing room shall be permitted to engage in text messaging while the hearing is on the record.

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. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a requests for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accommodations.aspx.

12. Hearing Shall Be 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.

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.

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

IT IS SO ORDERED.

DATE: October 20, 2014

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ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings