BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. AVESON CHARTER SCHOOLS, AVESON GLOBAL LEADERSHIP ACADEMY, AND AVESON SCHOOL OF LEADERS,	OAH Case No. 2017090125
AVESON CHARTER SCHOOLS, AVESON GLOBAL LEADERSHIP ACADEMY, AND AVESON SCHOOL OF LEADERS, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017120695 ORDER FOLLOWING PREHEARING CONFERENCE, DENYING STUDENT'S MOTION TO CONTINUE, GRANTING AVESON'S MOTION FOR OFFICIAL NOTICE, AND DENYING WITHOUT PREJUDICE AVESON'S MOTION TO LIMIT ISSUES

On March 2, 2018, a telephonic prehearing conference was held before Administrative Law Judge Cole Dalton, Office of Administrative Hearings. Jack Clark, Attorney at Law, appeared on behalf of Aveson[1]. Mother appeared on behalf of Student. 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 March 8, 13, 14, and 15, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Aveson Global Leadership Academy, located at 575 West Alta Dena Drive, Alta Dena, CA 91001. 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.

[1] Aveson Charter Schools, Aveson Global Leadership Academy, and Aveson School of Leaders are referred to herein collectively as Aveson.

As ordered in the scheduling order, the named local educational agency 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. The named local educational agency certified that the facilities used for this case comply with the law.

Prior to the beginning of the hearing, Aveson shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Aveson's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Aveson shall provide drinking water and tissue 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. Aveson shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

Aveson shall have a separate meeting room available for Student, Parents, and their advocate for use while hearing is not in session.

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.

a. Student's Issues.

(1) Did Aveson deny Student a free appropriate public education by:

(a) Failing to assess Student in the areas of (i) speech and language, and (ii) central auditory processing disorder, during the statutory time frame;

(b) Failing to provide prior written notice when it denied Parents' May 15, 2017 request for assessments;

(c) Failing to explain the purpose of its May 19, 2017 occupational therapy assessment plan; and

(d) Failing to conduct an occupational therapy assessment pursuant to the May 19, 2017 assessment plan?

(2) Did Aveson deny Student a FAPE during the 2015-2016 school year by:

(a) Failing to offer Learning Lab to address Student's needs in math; and

(b) Failing to implement IXL math services?

(3) Did Aveson deny Student a FAPE during the 2016-2017 school year by failing to appropriately address Student's needs in math?

(4) Did Aveson significantly impede Parents' opportunity to participate in the decision making process throughout the 2016-2017 school year regarding development of Student's individualized education programs, by:

(a) Failing to respond to Parents' requests for information before and during the IEP meetings of (i) September 15, 2016, (ii) October 2016, (iii) December 8, 2016, an (iv) June 1, 2017, and June 15, 2017; and

(b) Providing Parents with August 23, 2017 correspondence purporting to refuse to answer any further questions from Parents?

(5) Did Aveson deny Student a FAPE at the June 1 and 15, 2017 IEP team meetings by failing to have a school nurse (a) attend the meetings, and (b) address Student's visual processing deficits, which created needs in math, reading, writing, and spelling?

(6) Did Aveson significantly impede Parents' opportunity to participate in the decision making process regarding the development and implementation of his individualized education programs, during the statutory time frame, by:

(a) Failing to provide Parents with progress reports and other records demonstrating Student's progress;

(b) Failing to provide Parents with report cards and transcripts that accurately demonstrated Student's progress?

(7) Did Aveson deny Student a FAPE during the statutory time frame by failing to develop goals in (a) decoding, (b) reading fluency, and (c) comprehension?

(8) Did Aveson deny Student a FAPE during the statutory time frame by failing to appropriately address bullying?

Student seeks an order for reimbursement, compensatory education, and Aveson training.

b. District's Issue.

(9) Did District appropriately deny Student's request for an independent psychoeducational evaluation with Dr. Chris Davidson because it did not comply with Aveson's cost and location criteria for independent educational evaluations?

Aveson seeks an order that Student choose an evaluator who meets agency criteria.

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 Aveson exhibit (for example, "S-1, S-2, 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.

The parties shall meet and confer by no later than **5:00 p.m. on March 6, 2018**, to discuss exhibits and eliminate duplicate exhibits from the exhibit binders.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. 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.

Aveson shall include as part of its exhibits the school calendar(s) for the years at issue.

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).

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 meet and confer by **5:00 p.m. on March 6, 2018,** as to the schedule of witnesses and coordinate the availability and order 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.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one **joint** detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination.

Aveson 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 each witness is expected to take.

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. 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. The proponent of the witness shall ensure the witness testifies from a private location with no other persons present using a "land-line" 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. Aveson's motion to make an audio recording of the hearing is granted, subject to the following conditions, which shall be applicable to both parties: (1) Such recording shall be for counsel's personal use only and only for review and preparation of the hearing; (2) 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; (3) The hearing will not be stopped or delayed at any time to accommodate the recordings or any problems with the recording equipment; (4) The parties shall not play any part of the recording for any prospective witness(es) and the recording shall not be disseminated; (5) The parties shall not use the recording in any subsequent due process hearing; and (6) The parties shall dispose of the unofficial recording when the ALJ's decision in this matter is issued. Any recording made by either party is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ. The OAH recording made by the hearing ALJ is the official record unless otherwise ordered.

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 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, each party has the burden of proof as to their respective issues. Further, as Student's case is the primary case, Student will present his case-in-chief, followed by Aveson.

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 of March 2, 2018.

a. Student's Motion to Continue. On February 27, 2018, Student filed a motion to continue the hearing for an additional six to eight weeks as Parents have not yet retained counsel, among other reasons. On February 28, 2018, Student filed an amended motion to continue the hearing stating Parents' unavailability from April 2 to 6, 2018, because they might be traveling to England.

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).)

Student's motion to continue is denied. Student filed his complaint on September 5, 2017. The matter has been continued three times already, once by joint request on October 23, 2017; once on Student's request on November 27, 2017; and once by an amended complaint filed on January 12, 2018. Moreover, Student has not demonstrated good cause for a further continuance.

Student argues that he has not been able to retain counsel. Student has been assisted by an advocate from the time this matter was filed and has prior experience litigating a due process with an attorney, evidencing tools available to Student for locating and retaining counsel. Moreover, Student has had six months to do so. On October 20, 2017, OAH issued an order in response to a dismissal request inappropriately filed by an advocate, which reminded Student of his right to be represented by an attorney. On November 22, 2017, Student requested a second continuance on several grounds and indicated, "[w]e hope to also obtain counsel." During the prehearing conference of January 8, 2018, held in District's case, Mother stated that Student reserved the right to bring attorneys into the case.

Student has had sufficient time to obtain counsel and has offered no nexus between delaying the hearing further and being able to find counsel at this late date. With the current hearing dates, a decision will not be rendered in this matter until the case is approximately eight months old. Any further continuance would be contrary to public policy and not what Congress intended when it established due process timelines under the IDEA.

Student's motion to continue is denied. The hearing will proceed on the dates currently set.[2]

b. Aveson's Motion in Limine. On February 28, 2018, Aveson filed a motion for OAH to take official notice of the December 7, 2015 Decision in OAH Case Number 2015021006, involving the same parties, and to preclude rehearing of the same issues in the instant hearing based on res judicata, collateral estoppel, and the two year statute of limitations. On February 28, 2018, Student filed an opposition to the motion on the

[2] At the PHC, Student asked how late he could wait to file a dismissal of his case. Student has until the start of hearing to file a dismissal without prejudice. Student should be aware that dismissing his case would result in the hearing going forward on Aveson's issue, on the dates currently set.

ground that OAH does not hear motions for summary judgment, and that Aveson's motion seeks summary adjudication as to which issues can be presented at hearing. Student does not oppose official notice of OAH's prior Decision.

A party requesting a due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the complaint, unless the other party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

Evidence Code Section 350 states, "No evidence is admissible except relevant evidence." Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible person are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or stature rule which might make improper the admission of the evidence over objections in civil action. (Govt. Code §11513 (c).)

The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Govt. Code §11513 (f).) Further, Education Code section 56505.1, subd. (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

Official notice may be taken of any generally accepted technical or scientific matter within the agency's special field, or of any fact which may be judicially noticed by the courts of this State. (Gov. Code, § 11515.)

Aveson's motion for official notice of OAH's December 7, 2015 Decision between the same parties is granted in order to avoid litigating issues that have already been decided.

Aveson's motion to limit the issues is denied, without prejudice. Aveson argues that Student's issues regarding (1) failure to assess for speech and language, central auditory processing disorder, and dyslexia and (2) failure to offer goals for decoding, reading fluency, and comprehension were litigated in the 2015 hearing and should be precluded from the present hearing. While the same or similar issues may have been addressed by the 2015 Decision, the present hearing involves a distinctly different time period. Accordingly, the ALJ will consider and rule on evidentiary objections during the hearing, in context.

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. Mother requests (1) that she be able to testify using notes and (2) additional time to answer questions, as accommodations for hearing due to a learning disability. NOTE: MOTHER IS INSTRUCTED TO CALL (916) 263-0880 AS SOON AS POSSIBLE TO ALLOW OAH TO RESPOND TO THE REQUEST FOR ACCOMMODATION.

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.

14. Hearing Open To the Public. At the request of Student, the hearing will be open to the public. District shall arrange seating at the back of the hearing room. All witnesses, other than the parties or their representatives, shall be sequestered and shall not be permitted in the hearing room prior to their testimony. The parties shall ensure that their witnesses are aware of this and that the witnesses do not attend the hearing prior to the time they testify. Once they have testified, the witness may attend the hearing.

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.

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: March 05, 2018

DocuSigned by:

COLE DALTON
Administrative Law Judge
Office of Administrative Hearings