BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHAL OF STUDENT v. PASADENA UNIFIED SCHOOL DISTRICT,	OAH Case No. 2016030805
PASADENA UNIFIED SCHOOL DISTRICT v. PATENTS ON BEHALF OF STUDENT.	OAH Case No. 2016060614 ORDER FOLLOWING PREHEARING CONFERENCE, CHANGING LOCATION FOR HEARING, AND DENYING DISTRICT'S MOTION TO REQUIRE STUDENT TO FILE AND SERVE AN AMENDED PREHEARING CONFERENCE STATEMENT

On July 1, 2016 a telephonic prehearing conference was held before Administrative Law Judge Robert Martin, Office of Administrative Hearings. Hamlet Yarajanian, Advocate, appeared on behalf of Student. Meredith Reynolds, Attorney at Law, appeared on behalf of Pasadena Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on July 12, 13, 14 and 18, 2016, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at McKinley School, 325 South Oak Knoll Avenue, CA 91109. The hearing shall begin at 9:30 a.m. on July 12 and 18, and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency was 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. District failed to certify that it would provide a facility for

this case that complied with the law. The local educational agency shall inform OAH within two business days following the date of this order it is able to certify that it will 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 his 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 available to all parties, witnesses and the ALJ.

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 to be resolved at the consolidated due process hearing, as alleged in the parties' respective complaints and clarified by the parties and the ALJ at the PHC, and the parties' proposed resolutions, are as follows:

Student's Issues. Did District deny Student a free appropriate public education by:

(1) In Student's April 22, 2014 annual Individualized Education Program:

a. Failing to offer Student any individual speech and language services; and

b. Failing to offer Student adequate accommodations for Student's auditory processing deficits?

(2) In Student's August 29, 2014 amended IEP:

a. Failing to offer Student any speech and language services; and

b. Failing to offer Student any vision therapy services?

(3) Offering Student placement and services in Student's April 22, 2014 annual IEP, as amended on August 29, 2014, that failed to provide Student an educational benefit under the standard of *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*)?

(4) Offering Student placement and services in Student's March 27, 2015 annual IEP that failed to provide Student an educational

benefit under the standard of *Rowley* ?

(5) In Student's March 27, 2015 annual IEP:

a. Failing to offer Student any speech and language services;

b. Failing to offer Student any vision therapy services; and

c. Failing to offer Student adequate accommodations for Student's auditory processing deficits?

(6) In Student's September 2015 IEP, completed in February 2016 IEP:

a. Failing to offer Student Lindamood Bell educational services;

b. Failing to offer Student play therapy from an outside provider; and

c. Failing to provide adequate accommodations for Student's auditory processing deficits?

Student's Proposed Resolutions. An order directing District to:

(1) Provide 240 hours of *Visualization and Verbalization* program at Lindamood Bell;

(2) Provide 160 hours of the *Seeing Stars* program at Lindamood Bell;

(3) Provide 144 hours of compensatory speech and language services by a nonpublic agency (120 minutes/week x 36 weeks x 2 years);

(4) Provide Earobics or Fast ForWord to address auditory processing deficits;

(5) Provide an inclusion specialist to provide support in general education classes;

(6) Provide 10 hours of vision therapy by Dr. John Tassinari (l hour per week for 10 weeks at $ 125/hr)

(7) Reimburse parents for the vision therapy evaluation and 20 sessions of vision therapy by Dr. John Tassinari;

(8) Fund play therapy through a private agency;

(9) For costs of suit and attorney's fees herein incurred; and

(10) For such other and further relief as the Court may deem just and proper.

District's Issue.

(1) Is District entitled to conduct an educationally-related intensive counseling services assessment of Student pursuant to District's April 9, 2016 assessment plan, without Parents' consent?

District's Proposed Resolution.

(1) An order finding that District is entitled to conduct an educationally-related intensive counseling services assessment of Student pursuant to District's April 9, 2016 assessment plan, without Parents' consent.

3. Exhibits. Student identified 22 exhibits that Student intends to present at hearing. Student indicated that Student intended to include audio recordings of several IEP team meetings in Student's final exhibit binder. District identified 13 Exhibits that it intends to present at hearing. 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 Respondents 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. Each party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination.

Each party's final witness list and exhibit binder shall include a resume for each witness who is expected to testify as to their professional credentials. Student's final witness list and exhibit binder shall specifically identify and provide a transcript of any portions of IEP recordings that Student intends to offer as evidence in Student's case, but Student is not be required to identify or provide a transcript for portions of IEP recordings that might be offered as rebuttal evidence. District shall include as part of its exhibits the school calendar(s) for all of the years at issue.

4. Witnesses. Student identified 14 percipient witnesses and five expert witnesses whom Student intended to present at hearing. District identified 12 percipient witnesses and one expert witness. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed that it would make witnesses under its control

reasonably available to Student without the need for subpoena. District will also, by 5:00 p.m. on Wednesday, July 6, inform Student of the identity of, and available contact information for, any witness identified by Student as an employee of District who has left District's employ. The parties will 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.

a. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), 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. The parties shall exchange final witness lists and exhibit binders on or before 5:00 p.m. on Tuesday, July 5, 2016. Witnesses and documents not disclosed by that time may be excluded at the request of the other party from introduction at the hearing. Each party reserves the right to present additional witness and documents for purposes of rebuttal.

Each party shall a copy of its final exhibit and witness lists with OAH by5:00 p.m. on Wednesday, July 6, 2016.

b. Meet and Confer Regarding Witnesses. The parties are ordered to meet and confer on Friday, July 8, at 11:00 a.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to District's hearing counsel to initiate the meet and confer. The parties are to 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.

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

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. District Witness Karyn Messler may appear telephonically at hearing in this matter, if she is unable to attend for medical reasons. District 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.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's request to make an audio recording of the hearing is granted, 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, in order to avoid recording conversations while off the record; (3) the recording will not be shared with any witness or third party; and (4) operation of the party's recording mechanism will not be allowed to delay the hearing. District may also make an audio recording under the same conditions.

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, Student is the petitioning party in the primary case. Accordingly, Student shall present Student's case-in-chief, followed by District.

9. Motions.

District's Motion to Require Student to File and Serve an Amended PHC Statement. On June 29, 2016, Student and District filed prehearing conference statements in this matter. On June 30, 2016, District filed a "Request for Enforcement Order re: Order Granting Motion to Consolidate," treated here as a motion to require that Student file and serve an amended prehearing conference order containing a response specifically addressing the issue raised in District's complaint. District's motion was denied at the PHC. Although the Education Code and the Individuals with Disabilities Education Act require a party to provide a response that specifically addresses the issues raised in the complaint within 10 days of receiving the complaint (Ed. Code, section 56502, subd. (d)(2); 20 U.S.C. § 1415(c)(2)(b)), District did not demonstrate that it would be unduly prejudiced in this matter

by Student's failure to respond to District's contention that it was entitled to assess Student pursuant to its April 9, 2016 assessment plan, without Parents' consent.

Other Motions. The parties indicated that they may file a joint motion for continuance prior to hearing. In the event that any other 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.

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. With the exception of District's request for permission to offer telephonic testimony of one witness, identified above, the parties identified no hearing participant with special needs requiring accommodation. 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 request for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing is Open To the Public. At Student's request, the hearing will be open to the public.

15. 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.

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: July 5, 2016

DocuSigned by:

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings