BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

| | |
|---|---|
| In the Consolidated Matters of:<br><br>PARENTS ON BEHALF OF STUDENT,<br><br>v.<br><br>HEMET UNIFIED SCHOOL DISTRICT, | OAH CASE NO. 2013090788 |
| HEMET UNIFIED SCHOOL DISTRICT,<br><br>v.<br><br>PARENTS ON BEHALF OF STUDENT. | OAH CASE NO. 2014010760<br><br>ORDER FOLLOWING PRE-HEARING CONFERENCE OF JANUARY 27, 2014; ORDER GRANTING DISTRICT'S MOTION TO CONSOLIDATE |

On January 27, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings (OAH). Student was represented by his parents. Peter A. Sansom, Attorney at Law, appeared on behalf of the Hemet Unified School District (District). The ALJ recorded the prehearing conference.

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

District's Motion to Consolidate:

1. Student filed her request for due process (complaint) in OAH case number 2013090788 (Student's case) on September 23, 2013, naming the District. The District filed its complaint in OAH case number 2014010760 (District's case) on January 22, 2014, naming Student. On January 23, 2014, the District filed a motion to consolidate its case with Student's case.

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative

proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

Student's complaint alleges that the District has denied her a free appropriate public education by failing to provide her with a placement in a preschool class with typically developing peers at her home school. Student also contends that the District's May 6, 2013 offer of an individualized education program (IEP) denies Student a FAPE because the placement offered requires Student to ride on a school bus for too long of time.

The District's case contends that its newest IEP offer, which is for the same special day class placement offered to Student in her May 6, 2013 IEP, constitutes a FAPE for Student in the least restrictive environment.

Student did not oppose consolidation of her case with the District but requested that the consolidated matter be held on the dates presently scheduled for Student's case. The District agreed to Student's requested hearing dates.

Since the two cases involve the common issues of which placement is appropriate for Student, and will involve overlapping witnesses and documents, consolidation in this case is appropriate. In addition, consolidation furthers the interests of judicial economy in not having two hearings where the same witnesses will testify and the same documents presented. Accordingly, the District's motion to consolidate is granted. All dates presently set for the District's case are vacated. This case will proceed on the dates presently set for Student's case, as discussed below in section 2. The 45-day timeline for issuance of the decision in the consolidated cases shall be based on the date of the filing of the complaint in OAH Case Number 2014010760 (District's Case).

Prehearing Conference Order:

2. Hearing Dates, Times, and Location. The hearing in this consolidated matter shall take place on February 3 – 6, 2014, at the District's offices located at **1791 West Acacia Avenue, Hemet, California, 92545,** and continuing day to day thereafter, Monday through Thursday, at the discretion of the ALJ**.** The hearing shall begin at 1:30 p.m. on February 6, 2014, and at 9:00 a.m. on 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.

The District shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum 1) a table for Parents and their representatives if appropriate; 2) a table for the District's legal representative and the District's representative; 3) a table for the witness; and 4) a table for the ALJ, near an electrical outlet. The District shall provide

drinking water to all parties, witnesses and the ALJ. The water does not have to be bottled. 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 if the hearing has not concluded.

The District shall also ensure that a separate and private room is available near the hearing room, for Parents and their representatives during recesses and breaks.

3. Issues and Proposed Resolutions. The issues at the due process hearing were discussed with the parties at the PHC and are listed below.

A. Student's Issues:

i) Did the District deny Student a FAPE because the May 6, 2013 IEP failed to offer Student a preschool placement with typically developing peers at Hamilton Elementary School, Student's home school?

ii) Is the District's May 6, 2013 IEP offer to Student inappropriate because it requires Student to travel too great a distance by school bus?

iii) Is the District required to accept Student into the Early Start program at Hamilton Elementary School or alternatively create a typical peer preschool program for Student there?

B. District's Issue:

i) Does the District's IEP offer of January 8, 2014, constitute a FAPE in the least restrictive environment?

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. If the parties wish, they may alternatively prepare one joint exhibit binder. 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.

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, and at the discretion of the ALJ.

The parties are ordered to meet and confer by Friday, January 31, 2014, as to the schedule of witnesses.

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.

At the start of the hearing, the parties shall present the ALJ with a list of the witnesses to be called each day, with an estimate of the time necessary for the testimony of each witness.

6. 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. Only one round of re-direct and/or re-cross examination shall be permitted, unless otherwise ordered.

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.

8. Order of Presentation of Evidence. This matter is consolidated, and involves two parties. The order of presentation of evidence shall be as follows: The District shall present its case first, followed by the Student's case. If a witness if to be called by both parties, that witness shall only testify once.

9. Motions. As stated above, the District's motion to consolidate is granted. No other prehearing motions are pending or contemplated.

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

11. 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.

12. 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.

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

14. Hearing Closed To the Public. At the request of Student's parents, the hearing will be closed to the public.

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 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.

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

IT IS SO ORDERED.

Dated: January 27, 2014

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings