BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. POWAY UNIFIED SCHOOL DISTRICT,	OAH Case No. 2016090882
POWAY UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2016050256 ORDER FOLLOWING PREHEARING CONFERENCE

On March 27, 2017, a telephonic prehearing conference was held before Administrative Law Judge Paul H. Kamoroff, Office of Administrative Hearings. Megan Nunez and Jennifer L. Varga, Attorneys at Law, appeared on behalf of Parent and Student. Carlos Gonzales, Attorney at Law, appeared on behalf of Poway Unified School District. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing is shall take place on April 4, 5, 6, and 7, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Office of Administrative Hearings, San Diego, located at 1350 Front Street, Suite 3005, San Diego, CA.[1] 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.[2]

[1] An OAH, San Diego, courtroom has been reserved for April 4, 5, and 7, 2017. The hearing venue for April 6, 2017, will be addressed at the commencement of the due process hearing.

[2] District filed its response to Student's complaint on September 29, 2016, which permits the hearing to go forward. (*M.C. v. Antelope Valley Unified Sc. Dist.* (9th Cir. March 27, 2017) ___ F.3d ___, 2017 WL 1131821, **5-6.)

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.

Student's Issues:

a. Whether District denied Student a free appropriate public education during the 2014-2015 school year, by:

    i. Failing to provide appropriate speech and language services;

    ii. Failing to provide appropriate specialized academic instruction;

    iii. Failing to provide appropriate counseling and behavior services; and

    iv. Seriously infringing on Parents' ability to participate during the December 14, 2015 individualized education program team meeting?

b. Whether District denied Student a FAPE during the 2015-2016 school year, by:

    i. Failing to appropriately assess Student in the areas of autism, speech and language, and functional behavior;

    ii. Failing to provide appropriate speech and language services;

    iii. Failing to provide appropriate specialized academic instruction;

    iv. Failing to provide appropriate behavior and counseling services;

    v. Failing to implement Student's May 2015 individualized education program; and

    vi. Failing to provide prior written notice following Parents' request for a change of placement and/or services in January and May 2016?

c. Whether District denied Student a FAPE during the 2016-2017 school year, by:

i. Failing to provide appropriate occupational therapy services;

ii. Failing to provide appropriate speech and language services;

iii. Failing to provide appropriate specialized academic instruction;

iv. Failing to provide appropriate counseling and behavior services;

v. Failing to provide appropriate transition services;

vi. Failing to offer an appropriate placement in the January 19, 2017 IEP offer;

vii. Predetermining the placement and services, and failing to consider a continuum of placements, in the January 19, 2017 IEP offer; and

viii. Failing to conduct appropriate assessments in the areas of autism, speech and language, and functional behavior.

District's Issues:

d. Whether District's February 12, 2016 IEP offered Student a FAPE in the least restrictive environment;

e. Whether District's January and February 2016 assessments in the areas of psycho-education, assistive technology, speech and language, occupational therapy, and functional behavior were appropriate;

f. Whether District may reassess Student pursuant to its August 25, 2016 assessment plan, without Parents' consent.

Proposed Resolutions:

To remedy Student's issues, he seeks placement at a non-public school, with transportation, and independent educational evaluations, funded by District.

To remedy District's issues, it seeks an order that it may implement the February 12, 2016 IEP, without Parents' consent; that it is not responsible for funding independent educational evaluations; and that it may assess Student pursuant to its August 25, 2016 assessment plan, without Parents' consent.

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 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. 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.

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 are ordered to meet and confer by 5:00 p.m. on March 29, 2017, regarding the scheduling of witnesses. The parties shall submit to the ALJ a joint witness list, describing the date, time, and duration for the testimony of each witness, at the commencement of the due process hearing. District shall make witnesses under its employ available to Student without a subpoena. The parties shall attempt to reach agreement on a witness list for the first day of hearing. District shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, 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.

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; 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.

Student's motion to allow Jill Weckerly to testify telephonically is denied based upon Student failing to offer good cause to support the motion.

7. Electronic Recording of Hearing.

a. Audio Recording. The parties' joint motion to make an audio recording of the hearing is granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, to avoid recording conversations while off the record; 3) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 4) the recording may not be shared with any non-party representative, witness or social media.

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, the matter is consolidated. Student shall present his case-in-chief, followed by District.

9. Motions. Prior to the prehearing conference, Student submitted a request to continue the due process hearing based upon a desire for additional time to mediate the case.

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.) The basis of Student's request does not constitute good cause. Accordingly, Student's request is denied as good cause was not established why this matter, which was filed on September 26, 2016, has not mediated before now.

During the prehearing conference, Student requested to change the hearing venue from District's office to the Office of Administrative Hearings, San Diego. District opposed the motion.

The IDEA and the Education Code require that due process hearings be conducted "at a time and place reasonably convenient to the parents and child involved." (34 C.F.R. § 300.515, subd. (d); Ed. Code §56505, subd. (b).) The Office of Administrative Hearings, San Diego, is a location that is reasonably convenient to Student and District. Accordingly, Student's request is granted.

Student anticipates submitting a motion for reconsideration for his request to continue the due process hearing. No additional pretrial 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 March 27, 2017.

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. At present, neither party has requested any special needs or accommodations.

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: http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed To the Public. The hearing will be closed to the public unless Student requests it be open.

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.

DATE: March 28, 2017

DocuSigned by:
Peter Paul Castillo for
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PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings