BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. TEHACHAPI UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017031162
TEHACHAPI UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017020218 ORDER FOLLOWING PREHEARING CONFERENCE

On May 12, 2017, a telephonic prehearing conference was held before Administrative Law Judge Alexa J. Hohensee, Office of Administrative Hearings. Goriune Dudukgian, Attorney at Law, appeared on behalf of Student. Christina Oleson, Attorney at Law, appeared on behalf of Tehachapi 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 consolidated hearing shall take place on May 23-25, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 300 South Robinson Street, Tehachapi, California 93561. 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.

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. The named local educational agency 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 days of 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 at the consolidated due process hearing, and the proposed resolutions, are listed below.

Student's Case

1. Did District fail to appropriately assess Student in all areas of suspected disability, specifically, in social skills training and occupational therapy, after:

    a. District's October 28, 2015 psychoeducational evaluation; and

    b. The October 24, 2016 individualized education program team meeting and the request of Student's second grade teacher?

2. Is District required to fund an independent educational evaluation of Student in the area of psychoeducation?

As remedies, Student requests: an independent educational evaluation in the area of psychoeducation; assessments in the area of social skills training and occupational therapy; and compensatory education.

District's Case

1. Was District's October 28, 2015 psychoeducational assessment appropriate, such that Student is not entitled to an independent educational evaluation.

As a remedy, District seeks an order that its psychoeducational assessment was appropriate, and that Student is not entitled to an independent assessment at public expense.

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 in a way that makes clear the party offering it (such as "S1" or "D2"). 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. Each party shall serve an exhibit binder containing its respective exhibits on the other party by 5:00 p.m. on May 16, 2017, 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 5:00 p.m. on May 18, 2017, to eliminate duplicate exhibits from the exhibit binders. Duplicate exhibits and tabs should be removed from all binders prior to the first day of hearing. The parties shall not re-number exhibits after duplicates are removed. The parties are encouraged, if the total number of documents is not too large, to place the exhibits for both parties into one binder. Each exhibit shall consist of one document; separate documents may not be combined into one exhibit.

The parties shall include, as exhibits, resumes for each witness expected to testify as to their professional credentials. The District shall include as part of its exhibits the school calendar(s) for the years at issue. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

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. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

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 to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

The parties are ordered to meet and confer by 5:00 p.m. on May 18, 2017, as to the schedule of witnesses. The parties shall 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 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (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.

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. The District shall have witnesses available in case agreement on a witness list is not reached.

The ALJ will finalize the witness schedule, and will revisit the schedule at the beginning and end of each hearing day. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

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. If a party intended to call a witness called first by the other party, that party shall complete their direct examination at the same time as their cross 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 physical 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. Electronic copies of the evidence binders will not be permitted. The witness must be on a clear telephone connection, and in a location that ensures the confidentiality of the proceedings. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested permission to make an audio recording of the hearing. Any party who desires to make such a recording shall do so only

on the conditions that: (1) The parties shall turn on and off the recording device at the same time that the ALJ is on and off the record, in order to avoid recording conversations while off the record; (2) the parties shall not play any part of the recording for a prospective witness; (3) the parties shall not publish or play any part of the recording for any purpose other than assisting in the representation and presentation of this due process hearing; (4) the parties will erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and (5) the parties shall not use this recording in any subsequent due process hearing. OAH's recording is the only official recording; recording of the hearing by a party is not the official record and is permitted as a courtesy. The operation of the party's recording mechanism will not be allowed to delay the hearing.

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, in these consolidated cases where both parties are petitioners, District shall present its case-in-chief, followed by Student.

9. Motions. The parties were heard on Student's motion to bifurcate. Student asserts that if the issue of failure to assess in all areas of suspected disability is heard first, and Student prevails, a subsequent delay in the proceedings on the issue of whether Student was denied a free appropriate public education would permit Student to use the results of any assessments to prove up his request for compensatory damages. Student also argued that such bifurcation is permitted by Education code, section 56505.1, subdivision (3), which permits the hearing judge to order an impartial assessment of the pupil be conducted for the hearing and continue the hearing until the assessment has been completed. District contends that the cases were consolidated because they involved common issues of fact and law, and the same witnesses and evidence would be presented, and that bifurcation would result in duplicative hearings and be contrary to the rules of judicial economy and efficiency.

A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) Student will be required to prove a substantive violation of Student's right to a FAPE as part of his case-in-chief on the assessment issue. Student should be prepared to prove up his damages on all claims at the time of the due process hearing.

In addition, 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.) Bifurcation for mid-hearing assessments, which may take up to 60 days, may be incompatible with the mandate for timely decisions.

Lastly, the parties jointly sought to consolidate these cases in the interest of judicial economy and efficiency, and bifurcation at hearing would result in the duplication of effort, witnesses and evidence.

Accordingly, Student's motion to bifurcate is denied. This ruling does not bar Student from requesting that the ALJ at the hearing order an impartial assessment as authorized by Education code, section 56505.1, subdivision (e).

Other than Student's motion to bifurcate, no 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 PHC of May 12, 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. 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.

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

IT IS SO ORDERED.

DATE: May 12, 2017

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings