BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2012080386
v.	ORDER FOLLOWING PREHEARING CONFERENCE
CALIFORNIA CHILDREN'S SERVICES.[1]	

On April 24, 2013, a telephonic prehearing conference (PHC) in this matter was held before Administrative Law Judge Peter Paul Castillo (ALJ), Office of Administrative Hearings (OAH). Attorney Daniel Shaw appeared on behalf of Student (Student). Attorney Derek Backus appeared on behalf of California Children's Service (CCS), and Attorney Natalie Smith was present on the telephone call. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on May 7 – 9, 2013. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for May 7, 2013, when the hearing shall begin at 9:30 a.m., unless otherwise ordered continuing day to day, Monday through Thursday, as needed at the discretion of the ALJ. The hearing shall take place at CCS' Santa Clara offices, located at, 720 Empey Way, San Jose, California, 95128.[2] Student's request to add May 10, 2013, as an additional day of hearing for his expert witness testimony is denied based on the unavailability of Mr. Backus and that Student should have contacted his experts as to their availability right after the February 13, 2013 PHC in which these dates were set.

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.

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[1] CCS is administered by, and is also referred to as the California Department of Health Care Services.

[2] At a minimum for the hearing, the room shall have separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for CCS's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. CCS shall ensure that all parties and the ALJ have drinking water and tissue available to them.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.

Issue 1: During the 2011-2012 and 2012-2013 school years (SY's), did CCS deny Student a free appropriate public education (FAPE) by failing to:

a) Provide Student with adequate physical therapy (PT) to meet his unique needs;

b) Provide Student with adequate occupational therapy (OT) to meet his unique needs;

c) Ensure that Student was provided with adequate equipment to access his educational program, including a motorized wheelchair;

d) Adequately assess his PT and OT needs; and

e) Ensure that his individual educational program (IEP) contains goals designed to address his unique needs?

Issue 2: Did CCS violate Parent's and Student's procedural rights, which prevented Parents from meaningfully participating in Student's educational decision-making process and denied Student an educational benefit, which denied Student a FAPE, by failing to:

a) Participate in all IEP team meetings;

b) Permit Parents to meaningfully participate in the IEP process;

c) Comply with the requirements for independent assessments;

d) Permit other IEP team members to provide input at IEP team meetings; and

e) Convene an IEP team meeting with it made changes to Student's IEP goals or services?

Proposed Resolutions: Student requests that CCS provide Student as compensatory education in the form of PT and OT services, and reimburse Parents for the cost of independent PT and OT assessments and services. CCS provide Student with two hours a week of PT and OT services respectively, and a power wheel chair, including any necessary equipment. Student requests that CCS participate in all IEP team meetings and provide a copy of its goals for Student to Parents and his school district during the IEP development process.

CCS' Defense: Student has not proven that OAH has jurisdiction to hear this dispute because CCS' decisions were based on its legal requirements to provide medically necessary OT and PT and other services, not educationally related.

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 "C" in front of the exhibit to designate if it is a Student or CCS exhibit (for example, "S-5, S-6", "C-1, C-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. In compliance with Education Code section 56505, subdivision (e)(7), the parties shall exchange exhibits by 5:00 p.m., on April 30, 2013. 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.

CCS' request to add Jeff Powers as a witness was granted, and CCS shall provide Student with a brief statement as to his expected testimony. Additionally, the ALJ authorized CCS to issue seven subpoenas for witness testimony.

The parties are ordered to meet and confer by May 2, 2013, as to the schedule of witnesses, when a party expects a witness to testify, and have agreed 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. By 1:00 p.m. on May 1, 2013, each party shall serve on the other party and on the ALJ, the final witness list, including the anticipated order of the witnesses to be called at the hearing, an estimate of the length of time for the direct examination of each witness the party actually intends to call, along with time estimates for the testimony of any additional witnesses the party may call, depending on the flow of the hearing and the evidence.[3] Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the

[3] Parties shall not mail a hard copy of any document to OAH that has already been filed by facsimile transmission.

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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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.

5. 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 with the expectation that each witness shall only be called to testify 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.

CCS' motion to allow Mr. Powers to testify telephonically is granted. Student's request to permit Deborah Baumgarten and Kristine Corn to testify telephonically is granted. Each party shall provide their respective witnesses with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing, and CCS shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Motions. The parties' request to audio tape the hearing is granted. The recording by OAH shall be official record of the hearing and no stoppages of the hearing will be granted to accommodate the parties' recording, and parties must cease recording when the ALJ informs the parties that the matter is off the record.

No further 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 April 24, 2013.

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

9. 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 during the hearing unless permission to the contrary is obtained from the ALJ.

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

12. Hearing Closed To the Public. At the request of the parent, the hearing will be open to the public. Student's non-attorney advocate may assist Mr. Shaw during the hearing.

13. Settlement. The parties are encouraged to continue their attempts 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. If a settlement is reached five business days or fewer before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880. 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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. The ALJ will check for messages the evening prior to the hearing and the morning of the hearing.

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

IT IS SO ORDERED.

Dated: April 25, 2013

/s/
PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings