BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: TUOLUMNE COUNTY SUPERINTENDENT OF SCHOOLS AND CURTIS CREEK SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2019020281
PARENTS ON BEHALF OF STUDENT, v. TUOLUMNE COUNTY SUPERINTENDENT OF SCHOOLS AND CURTIS CREEK SCHOOL DISTRICT.	OAH Case No. 20190010105 ORDER FOLLOWING PREHEARING CONFERENCE

On March 11, 2019, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Marcy Gutierrez, Attorney at Law, appeared on behalf of Tuolumne County Superintendent of Schools and Curtis Creek School District. Mandy Leigh and Damien Troutman, Attorneys at Law, appeared on behalf of Parents and Student. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place at Curtis Creek's District Office located at 18755 Standard Road, Sonora, California, 95370, on March 19 through 21, 2019, and continuing day to day at the discretion of the ALJ. 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.[1]

As ordered in the scheduling order, Curtis Creek shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ.

[1] This matter will not be in session on Friday, March 22, 2019, due to the unavailability of Tuolumne's and Curtis Creek's counsel and OAH operational needs.

Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Curtis Creek has not certified that the facilities used for this case comply with the law. **Curtis Creek shall file a written certification with OAH within two business days of the date of this order.**

Prior to the beginning of the hearing, Curtis Creek shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for the local educational agencies' legal representative and special education representatives; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Curtis Creek shall provide drinking water and tissue to all parties, witnesses and the ALJ. 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. Curtis Creek shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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.[2] The issues at the due process hearing, and the proposed resolutions, were discussed and clarified during the PHC and are listed below.[3]

Local Educational Agencies' Issues

Issue 1: Does Curtis Creek's February 1, 2019 individualized education program offer of placement at Devereux offer Student a free appropriate public education in the least restrictive environment?[4]

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[2] The ALJ has reworded and re-organized some of the issues as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist*. (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist*. (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist*. (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].)

[3] If any party believes that the issues as framed in this Order do not capture the issues as discussed during the PHC, that party shall immediately inform OAH in writing.

[4] The undersigned ALJ informed the parties that in order to address Issue 1, the ALJ will need to analyze the entire IEP offer, both procedurally and substantively. Curtis Creek was advised that despite the narrow framing of Issue 1, it should be prepared at hearing to present evidence as to the substantive and procedural validity of the full educational program offer.

Issue 2: Are Tuolumne and Curtis Creek entitled to a release of information signed by Parents authorizing Tuolumne and Curtis Creek to communicate with Student's medical providers and with Devereux?

Issue 3: May Curtis Creek conduct a functional behavior assessment? of Student pursuant to the February 6, 2019 assessment plan?

Proposed Resolutions

Tuolumne and Curtis Creek seek the following resolutions: (1) An order that the February 2019 offer of placement at Devereux offers Student a FAPE in the least restrictive environment. (2) An order that they are entitled to a release of information to communicate with Student's medical providers and Devereux. (3) An order that Curtis Creek may conduct a functional behavior assessment of Student.

Student's Issues

Issue 4: Beginning January 4, 2017, did Tuolumne and Curtis Creek deny Student a FAPE during the 2016-2017 school year by:

a. not offering a more restrictive placement based on his history of frequent, intense and dangerous behaviors;

b. failing to continue his occupational therapy goals;

c. failing to offer clear and measurable annual goals, reasonably calculated to meet his unique needs, with clear, accurate baselines;

d. failing to develop sufficient goals to meet his needs in the area of executive functioning;

e. discontinuing his occupational therapy services;

f. reducing his educationally related mental health counseling services; and

g. failing to offer appropriate and timely behavioral intervention services, specifically an appropriate functional behavior assessment, functional behavioral intervention plan, and one-to-one aide support?

Issue 5: During the 2017-2018 school year, did Tuolumne and Curtis Creek deny Student a FAPE by:

a. not offering a more restrictive placement based on his history of frequent, intense and dangerous behaviors;

b. failing to offer occupational therapy goals;

c. failing to offer clear and measurable annual goals, reasonably calculated to meet his unique needs, with clear, accurate baselines;

d. failing to develop sufficient goals to meet his needs in the area of executive functioning;

e. failing to offer occupational therapy services;

f. failing to offer sufficient educationally related mental health counseling services;

g. failing to offer appropriate behavior intervention services and instead relying on an inadequate functional behavior assessment and behavior intervention plan;

h. failing to offer and provide a one-to-one aide in a timely manner; and

i. failing to conduct an assistive technology assessment across all academic settings?

Issue 6: During the 2018-2019 school year, did Tuolumne and Curtis Creek deny Student a FAPE by:

a. failing to offer and provide a more restrictive placement based on his history of frequent, intense and dangerous behaviors;

b. offering to change placement outside the IEP process; and

c. failing to offer appropriate behavior intervention services to allow him to access his education in the least restrictive environment?

Proposed Resolutions

Student seeks an order declaring Student the prevailing party and requiring Tuolumne and Curtis Creek to: fund placement in a residential treatment center or appropriate non-public 24/7 therapeutic placement; fund the creation of IEP goals in areas of need by a non-District expert; fund a functional behavior assessment and the creation of a behavior intervention plan and behavior goals by a non-District Ph.D.-level behaviorist; fund a neuropsychological assessment; fund an assistive technology assessment by a non-District evaluator; fund training and counseling for Parents in supporting Student; provide compensatory education; reimburse all services performed by Dr. Paula Solomon; reimburse

assessments; provide 50-100 hours of staff training regarding behavior interventions; and pay Student's attorney fees.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Tuolumne and Curtis Creek intend to prepare and use a joint exhibit binder. 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 ensure that there is only one document or a short series of related documents for each exhibit tab. 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 timely exchanged shall not be admitted into evidence at the hearing unless 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 timely disclosed except for good cause shown 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 shall attempt to reach agreement on a witness list for the first day of hearing. Tuolumne and Curtis Creek shall have witnesses available in case agreement on a witness list is not reached. The parties shall meet and confer no later than March 13, 2019, regarding the scheduling of witnesses and the order and length of witness testimony. 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 generally 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. 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 requests that Michael Clumeck of Edgewood Center for Children and Families and out-of-state witness Barbara Radebaugh testify telephonically were granted subject to the above requirements. Tuolumne's and Curtis Creek's request that Perry Mae and Claudette Mae of Devereux testify telephonically was granted subject to the above requirements.

7. Electronic Recording of Hearing.

a. Audio Recording. Each parties' 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, in order to avoid recording conversations while off the record; and 3) that 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, each party bears the burden of proof as to its respective issues. Tuolumne's and Curtis Creek's case has been designated the lead case, and they shall present their cases-in-chief first, followed by Student, unless the parties agree otherwise.[5]

9. Motions. 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 prehearing conference of March 11, 2019.

[5] Tuolumne's and Curtis Creek's counsel will inform Student's counsel by March 12, 2019, if she has any objection to Student's proposed order of witnesses which has already been disclosed.

10. Compensatory Education and 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 at the time of hearing.

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 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 Closed To the Public. At the request of Student, 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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb .

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 12, 2019

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings