BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. NEWPORT-MESA UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2013071304
NEWPORT-MESA UNIFIED SCHOOL DISTRICT v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2013040881 ORDER FOLLOWING PRE-HEARING CONFERENCE OF MARCH 3, 2014; DENYING REQUEST FOR CONTINUANCE

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On March 3, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Paul H. Kamoroff, Office of Administrative Hearings (OAH). Student's mother appeared on behalf of Student (Student). Debra K. Ferdman, Attorney at Law, appeared on behalf of the Newport-Mesa Unified School District (District). The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on March 10, 11, 12, and 13, 2014, and shall continue day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m., with the exception of the first day of hearing, on which day the hearing shall begin at 1:30 p.m., unless otherwise ordered.

The hearing shall take place at the District's offices located at 220 23rd Street, Costa Mesa, CA 92627.

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 are listed below.

a) Whether the District's multi-disciplinary assessment dated April 1, 2013, administered by District staff, was conducted appropriately?

b) Whether the District's Individualized Education Program offer of April 1, 2013, provided Student a free appropriate public education in the least restrictive environment?

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 District has represented that it has served its evidence binders on Student in compliance with Education Code section 56505, subdivision (e)(7). Student has not served an exhibit binder on the District and will therefore be limited to any evidence contained in the District's exhibit binder.[1]

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.

In addition to witnesses identified in Student's PHC statement submitted on September 11, 2013, Student may call the following witnesses: Damian Hill; Sarah Flores; Debra Pivac; Brianna Pivac; Michael Juric; Student's instructional assistants while at Corona

[1] Student may have until 5:00 p.m. on March 3, 2014, to serve on the District evidence identified as a compact disc of a November 13, 2013 District meeting.

Del Mar School, identified as "Jesse" and "Sylvia," Pacey Clawson, Mr. Matheson, who is a coach employed by the District, and Dr. Grace Mucci. Student shall provide the District Dr. Mucci's contact information and resume by no later than March 4, 2014, if Student intends on calling Dr. Mucci as an expert witness.

The District shall be permitted to call any witness identified in its fifth amended PHC statement, submitted on February 26, 2014.

Except as described above, or unless used solely for rebuttal or impeachment, 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 ordered to meet and confer by March 6, 2014, by 5:00 p.m., as to the schedule of witnesses. The District shall ensure that any witnesses who are presently employed by the District and who have been included in Student's PHC statement dated September 11, 2013, or included herein, are available to testify during the hearing. The parties 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.

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

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. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's motion for Dr. Grace Mucci to appear telephonically is GRANTED. The Student shall provide Dr. Mucci with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing. The District 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.

7. Timely Disclosure of Exhibits. The parties shall timely exchange exhibits, no later than five business days prior to the hearing.

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].) This matter is consolidated, and involves two parties. Based upon stipulation of the parties, the order of presentation of evidence shall be as follows: the District shall present its case-in-chief followed by the Student. If a witness is to be called by more than one party, each party shall ask their questions of the witness so that the witness does not need to return for testimony.

9. Motions. On February 26, 2014, Student filed a motion for continuance based upon an American with Disabilities Act accommodation request. The District timely filed an opposition to Student's motion. Student failed to provide sufficient information to support good cause for a continuance and the motion is therefore DENIED.

During the PHC, Student orally submitted a motion for Student to be permitted to testify following each witnesses testimony. The District opposed Student's motion. Student failed to provide a legal basis or good cause for this request and the request is therefore DENIED. Student may provide direct testimony and, if applicable, rebuttal testimony.

At present, no other prehearing motions are pending or contemplated, except for a possible motion by Student for reconsideration of his motion to continue, and a motion by the District for telephonic testimony. Any other prehearing motions filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during the prehearing conference of March 3, 2014.

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.

The District shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum 1) a table for Parent and Student's representative; 2) a table for District and District's representative; 3) a table for the witness; and 4) a table for the ALJ,

near an electrical outlet, and a 5) portable dry erase or chalkboard.[2] District shall provide drinking water 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.

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.[3]

14. Hearing Open To the Public. At the request of the parent, 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.

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[2] During the PHC, Student requested that a dry erase or chalkboard be made available during the hearing to assist Student's mother to present evidence. That request is granted and the District shall make this available during the hearing.

[3] Student has identified that one of his witnesses, Brianna Pivac, requires the use of a keyboarding device to communicate, which Student or the witness shall provide.

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

IT IS SO ORDERED.

Dated: March 3, 2014

/s/
PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings