BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Consolidated Matters of:<br><br>PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>POWAY UNIFIED SCHOOL DISTRICT, | OAH Case No. 2018060763 |
| POWAY UNIFIED SCHOOL DISTRICT,<br><br>v.<br><br>PARENT ON BEHALF OF STUDENT. | OAH Case No. 2018080048<br><br>ORDER FOLLOWING PREHEARING CONFERENCE |

On January 18, 2019, a telephonic prehearing conference was held before Administrative Law Judge Clifford H. Woosley, Office of Administrative Hearings. Paul A. Hefley, Jr., attorney at law, appeared on behalf of Student. Justin R. Shinnefield, 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 shall take place on **January 24, 29, and 30, 2019**, and continue day to day, at the discretion of the ALJ, beginning at **9:30 AM** on **January 24 and 29, 2019,** and at **9:00 AM** all other days unless otherwise ordered. The hearing shall take place at **Poway USD, 15250 Avenue of Science, San Diego, CA 92128.**

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.

The scheduling order directed the named local educational agency to certify that it would 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 certified that the facilities used for this case comply with the law.

Prior to the beginning of the hearing, Poway Unified 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 Poway Unified's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Poway Unified 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.

Student's Issues:

(1.) Did Poway Unified deny Student a free appropriate public education when it prepared a behavior emergency report on May 23, 2018 but failed to convene an individualized educational program meeting to review and determine if the incident constituted a need to modify Student's behavior intervention plan?

(2.) Was Student denied a FAPE from June 11, 2016 to the date the complaint was filed when Poway Unified failed to develop Student's IEP to include appropriate accommodations, modifications, supports, and services?

(3.) Did Poway Unified deny Student a FAPE by failing to conduct a legally appropriate psychoeducational assessment in October 2017?

(4.) Did Poway Unified deny Student a FAPE by failing to conduct a legally appropriate functional behavior assessment in December 2016?

(5.) During the 2017-2018 school year, did Poway Unified deny Student a FAPE by failing to convene an IEP meeting and review his IEP when he showed a lack of expected progress toward his annual goals?

(6.) Did Poway Unified deny Student a FAPE because the nonpublic school placement offer was not Student's least restrictive environment?

(7.) Did Poway Unified deny Student a FAPE by failing to initiate a due process hearing within a reasonable time after the IEP Team reached an impasse regarding his placement in 2017?

Student's Proposed Resolutions:

(a) Appropriate placement.

(b) Compensatory education.

(c) A one-to-one aide.

(d) Independent educational evaluations.

Poway Unified's Issue:

(1.) Did Poway Unified's September 6, 2017 IEP offer of program, services, and placement, as amended on October 25, 2017, December 14, 2017, January 29, 2018, and May 3, 2018, provide Student with a FAPE in the least restrictive environment?

Poway Unified's Proposed Resolutions:

(a) A finding that Poway Unified's September 6, 2017 IEP offer, as subsequently amended, constituted a FAPE 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 Poway Unified 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 shall be separately identified, with a tabbed divider. Each exhibit binder shall contain a detailed table of contents. The parties are to serve their evidence binders on each other by close of business, in compliance with Education Code section 56505, subdivision (e)(7).

Poway Unified's exhibits shall include its school calendar for all school years that are related to the issues herein.

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 shall 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.

Each party shall provide current curriculum vitae for witnesses called to testify where the witnesses' education and experience are relevant to the witnesses' testimony, opinion, credibility and/or persuasiveness. These shall be properly numbered and placed in the parties' exhibit binders.

The parties are ordered to meet and confer by **January 22, 2019**, to reach agreement on an hour-by-hour witness schedule for the first day of hearing. The parties shall have a proposed hour-by-hour witness schedule for the remainder of the hearing, which includes estimated time of direct and cross-examination by both parties. 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 witness is expected to take. Poway Unified shall have witnesses available in case agreement on a witness list is not reached.

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.

Student shall identify the Poway Unified employee witnesses who he intends to call to testify at hearing. Poway Unified will then notify Student of any identified witness, who is no longer employed by Poway Unified, along with the witness's most recent residential address, by close of business, **January 22, 2019**.

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. 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).) In the event that telephonic testimony is requested, the party seeking to present a witness by telephone shall move in advance for leave to do so. Any motion filed shall be supported by a declaration under penalty of perjury

establishing good cause as to why the motion was not timely made three days prior to the prehearing conference, unless the opposing party has stipulated that the witness may appear by telephone. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of *exact physical copies of the exhibit binders* from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. *Faxed or electronic copies are unacceptable.* Poway Unified shall ensure that the hearing room shall have sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled. Neither party asked for telephonic testimony of a witness.

7. Electronic Recording of Hearing.

a. Audio Recording.

Student's motion to make an audio recording of the hearing is granted, subject to the following conditions: 1) OAH's recording is the only official recording; 2) 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; 3) operation of the party's recording mechanism will not be allowed to delay the hearing; 4) such recording shall be for counsel's personal use only and only for review and preparation of the hearing; 5) the parties and/or counsel shall not play any part of the recording for any prospective witness and the recording shall not be disseminated to anyone other than counsel; 6) the parties shall not use the recording in any subsequent due process hearing or other proceeding; and 7) the parties shall destroy the unofficial recording upon the earlier of the following: (a) upon settlement of this matter, (b) dismissal of this case, or (c) after the hearing and all opportunities for appeal from any decision has been exhausted. Poway Unified may also audio record, subject to the same conditions.

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 two consolidated matters, Student's complaint was filed first. Accordingly, Student shall present his case-in-chief, followed by Poway Unified. However, if a witness is called by more than one party, all parties shall examine the witness when the witness is first called.

9. Motions. Neither party made any additional motions at the PHC. 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 timely made three business days prior to the prehearing conference.

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 Parties 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. There shall be no texting permitted while the hearing is in session.

13. Special Needs and Accommodations. A Spanish language interpreter and translator is required. 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, or email the OAH ADA coordinator at OAHADA@dgs.ca.gov, 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. Closed Hearing. 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.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.

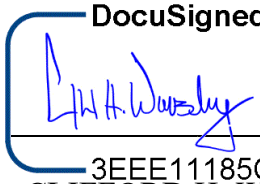
If the parties settle the matter subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. OAH will not cancel the hearing dates without this information.

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

IT IS SO ORDERED.

DATE: January 18, 2019

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CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings